Discrimination.— Literally speaking, the Fifth Amendment, unlike the Fourteenth Amendment, "contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress."[501] Nevertheless, "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment."[502] 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."[503] 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."[504] Thus, in *Bolling v. Sharpe*,[505] a companion case to *Brown v. Board of Education*,[506] 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 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."

"In view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."

In subsequent cases, the Court has applied its Fourteenth Amendment jurisprudence to federal legislation that contained classifications based on sex[507] and illegitimacy,[508] and that set standards of eligibility for food stamps.[509] However, almost all legislation involves some degree of classification among particular categories of persons, things, or events, and, just as the Equal Protection Clause itself does not outlaw "reasonable" classifications, neither is the Due Process Clause any more intolerant of the great variety of social and economic legislation typically containing what must be arbitrary line-drawing.[510] Thus, for example, the Court has sustained a law imposing greater punishment for an offense involving rights of property of the United States than for a like offense involving the rights of property of a private person.[511] A veterans law that extended certain educational benefits to all veterans who had served "on active duty" and thereby excluded conscientious objectors from eligibility was held to be sustainable, its being rational for Congress to have determined that the disruption caused

by military service was qualitatively and quantitatively different from that caused by alternative service, and for Congress to have so provided to make military service more attractive.512

"The federal sovereign, like the States, must govern impartially. . . . [B]ut . . . there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State."513 The paramount federal power over immigration and naturalization is the principal example, although there are undoubtedly others, of the national government's being able to classify upon some grounds—alienage, naturally, but also other suspect and quasi-suspect categories as well—that would result in invalidation were a state to enact them. The instances may be relatively few, but they do exist.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798) ("An act of the legislature (for I cannot call it a law), contrary to the first great principles of the social compact, cannot be considered a rightful exercise of legislative authority") (Chase, J.).

In the years following the ratification of the 14th Amendment, the Court often observed that the Due Process Clause "operates to extend . . . the same protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment," Hibben v. Smith, 191 U.S. 310, 325 (1903), and that "ordinarily if an act of Congress is valid under the Fifth Amendment it would be hard to say that a state law in like terms was void under the Fourteenth," Carroll v. Greenwich Ins. Co., 199 U.S. 401, 410 (1905). *See also* French v. Barber Asphalt Paving Co., 181 U.S. 324, 328 (1901). There is support for the notion, however, that the proponents of the 14th Amendment envisioned a more expansive substantive interpretation of that Amendment than had developed under the Fifth Amendment. See AKHIL REED AMAR, THE BILL OF RIGHTS 181–197 (1998).

Loan Ass'n v. Topeka, 87 U.S. (20 Wall.) 655 (1875). "There are . . . rights in every free government beyond the control of the State. . . . There are limitations on [governmental power] which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist . . . ."

165 U.S. 578 (1897). Freedom of contract was also alluded to as a property right, as is evident in the language of the Court in Coppage v. Kansas, 236 U.S. 1, 14 (1915). "Included in the right of personal liberty and the right of private property— partaking of the nature of each—is the right to make contracts for the acquisition of property. Chief among such contracts is that of personal employment, by which labor and other services are exchanged for money or other forms of property. If this right be struck down or arbitrarily interfered with, there is a substantial impairment of liberty in the long-established constitutional sense."