ESSAY

TAKING ITS PROPER PLACE IN THE CONSTITUTIONAL CANON: *BOLLING v. SHARPE*, *KOREMATSU*, AND THE EQUAL PROTECTION COMPONENT OF FIFTH AMENDMENT DUE PROCESS

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INTRODUCTION

THERE has been some scholarly attention paid of late to the constitutional canon, and to what finds its way in and why.[1] The justly acclaimed but often criticized decision in *Bolling v. Sharpe*[2] provides a most interesting lens through which to examine that question. *Bolling* is, of course, firmly ensconced in the constitutional canon. Decided the same day as *Brown v. Board of Education*,[3] it was a landmark decision in which the Supreme Court struck down racial segregation in the District of Columbia public schools. It is nothing less than the received wisdom in American constitutional law that in *Bolling v. Sharpe* the Supreme Court cut from whole cloth the doctrine that the Due Process Clause of the Fifth Amendment has an "equal protection component" that renders principles of equal protection applicable to the federal government. This doctrine is a significant feature of American constitutional law, and one that provides a critical part of the framework

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[1] See generally, e.g., J.M. Balkin & Sanford Levinson, The Canons of Constitutional Law, 111 Harv. L. Rev. 963 (1998); David Fontana, A Case for the Twenty-First Century Constitutional Canon: *Schneiderman v. United States*, 35 Conn. L. Rev. 35 (2002); Richard H. Pildes, Democracy, Anti-Democracy, and the Canon, 17 Const. Comment. 295 (2000); William J. Rich, Taking "Privileges or Immunities" Seriously: A Call to Expand the Constitutional Canon, 87 Minn. L. Rev. 153 (2002).

[2] 347 U.S. 497 (1954).

[3] 347 U.S. 483 (1954).

within which the federal government interacts with the individual.[4] And it is widely accepted, by those who defend the decision as well as those who attack it, that this doctrinal innovation cannot be easily justified by the Fifth Amendment's text or its history and that the Court's opinion itself certainly did not justify it. The conventional account is that the decision was therefore essentially political rather than judicial.[5]

[4] See, e.g., Donald A. Dripps, Overcriminalization, Discretion, Waiver: A Survey of Possible Exit Strategies, 109 Penn. St. L. Rev. 1155, 1175 n.51 (2005) (citing *Bolling* to support the proposition that the Fifth Amendment Due Process Clause has an "equal protection component"); Michael J. Gerhardt, The Constitutional Limits to Court-Stripping, 9 Lewis & Clark L. Rev. 347, 357 & n.31 (2005) (same); Girardeau A. Spann, Neutralizing *Grutter*, 7 U. Pa. J. Const. L. 633, 636 n.10 (2005) (same). Of course, contrary to the canonized version, the *Bolling* decision did not actually use the phrase "equal protection component," as that formulation arose only in later descriptions of the case. See United States Dep't of Agric. v. Moreno, 413 U.S. 528, 533 (1973) (using the phrase "equal protection component" in a Supreme Court decision for the first time); see also Lawrence Lessig, Understanding Changed Readings: Fidelity and Theory, 47 Stan. L. Rev. 395, 409–10 (1995) (noting that "equal protection component" language was not used in *Bolling*). Nor, again contrary to the canonical mythology, did *Bolling* formally equate the federal government's obligation under the Fifth Amendment Due Process Clause to that of the states under the Fourteenth Amendment's Equal Protection Clause. The Supreme Court formally equated the two only much later, though it claimed erroneously that the analysis had always been the same. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 224 (1995); 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."); see also Richard A. Primus, *Bolling* Alone, 104 Colum. L. Rev. 975, 989 (2004) ("By the mid-1970s, the Court asserted flatly and repeatedly that the rules governing Fifth and Fourteenth Amendment equal protection claims were, and had always been, the same. The historian of ideas should squirm at this assertion; it certainly does not map constitutional thought before 1935, and even *Bolling* did not establish this complete version of reverse incorporation.").

[5] See, e.g., Wendell E. Pritchett, A National Issue: Segregation in the District of Columbia and the Civil Rights Movement at Mid-Century, 93 Geo. L.J. 1321, 1321 n.2 (2005) ("This 'political' interpretation of *Bolling* is the majority scholarly view."); John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 32 (1980) (criticizing reverse incorporation as "gibberish both syntactically and historically"); Robert H. Bork, The Tempting of America: The Political Seduction of the Law 83 (1990); cf. Geoffrey R. Stone et al., Constitutional Law 476–77 (5th ed. 2005); Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 677 (15th ed. 2004), both discussed infra at notes 16–19 and accompanying text. The strength of this narrative is such that our most distinguished constitutional scholars ultimately rest defenses of *Bolling* upon textual grounds that rely on provisions of the Constitution other than the Due Process Clause, see, e.g., Drew S. Days III, Days, J., concurring, *in* What *Brown v. Board of Education* Should Have Said 92, 97–98 (Jack M. Balkin ed., 2001)

Indeed, it is for these reasons that *Bolling* is universally known. *Brown* itself decided four consolidated cases, but the names of the South Carolina, Delaware, and Virginia cases, those decided with the Topeka, Kansas case in *Brown*, are rarely spoken. Of the cases decided with *Brown*, *Bolling* stands alone because it presented a different problem from the others: the question of racial segregation implemented by the federal government in the District of Columbia—the federal government to which the Equal Protection Clause, which places a restriction only upon the states, itself does not apply.

In this Essay I will challenge a part of the received wisdom concerning *Bolling* and what acceptance of that received wisdom says about the way in which our constitutional canon is formed.[6] I will

(relying on the Citizenship Clause of the Fourteenth Amendment); Ely, supra at 33 (relying on the Ninth Amendment); Akhil Reed Amar, Intratextualism, 112 Harv. L. Rev. 747, 766–73 (1999) (arguing that *Bolling* could be justified under the Citizenship Clause, the Attainder Clauses, or the Nobility Clauses and that, in any case, an intratextual reading of the Due Process and Equal Protection Clauses provides a possible defense for *Bolling* as a Fifth Amendment Due Process decision); Sanford Levinson, Constitutional Rhetoric and the Ninth Amendment, 64 Chi.-Kent L. Rev. 131, 148 n.69 (1988) ("One could, however, view the right not to be the victim of stigmatic discrimination on the grounds of race as precisely the kind of unenumerated right recognized by the ninth amendment as applying to the actions of the federal government."). Or even on "unwritten [constitutional] premises and purposes." See Frank I. Michelman, Michelman, J., concurring in part and concurring in the judgment, *in* What *Brown v. Board of Education* Should Have Said 124, 124–32 (Jack M. Balkin ed., 2001). Indeed, even those who ultimately defend *Bolling* on Fifth Amendment Due Process grounds have sometimes written in a defensive tenor about the decision and offer alternative textual sources for its support. See, e.g., Amar, supra, at 766–73; Laurence H. Tribe, Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation, 108 Harv. L. Rev. 1221, 1297–99 n.247 (1995) ("Given the absence of an Equal Protection Clause applicable to Congress, is there anything in the Constitution to prevent the federal government from engaging in the grossest forms of racial apartheid? The answer may well be 'yes.' I have elsewhere explained an interpretation of the Bill of Attainder Clauses sufficiently broad to condemn as unconstitutional any state or federal measure singling out readily identifiable and closed classes of persons (in other words, classes from which one is unable voluntarily to withdraw) for stigmatizing disabilities.") [hereinafter Tribe, Taking Text and Structure Seriously]; accord 1 Laurence H. Tribe, American Constitutional Law 67–68 n.65 (3d ed. 2003) (defending *Bolling* on substantive due process grounds) [hereinafter Tribe, American Constitutional Law].

[6] Professor David Bernstein has also recently challenged the received wisdom about *Bolling* in a very interesting essay first presented at a conference with this one, but in a different way than I do. See David E. Bernstein, *Bolling*, Equal Protection, Due Process, and *Lochner*phobia, 93 Geo. L.J. 1253 (2005). He argues that courts and

not disagree that *Bolling* was a landmark decision that is justly celebrated. But, as I hope to show, *Bolling* itself is not the dramatic doctrinal departure it is supposed to be, nor is the decision the legally unjustifiable "political" act it is charged with being.[7] Indeed, I hope to suggest that the attention the decision has received for the "reverse incorporation" doctrine it employed and the attendant criticism of the decision's reasoning—the very features that establish its uncomfortable place in the constitutional cannon—reflect in fact unjustified discomfort with the *substance* of the decision. Even supporters of the decision have been too quick to accept the validity of that criticism and to ignore the Court's own reasoned explanation for its decision. As a consequence, opponents of *Bolling* control the narrative surrounding the decision. This reflects a more

scholars have erred in interpreting *Bolling* as an equal protection decision when a close reading reveals that it was actually "a substantive due process opinion with roots in *Lochner*-era cases." Id. at 1282. Bernstein argues that the Court in *Bolling* could have provided a persuasive legal justification for its decision by relying on various *Lochner*-era precedents to establish the proposition that "forcing blacks to attend segregated schools infringed on a liberty right protected by the Fifth Amendment's Due Process Clause." Id. at 1255. Instead, his argument continues, the clarity of the Court's reasoning was obscured by a fear of relying on *Lochner*-era precedents, which ultimately led to the inclusion of weak "dicta" regarding the overlap between due process and equal protection. Id. at 1256, 1279–80. By contrast, I argue that: (1) *Bolling*'s partial incorporation of an equal protection norm into the Fifth Amendment's Due Process Clause was not a dramatic doctrinal departure but was instead an acknowledgement—made explicitly for the first time—of a legal concept that was already relatively well accepted; and (2) the doctrinal puzzle surrounding *Bolling* and reverse incorporation can be solved by viewing *Bolling* in light of modern—not *Lochner*-era—substantive due process jurisprudence.

[7] Some other scholars have of course remarked on the antecedents to *Bolling*'*s* supposedly whole-cloth doctrinal innovation that I highlight here. See, e.g., Jack M. Balkin, Balkin, C.J., judgment of the Court, *in* What *Brown v. Board of Education* Should Have Said 77, 87–88 (2001); Primus, supra note 4, at 989 ("From *Bolling* forward—and indeed, perhaps already a few years before *Bolling*, in cases like *Carolene Products* and *Korematsu*—constitutional doctrine has behaved as if the Fifth Amendment's Due Process Clause incorporated the full apparatus of Fourteenth Amendment equal protection against the federal government."); Tribe, American Constitutional Law, supra note 5, at 1319–20 n.37 (pairing *Bolling* with *Korematsu* in support of the proposition that equality notions have been incorporated into substantive due process). And also see Professor Karst's typically wonderful article, Kenneth L. Karst, The Fifth Amendment's Guarantee of Equal Protection, 55 N.C. L. Rev. 541, 542–46 (1977); cf. Jim Chen, Come Back to the Nickel and Five: Tracing the Warren Court's Pursuit of Equal Justice Under Law, 59 Wash. & Lee L. Rev. 1203, 1217 (2002) ("[I]t was *Bolling* that finally and decisively resolved the *Korematsu* conundrum.").

pervasive problem in constitutional law, certainly one that can be seen in the conventional wisdom about those other landmark decisions, *Brown v. Board of Education* and *Roe v. Wade*,[8] which, too, have been unjustly criticized for their reasoning. In the end, I conclude that when the layers of accumulated lacquer of commentary and response are stripped away, *Bolling* deserves its place in the canon not so much for breaking doctrinal ground in a hard- or impossible-to-justify way, but because of the momentous substance of the decision in which its doctrine was applied.

I. *BOLLING*'S ROLE IN THE CONSTITUTIONAL CANON

For those of us who take constitutional text seriously, as I do, the objections to *Bolling* must be taken seriously. Textually, at least at first blush, *Bolling* presents something of a paradox. Of course, the textual question presented by "reverse incorporation" of equal protection into the Fifth Amendment's Due Process Clause is the mirror image of that presented by incorporation of the Bill of Rights into the Fourteenth Amendment's Due Process Clause. There the question is why the doctrine does not render the Bill of Rights itself superfluous. The Fifth Amendment, after all, contains a Due Process Clause identical in terms to that in the Fourteenth. If its language can bear the meaning given it in the incorporation decisions, then what is the necessity for the other enumerated rights contained in the first eight amendments?[9] The principle for which *Bolling* stands presents, as I have said, the mirror problem: why does the Fourteenth Amendment contain an Equal Protection Clause if the text of its Due Process Clause has the same effect?[10]

In my view, this puzzle can be easily solved if one understands *Bolling* as nothing more remarkable than a routine modern sub-

[8] 410 U.S. 113 (1973)

[9] Cf. Adamson v. California, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring) ("Are Madison and his contemporaries in the framing of the Bill of Rights to be charged with writing into it a meaningless clause?"). For discussion of the doctrinal issue of incorporation, see generally Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193 (1992); Jerold H. Israel, Selective Incorporation: Revisited, 71 Geo. L.J. 253 (1982).

[10] Numerous constitutional scholars have pointed out the textual problems presented by *Bolling* and reverse incorporation. See, e.g., Ely, supra note 5, at 32; Lessig, supra note 4, at 409 (noting that *Bolling* presented the Court with an "embarrassing textual gap" in the Constitution).

stantive due process decision—though one that recognized quite dramatically that denying students admission to an integrated school on the basis of their race served no legitimate public purpose.[11] Justice Souter offered perhaps the most well-known defense of *Bolling* on these grounds in his Supreme Court confirmation hearings in 1990.[12] On this reading, the coexistence of the Equal Protection Clause with the Due Process Clause in the Fourteenth Amendment—and, indeed, the onetime coexistence of slavery with the Fifth Amendment's Due Process Clause—reflects the fact that society has not always recognized or at least been willing to admit the nature of discrimination and segregation. One well might have failed (or refused) at the time of the adoption of the Fourteenth Amendment to recognize that the racial discrimination prohibited to the states by the Equal Protection Clause was *irrational* or that the purposes it served were inherently illegitimate.[13] Thus, even if

[11] I have made in more telegraphic form elsewhere this argument that segregation in the governmental provision of services and facilities violates substantive due process. See Peter J. Rubin, Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After *Adarand* and *Shaw*, 149 U. Pa. L. Rev. 1, 29 n.72 (2000).

[12] There he said:

> What the Court did in *Bolling* was not simply to say, look, all along there was an equal protection component in due process. . . .
>
> The most interesting thing about *Bolling* is that the Court said, [there] is not a legitimate governmental objective [served by the restriction on freedom to attend schools on an integrated basis]. Hence, the Court solved the problem of segregation not by pretending that due process simply means equal protection but we never noticed it before. They solved it by doing a kind of due process analysis. They said there is no legitimate governmental objective to be served here.
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> . . .
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> . . . As you know, subsequently that has been kind of transformed in a way and has been put in this short-handed way saying, oh, well, *Bolling v. Sharpe* says there is an equal protection component and that is the accepted view today, but the Court, I think, was more subtle than that in *Bolling*.

Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearings Before the Comm. on the Judiciary, 101st Cong. 305–06 (1990) (statement of Judge David H. Souter).

[13] Most scholars who have addressed the issue conclude that, as originally understood, the Fourteenth Amendment did not prohibit racial segregation in public schools. See, e.g., Bork, supra note 5, at 75–76; Alexander M. Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 7 (1955); Michael Klarman, An Interpretive History of Modern Equal Protection, 90 Mich. L. Rev. 213, 216 (1991); Mark V. Tushnet, Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles, 96 Harv. L. Rev. 781, 790 (1983). The strongest evi-

every denial of equal protection now would be understood also to violate substantive due process, as the Supreme Court has held,[14] the existence of that equal protection component of due process in the presence of both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment is not insolubly problematic. The presence of both provisions in the constitutional text can be explained by an evolving notion of what is so arbitrary that it violates due process.

The conventional wisdom, though, is that the *Bolling* decision cannot bear scrutiny—with only *Brown* and *Roe* coming in for similar (and equally or more scathing) criticism. The text of the decision itself in fact supports the reading I have just described. It says, in a sentence not quoted in many discussions of *Bolling*, 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."[15] This sentence, however, does not even appear in the discussion of *Bolling* in one of the two leading constitutional law casebooks.[16] It is the sentence that followed that has gained the most attention. That sentence reads, quite famously: "[i]n view of our decision that the Constitution prohibits the states from main-

dence of this is that the same Congress that sent the Fourteenth Amendment to the states operated the segregated school system in the District of Columbia. See An Act relating to Public School in the District of Columbia, ch. 217, 14 Stat. 216 (1866) (providing for the funding of the "colored schools" of the District of Columbia). Judge (then Professor) Michael McConnell has recently argued to the contrary, asserting that the "scholarly consensus" is wrong and that the original intent actually supports the unconstitutionality of segregation. See Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947, 953 (1995).

[14] *Adarand Constructors, Inc. v. Pena*—a case that limits federal power to engage in race-based affirmative action and that, uncomfortably, purports to be the capstone of the *Bolling* line—holds that "[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." 515 U.S. 200, 224 (1995) (citations omitted). The *Adarand* decision decisively rejected the notion, previously adopted in *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563–66 (1990), that the federal government's use of racial classifications in affirmative action programs is subject to lesser constitutional scrutiny than similar use by the states. See *Adarand*, 515 U.S. at 227 ("[A]ll racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny.").

[15] *Bolling*, 347 U.S. at 500.

[16] See Stone et al., supra note 5, at 476–77.

taining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government."[17]

Both of the leading constitutional law case books today ask whether it is indeed "unthinkable" that the Constitution would impose a lesser duty upon the federal government with respect to racial discrimination than it does upon the states.[18] I happen to believe that it is unthinkable, in the sense that it would be shocking. Imagine a world in which segregation persisted in Washington, D.C., alone, protected perhaps by filibuster, into the 1960s! But that is not the sense in which the case book editors use the word "unthinkable." Following the received wisdom on *Bolling*, the case book questions about this word imply that this sentence contains the Court's legal reasoning.[19] And it is not literally unthinkable that the Constitution would impose greater restrictions on racial discrimination by the states than by the federal government.[20]

To begin with, the original Constitution, including the Fifth Amendment with its Due Process Clause, was not understood at

[17] *Bolling*, 347 U.S. at 500.

[18] Stone et al., supra note 5, at 476; Sullivan & Gunther, supra note 5, at 677.

[19] See Stone et al., supra note 5, at 476–77; Sullivan & Gunther, supra note 5, at 677. The idea that the Court's reasoning boiled down to the word "unthinkable," is central to the received version of the *Bolling* story, and it has of course been repeated by, or colored the assertions of, a wide range of scholars, not only the distinguished editors of the two casebooks cited above. See, e.g., Chen, supra note 7, at 1228 ("*Bolling*, in the end, hinged on a single word: 'unthinkable.' Chief Justice Warren did what his colleague, John Marshall Harlan, would decry on several other occasions: the 'substitut[ion] [of] resounding phrases for analysis.'" (alteration in original) (quoting Douglas v. California, 372 U.S. 353, 361 (1963) (Harlan, J., dissenting))); Michael C. Dorf, Equal Protection Incorporation, 88 Va. L. Rev. 951, 972 n.63 (2002) (stating that the *Bolling* Court "reason[ed] that it would be 'unthinkable' to impose a duty on the federal government under the Fifth Amendment's Due Process Clause that is less than the one imposed on the states under the Fourteenth Amendment's Equal Protection Clause"); Primus, supra note 4, at 976 (stating that the "declaration" that "it would be 'unthinkable' . . . to hold that the Constitution imposes a lesser duty of nondiscrimination on the federal government than it does on the states . . . has become the keystone for the reverse incorporation doctrine").

[20] In addition to the historical fact that different anti-discrimination obligations have previously attached to the federal and state governments, numerous justices and scholars have argued, as a normative matter, that constitutional principles (of equal protection and otherwise) should, in some situations, apply differently to these two governments. For a relatively recent argument to this effect, see Mark D. Rosen, The Surprisingly Strong Case for Tailoring Constitutional Principles, 153 U. Pa. L. Rev. 1513, 1515–16 (2005).

the time of its adoption to outlaw racial discrimination by the federal government. Indeed, everything from the three-fifths provision to the Fugitive Slave Clause pointed in the other direction.[21] The Civil War, which led to the adoption of the Fourteenth Amendment, revealed the states to be the primary threat to the equality and liberty of our citizenry. And the principles articulated by James Madison in Federalist No. 10—the very principles that argued for a strong national government—principles ultimately vindicated, in my view, in *Brown* itself,[22] suggest that the need for a judicially enforceable equal protection norm should be less with respect to the larger, federal jurisdiction than it is with respect to the states.[23] Finally, of course, even the Framers of the Fourteenth Amendment apparently thought a Due Process Clause was insufficient to outlaw racial segregation, having complemented the one in the Fourteenth Amendment with an Equal Protection Clause, which has no textual analogue applicable to the federal government.

Bolling should perhaps be lauded for the candor of its reference to unthinkability, not derided. For given the revolution undertaken by the Court in *Brown*, given the moment of that most momentous decision, the Court was surely right that it would be as a matter of justice unthinkable were the Constitution not to prohibit racial seg-

[21] Although the original Constitution does not explicitly mention slavery, three particular provisions served to accommodate or protect the institution of slavery. See U.S. Const. art. I, § 2, cl. 3 (Three-Fifths Clause); id. art. I, § 9, cl. 1 (barring congressional abolition of the slave trade before 1808); id. art. IV, § 2, cl. 3 (Fugitive Slave Clause). Further, though it was adopted a few years after the original Constitution, the Fifth Amendment Due Process Clause was clearly not understood at the time to undo the constitutional structure that protected slavery from federal interference. See Richard H. Fallon, Jr., Legitimacy and the Constitution, 118 Harv. L. Rev. 1787, 1815 (2005) ("What is more, the Due Process Clause of the Fifth Amendment was ratified in 1791, when race discrimination was widely accepted and the Constitution protected chattel slavery. When the Due Process Clause was ratified, virtually no one thought that it prohibited the federal government from discriminating based on race.").

[22] Cf. Walter E. Dellinger III, 1787: The Constitution and "The Curse of Heaven," 29 Wm. & Mary L. Rev. 145, 160–61 (1987).

[23] See The Federalist No. 10 (James Madison) (arguing that factions presented a lesser threat to the federal government because majority factions were unlikely to form across such a broad and diverse population); see also Russell N. Watterson, Jr., *Adarand Constructors v. Pena*: Madisonian Theory as a Justification for Lesser Constitutional Scrutiny of Federal Race-Conscious Legislation, 1996 BYU L. Rev. 301, 321–23 (arguing that Madison's "theory of the large republic" supports lesser constitutional scrutiny for racial classifications made by the federal government).

regation in federally operated schools and, ultimately, other facilities.[24] But it is difficult, though not impossible, to defend *Bolling* on the legal merits while treating this as the sum and substance of the Court's reasoning.[25] It is the weakness of its purported reasoning that is at the heart of the received version of the story of *Bolling*, the one that places it in the canon. That story goes something like this:

Having decided *Brown*, but with no doctrinal leg to stand upon with respect to segregation by the federal government, Chief Justice Warren, in what amounted to a political rather than a judicial act, announced what had never been imagined: that the Due Process Clause of the Fifth Amendment had an equal protection component. And he did so for no better reason than that it would be "unthinkable" if it did not.[26] Indeed, the strong version of this story asserts that *Bolling* is Exhibit A (well, maybe Exhibit C or D) in the case against the supposed "activism" of the Warren Court.[27]

And that story is passed down, or at least contended with, every time a law student is taught that *Bolling* broke new ground with its debatable—or even worse—announcement that the Fifth Amendment's Due Process Clause contained an equal protection component. Indeed, *Bolling*'s treatment in the case books, a reflection of this received version of the *Bolling* story, perpetuates the narrative

[24] Cf. Primus, supra note 4, at 1041 ("*Bolling*'s statement that imposing different constitutional equality standards on the state and federal governments would be 'unthinkable' was probably intended in a normative sense . . . . [T]he rise of the paradigm of universal rights made it increasingly unwieldy, as an intuitive matter, to maintain a doctrinal structure on which it mattered which government engaged in such discrimination. In a descriptive as well as a normative sense, such distinctions were no longer as 'thinkable' as they had once been.") (footnote omitted).

[25] While it has been widely accepted in the literature that *Bolling* does indeed rest upon the unthinkability of the alternative outcome, constitutional scholars have nonetheless concluded that it is justified. Professor Primus argues that the primary defense of *Bolling* has, indeed, been on the basis of the unthinkability of the alternative. See Primus, supra note 4, at 976–77 ("*Bolling* and reverse incorporation have generally been regarded as hard or even impossible to justify in terms of the text or the history of the Fourteenth Amendment. Nonetheless, the conventional wisdom in constitutional scholarship has not concluded that *Bolling* is wrongly decided or that reverse incorporation is an illegitimate doctrine. Instead, the dominant approach has been to regard *Bolling* and reverse incorporation as justified by the force of sheer normative necessity.") (footnotes omitted). But see the discussion of the alternative defenses of *Bolling*, supra note 5.

[26] See supra note 19.

[27] See, e.g., Bork, supra note 5, at 83–84.

of *Bolling* in which it has come to be understood as a legally unprincipled decision.

II. UNRAVELING THE NARRATIVE: *BOLLING*—AND *KOREMATSU*

There is only one problem with this narrative: it is not quite true. The purported innovation of holding that the Due Process Clause provides equal protection has powerful antecedents in cases that we routinely study, but that, most interestingly, are not canonized for this proposition. And this is true even if we limit ourselves to an examination of modern cases.

These are not the cases cited by the Court in *Bolling* in support of its assertion that "discrimination may be so unjustifiable as to be violative of due process."[28] *Detroit Bank v. United States*, a 1943 case cited by the Court, said that a distinction in the federal estate tax statute was not so arbitrary as to violate due process.[29] *Currin v. Wallace*, the second cited decision, based its holding primarily on the very fact that the Fifth Amendment has no Equal Protection Clause, though it goes on to say that, even assuming there might be a discrimination so injurious that it would violate due process, that was not the claim put forward in the case at bar.[30] And *Steward Machine Co. v. Davis*, also cited by the Court in *Bolling*, says only that a distinction that does not violate the Fourteenth Amendment does not violate the Fifth Amendment's Due Process Clause, even assuming that a gross discrimination of some kind might.[31] Indeed,

[28] *Bolling*, 347 U.S. at 499 & n.2.

[29] 317 U.S. 329, 337–38 (1943). Although it found the particular legislation at issue to be consistent with due process, the Court suggested there, in dicta and without much elaboration, that some discriminatory legislation may violate due process guarantees. Id. ("Unlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress. Even if discriminatory legislation may be so arbitrary and injurious in character as to violate the due process clause of the Fifth Amendment, no such case is presented here.") (citations omitted).

[30] 306 U.S. 1, 14 (1939) ("If it be assumed that there might be discrimination of such an injurious character as to bring into operation the due process clause of the Fifth Amendment, that is a different matter from a contention that mere lack of uniformity in the exercise of the commerce power renders the action of Congress invalid.").

[31] 301 U.S. 548, 584–85 (1937) ("The classifications and exemptions would therefore be upheld if they had been adopted by a state and the provisions of the Fourteenth Amendment were invoked to annul them. . . . The act of Congress is therefore valid, so far at least as its system of exemptions is concerned, and this though we assume

these cases are notable for their recognition that the Fifth Amendment contains no Equal Protection Clause.

Nor is the *Lochner*-era decision in *Buchanan v. Warley*,[32] on which the *Bolling* Court relied, on point. That case held that a state law restriction on the conveyance of property to African Americans worked a denial of a white seller's right to property "without due process of law."[33] The decision relied, it is true, on substantive due process, but the object of the state law at issue was held outside the police power precisely because of the Fourteenth Amendment's restriction (presumably in the Equal Protection Clause) on racial discrimination by state government.[34]

The closest the Court had even come in any of the cases cited in *Bolling* to saying that race discrimination might violate Due Process was probably in *Gibson v. Mississippi*, an 1896 case in which the first Justice Harlan wrote 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."[35] But *Gibson* was a case challenging state, not federal, action. The Court did not even mention the Due Process Clause in this dictum, nor did it purport to apply it, including this language purely to distinguish cases cited by the petitioner from the case at bar.[36]

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that discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment.").

[32] 245 U.S. 60 (1917).

[33] Id. at 75–81.

[34] Id. at 79 ("The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color."). Professor David Bernstein concludes that *Buchanan* is "directly on point" because it "held that denial of property rights for African Americans could not be based on weak race-related police power rationales." Bernstein, supra note 6, at 1256, 1272. The reason the state's race-related police power rationales failed, however, is that the Fourteenth Amendment granted African Americans the right "to acquire property without state legislation discriminating against [them]." *Buchanan*, 245 U.S. at 79. Thus, if one assumes that this right against discrimination by the state is derived from the Equal Protection Clause—and Bernstein gives us no reason not so to assume—then *Buchanan* is no more on point with respect to the *Bolling* question than any other case applying the equal protection clause to determine the validity of state legislation.

[35] 162 U.S. 565, 591 (1896).

[36] Id. at 592.

Yet there is one case involving federal governmental discrimination that antedates *Bolling*, that utilizes principles of equal protection in reaching its decision, and that makes no attempt in its text to reserve the question whether the Due Process Clause of the Fifth Amendment stands as a bulwark against racial discrimination. And every introductory constitutional law class studies it.

Now here, my title gives the surprise away. It is one of the most notorious decisions the Court has ever issued: *Korematsu v. United States*.[37] *Korematsu* itself is a challenge to discriminatory action by the United States government. And Justice Black's opinion begins by saying:

> It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.[38]

Korematsu is routinely taught as announcing the basic approach to questions of equal protection used in the modern era: some classifications—archetypally racial ones—are suspect; these must be strictly scrutinized to ensure that their use is justified.[39] (And, I should say, *Korematsu* was cited in *Bolling*, but only for the proposition that strict scrutiny applies to racial classifications.[40]) Of course, the disgraceful racial exclusion law there was upheld, and the purportedly "strict" scrutiny was in fact utterly deferential.[41] So one might think we focus on *Bolling* and not *Korematsu* because all that language in *Korematsu* is dictum. But that is an inadequate

[37] 323 U.S. 214 (1944).

[38] Id. at 216.

[39] Leading casebooks and treatises regularly place *Korematsu* in the equal protection section and discuss the case in terms of Fourteenth Amendment equal protection jurisprudence, without pausing to explain why an equal protection analysis even applies. See, e.g., Erwin Chemerinsky, Constitutional Law: Principles and Policies 668–72 (2d ed. 2002); Jesse H. Choper et al., Constitutional Law: Cases—Comments—Questions 1162–67 (9th ed. 2001); Stone et al., supra note 5, at 505–06, 512–13.

[40] *Bolling*, 347 U.S. at 499.

[41] *Korematsu*, 323 U.S. at 218 (accepting military's conclusion of necessity without any scrutiny of the basis for this conclusion).

explanation. Despite its outcome, we do teach *Korematsu* as the case announcing the equal protection principles of suspect classifications and strict scrutiny. What most of us do not say is that it announced an "equal protection component" to the Due Process Clause. Yet it is a case involving federal government action to which the Equal Protection Clause itself did not apply.

The Court in *Korematsu* does not mention that the Equal Protection Clause does not apply to the federal government. Rather, it simply states, without reference to a particular textual provision, that the petitioner claimed that the exclusion order "amounted to a constitutionally prohibited discrimination solely on account of race."[42] The idea that the federal government might not discriminate on the basis of race seems almost taken for granted—and this is a decade before *Bolling*. The Court goes on to say, unselfconsciously: "[o]ur task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice."[43] And, most astonishing, but almost totally unremarked, Justice Murphy in his dissenting opinion says: "[b]eing an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment."[44] This is an articulation of the very principle said to have been born in the *Bolling* decision!

III. THE CONTROVERSY THAT WASN'T: RACIAL DISCRIMINATION AND DUE PROCESS IN THE YEARS BEFORE *BOLLING*

Now *Korematsu*, in its turn, relied upon *Hirabayashi v. United States*, the Japanese curfew case decided the previous year.[45] *Hirabayashi* is something of a mixed bag so far as equal protection doctrine is concerned. Unlike *Korematsu*, the *Hirabayashi* opinion reminds us that "[t]he Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process."[46] And it

[42] Id. at 217.
[43] Id. at 223.
[44] Id. at 234–35 (Murphy, J. dissenting).
[45] Hirabayashi v. United States, 320 U.S. 81 (1943).
[46] Id. at 100 (citing Detroit Bank v. United States, 317 U.S. 329, 337–38 (1943)).

seems to employ rational basis scrutiny.[47] It does, however, go on to say 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," and that "[w]e may assume" that principles prohibiting racial discrimination in equal protection cases would be controlling absent the wartime circumstances presented in the case.[48]

Remarkably, the briefing in *Korematsu* seems to take almost for granted the proposition that, as a doctrinal matter, the Fifth Amendment includes an equal protection guarantee. It is true that the government relied almost entirely on *Hirabayashi* in support of its claim.[49] The government's brief, though, seems to concede that there would have been, in an ordinary case, a restriction on its use of race. It says: "[t]he fact that the exclusion measure adopted was directed only against persons of one race does not invalidate it under the circumstances surrounding its adoption."[50] But it does not even assert that the United States is not subject to the equal protection guarantee of the Fourteenth Amendment.

Perhaps even more surprisingly, the government was equally reluctant in *Hirabayashi* to rest its position on the absence of an equal protection guarantee aimed at the federal government. In its brief, it wrote:

> Since, as we shall undertake to show, the classification is a reasonable one in the circumstances, it will be unnecessary to place more than passing reliance upon the fact that the Fifth Amendment, unlike the Fourteenth, contains no equal protection clause,

[47] *Hirabayashi*, 320 U.S. at 101 ("Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew.").

[48] Id. at 100. The Court goes on to state that "racial discriminations are in most circumstances irrelevant and therefore prohibited" from being used by Congress and the Executive. Id. Coming just one paragraph after an explicit admonition that the "Fifth Amendment . . . restrains only such discriminatory legislation by Congress as amounts to a denial of due process," the Court's reasoning must be read to indicate that, "in most circumstances," racial discriminations amount to a denial of due process. See id.

[49] In the section of the brief arguing for the constitutionality of the exclusion order, the government cites only two cases other than *Hirabayashi*, and only in passing. See Brief for the United States at 20–27, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22).

[50] Id. at 26.

> or to attempt to determine what, if any, type of governmental action is restrained by the equal protection clause that is not already fully subject to the due process clause.[51]

Is it possible that someone in the office of the Solicitor General had concluded, as long ago as 1943, that the Court would not accept the proposition that racial discrimination by the federal government was any more permissible than racial discrimination by the states? Did the government understand that racial discrimination prohibited to the states under the Equal Protection Clause was likely to be found "arbitrary" as a matter of due process? Was an alternative conclusion, perhaps, already *legally* "unthinkable"?

The briefing in *Bolling* itself was also most unusual. The United States filed a single amicus brief in all the *Brown* cases, including *Bolling*. It actually urged reversal in *Bolling*; that is, it argued that the segregated schools in Washington, D.C., were unconstitutional![52] It argued, in this late 1952 Truman administration Cold War era brief, that Washington, D.C., was the window through which foreign visitors saw America and that "[i]t is in the context of the present world struggle between freedom and tyranny that the problem of racial discrimination must be viewed."[53] It argued broadly that classification on the basis of race was unlawful for national as well as state and local government.[54] Its only legal argument particularly tailored to *Bolling* was that the federal statutes involved could be construed not to require segregation in order to avoid what it called "a grave and difficult question under the Fifth Amendment."[55] But beyond that, the brief said that, if the question were reached, separate but equal was wrong and should be jettisoned.[56] In its argument on the merits it did not even mention the Fifth Amendment problem involved in the case concerning schools

[51] Brief for the United States at 59, Hirabayashi v. United States, 320 U.S. 81 (1943) (No. 870) (citations omitted).

[52] Brief for the United States as Amicus Curiae at 17, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 8).

[53] Id. at 6.

[54] Id. at 3 ("Under the Constitution every agency of government, national and local, legislative, executive, and judicial, must treat each of our people as an *American*, and not as a member of a particular group classified on the basis of race or some other constitutional irrelevancy.").

[55] Id. at 16.

[56] Id. at 17–26.

in this federal enclave. And, stunningly, the federal government did not argue that the Equal Protection Clause was inapplicable to federal governmental action or that the measure of constitutionality under the Due Process Clause differed from that under the Equal Protection Clause. Only the District of Columbia Corporation Counsel made the point, repeatedly, that the Fifth Amendment contained no Equal Protection Clause and that slavery itself had "flourished" under the Fifth Amendment.[57] But it should not be surprising, even in an ordinary context, that the Corporation Counsel's exertions on behalf of the power of the federal government might lack force when they were not supported, echoed, or even acknowledged by the Solicitor General himself. And, in the end, even the Corporation Counsel seemed to think he needed to show that separate but equal was all right in the states if he were to win.[58]

IV. *BOLLING*, INTERPRETIVE METHOD, AND THE CONSTITUTIONAL CANON

So, why does *Bolling* get the equal protection component headlines instead of *Korematsu*? Why is it described as a landmark decision for that innovation—and concomitantly criticized for it? Further historical research may shed further light on this question, but I will leave you with a hypothesis, which turns, perhaps unsurprisingly, on the fact that *Bolling* was decided with *Brown*.

The received wisdom is part of a broader narrative challenging the validity of judicial decisions protecting individual rights and equality.[59] Maybe it is because *Brown* was itself so controversial

[57] Brief for Respondents at 17, Bolling v. Sharpe, 347 U.S. 497 (1954) (No. 413).

[58] Id. at 17–31.

[59] See, e.g., Nelson Lund & John O. McGinnis, *Lawrence v. Texas* and Judicial Hubris, 102 Mich. L. Rev. 1555, 1557 (2004) (asserting that the opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), which invalidated Texas's same-sex sodomy law, "is a tissue of sophistries embroidered with a bit of sophomoric philosophizing"); Romer v. Evans, 517 U.S. 620, 636, 653 (1996) (Scalia, J., dissenting) ("[T]he Constitution of the United States says nothing about [discrimination against homosexuals] . . . . Today's opinion [striking down discrimination against gay men and lesbians] has no foundation in American constitutional law, and barely pretends to. . . . Striking it down is an act, not of judicial judgment, but of political will."); Kenneth W. Starr, First Among Equals, 124–25 (2002) (asserting that "[h]owever you might judge the outcome in *Roe*, and I do not admire that outcome, the Court's opinion suffered from a grave de-

that *Bolling* has been singled out for attention as doctrinally unsound. When the Court addressed racial discrimination in the curfew and exclusion affecting those of Japanese descent, it seemed beyond question, to the Court and the litigants before it at the very least, that racial discrimination by the federal government was ordinarily unconstitutional—although of course the curfew and exclusion were upheld. But when that principle was applied to the racial discrimination involved in the racial segregation of public schools, there was sufficient controversy about the substantive outcome that the previously uncontroversial principle was attacked.

Viewed in this way, it is relevant to *Bolling*'s place in the canon that it was one of the *Brown* cases because of the implicit fact that the desegregation decision was itself controversial—actually hated of course by many. And indeed, its reasoning, too, was challenged as illegitimate by scholars at the time, most famously by Professor Wechsler.[60] On this reading, the continued debate about *Bolling*—and the attention paid the doctrinal puzzle it presents—starts with deep discomfort in some quarters about the outcome in the case.

So, the question with which I will leave you is this: why have even many supporters of the *Bolling* decision so readily accepted or internalized the criticism of the decision's reasoning and accepted, likewise, that it represented a breathtaking (and, corollary, legally indefensible) innovation? Why do so many commentators lack the courage of the convictions of the decision's own text?

The textual puzzle of *Bolling* is in fact evanescent. It evaporates when one realizes that societies evolve, and that what once may have seemed (or have been said to be) "rational" or legitimate may come to be understood otherwise. Indeed, this ordinary process of societal development presumably underpins the largely unremarked use of the Due Process Clause to evaluate the racial discrimination at issue in *Hirabayashi* and *Korematsu*. And this reali-

ficiency in legal reasoning. Even to observers who liked the pro-choice result, the Court's opinion seemed more like legislation than adjudication . . . ."; Robert H. Bork, At Last, an End to Supreme Court Activism, N.Y. Times, Aug. 29, 1990, at A21 (asserting that *Griswold v. Connecticut*, 381 U.S. 479 (1965), "invented" "[t]he 'right to privacy'" through judicial "legislating"); Bork, supra note 5, at 75 (concluding that *Brown* was correctly decided but asserting that "it must be said in all candor that the decision was supported by a very weak opinion").

[60] See Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 31–35 (1959).

zation is of course necessarily central to any progressive jurisprudence of the American Constitution.[61]

Ultimately what appears to be at issue then is belief in the very legitimacy of this interpretive principle. A fundamental recognition of its legitimacy ought to counter effectively the erroneous suggestion that progressive decisions, like *Bolling*, are lawless.[62]

The doctrinal debate about *Bolling* will likely recede only when the legal culture reaches the point of internalizing the legitimacy of interpretive methods that account for the evolution of society's understanding of what is required by the foundational principles enshrined in the Constitution. Such a change in legal culture would reshape, too, the constitutional canon. *Bolling*, then, might take its place in the canon for the proper reason: not for some supposedly textually insupportable, and hence obviously politically motivated, doctrinal innovation, but for the substance, importance, and correctness of the decision itself.

[61] Cf. Planned Parenthood v. Casey, 505 U.S. 833, 861–64 (1992) (showing how such an approach explains the propriety of the Court's overruling *Plessy v. Ferguson* in *Brown* and *Lochner v. New York* in *West Coast Hotel Co. v. Parrish*).

[62] Constitutional legal analysis is constrained, too, by the related discomfort with the legitimacy of judicial review. Theorists have, in the post-*Lochner* era, articulated a number of narrow justifications for it, most famously in the supposedly democracy-enhancing representation-reinforcement theory of *Carolene Products* and John Hart Ely. United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938); Ely, supra note 5, at 1–9. But given a Constitution in which the text is not so narrowly framed, a more robust defense of judicial review is needed. See Rubin, supra note 11, at 16.