

clause and it provides no guaranty against discriminatory legislation by Congress.”⁴⁸⁷ Nevertheless, “Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”⁴⁸⁸ Even before the Court reached this position, it had assumed that “discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment.”⁴⁸⁹ The theory that was to prevail seems first to have been enunciated by Chief Justice Taft, who observed that the Due Process and Equal Protection Clauses are “associated” and that “[i]t 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. . . . [Due process] 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.”⁴⁹⁰ Thus, in *Bolling v. Sharpe*,⁴⁹¹ a companion case to *Brown v. Board of Education*,⁴⁹² the Court held that segregation of pupils in the public schools of the District of Columbia violated the Due Process Clause. “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.”

“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

⁴⁸⁷ *Detroit Bank v. United States*, 317 U.S. 329, 337 (1943); *Helvering v. Lerner Stores Corp.*, 314 U.S. 463, 468 (1941).

⁴⁸⁸ *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 214–18 (1995).

⁴⁸⁹ *Steward Machine Co. v. Davis*, 301 U.S. 548, 585 (1937). *See also* *Currin v. Wallace*, 306 U.S. 1, 13–14 (1939).

⁴⁹⁰ *Truax v. Corrigan*, 257 U.S. 312, 331 (1921). *See also* *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

⁴⁹¹ 347 U.S. 497, 499–500 (1954).

⁴⁹² 347 U.S. 483 (1954). With respect to race discrimination, the Court had earlier utilized its supervisory authority over the lower federal courts and its power to construe statutes to reach results it might have based on the Equal Protection Clause if the cases had come from the states. *E.g.*, *Hurd v. Hodge*, 334 U.S. 24 (1948); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Railroad Trainmen v. Howard*, 343 U.S. 768 (1952). *See also* *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946).