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**Bolling, Equal Protection, Due Process, and
Lochnerphobia**

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Abstract

In *Brown v. Board of Education*, the United States Supreme Court invalidated state and local school segregation laws as a violation of the Fourteenth Amendment's Equal Protection Clause. That same day, in *Bolling v. Sharpe*, the Court held unconstitutional *de jure* segregation in Washington, D.C.'s public schools under the Fifth Amendment's Due Process Clause. Fifty years after it was decided, *Bolling* remains one of the Warren Court's most controversial decisions.

The controversy reflects the widespread belief that the outcome in *Bolling* reflected the Justices' political preferences and was not a sound interpretation of the Due Process Clause. The *Bolling* Court stands accused of "inventing" the idea that due process includes a guarantee of equal protection equivalent to that of the Fourteenth Amendment's Equal Protection Clause.

A careful analysis of *Bolling v. Sharpe*, however, reveals some surprises. First, the almost universal portrayal of *Bolling* as an opinion relying on an "equal protection component" of the Fifth Amendment's Due Process Clause is incorrect. In fact, *Bolling* was a substantive due process opinion with roots in *Lochner* era cases such as *Buchanan v. Warley*, *Meyer v. Nebraska*, and *Pierce v. Society of Sisters*. The Court, however, chose to rely explicitly only on *Buchanan* because the other cases were too closely associated with *Lochner*.

Another surprise is that the proposition that *Bolling* has come to stand for, that the Fifth Amendment prohibits discrimination by the Federal Government, was not simply "made up" by the Supreme Court, but has a basis in longstanding precedent.

Finally, *Bolling* is an important example of the distorting effect of *Lochner*phobia on Supreme Court jurisprudence. *Bolling* would have been a much stronger opinion had it been willing to explicitly rely on *Lochner* era precedents such as *Meyer*, and to employ a more explicitly *Lochnerian* view of the Due Process Clause.

***Bolling*, Equal Protection, Due Process, and *Lochner*phobia**

DAVID E. BERNSTEIN¹

In *Brown v. Board of Education*, the United States Supreme Court invalidated state and local school segregation laws as a violation of the Fourteenth Amendment's Equal Protection Clause.² That same day, in *Bolling v. Sharpe*, the Court held unconstitutional *de jure* segregation in Washington, D.C.'s public schools under the Fifth Amendment's Due Process Clause.³ Fifty years after it was decided, *Bolling* remains one of the Warren Court's most controversial decisions.

The controversy reflects the widespread belief that the outcome in *Bolling* reflected the Justices' political preferences and was not a sound interpretation of the Due Process Clause. The *Bolling* Court stands accused of "inventing" the idea that due process includes a guarantee of equal protection equivalent to that of the Fourteenth Amendment's Equal Protection Clause.⁴ *Bolling* is especially infamous for the following dictum: "In view of our decision in *Brown* that the Constitution prohibits the states from maintaining racially segregated public schools," Chief Justice Earl Warren wrote, "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."⁵ This dictum, considered alone, sounds very much like a concession that the Court could find no proper legal basis for its decision in *Bolling*, beyond the "unthinkability" of a contrary decision.⁶

Yet the prominence given to the "unthinkable" dictum has obscured the fact that in the preceding three paragraphs of the *Bolling* opinion, Warren provided a more traditional "legal" rationale for the Court's ruling:

¹ Professor, George Mason University School of Law. An earlier version of this Essay was presented at the Georgetown University Law Center conference *Bolling v. Sharpe at 50: Desegregation in the District of Columbia: Past, Present and Future* in April 2004. The author thanks George Mason's Law and Economics Center for providing financial support for this Essay. Jack Balkin and Mike Seidman have provided helpful comments.

² *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

³ *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁴ See *infra* notes 23–34 and accompanying text.

⁵ *Bolling*, 347 U.S. at 500.

⁶ See, e.g., Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541, 546 (1977) (noting that the *Bolling* opinion "lay the Court open to the charge that what it found 'unthinkable' was the political implication of a contrary decision, rather than an anomaly of constitutional principle").

We have this day held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools. The legal problem in the District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than “due process of law,” and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect. As long ago as 1896, this Court declared the principle “that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race.” And in *Buchanan v. Warley*, the Court held that a statute which limited the right of a property owner to convey his property to a person of another race was, as an unreasonable discrimination, a denial of due process of law.

Although the Court has not assumed to define “liberty” with any great precision, that term is not confined to mere freedom from bodily restraint. Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. Segregation in public education is not reasonably related to any proper



governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.⁷

Thus, the opinion made the following points: first, that although the Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause, the concepts of equal protection and due process both arise from the American ideal of fairness.⁸ While not interchangeable, the phrases are not mutually exclusive, and the Court has previously recognized that unjustified discrimination may violate due process.⁹ Second, classifications based on race “must be scrutinized with particular care” because they run contrary to American tradition.¹⁰ And, third, forcing Blacks to attend segregated schools arbitrarily deprives them of their liberty in violation of the Due Process Clause.¹¹

In subsequent opinions, the Supreme Court interpreted *Bolling* as an equal protection case,¹² and it eventually held that the Fifth Amendment’s Due Process Clause contains an equal protection guarantee precisely equivalent to that of the Fourteenth Amendment’s Equal Protection Clause.¹³ However, as Larry Lessig has noted, a close reading of *Bolling* reveals that “[w]hat is significant about the actual opinion . . . is not that the Court found an ‘equal protection component’ to the Due Process Clause. No such ‘component’ was ever ‘found.’”¹⁴

While dicta in *Bolling* state that the concept of due process overlaps to some extent with the concept of equal protection, the ultimate holding of the Court is based on the traditional due process concern that the government not engage in arbitrary deprivations of liberty.¹⁵ As Justice David Souter has explained, *Bolling* concluded that the federal government had no legitimate

⁷ *Bolling*, 347 U.S. at 498–500 (citations omitted).

⁸ *See id.* at 499.

⁹ *See id.* at 499 n.2.

¹⁰ *See id.* at 499.

¹¹ *See id.* at 500.

¹² *See Schneider v. Rusk*, 377 U.S. 163, 168–69 (1964) (citing *Bolling* for the proposition that “while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is ‘so unjustifiable as to be violative of due process.’”).

¹³ *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (“This Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.”). As we shall see, the statement in this parenthetical is incorrect, but it does reflect the state of the law from 1975 until today.

¹⁴ Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 409 (1995).

¹⁵ *See Bolling*, 347 U.S. at 500.

government interest in requiring segregated schools that could overcome Blacks' contrary liberty interest not to be relegated to Jim Crow schools.¹⁶

The only novelty in *Bolling* is the idea that forcing Blacks to attend segregated schools infringed on a liberty right protected by the Fifth Amendment's Due Process Clause. Once the Court identified this liberty right, the only remaining question was whether the federal government could justify school segregation as a valid exercise of the federal government's exercise of sovereign authority in the District of Columbia. Given that *Brown* failed to accord any weight to (or even mention) the defendants' state police power arguments in favor of segregation,¹⁷ the answer was obviously "no."

Part I of this Essay reviews scholarly criticism of *Bolling*. With the exception of Lessig,¹⁸ legal scholars have not seriously addressed *Bolling*'s stated "substantive due process"¹⁹ rationale. Rather, scholars criticize *Bolling* for purportedly holding that the Fifth Amendment's Due Process Clause provides an equal protection guarantee equivalent to that of the Equal Protection Clause. To critics of the Warren Court, *Bolling* is an example of judicial activism run amok, with the Warren Court using the Due Process Clause to avoid reaching a constitutionally mandated result that considered "unthinkable" for extra-legal reasons. By contrast, scholars more sympathetic to Warren Court jurisprudence embrace the result in *Bolling*, but reject, or at least refuse to endorse, its reliance on the Fifth Amendment's Due Process Clause.

As we shall see in Part II, there was in fact precedent far stronger than the rather lame precedents cited by the Court²⁰ supporting *Bolling*'s dicta that due process and equal protection

¹⁶ See Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Judiciary Comm., 100th Cong., 2d Sess. 305 (1990) (statement of Judge Souter).

¹⁷ See *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

¹⁸ See Lessig, *supra* note 14.

¹⁹ I dislike the term "substantive due process," but will use it in this Article because of its widespread use to describe jurisprudence protecting liberty rights via the Due Process Clause of the Fifth and Fourteenth Amendments. As applied to *Lochner*-era jurisprudence, and perhaps even to *Bolling*, the phrase "substantive due process" is anachronistic. See G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 245 (2000) (explaining that it was not until the 1950s that jurisprudence under the Due Process Clause was firmly separated by courts and legal scholars into "substantive" and "procedural" categories).

²⁰ The Court cited three Fifth Amendment cases in support of its statement that "as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process": *Detroit Bank v. United States*, 317 U.S. 329 (1943); *Currin v. Wallace*, 306 U.S. 1, 13-14 (1939); and *Steward Machine Co. v. Davis*, 301 U.S. 548, 585 (1937). *Bolling*, 347 U.S. at 499.

Currin is of no help to the Court, as it simply states that although the exercise of the commerce power is subject to the Fifth Amendment, "that Amendment, unlike the Fourteenth, has no equal protection clause." 306 U.S. at 14. *Davis* repeats the same point, though it adds that the Court assumes that discrimination in taxation, "if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment." 301 U.S. at 585. *Detroit Bank*, meanwhile, states on the one hand that the Fifth Amendment "contains no equal protection

limits on government's power to discriminate overlap to some extent. The historical relationship between due process and equal protection is discussed in Part II.

More important, critics fail to grapple with *Bolling*'s holding that public school segregation was an arbitrary violation of Black students' due process liberty interest in pursuing their education. Strong precedents from the 1910s and 1920s supported *Bolling*'s conclusion that due process of law prohibited the government from classifying based on race or sex when doing so resulted in a violation of liberty or property rights, and the classification in question was not based on any inherent differences between the groups classified.

Bolling, in fact, referenced a 1917 precedent directly on point—*Buchanan v. Warley*.²¹ *Buchanan* invalidated a residential segregation ordinance under the Fourteenth Amendment's Due Process Clause as a deprivation of liberty and property not justified by the state's claimed police power interests in keeping the races separate.²² *Lochner* era precedent also supported *Bolling*'s implicit conclusion that violation of liberty rights protected by the Due Process Clause could not be justified by appeals to prejudice against, or fear of, minority groups.²³ Once the Court identified a property or liberty interest protected by the Constitution's guarantee of due process of law, a deprivation of this liberty could not be justified by mere racism, sexism, or hostility toward minorities.²⁴ However, as I will show in Part III, the Court failed to cite these precedents because of *Lochner*phobia—the Court, responding in particular to objections from Justice Black, did not want to be seen as endorsing or reviving the substantive due process jurisprudence of the *Lochner* era.

I. SCHOLARLY CRITICISM OF *BOLLING*

clause and it provides no guaranty against discriminatory legislation by Congress.” 317 U.S. at 337. On the other hand, the Court acknowledges that discriminatory legislation “may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment.” *Id.* at 338. Each of the latter two cases could be interpreted not as stating that the Due Process Clause contains an equal protection component, but as stating that taxation is unconstitutional under the Due Process Clause when it amounts to arbitrary confiscation. Concern with arbitrary confiscation is not quite the same as the traditional equal protection concern with arbitrary classification. Moreover, in each of these cases the Court ruled against the plaintiff, leaving any Fifth Amendment basis for invalidating discriminatory legislation vague and unclear, at least based on these precedents.

²¹ *Buchanan v. Warley*, 245 U.S. 60 (1917).

²² *Id.* at 82.

²³ See *infra* notes 143–153 and accompanying text.

²⁴ See, e.g., *Farrington v. Tokushige*, 273 U.S. 284 (1927); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Adkins v. Children’s Hospital of D.C.*, 261 U.S. 525 (1923); *Buchanan*, 245 U.S. at 60. Lessig asserts that *Bolling* recognized that the Fourteenth Amendment inaugurated a “middle republic” granting full citizenship rights to African Americans, after which “[f]ederal powers can no longer be used to advance interests of racial inequality.” Lessig, *supra* note 14, at 410.

As noted previously, scholarly criticism of *Bolling* typically finds fault in the opinion's purported discovery of an "equal protection component" to the Fifth Amendment's Due Process Clause, or criticizes the Court for its "unthinkable" dictum. But scholars have not seriously addressed the Court's underlying rationale for its decision—that Black children forced to attend segregated schools were being deprived of liberty without due process, a deprivation not justified by any valid police power rationale.

Critics of the Warren Court's alleged judicial activism have been especially scathing in their criticism of *Bolling*.²⁵ Raoul Berger states that the so-called "equal protection tradition" of the Fifth Amendment's Due Process Clause was "born" in *Bolling*.²⁶ But he regards the idea that the Due Process Clause contains an equal protection guarantee as "quite untenable."²⁷ First, he argues that "the conception of due process constitutionalized in 1789 could not contain an as yet unknown component."²⁸ Second, he observes that "the framers of the fourteenth amendment added to due process an equal protection clause, a considered judgment that the due process clause had no element of equal protection."²⁹

Similarly, Robert Bork sharply criticizes *Bolling*, calling it "social engineering from the bench," a mistaken interpretation of due process on par with *Dred Scott* and *Lochner*.³⁰ He (incorrectly) states that the *Bolling* Court concluded that the Fifth Amendment's Due Process Clause "included the same equal protection . . . concept" as the Fourteenth Amendment's Equal Protection Clause³¹ and that this conclusion "rested on no precedent or history."³² Bork also addresses the Court's reliance on due process more generally. He asserts that the framers of the Fourteenth Amendment understood due process to refer to procedures only, which is why they also included a "requirement of equal protection in the substance of state laws."³³ Bork's view,

²⁵ Thus, one can describe *Bolling* as "universally accepted" only if one limits the universe to supporters of Warren Court jurisprudence. See William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2365 (2002) (describing *Bolling* as "universally accepted" but noting the difficulty of justifying it using originalist methods of constitutional interpretation).

²⁶ Raoul Berger, *Insulation Of Judicial Usurpation: A Comment On Lawrence Sager's "Court-Stripping" Polemic*, 44 OHIO ST. L.J. 611, 629 n.173 (1983).

²⁷ Raoul Berger, *Activist Censures of Robert Bork*, 85 NW. U. L. REV. 993, 1015 (1991).

²⁸ *Id.*

²⁹ *Id.*

³⁰ ROBERT H. BORK, *THE TEMPTING OF AMERICA* 83-84 (1990).

³¹ As noted previously, the *Bolling* Court did not state this, though later Supreme Court opinions did. See *Weinberger v. Wisenfeld*, 420 U.S. 636, 638 n.2 (1975).

³² BORK, *supra* note 30, at 83.

³³ *Id.*

of course, would lead to the abolition of substantive due process opinions, so his critique goes well beyond the *Bolling* opinion.

Michael McConnell, meanwhile, concludes that “[t]he suggestion that the Due Process Clause of the Fifth Amendment prohibits segregation of public facilities is without foundation.”³⁴ McConnell finds it not just “thinkable” but highly plausible that the framers of the Fourteenth Amendment sought to put equal protection restrictions on the states that they did not seek to put on the federal government, given the Republicans’ firm control of Congress, and their strong distrust of the recently-rebellious southern states.

Professor Lino Graglia is perhaps the most scathing critic of the Court’s decision in *Bolling*.³⁵ In Graglia’s view, *Bolling* shows that activist Justices ignore the text of the Constitution to achieve desired political results.³⁶ Graglia writes that “everyone knows, or thinks he knows, that school racial segregation was held unconstitutional in *Brown* because the Court found it prohibited by the Equal Protection Clause of the Fourteenth Amendment.”³⁷ He argues, however, that “the Equal Protection Clause was not necessary to the decision; that is, the same result could and would have been reached in its absence.”³⁸

To prove his thesis, Graglia points to *Bolling*:

On the same day the Court decided *Brown*, it also decided *Bolling v. Sharpe*, a challenge to school racial segregation by federal law in the District of Columbia. Because the Equal Protection Clause occurs only in the Fourteenth Amendment, which does not apply to the federal government, it was not available for the case. What difference did its absence make in the result reached? None at all; school segregation was found no less constitutionally prohibited in the District of Columbia. . . . This time, however, segregation was found to violate the Due Process Clause of the Fifth Amendment, which does apply to the federal government. In other words, we are asked to believe that a constitutional provision adopted in 1791 as part of a Constitution that explicitly

³⁴ Michael W. McConnell, *Michael W. McConnell (concurring in the judgment)*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 158, 166 (Jack M. Balkin ed., 2001).

³⁵ Lino A. Graglia, *Constitutional Law: A Ruse for Government by an Intellectual Elite*, 14 GA. ST. U. L. REV. 767, 774 (1998).

³⁶ *See id.*

³⁷ *Id.*

recognized and protected slavery was meant to prohibit school racial segregation. If the Due Process Clause of the Fifth Amendment did not exist, the Court would simply have had to rely, with equal validity, on some other constitutional provision, perhaps the provision prohibiting discrimination among seaports.³⁹

Lucas Powe, though not a consistent critic of the Warren Court, finds the Court's reliance on the Due Process Clause in *Bolling* "stunning."⁴⁰ Powe states that Warren could have shown that the due process had a strong equal protection component prior to the Civil War "but this had been lost in history, and Warren did not rediscover it. He just asserted the point."⁴¹ According to Powe, the Supreme Court had never before found that the due process and equal protection clauses banned similar actions.⁴²

Other legal scholars, generally those more sympathetic to the Warren Court and its egalitarian jurisprudence, support the result in *Bolling*, but none seem to have endorsed the Court's due process reasoning. Indeed, several prominent scholars have harshly criticized *Bolling*, often misinterpreting *Bolling* as an equal protection case. Sandy Levinson writes that "[t]here is no satisfactory theory . . . that explains the imposition on the federal government . . . of the equal protection norms."⁴³ John Hart Ely calls the *Bolling* decision "gibberish both syntactically and historically."⁴⁴ Thomas Grey cites *Bolling* an example of "when the Court treats the words of the Constitution as essentially irrelevant to its decision."⁴⁵

Frank Michelman adds that "[i]t may well be true that the original American constitutional conception of due process of law reflected a natural right tradition—'a higher law background,' as it has been called—containing a requirement of formal generality in law and formal equality before the law."⁴⁶ However, Michelman adds that the antebellum constitutional understanding

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 32 (2000).

⁴¹ *Id.*

⁴² *Id.*

⁴³ Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI.-KENT L. REV. 131, 147(1988).

⁴⁴ JOHN HART ELY, DEMOCRACY AND DISTRUST 32 (1980).

⁴⁵ Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI.-KENT L. REV. 211, 230 (1988).

⁴⁶ Frank I. Michelman, *Frank I. Michelman (concurring in part and concurring in the judgment)*, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID, *supra* note 34, at 124, 128.

cut from this tradition would not have precluded *de jure* segregation.⁴⁷ Lawrence Sager, meanwhile, is greatly troubled by the “baldly prochronistic doctrine that the due process clause of the fifth amendment incorporates the principles which underlie the equal protection clause (ratified roughly 100 years later).”⁴⁸ Akhil Amar argues that the words “due process” in the Fifth Amendment mean the same thing as the words “due process” in the Fourteenth Amendment, which in turn must mean something different than the words “equal protection” in the Fourteenth Amendment.⁴⁹

Scholars seeking to justify the result in *Bolling* instead rely on their own creative constitutional reasoning. Drew Days, for example, asserts that the Citizenship Clause of the Fourteenth Amendment supports the result in *Bolling*.⁵⁰ Michelman rests his defense of the result in *Bolling* on unwritten constitutional principle found in neither the history nor the text of the Constitution.⁵¹ Amar relies on the Citizenship Clause, the Bill of Attainder Clause, and the Titles of Nobility Clause to support the result in *Bolling*.⁵² Jack Balkin argues that a complex combination of structural, textual, and historical arguments justifies the result in *Bolling*.⁵³ Like Balkin, Bruce Ackerman argues that integrated public school education in the District of Columbia was a privilege or immunity of national citizenship, and, like Days, justifies *Bolling* on the basis of the Citizenship Clause of the Fourteenth Amendment.⁵⁴

John Hart Ely, writing twenty or so years after his initial condemnation of *Bolling*, argues that “it was the office of the Equal Protection Clause unequivocally to apply to the states a command of equality of the sort that the original framers, and this Court among others, had already acknowledged in various contexts to be constitutionally applicable to the federal government.”⁵⁵ Even Ely, however, is unwilling to endorse the *Bolling* Court’s Due Process Clause argument. He neglects the view that *Bolling* was an “arbitrary deprivation of liberty”

⁴⁷ *Id.* at 129.

⁴⁸ Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What On Earth Can You Do With the Ninth Amendment?*, 64 CHI.-KENT L. REV. 239, 262 (1988).

⁴⁹ Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 767 (1999).

⁵⁰ Drew S. Days, III, *Drew S. Days, III (concurring)*, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID, *supra* note 34, at 92, 97–98.

⁵¹ Michelman, *supra* note 46, at 131–32.

⁵² Amar, *supra* note 49, at 768–72.

⁵³ Jack Balkin, *Brown v. Board of Education—A Critical Introduction*, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID, *supra* note 34, at 3, 63–64.

⁵⁴ Bruce Ackerman, *Bruce Ackerman (concurring)*, in WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID, *supra* note 34, at 100, 114–16.

⁵⁵ John Hart Ely, *John Hart Ely (concurring in the judgment except as to the remedy)*, WHAT BROWN V. BOARD OF

case rather than an equal protection case, and expressly passes on the question of “whether the term ‘due process’ can responsibly [be interpreted] to contain” a “command of equality” similar to the Fourteenth Amendment’s Equal Protection Clause.⁵⁶ Instead, to support *Bolling’s* outcome, Ely relies on the Declaration of Independence, various early nineteenth-century cases, and especially the Ninth Amendment.⁵⁷

Thus, legal scholars almost completely ignore *Bolling’s* holding that substantive due process prohibits the Federal Government from arbitrarily restricting Blacks to segregated public schools. And to the extent that they see *Bolling* as an equal protection case, they fail to consider whether there was a basis in precedent for the notion that the Fifth Amendment’s Due Process Clause creates limits on discriminatory legislation. The historical relationship between due process and antidiscrimination concerns is discussed in the next Part of this Essay.

II. DUE PROCESS AND EQUAL PROTECTION

The idea that due process considerations limited government’s power to discriminate stretches back to the early years of the American republic.⁵⁸ The Due Process Clause of the Fourteenth Amendment, to the extent it was thought to have “substance” at all, was initially thought to include—and perhaps even be limited to—a prohibition on discriminatory “class” legislation.⁵⁹ In the early twentieth century, several state courts explicitly invalidated discriminatory legislation based solely on due process considerations.⁶⁰

During the *Lochner* era, Supreme Court litigants frequently asserted that the Fifth Amendment’s Due Process Clause included an equal protection component. The Court initially remained agnostic on the matter. However, by 1921, the Court acknowledged in dicta that the concept of due process contained in the Fifth and Fourteenth Amendments included an equal protection component, albeit a weaker one than that contained in the Fourteenth Amendment’s Equal Protection Clause. And in 1923, in *Adkins v. Children’s Hospital*, the Court invalidated a

EDUCATION SHOULD HAVE SAID, *supra* note 34, at 135, 139.

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *Vanzant v. Waddell*, 10 Tenn. 260, 269–70 (1829). See generally RODNEY L. MOTT, DUE PROCESS OF LAW (1926).

⁵⁹ See *infra* notes 75–79 and accompanying text.

⁶⁰ See *infra* note 80.

District of Columbia law that mandated minimum wages for women in part because of equality concerns raised under the Fifth Amendment's Due Process Clause.⁶¹

Meanwhile, *Buchanan v. Warley* suggested that once a court identified a recognized due process liberty or property interest invaded by a statute or government policy, that law or policy could not be defended under the police power based on a discriminatory rationale.⁶² This understanding of the egalitarian limits on the assertion of the police power to justify infringements on rights protected by due process was reiterated in *Adkins*, where the Court held that outdated notions of women's capabilities could not justify a sex-based minimum wage law.⁶³

A. THE PRE-*LOCHNER* UNDERSTANDING OF DUE PROCESS LIMITS ON DISCRIMINATION

Let us recall what legal scholars have written about the Court's proclamation in *Bolling* that "discrimination may be so unjustifiable as to be a violation of due process," and its further dictum that it's "unthinkable" that the Federal Government may segregate public schools when states may not.⁶⁴ Raoul Berger claims that the idea that the due process includes an equal protection component was "born" in *Bolling*.⁶⁵ Robert Bork argues that the Court's assertions "rested on no precedent or history."⁶⁶ Lucas Powe asserts that the Supreme Court had never before found that the due process and equal protection clauses banned similar actions.⁶⁷ Lawrence Sager finds *Bolling*'s antidiscrimination doctrine "baldly prochronistic."⁶⁸ Akhil Amar insists that the meanings of due process and equal protection do not overlap.⁶⁹

In fact, however, a long tradition in American thought held that for legislation to be considered "the law of the land," and thus consistent with due process, it must be a "general and public law, equally binding upon every member of the community."⁷⁰ Meanwhile, "every partial or private law . . . is unconstitutional and void."⁷¹ By the postbellum period, "partial" or "unequal" legislation was usually referred to as "class legislation."⁷² While some authors have

⁶¹ See *Adkins v. Children's Hospital of D.C.*, 261 U.S. 525 (1923).

⁶² See *Buchanan v. Warley*, 245 U.S. 60 (1917).

⁶³ See *Adkins*, 261 U.S. at 561.

⁶⁴ *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

⁶⁵ See Berger, *supra* note 27, at 629 n.173.

⁶⁶ See BORK, *supra* note 30, at 83.

⁶⁷ POWE, *supra* note 40, at 32.

⁶⁸ See Sager, *supra* note 48, at 262.

⁶⁹ See Amar, *supra* note 49, at 767.

⁷⁰ *Vanzant v. Waddell*, 10 Tenn. 260, 270 (1829).

⁷¹ *Id.*

⁷² See David E. Bernstein, *Lochner, Parity, and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999).

closely associated the concept of class legislation with the modern concept of special interest legislation,⁷³ in practice, by the late nineteenth century, class legislation was primarily legislation that contained arbitrary classifications.⁷⁴

In the period just before the Court adopted the liberty of contract doctrine, Supreme Court precedent suggested that when states asserted they were acting within their police power, due process protection included, or perhaps was even limited to, a ban on class legislation. The Equal Protection Clause, of course, also prohibited unequal legislation, and did so more specifically.⁷⁵ Thus, while the Due Process Clause protected procedural rights from state interference, its substantive component overlapped with the Equal Protection Clause.

Indeed, in *Dent v. West Virginia*,⁷⁶ the Supreme Court even declared that an absence of arbitrary classification bars both equal protection and due process claims against regulatory legislation. The Court stated, “legislation is not open to the charge of depriving one of his rights without due process of law, if it be general in its operation upon the subjects to which it relates.”⁷⁷ More often cited was dictum from *Leeper v. Texas*,⁷⁸ stating that “due process is . . . secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.”⁷⁹ However, unlike some state courts,⁸⁰ the Supreme Court did not actually

⁷³ See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* (1993).

⁷⁴ See Richard S. Kay, *The Equal Protection Clause in the Supreme Court: 1873-1903*, 29 *BUFF. L. REV.* 667, 688–89 (1980).

⁷⁵ See, e.g., *Barbier v. Connolly*, 113 U.S. 27, 33 (1884). See generally Kay, *supra* note 74.

⁷⁶ 129 U.S. 114 (1889); cf. *State v. Hogan*, 58 N.E. 572, 573 (Ohio 1900) (“The test of uniform operation, and with respect to the required conformity to the ‘law of the land’ and to the requirement of ‘due process of law,’ seems to be that if the law under consideration operates equally upon all who come within the class to be affected, embracing all persons who are or may be in like situation and circumstances, and the designation of the class is reasonable, not unjust nor capricious or arbitrary, but based upon a real distinction, the law does operate uniformly, and if, added to this, the law is enforced by usual and appropriate methods, the requirement as to ‘due process of law’ is satisfied.”)

⁷⁷ *Dent*, 129 U.S. at 124

⁷⁸ 139 U.S. 462, 468 (1891).

⁷⁹ *Id.* This dictum was cited in *Florida Cent. & Peninsular R.R. Co. v. Reynolds*, 183 U.S. 471, 478 (1902), and *Giozza v. Teirnan*, 148 U.S. 657, 662 (1893). See also *Caldwell v. Texas*, 137 U.S. 692, 697 (1891) (quoting but not explicitly citing *Leeper*). This language was quoted as late as 1921 by the Alabama Supreme Court in *Barrington v. Barrington*, 89 So. 512, 513 (Ala. 1921).

⁸⁰ In *Hyland v. Sharp*, 41 So. 264 (Miss. 1906), the Mississippi Supreme Court invalidated a law taxing the lending of money when the collateral for the loan was domestic securities. The court found that the law involved an arbitrary classification. “Can it be possible,” the court asked rhetorically, “that argument should be needed to show that the Legislature could not vary the occupation tax by the single consideration as to the kind of security taken for a loan?” *Id.* at 264. The court acknowledged that the purpose of the law was to reach those who lend at exorbitant interest to necessitous persons, with the penalty being the loss of essential household goods. *Id.* at 265. But by banning the use of household items as collateral, without regard to the interest rate of the loan or the actual use of the item in question, there was an arbitrary deprivation of property rights without due process of law. *Id.*; see also

hold any class legislation to be unconstitutional under the Due Process Clause, relying instead on the Equal Protection Clause.⁸¹

B. THE UNSETTLED STATE OF DUE PROCESS LIMITS ON DISCRIMINATION DURING THE *LOCHNER* ERA

By the time *Lochner v. New York* was decided in 1905,⁸² the U.S. Supreme Court had retreated from its statement in *Dent v. West Virginia* that a law that was not class legislation could not violate the Due Process Clause. In a series of opinions in the 1890s, the Court, usually speaking through Justice Brewer, Harlan, or Peckham, declared that “liberty of contract,” along with other vaguely defined fundamental liberties,⁸³ were protected against arbitrary legislation by the Due Process Clause.⁸⁴ In *Lochner* itself, the Court declined the opportunity to rely on a class legislation argument, instead relying on a liberty of contract argument to invalidate a maximum hours law for bakers.⁸⁵ It was *Lochner*’s substitution of fundamental rights analysis for class legislation analysis that allowed the 1920s Supreme Court to broaden due process protection of liberty interests to noneconomic matters in cases such as *Pierce v. Society of Sisters*⁸⁶ and *Gitlow v. New York*.⁸⁷

Rodge v. Kelly, 40 So. 552, 554 (Miss. 1906) (“As written, the statute is unfortunately class legislation, falling within the inhibition of the constitutional provisions named [due process and equal protection].”). In *State ex rel. Wyatt v. Ashbrook*, 55 S.W. 627, 632 (Mo. 1900), the Missouri Supreme Court invalidated a law that prohibited employers with more than fifteen employees from selling certain items in large cities without a license. Due process of law, “when having reference to legislative enactments, must mean a requirement of action or abstinence, binding upon and affecting alike each and every member of the community of the same class, or of similar circumstances, enacted for the general public good or welfare.” *Id.* The law in question, by contrast, involved classification that was “was wholly without reason or necessity. It is so arbitrary and unreasonable as to defy suggestion to the contrary. The simple statement of its creation is a most fatal blow to its continued existence. It is truly ‘classification run wild.’ It is special legislation unrestrained.” *Id.*

⁸¹ See, e.g., *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540, 570 (1902) (invalidating an antitrust law that exempted only farmers and ranchers); *Cotting v. Goddard*, 183 U.S. 79, 114-15 (1901) (Harlan, J., concurring for six Justices) (invalidating a mine inspection law because it applied only to one of the many mining companies in the state); *Gulf, Colo., & Santa Fe Ry. Co. v. Ellis*, 165 U.S. 150, 166 (1897) (invalidating a law that allowed plaintiffs with small claims against railroads to recover fees and costs if the railroad initially refused to pay the claim and then lost at trial, with three Justices dissenting); Kay, *supra* note 74.

Note that my interpretation differs from Gillman’s, who sees the *Lochner* line of cases as reflecting opposition to class legislation. My differences with Gillman are explored in David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1 (2003) [hereinafter Bernstein, *Revisionism*]. Similarly, I reject Cass Sunstein’s view that the *Lochner* line of cases primarily reflected a desire to uphold common law norms against legislative redistribution. See David E. Bernstein, *Lochner’s Legacy’s Legacy*, 82 TEX. L. REV. 1 (2003).

⁸² 198 U.S. 45 (1905).

⁸³ *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

⁸⁴ See, e.g., *id.* at 589 (1897) (Peckham, J.); *Frisbie v. United States*, 157 U.S. 160, 165–66 (1895) (Brewer, J.); *Hooper v. California*, 155 U.S. 648, 661–663 (1895) (Harlan, J., dissenting).

⁸⁵ See Bernstein, *Revisionism*, *supra* note 81.

⁸⁶ 268 U.S. 510 (1925) (invalidating a law banning private schools).

Once due process became the basis for protection of fundamental rights in the late 1890s, the Court—which had previously stated that the Due Process Clause’s only substantive protection was equality—suggested that the equality component of due process was minimal, if it existed at all. In *District of Columbia v. Brooke*,⁸⁸ for example, the plaintiff challenged a District of Columbia law that required resident owners of property to connect their property to a drainage system on penalty of criminal punishment, while merely assessing nonresident owners the cost of having the city do the work for them. The Court stated, “The defendant in error asserts this discrimination and argues its consequences at some length, but does not refer to any provision of the Constitution of the United States which prohibits Congress from enacting laws which discriminate in their operation between persons or things.”⁸⁹ A commentator wrote that this language “intimates” that “Congress may enact class legislation” and asserting that “[t]his opinion would seem to be correct.”⁹⁰

The commentator, however, ignored the *Brooke* Court’s caveat: the Court added that “the question of the power of Congress, broadly considered, to discriminate in its legislation, is not necessary to decide.”⁹¹ Even if “such power is expressly or impliedly prohibited,” the Court stated, the “prohibition cannot be stricter or more extensive” than the scope of the Fourteenth Amendment’s Equal Protection Clause upon the states, and this law would be valid if enacted by a state.⁹²

Indeed, plaintiffs challenging the constitutionality of federal legislation often argued that the Due Process Clause placed similar or equivalent restrictions on the federal government as the Equal Protection Clause put on the states. The Court, while sometimes entertaining such claims, was careful not to endorse this position.⁹³ In *McCray v. United States*,⁹⁴ for example, the Court stated,

⁸⁷ 268 U.S. 652 (1925) (suggesting that freedom of speech is a fundamental right protected by the Fourteenth Amendment).

⁸⁸ 214 U.S. 138, 142 (1909).

⁸⁹ *Id.* at 149.

⁹⁰ E. Connor Hall, *Due Process of Law and Class Legislation*, 43 AM. L. REV. 926, 927 (1909).

⁹¹ *Brooke*, 214 U.S. at 150.

⁹² *Id.*

⁹³ The Court’s hesitation in acknowledging an equal protection component to due process seems to call into question the views of those, such as Howard Gillman, who argue that *Lochner*-era liberty of contract due process jurisprudence was primarily about opposition to unequal “class legislation.” See, e.g., GILLMAN, *supra* note 73. For a provocative and stimulating attempt to reconcile various understandings of *Lochner*-era due process jurisprudence, see Barry Cashman, *Some Varieties and Vicissitudes of Lochnerism*, ___ B.U. L. REV. (forthcoming 2005).

⁹⁴ 195 U.S. 27, 61-62 (1904).

Conceding, merely for the sake of argument, that the due process clause of the 5th Amendment would avoid an exertion of the taxing power which, without any basis for classification, arbitrarily taxed one article and excluded an article of the same class, such concession would be wholly inapposite to the case in hand.

In *United States v. Heinze*,⁹⁵ the Court assumed without deciding “that Congress may not discriminate in its legislation,” but noted that even with that assumption, Congress still has the general power to make reasonable classifications in legislation.⁹⁶ In the *Second Employers’ Liability Cases*,⁹⁷ the Court concluded that a law that imposed liability only on interstate carriers by railroad was constitutional “[e]ven if it be assumed that that clause is equivalent to the ‘equal protection of the laws’ clause of the 14th Amendment, which is the most that can be claimed for it here.”⁹⁸

Lower federal courts were similarly circumspect. One court stated that the only possible prohibition on federal discriminatory legislation was the Due Process Clause of the Fifth Amendment:

The limitation in the former is ‘without due process of law.’ In the fourteenth amendment this limitation is accompanied with a prohibition of the denial of the ‘equal protection of the laws.’ Of course, the latter expression is broader than the former, although it must be conceded that the mere denial of the ‘equal protection of the laws’ might run into the other limitation.⁹⁹

Another court held that even if the Due Process Clause of the Fifth Amendment is broad enough to guarantee “equal protection of the laws” against Congressional action to the same extent the Fourteenth Amendment protects individuals vis-a-vis the states, it would still deny the defendant’s claim.¹⁰⁰ Similarly, a federal district court concluded that even if the Fifth Amendment prohibits Congress from enacting discriminatory legislation, the law at issue was not discriminatory, nor did it create an arbitrary classification.¹⁰¹

⁹⁵ 218 U.S. 532, 546 (1910).

⁹⁶ *Id.*

⁹⁷ 223 U.S. 1(1912).

⁹⁸ *Id.* at 52–53.

⁹⁹ *United States v. N.Y., N.H. & H.R. Co.*, 165 F. 742, 745–746 (C.C.Mass. 1908).

¹⁰⁰ *Watson v. St. Louis, I.M. & S. Ry. Co.*, 169 F. 942, 947 (D. Ark. 1909).

¹⁰¹ *Coca-Cola Co. v. Nashville Syrup Co.*, 200 F. 153, 155 (D. Tenn. 1912). In yet another case, a plaintiff argued that a District of Columbia law was unconstitutional class legislation under the Fourteenth Amendment. The court

At least one federal court, however, explicitly found an equality guarantee in the Fifth Amendment Due Process Clause. A 1911 circuit court opinion stated that the “due process of law” guaranteed by the Fifth Amendment “implies the administration of *equal laws* according to established rules by competent tribunals.”¹⁰²

Meanwhile, with the exception of cases involving what we today would call “regulatory takings” and decided as property rather than liberty cases,¹⁰³ there were no United States Supreme Court cases decided just before or during the *Lochner* era clearly invalidating legislation as “class,” “unequal,” “special,” “partial,” or “discriminatory” legislation by relying on the Due Process Clause alone.¹⁰⁴ Most Supreme Court discussions of class legislation involved only the Equal Protection Clause, even in cases in which due process claims were raised.¹⁰⁵ For example, the Court held that a law creating special, more lenient rules for torts committed by striking workers violated the fundamental rights of employers under the Due Process Clause. The Court then held that the rules in question also constituted illicit class legislation under the Equal Protection Clause.¹⁰⁶

Nevertheless, treatise writers insisted that due process contained an equal protection component. Hannis Taylor, author of 1917’s *Due Process of Law and The Equal Protection of the Laws*, wrote that the idea that “the generality and equality of laws, as a necessary part of due process, is purely an American creation.”¹⁰⁷ He added that these were, in fact, elements inherent in due process in its American form; they existed long before the adoption of the Fourteenth Amendment, and were therefore something independent of the guarantee that no state shall “deny to any person within its jurisdiction the equal protection of the laws.”¹⁰⁸

noted that the Fourteenth Amendment only applied to state legislation and not to D.C., but assumed arguing that a prohibition on class legislation by Congress in the District of Columbia may be implied “from our form of government.” *Siddons v. Edmonston*, 42 App. D.C. 459, 466 (1914).

¹⁰² *United States v. Billings* 190 F. 359, 363 (C.C.S.D.N.Y. 1911) (emphasis added).

¹⁰³ See generally *Cashman*, *supra* note 93 (noting that rate regulation cases comprised a large percentage of *Lochner*-era Fourteenth Amendment cases, and that these cases “would eventually find a settled home in the Due Process rather than Equal Protection Clause”).

¹⁰⁴ Some early cases relied on both an equal protection and due process analysis to invalidate laws that unjustly discriminated, including what one author claims was the first case in which the Court declared that a state police regulation was unconstitutional because it was inconsistent with due process “as a substantive requirement.” See *Reagan v. Farmers’ Loan & Trust Co.*, 154 U.S. 362 (1894); *MOTT*, *supra* note 58, at 341.

¹⁰⁵ See, e.g., *Truax v. Corrigan*, 257 U.S. 312, 333-34 (1921).

¹⁰⁶ *Id.*

¹⁰⁷ Hannis Taylor, *DUE PROCESS OF LAW AND THE EQUAL PROTECTION OF THE LAWS* 297 (1917).

¹⁰⁸ *Id.* at 307.

Five years later, Charles K. Burdick wrote that the Due Process Clause established “as a standard those principles of liberty and justice which lie at the foundation of our Anglo-Saxon institutions.”¹⁰⁹ He added:

No federal legislation has as yet been declared lacking in due process because it denied the equal protection of the laws. On the other hand the Supreme Court has entertained and given serious consideration to attacks upon federal legislation based upon the ground that, because of unreasonable classification, it denied the protection of reasonably equal laws It seems, therefore, that the conception of due process does exclude legislation which inflicts inequality of burden, which is clearly arbitrary, and without any basis in reason.¹¹⁰

Indeed, the Court ultimately did not completely abandon the equality component of due process. Rather, the Court limited due process’s potency and scope, so that the Equal Protection Clause remained the primary barrier to class legislation, with due process playing only a subsidiary role, providing only a “required minimum” of protection against unequal laws. Chief Justice Taft explained in *Truax v. Raich* in 1921:

The [equal protection] clause is associated in the amendment with the due process clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. The due process clause brought down from Magna Charta was found in the early state constitutions and later in the Fifth Amendment to the federal Constitution as a limitation upon the executive, legislative and judicial powers of the federal government, while the equality clause does not appear in the Fifth Amendment and so does not apply to congressional legislation. The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial,

¹⁰⁹ CHARLES K. BURDICK, *THE LAW OF THE AMERICAN CONSTITUTION: ITS ORIGIN AND DEVELOPMENT* 408 (1922); see also Oliver H. Dean, *The Law of the Land*, 48 AM. L. REV. 641, 668 (1914).

¹¹⁰ *Id.* at 418–419.

so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty, and property, which the Congress or the Legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of laws and not of men,' 'No man is above the law,' are all maxims showing the spirit in which Legislatures, executives and courts are expected to make, execute and apply laws. *But the framers and adopters of this amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.*¹¹¹

That same year, in *La Belle Iron Works v. United States*,¹¹² the Court, while noting that the Fifth Amendment has no equal protection clause, suggested that some more flexible limits are placed on unequal [federal] taxation by the "more general requirement of due process of law in taxation."¹¹³

The equal protection component of due process also played a significant role in one of the most controversial cases of the *Lochner* era, *Adkins v. Children's Hospital*.¹¹⁴ In *Adkins*, the Court held that a federally-mandated minimum wage for women in the District of Columbia violated the Fifth Amendment's Due Process Clause. Writing for the Court, Justice Sutherland argued that, in regulating wages, the law violated liberty of contract without a proper police power rationale,¹¹⁵ a traditional due process concern. Other rationales provided by Sutherland, however, seem closer to traditional equal protection analysis, though Sutherland couched these

¹¹¹ *Truax*, 257 U.S. at 331-32 (citation omitted).

¹¹² 256 U.S. 377 (1921).

¹¹³ *Id.* at 393. This language seemed to implicitly overrule language in *Brushaber v. Union Pac. R. Co.* 240 U.S. 1, 24 (1916), suggesting that the Fifth Amendment placed no limits on Congress's taxing power:

So far as the due process clause of the 5th Amendment is relied upon, it suffices to say that there is no basis for such reliance, since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring, upon the one hand, a taxing power, and taking the same power away, on the other, by the limitations of the due process clause.

¹¹⁴ 261 U.S. 525 (1923).

¹¹⁵ *Id.* at 554-555.

concerns in terms of the statute's arbitrariness, as opposed to discrimination per se. First, Sutherland suggested that the most constitutionally suspect aspect of the minimum wage law in question was that it placed an arbitrary, unfair burden on a particular class, employers, who should not be expected to bear the costs of supporting employees who lacked the skills to earn a better wage. The Court also suggested that the law contained arbitrary classifications because it purported to provide a minimum living wage for women, yet assigned different wages to women in different occupations, and did not take into account the disparate needs of different women.¹¹⁶

C. THE EQUALITY COMPONENT OF DUE PROCESS AS A LIMIT ON POLICE POWER RATIONALES FOR VIOLATIONS OF INDIVIDUAL RIGHTS

With the exception of the rate regulation cases and the odd ambiguous case arising under federal law such as *Adkins*, while the Equal Protection Clause prohibited all discriminatory legislation that did not have a valid police power justification, due process only entered the equality picture when a legal classification infringed on a liberty or property right recognized by the Court. Once the Court found such an infringement, mere hostility against the group negatively affected by the classification could not justify the infringement. Moreover, even government ends considered legitimate could not justify the infringement if the means chosen created too great a burden on liberty or property rights, if there was not a tight means-ends fit.

This line of reasoning seems to have originated in Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*,¹¹⁷ though Harlan did not explicitly rely on the Due Process Clause. Harlan's opinion is often interpreted to mean that racial classifications are always invalid under the Equal Protection Clause, but it says no such thing. Rather, Harlan argued that the railroad segregation law in question violated the "personal liberty" of black and white citizens to share a railroad car if they so choose:

It was said in argument that the statute of Louisiana does not discriminate against either race, but prescribes a rule applicable alike to white and colored citizens. But this argument does not meet the difficulty. Every

¹¹⁶ *Id.* at 556-57.

¹¹⁷ 163 U.S. 537 (1896).



one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. Railroad corporations of Louisiana did not make discrimination among whites in the matter of commodation for travelers. The thing to accomplish was, under the guise of giving equal accommodation for whites and blacks, to compel the latter to keep to themselves while traveling in railroad passenger coaches. No one would be so wanting in candor as to assert the contrary. The fundamental objection, therefore, to the statute, is that it interferes with the personal freedom of citizens. “Personal liberty,” it has been well said, “consists in the power of locomotion, of changing situation, or removing one’s person to whatsoever places one’s own inclination may direct, without imprisonment or restraint, unless by due course of law.” If a white man and a black man choose to occupy the same public conveyance on a public highway, it is their right to do so; and no government, proceeding alone on grounds of race, can prevent it without infringing the personal liberty of each.¹¹⁸

Harlan then argued that infringement on this liberty cannot be justified by a desire to maintain white supremacy.¹¹⁹

Twelve years later, Harlan authored a similar dissent in *Berea College v. Kentucky*,¹²⁰ arguing that mandatory segregation in private schools violated liberty rights without a valid police power purpose:

The capacity to impart instruction to others is given by the Almighty for beneficent purposes; and its use may not be forbidden or interfered with by government—certainly not, unless

¹¹⁸ *Plessy*, 163 U.S. at 557 (Harlan, J., dissenting) (internal citation omitted).

¹¹⁹ For an excellent discussion of the *Plessy* dissent, see Alexander T. Aleinikoff, *Re-Reading Justice Harlan’s Dissent in Plessy v. Ferguson: Freedom, Antiracism, and Citizenship*, 1992 U. ILL. L. REV. 961.

¹²⁰ 211 U.S. 45 (1908).

such instruction is, in its nature, harmful to the public morals or imperils the public safety. The right to impart instruction, harmless in itself or beneficial to those who receive it, is a substantial right of property—especially, where the services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond question, part of one’s liberty as guaranteed against hostile state action by the Constitution of the United States. . . . Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes, simply because of their respective races?¹²¹

The majority evaded Harlan’s argument by holding that the law was justified not as a police power measure, but as a modification of Berea College’s state corporate charter.¹²²

Harlan’s line of reasoning, however, was implicitly adopted in the 1917 case of *Buchanan v. Warley*.¹²³ Some scholars have portrayed *Buchanan* as an Equal Protection Clause case, but the Equal Protection Clause never appears in the opinion, even though it was explicitly relied upon in the plaintiff’s briefs.¹²⁴ The Court instead relied on the plaintiff’s alternative argument, that the statute infringed on the Due Process Clause’s protection of property. Noting this reliance, some scholars have portrayed *Buchanan* as a pure property rights case, divorced from any concerns for equality.¹²⁵ A close reading of the case belies this interpretation as well.¹²⁶

¹²¹ *Id.* at 67–69 (Harlan, J., dissenting).

¹²² For a discussion, see David E. Bernstein, *Plessy versus Lochner: The Berea College Case*, 25 J. SUP. CT. HIST. 93 (2000).

¹²³ 245 U.S. 60 (1917).

¹²⁴ Brief for Plaintiff in Error on Rehearing at 27–36, *Buchanan v. Warley*, 245 U.S. 60 (1917); Brief for Plaintiff in Error at 26, *Buchanan v. Warley*, 245 U.S. 60 (1917).

¹²⁵ See ALEXANDER BICKEL & BENNO SCHMIDT, *THE JUDICIARY AND RESPONSIBLE GOVERNMENT* 811-12 (1986) (recounting the views of those who think that *Buchanan* was purely a property rights decision); ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 139 (1988); (“The usual explanation for how it came about that the Supreme Court should vote unanimously to strike down a segregation ordinance in 1917—is that *Buchanan* is essentially a decision defense of property rights.”). A more nuanced view is taken by Michael Klarman, who concludes that “*Buchanan* probably had more to do property rights than with civil rights.” MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 82 (2004).

The Court did indeed rely on the right to alienate property as the basis of its holding in *Buchanan*, but equality concerns came into play as well. The question before the Court was whether the law infringed on property rights for a valid police power purpose.¹²⁷ After recounting the post-Civil War statutory and constitutional attempts to protect the rights of African Americans, the Court concluded that “[c]olored persons are citizens of the United States and have the right to purchase property and enjoy and use the same without laws discriminating against them solely on account of color.”¹²⁸ The state’s “attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and is in direct violation of the fundamental law enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law.”¹²⁹

The Court specifically rejected each of Kentucky’s asserted police power rationales for upholding the law. First, the Court dismissed the argument that existing “race hostility” was an appropriate rationale for narrowing the scope of citizens’ constitutional rights. The Court also rejected the argument that the segregation law came within the police power because it would promote the public peace by preventing race conflict. While the Court acknowledged that this was a desirable goal, it could not be accomplished “by laws or ordinances which deny rights created or protected by the Federal Constitution.”¹³⁰

The Court added that a segregation law could not be justified as promoting the “maintenance of the purity of the races.”¹³¹ The Court noted that the law did not directly prohibit the “amalgamation of the races.”¹³² The law did not even prohibit African Americans from working in white households.¹³³ Rather, the right at issue, according to the Court, was “the civil right of a white man to dispose of his property if he saw fit to do so to a person of color and of a colored person to make such disposition to a white person.”¹³⁴ Finally, the Court spurned

¹²⁶ For additional discussion, see David E. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591 (2004); David E. Bernstein, *Philip Sober Restraining Philip Drunk: Buchanan v. Warley in Historical Perspective*, 51 VAND. L. REV. 799 (1998)

¹²⁷ The Court acknowledged that “property may be controlled in the exercise of the police power in the interest of the public health, convenience, or welfare.” *Buchanan*, 245 U.S. at 74.

¹²⁸ *Id.* at 78–79.

¹²⁹ *Id.* at 82.

¹³⁰ *Id.* at 81.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *See id.*

¹³⁴ *Id.*

the claim that the law was necessary to prevent the depreciation in the value of property owned by white people when African Americans became their neighbors.¹³⁵ The Court noted that property owned by “undesirable white neighbors” or “put to disagreeable though lawful uses” could similarly depreciate property.¹³⁶ The Court implied that African Americans had to be treated as rights-bearing individuals and not as members of a subordinate class. The Court reaffirmed *Buchanan*’s holding in 1927¹³⁷ and 1930.¹³⁸

Six years after *Buchanan*, in *Adkins v. Children’s Hospital of the District of Columbia*,¹³⁹ the Court invalidated a minimum wage law for women using an analogous line of reasoning. In *Buchanan*, the Court had identified the right to acquire and alienate property as an interest protected by the Due Process Clause. In *Adkins*, the Court identified liberty of contract as a liberty interest protected by the Due Process Clause. In *Buchanan*, the Court held that denial of property rights for African Americans could not be based on weak race-related police power rationales. In *Adkins*, the Court held that women could not be denied liberty of contract based solely on weak gender-related police power rationales.

The government in *Adkins* asserted that the minimum wage law was necessary to preserve women workers’ “good health” and “morals.”¹⁴⁰ Sutherland wrote that women were, after passage of the Nineteenth Amendment, fully equal citizens, which in turn created a presumption that laws subjecting women to special disabilities or privileges are unconstitutional.¹⁴¹ He wrote,

¹³⁵ *Id.* at 82.

¹³⁶ *Id.*

¹³⁷ *Harmon v. Tyler*, 273 U.S. 668 (1927).

¹³⁸ *City of Richmond v. Deans*, 281 U.S. 704 (1930).

¹³⁹ 261 U.S. 525 (1923).

¹⁴⁰ *Id.* at 540.

¹⁴¹ Sutherland was undoubtedly sincere in his advocacy of women’s rights, having been an advocate of women’s suffrage and the Equal Rights Amendment in his earlier political career. *See* Speech of Sen. George Sutherland of Utah, at the Woman Suffrage Meeting, Belasco Theater 3–4 (Dec. 13, 1915) (“To my own mind the right of women to vote is as obvious as my own. . . . [W]omen on the average are as intelligent as men, as patriotic as men, as anxious for good government as men. . . . [T]o deprive them of the right to participate in the government is to make an arbitrary division of the citizenship of the country upon the sole ground that one class is made up of men, and should therefore rule, and the other class is made of women, who should, therefore, be ruled.”). Sutherland was an adviser to Alice Paul, leader of the National Woman’s Party, which advocated an Equal Rights Amendment that, among other things, would have banned special protective legislation for women. *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 97, 1013 (2002). Felix Frankfurter attacked Sutherland’s opinion in *Adkins* as a “triumph for the Alice Paul theory of constitutional law, which is to no little extent a reflex of the thoughtless, unconsidered assumption that in industry it makes no difference whether you are a man or woman,” *quoted in* ELIZABETH FAULKNER BAKER, PROTECTIVE LABOR LEGISLATION 98 (1925).

while the physical differences must be recognized in appropriate cases, and legislation fixing hours or conditions of work may properly take them into account, we cannot accept the doctrine that women of mature age, *sui juris*, require or may be subjected to restrictions upon their liberty of contract which could not lawfully be imposed in the case of men under similar circumstances.¹⁴²

Also in 1923, in *Meyer v. Nebraska*, the Supreme Court invalidated as a violation of the Fourteenth Amendment's Due Process Clause a Nebraska law banning the teaching of foreign languages to schoolchildren. The Court recognized a liberty interest in parents providing an education for their children, and found that the law infringed on that interest without a proper police power rationale. *Meyer* was a "*Lochnerian*" decision. As Robert Post notes, *Meyer* built on the *Lochner* line of economic liberty cases but "resolutely refuses to confine that realm [of liberty] to mere matters of economic exchange. This refusal is particularly striking because the [opinion's] assertions [of broad liberty rights] are supported only by the citation of a long string of substantive due process decisions dealing with specifically economic regulation, ranging from *Lochner* itself to *Adkins v. Children's Hospital*."¹⁴³

The *Meyer* law had been motivated by nativist hysteria attendant to World War I, and the state claimed the following police power justifications for the law:

[T]he purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals; and "that the English language should be and become the mother tongue of all children reared in this State." It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the

¹⁴² 261 U.S. at 540. Thus, if one considers the actions of the D.C. government in the 1920s to be "federal action," Matthew Perry is incorrect when he argues that Justice Frank Murphy's opinions in a series of cases in the mid-1940s "represent the first time a Supreme Court Justice not only suggested, but recognized and then applied an equal protection guarantee, through use of the Due Process Clause of the Fifth Amendment, to federal governmental action which affected civil rights and liberties." Matthew J. Perry, *Justice Murphy And The Fifth Amendment Equal Protection Doctrine: A Contribution Unrecognized*, 27 HAST. CONST. L.Q. 243, 247 (2000).

¹⁴³ Robert C. Post, *Defending the Lifeworld: Substantive Due Process in the Taft Court Era*, 78 B.U. L. REV. 1489, 1532-33 (1998).

children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.¹⁴⁴

The Court, while acknowledging the importance of ensuring that children attain proficiency in English, rejected the none-too-subtle discriminatory impetus behind the law, concluding that “the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.”¹⁴⁵

Two years later, in *Pierce v. Society of Sisters*, the Court invalidated an Oregon law inspired by anti-Catholic sentiment that prohibited private school education.¹⁴⁶ The Court reasserted the right of parents to direct their children’s education, and completely ignored the state’s asserted police power interest in mandating that all children attend the public school “melting pot” that would create a homogenous citizenry.¹⁴⁷

The Court faced a similar issue in 1927 in *Farrington v. Tokushige*, which involved a challenge to a law designed to shut down Japanese-language schools in Hawaii, then a federal territory.¹⁴⁸ The Ninth Circuit noted that the government’s justification for the law was based on the fact that Hawaii had “a large Japanese population,” and that “the Japanese do not readily assimilate with other races; that they still adhere to their own ideals and customs, and are still loyal to their emperor.”¹⁴⁹ The Supreme Court opaquely stated that it “appreciated the grave problems incident to the large alien population of the Hawaiian Islands.”¹⁵⁰ However, the Court concluded that “[t]he Japanese parent has the right to direct the education of his own child without unreasonable restrictions; the Constitution protects him as well as those who speak another tongue.”¹⁵¹

Thus, by the late 1920s, several precedents held that once the Court identified a liberty interest protected against government interference by the requirement of due process of law, the government could not justify legislative interference with that interest by appealing to prejudice

¹⁴⁴ *Meyer*, 262 U.S. at 401.

¹⁴⁵ *Id.* at 403.

¹⁴⁶ 268 U.S. 510 (1925).

¹⁴⁷ See *Soc’y of the Sisters of the Holy Names of Jesus and Mary v. Pierce*, 296 F. 928, 938 (D. Ore. 1924), *aff’d sub. nom. Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

¹⁴⁸ 273 U.S. 284 (1927).

¹⁴⁹ *Farrington v. Tokushige*, 11 F.2d 710, 714 (9th Cir. 1926), *aff’d*, 273 U.S. 284 (1927).

¹⁵⁰ 273 U.S. at 299.

¹⁵¹ *Id.* at 298.

against, or stereotypes about, the group the legislation targeted. And like *Bolling*, two of these precedents, *Adkins* and *Tokushige*, arose under the Fifth Amendment's Due Process Clause.

By the time *Bolling v. Sharpe* was decided in 1954, most of these precedents were moribund because of the Court's rejection of *Lochnerian* jurisprudence in the late 1930s. The Court explicitly overruled *Adkins* in 1937.¹⁵² The following year, it reinterpreted *Meyer*, *Pierce*, and *Tokushige* as opinions protecting minority nationalities and religions from discriminatory legislation,¹⁵³ rather than as substantive due process liberty opinions holding that discriminatory impulses are not valid police power interests justifying infringement on liberty. Similarly, the Court in *Shelley v. Kraemer*¹⁵⁴ favorably cited *Buchanan v. Warley*, but obscured the fact that *Buchanan* was a due process and not an equal protection case.

Chief Justice Warren, writing for the *Bolling* Court, faced two obvious choices in justifying its Fifth Amendment holding. First, the Court could have issued an opinion expressly relying on an equal protection component of due process.¹⁵⁵ Instead, Warren asserted that the protections

¹⁵² See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

¹⁵³ *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938); see Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1355, 1366–67 (2004) (noting that this interpretation of these opinions had no reasonable basis).

¹⁵⁴ See 334 U.S. 1, 12 (1948).

¹⁵⁵ In 1943, in *Hirabayashi*, the Court stated that “the Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process.” *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). However, the Court added that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.” *Id.* Moreover, the Court stated that it “may assume that these considerations would be controlling here were it not for the fact [of] the danger of espionage and sabotage, in time of war and of threatened invasion.” *Id.* In *Korematsu*, the Court reiterated that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.” *Korematsu v. United States*, 323 U.S. 214, 216 (1944). While the Court did not identify the source of this dictum, given that the case involved the internment of Japanese Americans by the federal government, the logical source would be the Fifth Amendment's Due Process Clause.

Justice Murphy, who dissented, relied explicitly on the Due Process Clause, but only as to the deprivation of procedural due process, not substantive liberty. *Id.* at 235 (Murphy, J., dissenting). Thus, it would be logical to interpret the majority's reference to “civil rights” as the denial of procedural, not substantive rights, and thus an inapt precedent for *Bolling*'s substantive due process holding. In any event, the Japanese plaintiffs were clearly deprived of their liberty in the internment cases. It is therefore not at all clear that any opinion in these cases invoking equal protection principles relied purely on discovering an equal protection component of due process, as opposed to invoking a principle that deprivations of *liberty* that involve racial classifications will require a stronger police power (or in these cases, national security) justification than would be required to justify a typical deprivation of liberty by the Federal Government.

As for the three opinions cited by Warren for the general proposition that discrimination can be so egregious as to violate due process, a review of the briefs filed in *Bolling* reveals that, ironically, these three cases were cited by the *defendants* in *Bolling* for the proposition that the Fifth Amendment does not contain an Equal Protection Clause. Brief for Respondents, *Bolling v. Sharpe*, 1952 WL 47280. In fact, these cases were brought to Warren's attention by his clerk, Earl Pollock, who cited them in pointing out to him that *Bolling* required a separate opinion from the

provided by the Due Process Clause overlap with those provided by the Equal Protection Clause, but failed to rely on this rationale.¹⁵⁶ Warren also cited the Japanese internment cases for the proposition that racial classifications must be subjected to heightened scrutiny.¹⁵⁷ However, the point of this citation appears to be that those cases raised the bar for the Federal Government to prove that its violation of Blacks' substantive due process liberty rights was not arbitrary.

Second, the Court could have relied explicitly on the substantive due process jurisprudence of the 1910s and 1920s, adding the right to attend (or send one's child to) a non-segregated public school to the educational liberty rights identified in *Meyer*, *Pierce*, and *Tokushige*. Instead, Warren ignored all of the relevant substantive due process precedents except for *Buchanan v. Warley*. As a result, the *Bolling* opinion seems incoherent, a cross between a half-hearted equal protection opinion and an inscrutable due process opinion.

As we shall in Part III, Warren originally drafted a far more coherent substantive due process opinion, citing *Meyer*, *Pierce*, and *Tokushige*. He modified the opinion, however, to avoid antagonizing his colleagues, especially Justice Black, by resuscitating the *Lochnerian* civil liberties opinions of the 1920s.

III. BOLLING AND *LOCHNER*PHOBIA

The original draft of Warren's opinion tracks the final opinion until the section following the citation of *Buchanan v. Warley*. The relevant section of the draft opinion is reprinted below. Text common to the draft and final opinion is in italics, text that only appears in the draft opinion is in plain text, and text that only appears in the final opinion is in ~~strikeout~~:

*We have this day held that the Equal Protection Clause of the
Fourteenth Amendment prohibits the states from maintaining
racially segregated public schools. The legal problem in the*

other segregation cases, because "the equal protection clause of the 14th Amendment has no direct relevance," and "the Fifth Amendment has repeatedly been construed by this Court not to impose the same limits on federal discrimination as the 14th Amendment imposes on states discrimination." Memorandum from Earl Pollock to Chief Justice Earl Warren, May 3, 1954, Earl Warren Papers, Library of Congress, Box 397.

Justice Murphy also argued in a concurring opinion in *Steele v. Louisville & Nashville Railroad Co.* that a federal law that authorized mandatory collective bargaining, but allowed workers' representatives to engage in racial discrimination "would bear the stigma of unconstitutionality under the Fifth Amendment in this respect." 323 U.S. 192, 208 (1944) (Murphy, J., concurring). Murphy did not clearly explain why he believed such a law would violate the Fifth Amendment, beyond to state that the "Constitution voices its disapproval whenever economic discrimination is applied under authority of law against any race, creed or color." *Id.* at 209.

¹⁵⁶ See *Bolling v. Sharpe*, 347 U.S. 497, 499–500 (1954).

¹⁵⁷ See *id.* at 499 & n.3.

District of Columbia is somewhat different, however. The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. Although equal protection has been the basis of most decisions involving racial discrimination, we have previously recognized that discrimination may also constitute a denial of due process of law. The “equal protection of the laws” is a more explicit safeguard of prohibited unfairness than “due process of law,” and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

~~Unreasonable and arbitrary classifications may be a denial of due process of law.~~ *Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect. As long ago as 1896, this Court declared the principle “that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race.”¹⁵⁸ Thus, And in *Buchanan v. Warley*, this Court held that a statute which limited the right of a property owner to convey his property to a person of another race was, as an unreasonable discrimination, a denial of due process of law.*

The Court has applied similar reasoning to analogous situations in the field of education, the very subject now before us [citing *Meyer* and its companion case, *Bartels v. Iowa*; *Pierce*; and *Tokushige*]. Thus children and parents are deprived of the liberty

¹⁵⁸ This sentence appeared two sentences earlier in the original draft opinion.

protected by the Due Process Clause when the children are prohibited from pursuing certain courses, or from attending private schools or foreign-language schools. Such prohibitions were found to be unreasonable, and unrelated to any legitimate governmental objective. Just as a government may not impose arbitrary restrictions on the parent's right to educate his child, the government must not impose arbitrary restraints on access to the education which the government itself provides.

*Although the Court has not assumed to define "liberty" with any great precision, that term is not confined to mere freedom from bodily restraint. The essence of liberty is the Liberty under law extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective. We have no hesitation in concluding that segregation of children in the public schools is a far greater restriction on their liberty than were the restrictions in the school cases discussed above. Segregation in the public schools places the brand of inferiority on the minority group, saps them of their motivation to obtain an education, and thus hampers them throughout life [Citing *Brown*]. Segregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on these children Negro children of the District of Columbia a burden that which constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.*

Due process is not a static concept: "It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights." [quoting *Wolf v. Colorado*, 338 U.S. 25, 27



(1949)].¹⁵⁹ We have declared that the Constitution prohibits the states from maintaining racially segregated public schools. It would be unthinkable that ~~that the same Constitution would impose a lesser duty on~~ the Federal Government should have a lesser duty to protect what, in our present circumstances, is a fundamental liberty.¹⁶⁰

Thus, the draft *Bolling* opinion relied on the idea that the right to pursue an education (or to educate one's children) was a fundamental liberty, a conclusion amply supported not only by the holdings of *Meyer*, *Pierce*, and *Tokushige*, but also by dictum in *Meyer* and *Pierce* stating that liberty interests protected by the Due Process Clause include the "right to acquire useful knowledge."¹⁶¹ While *Meyer* and *Pierce* were Fourteenth Amendment due process cases, *Tokushige* relied on those cases in interpreting the Fifth Amendment's Due Process Clause.¹⁶²

Once the right to educational liberty was recognized, it was a short leap to Warren's conclusion that just "as a government may not impose arbitrary restrictions on the parent's right to educate his child, the government must not impose arbitrary restraints on access to the education which the government itself provides."¹⁶³ And *Brown* clearly signified that the Court believed that segregation based on notions of white supremacy was an arbitrary restraint on public school education. Note that Warren did not contend that states are obligated to provide public education. Rather, his argument was that once they undertake to do so, they cannot restrict the rights of their citizens to participate in that system except in pursuit of a proper governmental objective.

As a hand-edited draft of *Bolling* found in Warren's papers reveals, Warren dropped the initial opinion's reliance on the 1920s precedents and its reliance on an explicit liberty interest in educational freedom because of objections from Justice Hugo Black.¹⁶⁴ Black's objection was

¹⁵⁹ An earlier, undated draft of the opinion found in Warren's papers contains an additional line here, struck out by Warren: "Our ideal of due process is an expanding concept."

¹⁶⁰ Undated draft, *Bolling v. Sharpe*, Earl Warren Papers, Library of Congress, Box 571.

¹⁶¹ Indeed, the plaintiffs quoted this language from *Meyer* in their brief. Brief for Petitioners at 13, *Bolling v. Sharpe*, 347 U.S. 497 (1954) (No. 4).

¹⁶² *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927).

¹⁶³ This was, in fact, precisely the argument made in the plaintiffs' briefs and during oral argument. Brief for Petitioners at 13, *Bolling v. Sharpe*, 347 U.S. 497 (1954) (No. 4). Text of the oral argument can be found at <http://www.lib.umich.edu/exhibits/brownarchive/oral/Hayes&Nabrit.pdf> (last visited May 31, 2005).

¹⁶⁴ The draft shows that Warren wrote next to the citations to *Meyer*, *Pierce*, *Bartels*, and *Farrington*, and the accompanying text, "strikeout Black", "Black strikeout," and "Out"; next to a citation to *Meyer* "Black strike out citation", and "Black out," and next to expansive due process language and an accompanying footnote to *Wolf v.*

consistent with his general attitude toward “substantive due process.” In his dissent in *Griswold v. Connecticut*, for example, Black criticized the Court’s reliance on *Meyer* and *Pierce*.¹⁶⁵ In the course of excoriating the Court for relying on those opinions’ “natural law due process philosophy,” Black claimed that *Bolling* “merely recognized what had been the understanding from the beginning of the country . . . that the whole Bill of Rights, including the Due Process Clause of the Fifth Amendment, was a guarantee that all persons would receive equal treatment under the law.”¹⁶⁶

While Black and perhaps others¹⁶⁷ dissuaded Warren from relying on *Lochner* era due process opinions, the *Bolling* opinion still concluded that segregation violated liberty interests protected by the Due Process Clause. Recall that the actual holding of *Bolling* is that “[s]egregation in public education is not reasonably related to any proper governmental objective, and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of the Due Process Clause.”¹⁶⁸ The *Bolling* Court, then, relied on a due process argument, but failed to identify precisely what liberty interest was involved, and also failed to cite relevant *Lochner* era opinions. The due process argument therefore lacks coherence, and seems poorly reasoned.¹⁶⁹

Indeed, the Court’s substantive due process ruling was so watered-down and cryptic that, as we have seen,¹⁷⁰ Black later claimed, contrary to the evidence,¹⁷¹ that *Bolling* was actually (and

Colorado “Black says strike” and Black-out.” Warren also eliminated the line, “Segregation in the public schools places the brand of inferiority on the minority group, saps them of their motivation to obtain an education, and thus hampers them throughout life [Citing *Brown*]” at the suggestion of Stanley Reed, with agreement from Black. Undated draft of *Bolling v. Sharpe*, Earl Warren Papers, Library of Congress, Box 571.

¹⁶⁵ *Griswold v. Connecticut*, 381 U.S. 479, 516 (1965) (Black, J., dissenting).

¹⁶⁶ *Id.* at 517 n.10.

¹⁶⁷ Though there is no record that he objected to the draft *Bolling* opinion, Justice Felix Frankfurter could not have been pleased with the favorable citation to *Meyer* and *Pierce*. In 1944, Frankfurter refused to join the Court’s opinion in *Prince v. Massachusetts* because it favorably cited *Meyer* and *Pierce*. He argued that Justice Holmes’ dissent in *Meyer* was correct, and that “I shall turn out to be a bad prophet indeed if this Court will not come to rue the implications of *Pierce v. Society of Sisters*.” Letter from Justice Frankfurter to Justice Rutledge, Jan. 22, 1944, quoted in Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking and the Supreme Court, 1948-1958*, 68 *GEO. L.J.* 1, 48 (1979).

¹⁶⁸ 347 U.S. 497, 500 (1954).

¹⁶⁹ “Although the ‘fundamental liberty’ analysis stood on shaky, even discredited, ground, it was at least precedented.” Hutchinson, *supra* note 166, at 50. Part of the problem, no doubt, was the extraordinary haste in which *Bolling* was drafted. The initial drafting was assigned to Warren clerks on May 4, 1954, the draft was distributed to the other Justices on May 8, their comments were received the following week, and the opinion was released on May 17.

¹⁷⁰ See *supra* note 166 and accompanying text.

¹⁷¹ As shown in the annotated *Bolling* opinion produced above, the basis for the draft opinion was clearly a substantive due process rationale with equal protection dicta, and the final opinion only subtracts from the

solely) an equal protection case. The Court itself, perhaps unable to decipher Warren's cryptic final opinion, later adopted that interpretation of *Bolling*. But for Warren's catering to Black's *Lochner*phobia, it would have been clear that the *Bolling* holding was not based on equal protection. Rather, like *Buchanan v. Warley*, it was a due process case holding that a violation of due process rights via racial classification will require a solid, nondiscriminatory police power justification.

Indeed, Warren's draft due process opinion arguably made a stronger case for the unconstitutionality of racial segregation under the Fifth Amendment's Due Process Clause than the Court's opinion in *Brown* made for the unconstitutionality of racial segregation under the Fourteenth Amendment's Equal Protection Clause. If nothing else, the draft *Bolling* opinion logically follows from precedents like *Buchanan*, *Meyer*, and *Tokushige*, while *Brown* required the Court to reverse *Plessy*.

The Court's *Lochner*phobia weakened *Bolling* in other ways as well. Even Warren's draft opinion remains vulnerable to the charge that it's absurd to think that the Fifth Amendment's Due Process Clause, enacted at a time when the Federal Government enforced the fugitive slave clause,¹⁷² and held, in *Dred Scott v. Sandford*, to protect slaveowners' property rights in their slaves, could be interpreted to ban segregated schools.¹⁷³ Here Warren could have sought help from *Adkins v. Children's Hospital*, and authored a paragraph along the following lines:

In *Adkins v. Children's Hospital*, we considered the issue of whether women could still be presumptively be considered to have lesser rights under the Fourteenth Amendment than have men, a position that would have been consistent with the views of the Framers of the Fourteenth Amendment. Speaking through Justice Sutherland, we noted that the Nineteenth Amendment, and the social and political changes that led to its passage, had changed the status of women such that they were now full citizens in American society entitled to equal rights under the Constitution. While

discussion justifying the substantive due process holding, without adding anything about equal protection.

¹⁷² U.S. Const., Art. IV, § 2 ("No person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of Party to whom such Service or Labour may be due.").

Adkins has been overruled on its precise holding that the special needs of women cannot be taken into account in the process of regulating industrial employment, the broader legal principle invoked, that subsequent amendments can change our interpretation of the meaning of due process, remains valid. The Fourteenth Amendment granted Negroes full rights of national citizenship, and the Federal Government may therefore no longer arbitrarily deprive them of liberty rights encompassed by the Due Process Clause.

If Warren succumbed to *Lochner*phobia in failing to cite *Meyer* and *Pierce*, it's not surprising that he was unwilling to cite *Adkins v. Childrens Hospital*, among the most reviled cases of the *Lochner* era.

The Court's *Lochner*phobia caused another problem. To the extent that *Bolling* has come to stand for the proposition that the concept of due process contains a guarantee of equal protection of the laws, critics can aptly note that the post-*Lochner* era precedents Warren relied on were weak at best. However, ample precedent from the *Lochner* era supported the notion that due process overlaps with equal protection, and some cases and commentators from that era (and also from the Gilded Age) argued that, at least as far as the Fifth Amendment's Due Process Clause was concerned, due process provided the same equality guarantees as the Fourteenth Amendment's Equal Protection Clause.

As noted above, an *Adkins*-style argument in *Bolling* could satisfy the "originalist"¹⁷⁴ objection that the Fifth Amendment was not intended to protect the rights of African Americans. An originalist might still object that even if the Fourteenth Amendment's Due Process Clause included a notion of equality, the Fifth Amendment's Due Process Clause did not; that opposition to "class legislation" was not part of American constitutional discourse during the

¹⁷³ See Graglia, *supra* note 35, at 771.

¹⁷⁴ While one originalist methodology would be to argue that the Fifth Amendment was not *intended* to apply to African Americans, other originalists would note that the Fifth Amendment speaks only of "persons," not "whites." Given that the meaning of the word "person" is not race-exclusive, and given the natural rights background of the Constitution, which provides a rule of construction to interpret ambiguous provisions, these originalists could argue that the Fifth Amendment did indeed include African Americans within its purview, even if the Framers did not intend it to do so. For a good discussion of originalism, natural rights, and rules of construction, see RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 125–30 (2004).

Founding era, and was not written into American constitutional law until the Reconstruction era. A full examination of this issue is beyond the scope of this Essay, but suffice for now to say that the idea that due process includes a guarantee that all laws be “equal and general” goes back to the founding era and beyond.¹⁷⁵

The question also arises as to whether an explicit recognition in *Bolling* of a liberty right to pursue an education would have mandated a different result in *San Antonio Independent School District v. Rodriguez*, which held that in the absence of racially discriminatory intent, unequal funding of public schools does not violate the Equal Protection Clause.¹⁷⁶ Under a *Lochnerian* analysis, the question would be whether a state was exceeding its police powers in allowing local jurisdictions to be the primary funders of public schools, given the funding disparities that would inevitably arise. States would likely argue that *Bolling* should be distinguished: no Texas law prevented an individual who wanted her son to attend a particular public school from moving to that district, so the right to pursue an education was not infringed. Moreover, given the advantages of local funding (and thus control) of public schools, local school funding not an arbitrary policy, and a lack of arbitrariness is all that’s needed to satisfy a *Lochnerian* test.

However, Warren’s draft *Bolling* opinion, though *Lochnerian* in its underlying origins, had declared that the right to pursue an education was a *fundamental* right.¹⁷⁷ Under modern due process law, a right’s status as fundamental means that any infringement of the right is subject to strict scrutiny—the government’s actions must not be simply reasonable and non-arbitrary, but also must further compelling interests and be narrowly tailored to serve those interests. Assuming interdistrict disparities in funding were found to infringe on the right to pursue an education, it would have been difficult to justify these disparities under a compelling interest test. Even without that assumption, the effect on desegregation lawsuits, in particular, would have been dramatic: plaintiffs would not have had to show that the inequality of resources in black and white schools was traceable to the maintenance of a dual system (discriminatory intent), but rather simply that the inequality infringed on black students’ right to pursue their education without compelling justification.

¹⁷⁵ See GILLMAN, *supra* note 73; Taylor, *supra* note 107, at 303–04.

¹⁷⁶ See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

¹⁷⁷ See *supra* notes 158–160 and accompanying text.

CONCLUSION

A careful analysis of *Bolling v. Sharpe* reveals some surprises. First, the almost universal portrayal of *Bolling* as an opinion relying on an “equal protection component” of the Fifth Amendment’s Due Process Clause is incorrect. The opinion is vague and opaque, but a comparison of Chief Justice Warren’s original draft opinion with the final opinion makes it clear that the Court’s precise holding was that school segregation in the District of Columbia arbitrarily violated black students’ right to educational liberty. *Bolling*, then, was a substantive due process opinion with roots in *Lochner* era cases such as *Buchanan v. Warley*, *Meyer v. Nebraska*, *Pierce v. Society of Sisters*, and *Farrington v. Tokushige*, even though the Court ultimately chose to cite only *Buchanan*.

Among other things, *Bolling*’s roots in *Lochnerian* cases belies the oft-heard notion that the *Lochner* line of cases was somehow directly at odds with racial equality, and that the overruling of those cases in the 1930s was a necessary prelude to *Brown*.¹⁷⁸ Indeed, not only did the *Lochner* line of cases not stand in the way of a broad interpretation of the Equal Protection Clause, *Bolling* shows that de jure segregation was actually highly vulnerable to *Lochnerian* argument. The Court simply had to recognize that exclusion of Blacks from government services provided to whites was properly understood as a denial of Blacks’ liberty.¹⁷⁹

Arguably, *Bolling* also shows the potential for a racially egalitarian jurisprudence to have emerged in a political environment far closer to America’s libertarian tradition than what had emerged by the 1950s. As the author of this Essay wrote over a decade ago,

It is possible to imagine that but for the interruption of the Great Depression and the New Deal, entirely different forms of civil rights protections would have arisen—a laissez-faire combination

¹⁷⁸ See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 147 (1991) (making this argument). For an argument that *Lochnerian* cases actually shielded Blacks from protectionist labor laws promoted by white interest groups, see DAVID E. BERNSTEIN, *ONLY ONE PLACE OF REDRESS: AFRICAN AMERICANS, LABOR REGULATIONS AND THE COURTS FROM RECONSTRUCTION TO THE NEW DEAL* (2001).

¹⁷⁹ This shift certainly required an abandonment of the Court’s previous position that the Fourteenth Amendment does not address issues of “social equality.” However, as the first Justice Harlan’s career shows, there is no inherent contradiction between sympathy with *Lochnerian* reasoning and support for a broad understanding of the Fourteenth Amendment’s Equal Protection Clause. See, e.g., *Berea College v. Kentucky*, 211 U.S. 45 (1908) (Harlan, J., dissenting) (arguing that prohibiting colleges from having integrated student bodies violated the right of teachers to pursue their occupations free from unreasonable government interference); *Adair v. United States*, 208 U.S. 161 (1908) (Harlan, J.) (concluding that a law banning employers from firing union members was an arbitrary violation of liberty of contract).

of equal protection of the law, liberty of contract, and freedom of association, instead of the more statist combination of interest group liberalism, the welfare state, and government enforcement of nondiscrimination norms against private parties.¹⁸⁰

Some would argue, however, that once a *Lochnerian* Court acknowledged that access to a government-provided service could be construed as a *liberty* right, the entire classical liberal/libertarian edifice of *Lochner* would be lost. After all, libertarianism is premised on the notion that all rights against the government are negative rights. On the other hand, a libertarian might argue that to subsidize one group is the economic equivalent of taxing its competitors. To subsidize whites' education more than Blacks' education—whether through extra monetary aid to white schools or merely by requiring Blacks to go to separate schools and thus, in the context of a racist society, inherently relegating them to second-class education—is, by economists' lights, the equivalent of taxing Blacks more than whites. The right to be free from discriminatory taxation on an arbitrary basis such as race is certainly within the scope of the classical liberal/libertarian paradigm.

Another surprise is that the proposition that *Bolling* has come to stand for, that the Fifth Amendment prohibits discrimination by the Federal Government, was not simply “made up” by the Supreme Court, but has a basis in longstanding precedent. The idea that the protection from discrimination provided by the Fifth Amendment is precisely the same as that provided by the Fourteenth Amendment's Equal Protection Clause, as the Court held subsequent to *Bolling*, is more of a stretch, but even that view has precedent in cases and commentary from the Gilded Age and the *Lochner* era.¹⁸¹

Finally, *Bolling* is an important example of the distorting effect of *Lochnerphobia* on Supreme Court jurisprudence. As discussed above, *Bolling* would have been a much stronger opinion had it been willing to explicitly rely on *Lochner era* precedents such as *Meyer* and *Tokushige*, and to employ a more explicitly *Lochnerian* view of the Due Process Clause. Moreover, the Justices' *Lochnerphobia* eventually led the Court to abandon the liberty-to-pursue-an-education basis of *Bolling* entirely, in favor of an equal protection interpretation of the case.

¹⁸⁰ David E. Bernstein, *Roots of the “Underclass”: The Decline of Laissez-Faire Jurisprudence and the Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 135 (1994).

¹⁸¹ See *supra* Part II.

Because the cursory equal protection analysis in *Bolling* was not supported by citations to relevant pre-New Deal precedents, the Court subsequently instead took to heart *Bolling*'s admonition that it would be “unthinkable” to permit the Federal Government to discriminate when the states were banned from doing so. The result has been the curious doctrine of “reverse incorporation” under which the Court has held that the Fifth Amendment’s Due Process Clause somehow incorporates against the Federal Government the Fourteenth Amendment’s Equal Protection Clause.

Bolling is hardly the only Supreme Court opinion that was been distorted by the Justices’ *Lochner*phobia. Justice William O. Douglas’s opinion in *Griswold v. Connecticut* infamously relied on the (to put it charitably) novel argument that the “penumbras and emanations” of various parts of the Bill of Rights created a fundamental right to privacy protected by the Fourteenth Amendment’s Due Process Clause.¹⁸² Douglas explicitly disclaimed any intention of reviving *Lochner*, and, while he favorably cited *Meyer* and *Pierce*, he baselessly reinterpreted them as First Amendment cases.¹⁸³ Justice John Marshall Harlan’s lone concurrence, by contrast, relied on traditional *Lochnerian* substantive due process reasoning. He argued that the Due Process Clause protects “basic values implicit in the concept of ordered liberty,” with regulations that infringed on liberty permitted only if they were reasonably related to legitimate police power concerns.¹⁸⁴

Of late, the Court’s *Lochner*phobia seems to waning. The Court still rejects the economic substantive due process cases of the *Lochner* era, such as *Lochner* itself and *Adkins v. Children’s Hospital*.¹⁸⁵ But in a string of recent opinions, a majority of the Court has otherwise embraced a *Lochnerian* interpretation of the Fourteenth Amendment’s Due Process Clause consistent with

¹⁸² See Lund & McGinnis, *supra* note 153, at 1570 (calling this “plain sophistry”).

¹⁸³ *Griswold v. Connecticut*, 381 U.S. 471, 482 (1965)

¹⁸⁴ *Id.* at 500 (Harlan, J., concurring) (internal quotation marks omitted).

¹⁸⁵ In *Planned Parenthood v. Casey*, the plurality opinion explained that the reason the Court overruled *Adkins* was because “[i]n the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Adkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare.” *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 861-62 (1992) (plurality opinion). Justice Souter later explained that the principle espoused in *Lochner*-era cases that arbitrary deprivations of liberty violated due process is “unobjectionable,” but “while the cases in the *Lochner* line routinely invoked a correct standard of constitutional arbitrariness review, they harbored the spirit of *Dred Scott* in their absolutist implementation of the standard they espoused.” *Washington v. Glucksberg*, 521 U.S. 702, 760-61 (1997) (Souter, J., concurring).

Meyer, Pierce, and Justice Harlan's opinion in *Griswold*.¹⁸⁶ The penumbral right to privacy has given way to a broader protection of liberty interests against arbitrary governmental interference, and the sharp, post-*Lochner* era distinction between fundamental liberty rights protected by strict scrutiny and other liberty interests protected only by very limited scrutiny has eroded.¹⁸⁷ In the 2002-03 term, the Court held that both standardless punitive damages awards¹⁸⁸ and restrictions on homosexual sodomy¹⁸⁹ constituted arbitrary violations of rights protected by due process considerations, even though the Court identified no relevant "fundamental rights." The Court instead implicitly concluded that animus toward big business or homosexuals, even if based in deeply-rooted notions of morality, were not valid police power justifications of the defendants' otherwise arbitrary deprivations of the plaintiffs' liberty interests.

In this climate, where *Lochnerian* substantive due process protection of liberty interests has become relatively routine, though not uncontroversial,¹⁹⁰ perhaps the time has come for courts and commentators to reconsider the *Bolling* opinion. *Bolling* was a substantive due process opinion, shorn of precedent and coherent reasoning by a Court afraid of its own *Lochnerian* shadow. As a result, *Bolling* receives little support from legal scholars, and has been misinterpreted as a pure equal protection opinion. In fact, with its roots in *Buchanan v. Warley* and the 1920s educational liberty cases, the liberty right to be free from compelled segregation in education is perhaps better grounded than the liberty right to terminate one's pregnancy, to engage in homosexual sodomy, or to be free from arbitrary punitive damages awards. This will not satisfy critics like Bork who oppose the Court's substantive due process jurisprudence across the board. But for the vast majority of legal scholars who do support the Court's current substantive due process jurisprudence, *Bolling* should be an easy case to defend.

¹⁸⁶ See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality opinion). As noted in the previous footnote, according to *Casey*, what was wrong with *Lochner* was not that the Court had protected a nontext-based fundamental right, but that the Court had erred in thinking that liberty of contract was a liberty interest that the Court should protect. Moreover, in contrast to *Roe*, the *Casey* Court allowed states to restrict abortion as long as the burden placed on women was not "undue," a compromise that harkened back to *Lochner's* deference to regulations of liberty that could be justified under the police power.

¹⁸⁷ See Randy E. Barnett, *Justice Kennedy's Libertarian Revolution: Lawrence v. Texas, 2002–2003 CATO SUP. CT. REV.* 21, 22.

¹⁸⁸ See *State Farm*, 538 U.S. 408.

¹⁸⁹ See *Lawrence*, 539 U.S. 558.

¹⁹⁰ See, e.g., *Lund & McGinnis*, *supra* note 153 (severely criticizing the Court's substantive due process jurisprudence, and *Lawrence* in particular).