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## A Workable Substantive Due Process

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# A WORKABLE SUBSTANTIVE DUE PROCESS

*Hon. Timothy M. Tymkovich, Joshua Dos Santos & Joshua J. Craddock\**

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## INTRODUCTION

It is now cliché to say that substantive due process is controversial. Yet it remains true that few legal doctrines have been more contentious in the last century or so in American law. It is also true, and not coincidentally, that this area of law is not just one of the most contentious, but one of the most confused. This Article seeks not to add to the controversy, but to explain the mire, and to propose a path across it.

The controversy stems from the judiciary's interpretation of a brief, but apparently capacious, phrase in the Fourteenth Amendment: "due process of law."<sup>1</sup> Much has been said: the phrase's original meaning is obvious;<sup>2</sup> its meaning is impossibly vague;<sup>3</sup> it merely addressed historical ills;<sup>4</sup> its very text denounces any substantive component;<sup>5</sup> its text connotes a substantive

1 U.S. CONST. amend. XIV, § 1.

2 See, e.g., Gerard V. Bradley, *The Bill of Rights and Originalism*, 1992 U. ILL. L. REV. 417, 434 (The Due Process Clause "yield[s] [a] manageable, discrete meaning[ ] upon historical investigation."); James W. Ely, Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 CONST. COMMENT. 315, 320–21 (1999).

3 See, e.g., LEARNED HAND, *THE BILL OF RIGHTS* 30 (1958) (observing that the Due Process Clauses are written "in such sweeping terms that their history does not elucidate their contents"); Lawrence Rosenthal, *Does Due Process Have an Original Meaning? On Originalism, Due Process, Procedural Innovation . . . and Parking Tickets*, 60 OKLA. L. REV. 1, 52 (2007) (describing "the original meaning of the Due Process Clauses" as "indeterminate"); Arthur E. Sutherland, *Privacy in Connecticut*, 64 MICH. L. REV. 283, 286 (1965) ("[N]o one knows precisely what the words 'due process of law' meant to the draftsmen of the fifth amendment, and no one knows what these words meant to the draftsmen of the fourteenth amendment.").

4 See, e.g., Nathan Schlueter & Robert H. Bork, *Constitutional Persons: An Exchange on Abortion*, FIRST THINGS (Jan. 2003), <https://www.firstthings.com/article/2003/01/002-constitutional-persons-an-exchange-on-abortion> (statements of Robert H. Bork).

5 See, e.g., *McDonald v. City of Chicago*, 561 U.S. 742, 812 (2010) (Thomas, J., concurring) ("But any serious argument over the scope of the Due Process Clause must acknowledge that neither its text nor its history suggests that it protects the many substantive rights this Court's cases now claim it does."); *United States v. Carlton*, 512 U.S. 26, 40 (1994) (Scalia, J., concurring in the judgment) ("I believe that the Due Process Clause guarantees no substantive rights, but only (as it says) process."); *Gosnell v. City of Troy*, 59 F.3d 654, 657 (7th Cir. 1995) (Easterbrook, J., for the court) (describing substantive due process as "an oxymoron" and procedural due process as "a redundancy"); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980) (calling substantive due process "a contradiction in terms—sort of like 'green pastel redness'"); Antonin Scalia, Address at the Woodrow Wilson International Center for Scholars: *Constitutional Interpretation the Old Fashioned Way* (Mar. 14, 2005) ("Only lawyers can walk around talking about substantive process, in as much as it's a contradiction in terms. If you referred to substantive process or procedural substance at a cocktail party, people would look at you funny.").

requirement of justice;<sup>6</sup> it incorporates cherished limits on the federal government and applies them to states;<sup>7</sup> it incorporates nothing.<sup>8</sup>

This back and forth has surely had its benefits; it has caused us to think more deeply about the role of the courts in our constitutional republic. And it has caused us to reevaluate our belief in democracy—to reaffirm our belief in its virtues and necessity.

But one thing, we can all agree, has not been positive: the resulting confusion about how courts are supposed to evaluate substantive due process claims. Battles often blur boundary lines. This battle is no different. No sooner is one line drawn in the sand when its opponents' counteroffensive wipes it out—or, worst of all, wipes it out incompletely. To put things plainly, the controversial nature of substantive due process doctrine has made the Supreme Court's due process caselaw unclear. A case might establish a principle, but soon afterward that principle will be disavowed, nodded to without compliance, or simply ignored. The Court's caselaw is, therefore, contradictory, imprecise, and sometimes impossible to understand. The inferior courts are left surveying the battlefield with little to guide them.

The problem goes deeper, however. Perhaps more problematically, different kinds of cases bearing the banner of substantive due process have developed separately, with no semblance of connection or doctrinal equivalence. In part, this stems from imprecise language. But it also has much to do with courts' natural tendency to resolve the cases before them without identifying the relationship between the case at hand and the wider world of substantive due process. The results are siloed strands of substantive due process caselaw, along with a hodgepodge of warring quotations and maxims with uncertain authority.

All this leaves courts adrift. It is not just that substantive due process doctrine is messy. It is that judges often don't know what to do with a newly asserted claim of substantive due process. Should they use one of the existing frameworks for substantive due process? More than one? If just one, which? Or maybe they should come up with a new test, as many cases seem to have done? There are no clear answers to these questions.

Courts are not likely to get the answers from litigants. In substantive due process cases, plaintiffs often allege they've been wronged grievously. At this, judges raise their eyebrows: "That sounds pretty bad," they think, "but what's the law here?" The briefs don't help much because plaintiffs often brief all

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6 See, e.g., 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1333 (3d ed. 2000) ("[T]here is a reasonable historical argument that, by 1868, a recognized meaning of the qualifying phrase 'of law' was substantive.").

7 See *Duncan v. Louisiana*, 391 U.S. 145, 147–48 (1968) ("In resolving conflicting claims concerning the meaning of this spacious language, the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment.").

8 See, e.g., RAOUL BERGER, *THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS* 5–9, 18–19 (1989).

sorts of different theories—the kitchen sink approach: “My case shocks the conscience, but if that test doesn’t apply I have a fundamental right that’s been infringed, and if that test doesn’t work out I also fit within this subspecies of substantive due process, and if I don’t win that way,” and so on. And if the plaintiffs choose only one theory, the defendants are very likely to argue that the plaintiffs’ chosen approach to substantive due process is not the correct one. On and on it goes, with courts unsure what to do because caselaw points every which way.

In this Article, we have three objectives. First, we’d like to add our own conceptualization of the various flavors of due process adjudication. Our aim here is not to add a new theory, but to explain what exists in new ways—to put all the pieces of the due process puzzle together and explain how they relate to each other. To the surprise of some, perhaps, we find a small kernel of originalist truth within current forms of substantive due process. In short, the “shocks the conscience” strand of substantive due process jurisprudence prohibits some egregious torts by the state. At a certain level of abstraction, this approach can be squared with the original public meaning of the Fourteenth Amendment’s Due Process Clause during ratification.

Second, we will explain the confusion currently overtaking the circuits. The confusion we refer to is not about nitty-gritty details. It is fundamental. Courts do not know what law to apply to a given plaintiff’s claim under substantive due process doctrine. There are two generic tests floating around—the shocks-the-conscience test and the fundamental-rights test. Courts disagree about when each test applies. Then there are more specific tests tailored to particular contexts, like pretrial detention. No one knows whether these more specific tests apply exclusively, or whether they apply in addition to one or both generic ones. Our goal here is to explain the debate.

Last, we will propose two solutions. Looking to the history of Due Process Clause jurisprudence, as well as to the Supreme Court’s stated policy concerns in this area, we propose dividing substantive due process into (1) cases challenging legislative action, (2) cases challenging executive action, and (3) cases challenging judicial action (though those distinctions themselves will require line drawing). In those challenging legislative action, plaintiffs must show the law impermissibly or irrationally burdens a fundamental right. In cases challenging executive action, plaintiffs must show they were deprived of a liberty or property interest in such an egregious fashion that the conduct shocks the conscience of federal judges. The shocks-the-conscience formulation is not to be an empty phrase, though. In each context, courts should specify the factors that make a case conscience shocking. In fact, we argue that this is what the more specific tests have already done. What has been unclear until now is that many of the cases creating more specific tests for substantive due process violations are simply manifestations of the shocks-the-conscience approach. Finally, in cases challenging judicial action, a state court decision will violate substantive due process only if it is an “arbitrary or capricious” abuse of power.

We separately propose repackaging and relaunching the *Glucksberg* “fundamental rights” test. Rather than defining a right in the abstract and balancing interests, we propose asking whether a law clearly violates a settled tradition or norm.

To explain all this, though, we must begin at the beginning.

#### I. A BRIEF HISTORY OF “DUE PROCESS” UP TO THE FOURTEENTH AMENDMENT

If you are lost, it is often best to retrace your steps. Before turning to the ongoing substantive due process confusion, then, a brief history of due process doctrine is in order. As routinely told, the history of “due process” as a concept begins in England. Chapter 29 of Magna Carta provided that “[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed . . . except by the lawful judgment of his peers [or/and] by the law of the land.”<sup>9</sup> In other words, when it came to punishment, no regal whims were allowed: the punishments listed could not be imposed without a jury, and to effect them the Crown had to comply with the “law of the land.” The law of the land, at this time, had two specific components: the common law—accumulated by careful reasoning from time immemorial and dependent on specific, procedural writs—and the acts of Parliament.<sup>10</sup>

Eventually, Magna Carta’s guarantee of the Crown’s compliance with the law of the land came to be known as “due process of law.” That phrase first appears in a 1354 statute that did not mention Magna Carta, but by 1642 Sir Edward Coke had concluded that “due process of law” was just another way of stating that well-known Magna Carta guarantee.<sup>11</sup>

Before continuing down the historical trail, it is worth pausing to call attention to this particular meaning of the words “due process of law.” Under this view, all “due process” guarantees is that the government will follow the strictures of existing law before depriving one of life, liberty, or property. It does not necessarily mean the government must follow fair procedures before doing so, only that the government must follow whatever procedures are called for by law. (There were perhaps one or two procedures even Coke believed the government could not remove, but by and large “due process” simply meant compliance with law.)<sup>12</sup> In short, no arbitrary executive or judicial deprivations. We call this the commonsense reading.

Skipping to the American Founding, all agree the Fifth Amendment’s Due Process Clause was supposed to incorporate this Magna Carta guarantee

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9 Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1682 (2012) (alterations in original) (quoting *Magna Carta*, c. 29 (1215), reprinted in A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY* 43 (1964)).

10 *Id.* at 1683, 1685.

11 See 2 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 50 (London, E. & R. Brooke 1797); Chapman & McConnell, *supra* note 9, at 1682–83.

12 See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 428–32 (2010).

of compliance with the law of the land. But, perhaps unsurprisingly, what Americans in 1789 thought of as “due process of law” may not have been the same as what their cousins across the pond thought. Much ink has thus been dedicated to refining just what “due process of law” meant to the Founders.<sup>13</sup>

Coke is a key figure here. His ideas formed “a chief source of early American constitutionalism.”<sup>14</sup> Since it seems plausible to attribute Coke’s views to those of our Constitution’s Framers, there is debate about what Coke’s precise formulation of “due process of law” was. In particular, did Coke think of the “law of the land” as including some kind of higher, “fundamental law”—law that even Parliament could not transgress? If so, this would make Coke’s conception of due process a kind of substantive limit on law *as well as* a guarantee of compliance with law. Some have read Coke’s commentary and decisions to say exactly that.<sup>15</sup> Others disagree.<sup>16</sup>

While the bulk of scholarship concludes Coke did not incorporate higher law into his definition of due process of law,<sup>17</sup> there is strong evidence the Framers understood due process to include substantive limits on laws passed by the legislature. In part, the Framers did hold the commonsense interpretation. As due process of law was commonly understood before the Founding, neither king nor Parliament could deprive someone of life, liberty, or property except through a common-law court so deciding by *applying settled law*.<sup>18</sup> That is, the deprivation could only be authorized by valid law already existing at the time of the deprivation. By itself, this is a minimal substantive requirement, of course.<sup>19</sup>

But Nathan Chapman and Michael McConnell have persuasively argued the Framers of the original Constitution also understood due process to impose a stronger, and substantive, limitation on legislatures: legislatures could not, consistent with due process, authorize other branches of government to deprive others of property without adjudication by a common-law

13 See, e.g., *Sessions v. Dimaya*, 138 S. Ct. 1204, 1224–27 (2018) (Gorsuch, J., concurring in part and concurring in the judgment); *id.* at 1245–48 (Thomas, J., dissenting); Evan D. Bernick, *Optimizing the Oxymoron: Substantive Due Process Justice Thomas Could Love*, 26 GEO. MASON L. REV. (forthcoming) (manuscript at 19–23), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3255717](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3255717); Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 640–45 (2009); Williams, *supra* note 12, at 428–54; Christopher Wolfe, *The Original Meaning of the Due Process Clause*, in *THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING* 213, 213–32 (Eugene W. Hickock, Jr. ed., 1991).

14 Chapman & McConnell, *supra* note 9, at 1684.

15 See *id.* at 1689–90. See generally Gedicks, *supra* note 13.

16 See Chapman & McConnell, *supra* note 9, at 1688; Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 94–98.

17 See Chapman & McConnell, *supra* note 9, at 1690; Easterbrook, *supra* note 16, at 96–97.

18 Chapman & McConnell, *supra* note 9, at 1683, 1688.

19 See Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 984 (2006).

court, nor could they deprive specific individuals of rights or property—the latter being a violation of the separation of powers.<sup>20</sup>

This is not to say the Founders had anything like a modern notion of “substantive due process”—which places a number of *nonprocedural* rights beyond the legislature’s power to regulate. But the Founders did believe due process required more than executive compliance with the law on the books. Rather, Americans tended to think legislatures had to comply with the “law of the land,” and to them, the “law of the land” included common-law procedural protections. Indeed, some of the American Revolutionaries’ principal objections to Parliament’s legislation came wrapped in this theory of due process.<sup>21</sup> Parliament, they thought, could not abrogate common-law protections, as those were the (unalterable) law of the land, the basic Rights of Englishmen. And various state court cases held legislative acts incompatible with the law of the land because they either (1) allowed the executive to deprive persons of property without adjudication by a common law court, or (2) directly deprived specific individuals of property. To Americans, the latter was legislative usurpation of the judicial power. And that violated the separation of powers, a rule that they thought indispensable for any scheme to bear the name “due process of law.”<sup>22</sup>

State court interpretations of due process pretty much followed these lines for the first century or so of the republic.<sup>23</sup> Then, in *Murray’s Lessee v. Hoboken Land & Improvement Co.*<sup>24</sup>—the first Supreme Court case to extensively define the contours of the Fifth Amendment Due Process Clause<sup>25</sup>—the Court knit together these views into a historical interpretation of the Clause. The Court decided, in line with the bulk of state decisions, that “due process” included not just the commonsense textual interpretation, but also a substantive limit on how much the legislature could tinker with established procedural protections.

As Justice Curtis put it, the Due Process Clause clearly placed limits on Congress; it did not leave “the legislative power to enact any process which might be devised.”<sup>26</sup> To figure out what those limits were, though, the Court defined its mission as essentially historical, looking to “settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors.”<sup>27</sup> But, given that Americans during the Founding had formed their own flavor of due process that had not precisely matched England’s, the Court restricted which “settled usages” of

20 Chapman & McConnell, *supra* note 9, at 1679.

21 *See id.* at 1681–82.

22 *See id.* at 1678 n.12, 1717, 1721–26, 1742.

23 *See id.* at 1740–54.

24 59 U.S. (18 How.) 272 (1855).

25 The Supreme Court first considered the Fifth Amendment’s Due Process Clause three years earlier in *Bloomer v. McQuewan*, 55 U.S. (14 How.) 539 (1852). *See Williams, supra* note 12, at 466.

26 *Murray’s Lessee*, 59 U.S. (18 How.) at 276.

27 *Id.* at 277.



England would define due process: only those “not . . . unsuited to” the American “civil and political condition.”<sup>28</sup> A simple metric would determine whether English usages and modes of proceedings continued to suit the American republic: whether the states had continued to use them in their colonial governments.<sup>29</sup> This should sound familiar to anyone acquainted with substantive due process jurisprudence. It was the beginning of the “look at what all the states do” approach.

But *Murray’s Lessee* arrived late on the scene, so to speak. Within a few years of its publication, the scourge of civil war would gut the nation. Having weathered a mortal threat against the nation as such, a victorious North would push adoption of a new due process clause for the union—this time in the Fourteenth Amendment to the Constitution, and this time, restricting the states themselves. It is this due process clause the Supreme Court would read to include a series of fundamental rights unrelated to procedure over the ensuing decades. Ironically, then, the Supreme Court interpreted “due process” by reference to the Founding, just before the nation-shaking events that would eventually lead to interpretations of the phrase that would have been unrecognizable to the Founders.

Let us turn to those nation-shaking events. By the time of the Civil War, slavery had been the country’s most heated political dispute for nearly three decades. It remained so when, after the war, the country had to ask: “Where do we go from here?” Never before had abolitionists seen such a clear opportunity to stamp out this “peculiar institution” once and for all. They took it, and the Thirteenth Amendment became law.

Unsurprisingly, though, the Thirteenth Amendment’s ban on slavery did not change the condition of black persons in the South overnight. Southern states enacted the Black Codes—subjecting black persons to what was essentially a caste system. The Codes limited the rights of black persons as compared to the rest of the state’s residents simply because they were black, thus keeping them in servitude in almost all but name. Their travel was restricted, their property rights practically nonexistent. They could not sue whites in court. They could not testify.<sup>30</sup>

Yet for many black persons, the code books were the least of their worries. Widespread mob violence and lynching made for an uneasy existence, not only for blacks, but also for Northern Republicans who ventured south. And though not authorized by any code provision, state-sanctioned mob justice routinely denied black persons accused of crimes any semblance of a fair proceeding.<sup>31</sup>

These were the facts enraging the North when talk began of proposing a new constitutional amendment. The history of the Fourteenth Amend-

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28 *Id.*

29 *Id.* at 277, 279.

30 See BERGER, *supra* note 8, at 118; RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA’S STRUGGLE FOR EQUALITY* 44–46 (1976); WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 102–03 (2011).

31 See BERGER, *supra* note 8, at 118; STUNTZ, *supra* note 30, at 102–04.

ment—the congressional debates, the ratification debates, what constituents wrote their representatives, what the newspapers said—is extensive and well documented. But for all the data collected, there are few answers. We will here provide a brief glimpse as to what is known about the Fourteenth Amendment's passage generally. We will not restrict our attention to the Due Process Clause. For reasons that will become evident later, the history of the rest of Section One—the Privileges or Immunities Clause in particular—are important in understanding the judiciary's expansive interpretation of the Due Process Clause later.

On to what is known about the Fourteenth Amendment's ratification in general. We know the Fourteenth Amendment came about at a peak of Republican rhetoric about natural rights, natural law, and justice.<sup>32</sup> Republicans often spoke of God-given rights, of rights inherent to American republicanism, and of rights in positive law. We know many spoke of the Amendment as if it constitutionalized natural rights.<sup>33</sup> We know many excoriated the Black Codes' caste system as a violation of natural rights. And we know the Amendment was intentionally redrafted to be judicially enforceable, rather than enforceable only by Congress (though they did not seem concerned with how the Court would interpret the vague provisions of Section One).<sup>34</sup> But we know in sum that some evidence points toward an expansive Fourteenth Amendment, other evidence toward a narrow one.<sup>35</sup> This leaves us with few, if any, answers to specific questions about application.

At the same time, senators, representatives, newspapers, and ratification delegates did ask many of the specific questions courts would later ask. Though they did not resolve these questions, their questions carry information in themselves. Would this Amendment's broad language mark the end of segregation and laws against interracial marriage? Some thought yes.<sup>36</sup> Others, no.<sup>37</sup> Similarly, some argued the Amendment enforced the Bill of Rights against the states.<sup>38</sup> Yet after ratification, none of the Northern states altered their laws to comply with the Bill of Rights. For example, no state adopted a grand jury requirement after ratification, even though the Fifth Amendment requires it.<sup>39</sup>

Perhaps the most important discussion at the time, and still most important to us now, was the question of what happened to state regulatory power after the Amendment. Would this Amendment not, by giving Congress power to enforce rights as it saw fit, strip states of much of their regulatory

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32 See WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 16–25, 36–39, 64–74 (1988).

33 See BERGER, *supra* note 8, at 25–26; NELSON, *supra* note 32, at 85–86.

34 See NELSON, *supra* note 32, at 58, 63, 145–46.

35 See *id.* at 143 (“Charles Sumner, for one, noted that it was like a sign on a highway with different inscriptions on each side, so that people approaching the sign from opposite directions necessarily read it differently.”).

36 See *id.* at 85, 107, 133.

37 See *id.* at 135–36, 154–55.

38 See *id.* at 154–55.

39 See *id.* at 117–18.

power? So asked many skeptical of the Amendment. No, came the reply. Most advocates answered that the Amendment conferred only equal state-law rights and did not create *any* substantive rights.<sup>40</sup> Indeed, it seems clear that federalism remained a cherished constitutional principle at the time, and few desired greater federal powers at the expense of the states.<sup>41</sup>

But, some observers asked, what did the Privileges or Immunities Clause mean, then? According to the Equal Protection Clause, states could not “deny to any person within its jurisdiction the equal protection of the laws”<sup>42</sup>—did this language not mean that states could not differentiate between black and white citizens? Why then, did the Amendment *also* have the Privileges or Immunities Clause, which says states cannot “make or enforce any law which shall *abridge the privileges or immunities* of citizens?”<sup>43</sup> What did this clause mean if it did not grant substantive rights? In response to this question, some stuck to the “equality only” explanation. Others attempted a different explanation: that states had full power to define rights, but once they did, they could not deny any person those rights.<sup>44</sup>

But, some again asked, wasn’t this last concern taken care of by the Due Process Clause—under which states would not be able to “deprive any person of life, liberty, or property, without due process of law?”<sup>45</sup> If the problem was that states did not afford black persons and northerners the procedures promised in the law books—affording them mob justice instead—wouldn’t the Due Process Clause already prohibit that? Why the need for the Privileges or Immunities Clause?

Some admitted the Fourteenth Amendment protected fundamental rights.<sup>46</sup> But more came up with complex ways to explain why the Privileges or Immunities Clause differed from the Due Process and Equal Protection Clauses without granting substantive rights.<sup>47</sup> The specifics are not as important as the conclusions: these persons argued that states would retain full power to define rights under state law. They said that the Amendment did not guarantee substantive rights, or if it did, it only guaranteed a very limited set.<sup>48</sup>

Indeed, some said the only rights guaranteed were those thought to be included in Article IV’s Privileges and Immunities Clause—which most leading legal scholars had concluded prevented states from disparaging the fundamental rights of out-of-state citizens within their borders.<sup>49</sup> For example,

40 See BERGER, *supra* note 8, at 72; NELSON, *supra* note 32, at 115–17.

41 See BERGER, *supra* note 8, at 18–19, 50–53; NELSON, *supra* note 32, at 9.

42 U.S. CONST. amend. XIV, § 1.

43 *Id.*; see NELSON, *supra* note 32, at 60–61.

44 See, e.g., John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1414–22, 1466–69 (1992).

45 U.S. CONST. amend. XIV, § 1; see NELSON, *supra* note 32, at 57.

46 See NELSON, *supra* note 32, at 119.

47 See *id.* at 119–24.

48 See BERGER, *supra* note 8, at 81; NELSON, *supra* note 32, at 10, 79–85.

49 See *Corfield v. Coryell*, 6 F. Cas. 546, 551 (C.C.E.D. Pa. 1823) (No. 3230) (Washington, J.) (“The inquiry is, what are the privileges and immunities of citizens in the several

North Carolina could not take away the right of a Virginia citizen to travel or access courts when within North Carolina's borders. But Article IV said nothing about the minimum rights a state had to provide its *own* citizens. Under this theory, then, the Fourteenth Amendment required states to extend to their own citizens the Article IV rights they were required to provide to citizens of other states.

Which of these theories the ratifiers believed is anyone's guess. We thus have few concrete answers to questions about what the Amendment meant to voters at the time—at least when it comes to specific applications. It seems that, for many, the Amendment might have been a general moral statement. Few thought of the specifics of legal application, and of the few who did, none resolved the questions.<sup>50</sup> The debate rages on today.

But one thing is clear from those otherwise equivocal pages of history. The debates almost entirely ignored the Due Process Clause. In fact, the Due Process Clause was added late in the drafting process.<sup>51</sup> It was the Privileges or Immunities Clause that engendered the most talk, if not concern. Most people seemed to have thought “due process of law” had a readily defined legal meaning. As Representative John Bingham said when asked about the meaning of the Due Process Clause—an answer now repeated in practically every history of the Amendment—“the courts have settled [the meaning of due process of law] long ago, and the gentleman can go and read their decisions.”<sup>52</sup> It could be the drafters simply meant to incorporate the Magna Carta-style guarantee against executive or judicial deprivations of life and property that had no basis in law.<sup>53</sup>

Applying this settled concept of due process to the states seems to have been uncontroversial. Republicans were, after all, trying to remedy the blatant denial of *any* process to many black persons and northerners in the South.<sup>54</sup> Nobody in Congress or the ratifying conventions espoused an interpretation of “due process” that was at odds with the prevailing interpretation of the states' own due process provisions. Nor did anyone suggest anything

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states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union, from the time of their becoming free, independent, and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate.”; 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 674 (Boston, Hilliard, Gray & Co. 1833) (“The intention of this clause was to confer on them, if one may say so, a general citizenship; and to communicate all the privileges and immunities, which the citizens of the same state would be entitled to under the like circumstances.”); *see also* Harrison, *supra* note 44, at 1398–1401.

50 *See* NELSON, *supra* note 32, at 89–90.

51 *See id.* at 57.

52 *See* Chapman & McConnell, *supra* note 9, at 1726 (alteration in original) (quoting CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866) (statement of Rep. Bingham)).

53 *See* BERGER, *supra* note 8, at 145; NELSON, *supra* note 32, at 57.

54 *See* STUNTZ, *supra* note 30, at 102–04.

remotely close to modern “substantive due process.”<sup>55</sup> Today, some interpret a few stray statements to mean something like substantive due process, but even if those statements came close to a theory of substantive due process, such a theory would have been an isolated view.<sup>56</sup> Still others point to a few state cases preceding the Amendment that had a streak of substantive due process to them. Yet there is no evidence the Amendment’s drafters and ratifiers agreed with those cases.<sup>57</sup>

From this exceedingly truncated recounting, we can glean two insights. First, the best historical interpretation of the Due Process Clause in the Fourteenth Amendment is probably that state governments could not deprive persons of life, liberty, or property without complying at a minimum with their own standing laws, as well as the settled procedures of English common law, as adopted and practiced by the American colonies. That was the reigning interpretation of the Fifth Amendment’s Due Process Clause at the time, and the interpretation many state courts had given to their own due process clauses too. We will call this the orthodox historical interpretation.

Second, while the ratifiers did not debate the Due Process Clause’s meaning, and likely did not conceive of due process as a source of non-procedural rights, they did debate whether other parts of the Fourteenth Amendment granted persons substantive rights that states could not abridge. In other words, it could be argued (and was argued) that the Fourteenth Amendment—in particular the Privileges or Immunities Clause—granted substantive rights, though only a limited variety.<sup>58</sup> In time, the Supreme Court would import a more extreme version of this idea into the Due Process Clause. It would be through the Due Process Clause, and not the more historically fitting Privileges or Immunities Clause, that the Supreme Court would find substantive rights that states cannot abridge—part of what we now call “substantive due process.”

## II. THE MANY FACES OF “DUE PROCESS” IN THE TWENTIETH CENTURY

Once the states ratified the Fourteenth Amendment, a long process of interpretation began—with the Due Process Clause having the most variegated history.

Up to this point, we have seen two interpretations of due process. First, the commonsense one from Magna Carta: the executive can only deprive someone of life, liberty, or property through application of existing law and procedure. Second, the historical one based on Americans’ understanding of due process at the time of the Founding and repeated in many state court decisions: neither the executive *nor* the legislature can deprive a person of life, liberty, or property without the procedural protections of English common law as incorporated in the new states. We should note that this second

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55 See Chapman & McConnell, *supra* note 9, at 1677, 1679–80.

56 See, e.g., *id.* at 1716–17.

57 See *id.* at 1777–78.

58 See BERGER, *supra* note 8, at 31.

interpretation did not *eliminate* the first. It only added to the first. That is, by the time of the Fourteenth Amendment, both the commonsense and the orthodox historical interpretations enjoyed popularity.

So how do we get from these interpretations to striking down laws as violating notions of privacy or personal autonomy? The answer is abstraction. The history of due process is a history of step after step toward an increasingly abstract notion of what due process means. The concept was first abstracted from text to a historical proposition. Next, from historical proposition to core principle of procedural justice. And finally, from core principle of procedural justice, to core principle of justice in general.

The same principle of abstraction holds for the definition of the rights of life, liberty, and property. As creative as one wishes to get with the definition of “fair process,” one cannot get to the expansive decisions in the Court’s repertoire without a broad definition of “liberty” and “property.” Indeed, had the Court simply defined “liberty” as freedom from physical confinement in a jail, it would be hard to imagine much controversy—or civil litigation—in this area of law.

So, there are two interpretive moves to keep track of: (1) more and more abstract interpretations of what “due process” means, and (2) broader and broader interpretations of what “liberty” includes.

#### A. *What Process Is Due, Anyway?*

We have already seen how the courts took the first step toward a more abstract definition of the words “due process.” They went from the commonsense, literal interpretation to a historical one: due process protects the procedural protections Americans have cherished for over hundreds of years. This move had, as we have seen, a solid historical foundation. There is good evidence the Founders thought of due process in this way.

About twenty years after the Fourteenth Amendment’s ratification, the Supreme Court took its second step toward abstraction. The case was *Hurtado v. California*.<sup>59</sup> The question: Does the Fourteenth Amendment’s Due Process Clause require states to use grand juries to bring felony charges? The Court held no, but its dicta is far more important here than the particulars of this holding. The Supreme Court of California had interpreted the Fourteenth Amendment’s Due Process Clause to mean the commonsense textual interpretation: due process only required the state to abide by existing law. Since the indictment at issue met all the strictures of California law, it could not violate due process.<sup>60</sup>

The Court’s opinion pitted this commonsense textual interpretation against the orthodox historical interpretation, seeming to side with the commonsense approach. The Court then mounted a full siege of the orthodox historical interpretation.<sup>61</sup> The Court noted that a number of recent deci-

59 110 U.S. 516 (1884).

60 *Id.* at 520–21.

61 *See id.* at 527–35.

sions by both state supreme courts and the Supreme Court had applied the commonsense interpretation to state due process clauses. And even Lord Coke's writings did not necessarily mean that "due process of law" required compliance with particular modes of English procedure.<sup>62</sup> More than that, why should history determine the meaning of due process? The clause's *purpose* was surely to preclude procedural arbitrariness, not enshrine the procedures of the past.<sup>63</sup>

Here, the Court prepared to strike the jugular of the historical interpretation. Why should English law determine American procedural standards when America differed to such a great extent from its former parent? Parliament is for the most part supreme in Britain, for instance, whereas American legislatures *do not* boast boundless power.<sup>64</sup> To the extent *Murray's Lessee* might have seemed to adopt the orthodox historical interpretation for the Fifth Amendment's Due Process Clause, the Court read *Murray's Lessee* simply to hold that traditional procedures satisfy due process but not that due process requires traditional procedures.<sup>65</sup> Why should tradition hamstring new experiences and experimentation—"stamp[ing] upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians"?<sup>66</sup> Indeed, should we once again throw the accused bound hand and foot into water and see if he floats, as tradition preferred some time ago?<sup>67</sup>

With this almost cheeky tone, the Court did away with any historical fetter. Tradition did not bind states; they could alter the common law as they wished.<sup>68</sup> Yet that did not leave states totally unbounded. "[I]t is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint."<sup>69</sup> Due process is a "bulwark[ ] . . . against arbitrary legislation" as well as "executive usurpation and tyranny."<sup>70</sup> "It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power."<sup>71</sup> "Arbitrary power," in fact, "is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude."<sup>72</sup> "The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities," against both "the power of numbers" and "the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."<sup>73</sup> Indeed, the Court

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62 *Id.* at 521–24.

63 *See id.* at 527–31.

64 *See id.* at 529–31.

65 *Id.* at 528.

66 *Id.* at 529.

67 *See id.* at 530.

68 *See id.* at 535.

69 *Id.*

70 *Id.* at 532.

71 *Id.* at 535.

72 *Id.* at 536.

73 *Id.*

went on, unless some fundamental rights are outside the control of the state, government is but despotism.<sup>74</sup>

Now we are getting close to twentieth century concept of substantive due process. But we are not there yet. For all its language about limits on state legislative power, the *Hurtado* Court was still concerned with *procedural* rights, not other kinds of rights. Its reasoning took a step into abstraction but did not go all the way. Tradition was not binding because the point of due process was not to uphold tradition but to ensure that government does not deprive persons of life, liberty, and property arbitrarily. But the Court said nothing about nonprocedural rights. Thus, the Court's procedural conclusion:

It follows that any *legal proceeding* enforced by public authority, [1] whether *sanctioned by age and custom*, or [2] *newly devised* in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.<sup>75</sup>

So, whether traditional or new, a state's *procedural* law must conform to "principles of liberty and justice." The question is not whether the state's procedures violate historical procedural protections. It is whether the state's procedures are arbitrary.

In retrospect, looking at *Hurtado's* expansive language, the jump to judicial review of arbitrary *nonprocedural* law seems like it would be easy. And easy it was. Before the end of the nineteenth century, the Court issued several decisions flatly stating the Fourteenth Amendment's Due Process Clause protected nonprocedural rights, too.<sup>76</sup>

But the Court did not repeat that here, exactly. Instead, it proceeded in two stages. First, the Court said the "liberty" and "property" protected by the Due Process Clause includes natural liberties—for example, the right "to follow any of the ordinary callings of life."<sup>77</sup> And then, the Court said any law that unduly interferes with those rights cannot be "due process of law."<sup>78</sup>

In many opinions, the Court did not spell out its reasoning. Indeed, its reasoning was sometimes inscrutable. In *Allgeyer v. Louisiana*,<sup>79</sup> for example, the Court held that a state could not prevent execution of a contract entered into under the laws of a different state. The court explained that executing the contract was "a proper act . . . which the defendants were at liberty to perform and which the state legislature had no right to prevent . . . [under] the Federal Constitution."<sup>80</sup> Why was this? Why did such an act violate the

74 *See id.* at 536–37.

75 *Id.* at 537 (emphasis added).

76 *See, e.g., Allgeyer v. Louisiana*, 165 U.S. 578 (1897); *Powell v. Pennsylvania*, 127 U.S. 678, 684 (1888).

77 *Allgeyer*, 165 U.S. at 590 (quoting *Butchers' Union Slaughter-House Co. v. Crescent City Live-Stock Landing Co.*, 111 U.S. 746, 764 (1884) (Bradley, J., concurring)).

78 *Id.* at 591.

79 *Id.*

80 *Id.* at 591.



Due Process Clause? The Court responded with tautology: “To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform.”<sup>81</sup>

Realizing those two declarative sentences dropped an anvil on state legislative power, the Court followed the tautology with a paradox, the kind of paradox that says “I am not saying X, but I am saying X.” “This does not interfere in any way”—the Court declared, perhaps blushing—“with the acknowledged right of the State to enact such legislation in the legitimate exercise of its police or other powers as to it may seem proper.”<sup>82</sup> But then again, the Court admitted, “this” sort of *does* interfere with legislative power: “In the exercise of such [legislative] right, however, care must be taken not to infringe upon those other rights of the citizen which are protected by the Federal Constitution.”<sup>83</sup>

The point is not to pick on a Supreme Court struggling to give effect to a capacious new Amendment. It is first to foreshadow the lack of clarity that plagues Fourteenth Amendment due process jurisprudence—that has plagued it from the beginning. Second, it is simply to highlight how quickly the Court abstracted to a much broader conception of due process of law—a conception not only concerned with the executive’s faithfulness to standing law before depriving a person of life, liberty, or property (as the common-sense, textual, Magna Carta interpretation would hold), or with the legislature’s enactment of fair procedural statutes that comport with traditional protections (as the orthodox historical approach in the United States had held). Instead, the Court was concerned also with the reasonableness of the *legislative process itself*.

Let us dwell on this thought further. It explains, in our view, the Supreme Court’s apparent tautology in *Allgeyer*. Up until this point, due process jurisprudence had focused on compliance with or the adequacy of procedural legislation. But in *Allgeyer* and cases like it, the Court turned its attention to the adequacy of the *legislative process itself*. The Due Process Clause would not only prohibit legislatures from churning out wildly unfair procedural statutes. It would also require the legislative process to be a reasonable process with respect to any legislation. Whenever the legislature touched on the liberty and property of the citizen (which, let’s face it, is almost always), its acts had to be reasonable. If its acts were not reasonable, then the legislative process itself must have fallen short somehow—and an unreasonable legislative process, as the *Allgeyer* Court said, is not the process due to the people writ large.

This interpretative move is yet another step further into abstraction. The reasoning goes something like this: (1) due process protects against unfair procedures; (2) by protecting against unfair procedures, due process

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81 *Id.*

82 *Id.*

83 *Id.*

really means to protect against arbitrariness in procedure; (3) since the Due Process Clause protects against arbitrariness in procedure, then it must also protect against arbitrariness in the legislative process; (4) legislation that unreasonably burdens liberty or property must only come from an arbitrary legislative process; (5) therefore, the Due Process Clause protects against legislation that unreasonably or arbitrarily burdens liberty or property.

This same logic leads to rational-basis review under the Due Process Clause. Since all legislation will curtail *some* aspect of natural liberty, then all legislation must be reasonable. Hence the rule that all legislation must be reasonably related to a legitimate end.<sup>84</sup>

To our knowledge, this explicit line of reasoning has rarely, if ever, appeared in the Court's decisions. It is, however, the best explanation able to tie *Allgeyer* and other decisions striking down nonprocedural statutes to the text of the Due Process Clause. Even if this interpretation is far-fetched and untethered to the historical meaning of "due process" as a term of art, it at least softens the charge made by many: that an interpretation of due process that allows courts to strike down nonprocedural laws must be flatly inconsistent with the ordinary meaning of the word "process."<sup>85</sup>

In any event, by effectively applying the requirement of fair process to the legislative process itself, the Court began reviewing legislation for its reasonableness. *Lochner v. New York*<sup>86</sup> is the most-cited early example of this line of cases. In *Lochner*, the Supreme Court held unconstitutional a state statute restricting the number of hours bakers could work.<sup>87</sup> The act interfered with the bakers' natural right to contract for labor, and the Court thought, did so for no good reason. Under our explanation here, we might say the Court thought the legislative process had malfunctioned by producing that "unreasonable" legislation.

Hence the fears some articulated during the Amendment's ratification came true. State legislatures would now sit as pupils of the federal government, which would now watchfully ensure they crossed their *t*'s and dotted their *i*'s and would require work to be shown for any arithmetic. It is just that the courts took up the role of master, not Congress.

### B. Liberty 2.0

But, as already mentioned, a more abstract interpretation of the words "due process" does not suffice to produce substantive due process's most famous decisions: *Lochner*, *Griswold*, *Roe*, *Casey*, *Lawrence*, and *Obergefell*. In addition to a more capacious definition of process—one that includes the legislative process itself—one needs a more capacious definition of "liberty" and "property."

84 See *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938); *Nebbia v. New York*, 291 U.S. 502 (1934).

85 See e.g., ELY, *supra* note 5, at 18.

86 198 U.S. 45 (1905).

87 *Id.* at 64.

This ingredient was not long in coming either. As already explained, before the Court turned the corner into the twentieth century, it had already found that the “liberty” mentioned in the Fourteenth Amendment included such rights as the right “to follow any of the ordinary callings of life.”<sup>88</sup> In effect, the Court opened the door for “liberty” to include as many natural or civil rights as the Court wished to recognize.

Now, as a purely textual matter, the foregoing might be a permissible way to interpret the word “liberty”—so long as one ignores the historical meaning of “liberty” in similar due process clauses (and ignores the nearby Privileges or Immunities Clause). Yet, as the standard story goes, the word “liberty” was probably not rendered so expansive through a free-going, “words-alone” interpretive method. One must recall now the history of the rest of the Fourteenth Amendment’s Section One.

During drafting and ratification, some believed the Privileges or Immunities Clause in Section One placed certain natural and civil rights beyond the state’s regulatory power. Those rights included, some said, the Bill of Rights. Nobody mentioned the possibility that the Due Process Clause did the same. Yet by the beginning of the twentieth century, the Court had said the Due Process Clause did so, and the Privileges or Immunities Clause did not.<sup>89</sup> How did that happen?

The short, almost-caricatured answer is this: an early Supreme Court decision killed the Privileges or Immunities Clause, and the dissenters used the Due Process Clause to loot its grave. In the *Slaughter-House Cases*<sup>90</sup> in 1873—one of the first decisions to construe the Fourteenth Amendment—Justice Miller’s majority opinion held that the Privileges or Immunities Clause only protected rights that owe their existence to the federal government: in effect, only a small collection of federal rights like the right to travel, not natural or state-law rights like the right to contract or to security in one’s property.<sup>91</sup> In doing so, the Court made the Privileges or Immunities Clause superfluous, since the preamended Constitution already prohibited states from interfering with federal rights.<sup>92</sup> Whatever the flaws in the majority’s interpretation, though, it did recognize a historical point that is likely true: the Fourteenth Amendment’s ratifiers generally did not wish to vastly increase federal power at the expense of the states.<sup>93</sup>

In any event, the majority’s decision in the *Slaughter-House Cases* sparked several forceful dissents. Justice Bradley’s dissent, for example, argued the Privileges or Immunities Clause did recognize substantive rights.<sup>94</sup> In addi-

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88 *Allgeyer*, 165 U.S. at 590 (quoting *Butchers’ Union Slaughter-House Co. v. Crescent City Live-Stock Landing Co.*, 111 U.S. 746, 764 (1884) (Bradley, J., concurring)).

89 See BERGER, *supra* note 8, at 31.

90 83 U.S. (16 Wall.) 36 (1873).

91 See *id.* at 74–78; see also NELSON, *supra* note 32, at 163.

92 See NELSON, *supra* note 32, at 162–64.

93 See *id.* at 164.

94 *Slaughter-House*, 83 U.S. (16 Wall.) at 121–22 (Bradley, J., dissenting).

tion, Justice Bradley explained that the Due Process Clause protects against legislation that infringes liberty or property without adequate justification.<sup>95</sup>

As we have seen, this latter theory prevailed. Though the Privileges or Immunities Clause did not, and still does not, provide substantive rights, the Due Process Clause made up the deficiency.

Yet plundering the Privileges or Immunities Clause's tomb for shiny new Due Process Clause rights against the state was not seamless. The story of the first major backlash is often told. In *Lochner* and cases like it, the Supreme Court struck down economic legislation because it unreasonably (as the Court saw it) infringed on economic liberty, and therefore deprived persons of liberty without "due process of law." We must pause here to note that the decisions making the most splash enforced economic rights against the *federal* government—thus interpreting the Fifth Amendment's Due Process Clause, not the Fourteenth's.<sup>96</sup> And in the bowels of the Great Depression, the President, and many in Congress, believed the Court was hamstringing the other branches' ability to deal with economic crises.<sup>97</sup>

Eventually, the Court reneged.<sup>98</sup> It buried the economic rights it had only recently dug up beneath a new doctrine: preferred rights theory. Under this theory, some rights were more important than others. This itself is not really groundbreaking. It is part of the same natural-rights reasoning that led to the enforcement of economic rights. It was a new conclusion, not a new methodology, that changed things: economic rights, the Court decided, were *not* among those important rights the Due Process Clause protects. In some sense, then, economic rights were buried with the same shovel the Court dug them up with.

But the Court kept the shovel. For a while, *Lochner*-talk hung over the Court like flood lights. And for that while, the Court did not venture to creative new grounds to dig up brand new rights. It did, however, continue to dig in familiar territory, through the incorporation doctrine.

Incorporation doctrine is not a separate aspect of the Due Process Clause. It is the very thing we have been talking about: finding natural and civil rights included in the "liberty" the Due Process Clause protects.<sup>99</sup> From

95 See *id.* at 122–23.

96 See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923).

97 See Franklin D. Roosevelt, *The Three Hundredth Press Conference (Excerpts)* (June 2, 1936), in 5 *THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* 191, 192 (Samuel I. Rosenman ed., 1938) (accusing the Court of creating a "no-man's-land" where no Government—State or Federal—can function"); see also *United States v. Butler*, 297 U.S. 1, 68 (1936) (holding the Agricultural Adjustment Act unconstitutional); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541 (1935) (holding provisions of the National Industrial Recovery Act unconstitutional).

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

99 Incorporation through the Due Process Clause is itself controversial as an original matter. See *McDonald v. City of Chicago*, 561 U.S. 742, 805–58 (2010) (Thomas, J., concurring in part and concurring in the judgment) (arguing that the individual rights protected in the Bill of Rights are incorporated through the Privileges or Immunities Clause, not the Due Process Clause).

the late nineteenth century to the present day the Court has been picking and choosing civil rights from the Bill of Rights that it believes fundamental enough for the Due Process Clause to guard against the states. The reason for that is simple: so long as we are looking for fundamental rights enshrined in tradition, the Bill of Rights seems a great place to look. So while the Court did not again find new natural or civil rights in the Due Process Clause until the 1960s, it did continue recognizing some rights from the Bill of Rights as rights the Fourteenth Amendment's Due Process Clause protects.<sup>100</sup>

Eventually, though, the *Lochner* flood lights dimmed, and the Court again felt free to go find some *really* new rights. *Griswold v. Connecticut*<sup>101</sup> came first in 1965. The Court explicitly rejected the *Lochner* approach to finding new Due Process Clause rights, yet went on to find a right to contraception use by implication from the provisions of the Bill of Rights. In effect, the *Griswold* Court engaged in the same old activity: looking around—whether in the Bill of Rights or elsewhere—for rights important enough for the Due Process Clause to protect. Indeed, Justice Goldberg's concurrence said so explicitly.<sup>102</sup>

After *Griswold* came *Roe v. Wade*,<sup>103</sup> *Lawrence v. Texas*,<sup>104</sup> and most recently, *Obergefell v. Hodges*.<sup>105</sup> These decisions all identify rights included within the Due Process Clause's protection of "liberty." We will later address a few particular issues that arise from the Supreme Court's methodology in these cases.

### C. *When Officials Do Heinous Things*

Up to this point, we have seen how the Supreme Court took more and more steps toward abstraction by (1) interpreting the Due Process Clause to require all legislation to be reasonable, and (2) defining "liberty" very broadly. In doing so, the Supreme Court forged the power to strike down legislation because it unreasonably interfered with some right included in its broad definition of "liberty."

But what about cases in which it is not legislation that unreasonably interferes with liberty? What if the state's agent takes a person's property,

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100 See, e.g., *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) (incorporating the Establishment Clause); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (incorporating the Free Exercise Clause); *De Jonge v. Oregon*, 299 U.S. 353 (1937) (incorporating the freedom of assembly); *Stromberg v. California*, 283 U.S. 359 (1931) (confirming incorporation of the freedom of speech); *Near v. Minnesota*, 283 U.S. 697 (1931) (incorporating the freedom of the press); *Gitlow v. New York*, 268 U.S. 652 (1925) (assuming incorporation of the freedom of speech and of the press).

101 381 U.S. 479 (1965). The Court later extended its reasoning from married couples to nonmarried individuals in *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

102 *Griswold*, 381 U.S. at 486 (Goldberg, J., concurring).

103 410 U.S. 113 (1973); see also *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

104 539 U.S. 558 (2003).

105 135 S. Ct. 2584 (2015).

interferes with his or her liberty, or even kills that person—without legislation explicitly authorizing or prohibiting it? The Supreme Court decided that such executive barbarism, too, violates the guarantee of the Due Process Clause.

Indeed, one might think that *any* executive conduct that violates state law would also violate the Due Process Clause. Under the commonsense, textual interpretation, executive officials violate the due process guarantee whenever they deprive a person of liberty or property without authorization by existing law. That would mean that government officials also violate the guarantee when the deprivation violates existing state law. Every violation of state law should therefore also violate the Fourteenth Amendment's Due Process Clause, right? After all, were not the Fourteenth Amendment's ratifiers concerned with Southern states ignoring their own procedural laws?

The Court has not thought so. Instead, only deprivations of liberty or property that “shock the conscience” rise to the level of a due process violation. In *Rochin v. California*,<sup>106</sup> Los Angeles police broke into Mr. Rochin's room, where he was sitting on the side of the bed, half-dressed.<sup>107</sup> The officers saw a few capsules on the nightstand and asked, “whose stuff is this?,” at which point Rochin lunged for the capsules and swallowed them. A scuffle ensued, during which officers “jumped on him” to try to force the capsules out. Finding brute force too blunt for the task, the officers took Rochin to a hospital, where they ordered a doctor to “pump” Rochin's stomach. The doctor forced a tube down Rochin's throat and poured in emetic solution, which promptly caused Rochin to vomit the capsules. The capsules contained an illegal substance—morphine.<sup>108</sup> A hunch now vindicated, the state used the capsules as evidence in Rochin's trial for illegal possession of morphine. The Supreme Court thought the officers' behavior offended “even hardened sensibilities”—so close was it “to the rack and the screw.”<sup>109</sup> And so Rochin's conviction had been “obtained by methods that offend the Due Process Clause.”<sup>110</sup> The officers' conduct had, quite simply, “shock[ed] the conscience.”<sup>111</sup> In cases since then, the Court has applied *Rochin's* reasoning and asked whether executive conduct shocks the conscience.<sup>112</sup>

The contrast between the *Rochin* rule and the commonsense, textual interpretation of the Due Process Clause is striking. Like the commonsense interpretation, *Rochin's* approach forbids executive officials from depriving individual liberty or property when existing law does not already authorize it. But unlike the commonsense interpretation, *Rochin* relies on a far more creative interpretation of what it means to “deprive” a person of “liberty or property.” The *Rochin* approach does not only place limitations on executive

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106 342 U.S. 165 (1952).

107 *Id.* at 166.

108 *Id.*

109 *Id.* at 172.

110 *Id.* at 174.

111 *Id.* at 172.

112 *See, e.g., County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1988).

officials' power to imprison or take away a person's land or chattel; it limits executive officials' power to burden a person's liberty in myriad ways—from physical injury to the rack and screw to (eventually) burdening a familial relationship.<sup>113</sup> Again, we see the Court's definition of "liberty" is expansive.

But the Court's expansive interpretation of liberty exponentially increases the number of ways executive officials could transgress the Constitution. Practically every tort becomes a substantive due process violation. If the government official shoots a person, or interferes with a person's job, or crashes into someone else's vehicle while driving, the official has likely burdened the person's "liberty" as the Court has defined it. It should not be surprising, then, that the Supreme Court placed a different kind of limitation on what kind of executive-official deprivations of "liberty" can violate the guarantee of the Due Process Clause: only deprivations that "shock the conscience." In other words, only very, very . . . very bad deprivations.

The Supreme Court said this explicitly in *County of Sacramento v. Lewis*.<sup>114</sup> There, the Court explained merely negligent deprivations of property or liberty are not violations of due process, because "the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm."<sup>115</sup> Instead, a government official's conduct violates due process only when his or her conduct is conscience shocking.

In this sense, the Supreme Court's shocks-the-conscience caselaw is a derivation of the commonsense interpretation of the Due Process Clause (that executive officials cannot take someone's property or liberty in a way unauthorized by existing law). The difference is scope. It is broader than the commonsense interpretation because the Court has defined "liberty" more broadly. It is narrower because only very egregious deprivations of a person's liberty can violate the Due Process Clause. But, the shocks-the-conscience caselaw remains true to at least one of the earliest interpretations of the phrase "due process of law": preventing unauthorized deprivations by executive officials. Given the Amendment's history—the Southern states' frequent deprivation of individual rights by state-sanctioned mobs or by officials ignoring standing law—it is easy to see a historical connection too. When commentators denigrate the shocks-the-conscience strand of due process as ahistorical, they are right, but not completely right—at least not when considering the abuses that the Fourteenth Amendment was enacted to cure.

#### D. Other Kinds of Due Process

We have now summarized two varieties of Due Process Clause jurisprudence: the kind that identifies fundamental rights that state legislation cannot infringe without adequate justification, and the kind that identifies

113 See, e.g., *Halley v. Huckaby*, 902 F.3d 1136, 1153–56 (10th Cir. 2018).

114 523 U.S. 833 (1998).

115 *Id.* at 848; see also *Daniels v. Williams*, 474 U.S. 327, 328 (1986) ("[T]he Due Process Clause is simply not implicated by a negligent act of an official.").

executive conduct (deprivations of liberty or property) that are beyond the pale. We have seen how these two strands grew out of prior understandings of due process through increasingly abstract interpretation.

That is not to say, however, that the simpler interpretations of “due process of law” all died away. Some of them are still with us.

To begin, we still have due process caselaw that deals with *procedural* rights. We call it “procedural due process,” though it should really be termed “procedural fairness due process.” In this line of cases, the Supreme Court no longer looks at whether a state’s procedural rule (established either by statute or court practice) deprives persons of property without traditional common-law procedural protections. But the Court does look to whether the state’s procedures are fair. It has developed rules about when a state must hold a hearing or provide notice about an impending deprivation.<sup>116</sup>

The same is true in the criminal context. The Court interprets the Due Process Clause to require that state criminal procedures be fair.<sup>117</sup> For some reason, though, we reserve the label “procedural due process” only for civil cases, and refer to due process doctrine in the criminal context simply as “due process.” Note, too, that the Supreme Court will sometimes find new procedural rights for criminal trials, by deeming a right in the Bill of Rights to be so fundamental that it should be “incorporated.”<sup>118</sup>

There is one last version of due process to discuss: due process against state court decisions. Just as with executive conduct, due process does not protect against violations of state law as such. If the challenge to judicial action has to do with the procedures used in court, then “procedural” due process applies, and courts ask whether the procedures were fair under Supreme Court caselaw. For nonprocedural challenges, a state court decision will violate due process only if it is an “arbitrary or capricious” abuse of power.<sup>119</sup> Usually, that requires that the decision be close to ridiculous—that it be unreasoning, on purpose.

All told, then, there are at least five different strands of due process jurisprudence. (1) There is “procedural due process,” in which courts identify procedural rights and review state civil procedures for fairness. (2) There is due process in the criminal context: requiring that criminal procedures be fair and finding new procedural rights in the criminal context, including through incorporation of some of the criminal trial rights contained in the Bill of Rights. And then there are the three forms of “substantive due process.” (3a) The first polices state legislation that enacts unfair procedures or burdens liberty. We suggest the proper reasoning is that state legislation that infringes liberty without a good reason must have come from a faulty and arbitrary use of the legislative process. (3b) The second form polices depriva-

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116 See, e.g., *Mathews v. Eldridge*, 424 U.S. 319 (1976).

117 See, e.g., *Perry v. New Hampshire*, 565 U.S. 228, 237 (2012) (analyzing whether admission of evidence was “so extremely unfair [as to] violate [ ] fundamental conceptions of justice” (quoting *Dowling v. United States*, 493 U.S. 342, 352 (1990))).

118 E.g., *Gideon v. Wainwright*, 372 U.S. 335 (1963).

119 See, e.g., *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990).



tions of liberty or property by executive officials, but only when those deprivations are very severe. (3c) And the third prohibits courts from wielding their powers unreasonably.

To put things a different way, a due process claim may be asserted against either the legislature, executive, or judiciary. The legislative process does not constitute the "process that is due" when legislation has no rational basis at all (or is too vague to be reasonable), when it infringes a fundamental right without a compelling reason, or when it enacts unfair procedures (either in the civil or criminal realm). Executive officials fail to provide the "process that is due" when they deprive persons of life, liberty, or property in conscience-shocking ways. And state courts fail to provide the "process that is due" when they render arbitrary decisions affecting the life, liberty, or property of the parties before them.

All of these interpretations of the Due Process Clause are manifestations of a single, admittedly abstract reading of the Clause: the "protection of the individual against arbitrary action of government."<sup>120</sup> That interpretation is not completely ahistorical. It is true Magna Carta attempted to curb arbitrariness in executive power. It is also true the Founders, influenced by Enlightenment philosophers, sought to prevent the exercise of arbitrary power.<sup>121</sup> At the same time, we cannot deny this interpretation is quite abstract, and that one could not get to the Court's big due process cases without creative interpretations of "due process" and "liberty."

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120 *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

121 *See* *Bank of Columbia v. Okely*, 17 U.S. (4 Wheat.) 235, 244 (1819) ("As to the words from *Magna Charta* . . . after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this: that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."); 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*233 ("The enormous weight of prerogative, if left to itself (as in arbitrary governments it is), spreads havoc and destruction among all the inferior movements: but, when balanced and regulated (as with us) by its proper counterpoise, timely and judiciously applied, its operations are then equable and certain, it invigorates the whole machine, and enables every part to answer the end of its construction."); *THE FEDERALIST* No. 84 (Alexander Hamilton); JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* 67 (J.W. Gough ed., Basil Blackwell 1946) (1690) ("A man . . . cannot subject himself to the arbitrary power of another; and having in the state of nature no arbitrary power over the life, liberty, or possession of another, but only so much as the law of nature gave him for the preservation of himself, and the rest of mankind; this is all he doth, or can give up to the commonwealth, and by it to the legislative power, so that the legislative can have no more than this."); 1 BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 113 (Thomas Nugent trans., London, W. Clarke & Son, 6th ed. 1899) (1748) (without separation of powers "the life and liberty of the subject would be exposed to arbitrary controul"); *id.* at 126 ("[F]ix[ed] laws" help ensure "that the public judgments should no longer be the effect of capricious will, or arbitrary power.").

### III. CONFUSION

The graph we have sketched above is an attempt at a linear regression. We have tried to map a line over the Supreme Court's disparate cases, with limited success. But this is not how courts talk about due process. Nor is it how litigants talk about it. Instead, several features of current due process jurisprudence ensure near total confusion.

First, the Supreme Court often does not specify which kind of "due process" it is applying—ignoring the fact there are several different strands of due process caselaw with very different reasoning. Second, the Supreme Court has not clearly explained when each "substantive due process" strand of cases applies. Third, the Court is not clear about when rights are fundamental. Fourth, courts have developed separate strands of caselaw apart from the general substantive due process framework. And last, the Supreme Court has not provided a usable test for courts to identify a fundamental right. We will address each of these shortcomings in turn.

#### A. Which Due Process?

Let's begin with the Court's frequent failure to distinguish between different strands of due process caselaw, particularly in its seminal cases of the 1970s and '80s. For whatever reason, a large number of the Court's due process decisions have concerned inmate lawsuits. We begin with a case that caused a great deal of confusion: *Parratt v. Taylor*.<sup>122</sup>

In the late 1970s, Mr. Bert Taylor, an inmate at a Nebraska prison, ordered twenty dollars' worth of hobby materials by mail order. The packages arrived while Taylor was in solitary confinement, so two employees who worked at the prison's hobby center signed for them. But somewhere, somehow, the packages disappeared. After Taylor's stint in solitary confinement had ended, Taylor found he had neither hobby materials nor answers. Disappointed, Taylor sued the warden and the hobby manager. His argument was simple: they had deprived him of property without due process of law.<sup>123</sup>

That theory of relief proved too simple for the Supreme Court. The Court thought that Taylor "[u]nquestionably" had shown a deprivation of property.<sup>124</sup> But the Court struggled to make sense of what Taylor could mean when he said his hobby materials were taken from him "without due process of law."<sup>125</sup> In one sense, Taylor's meaning was obvious: there had been no process that informed him that his hobby materials would be taken, nor an opportunity for him to defend his rightful possession of them. But of course, there couldn't have been such a process; the prison employees simply lost the package (so far as we know, accidentally).

Backed into a corner by the ruthless logic of Taylor's claim, the Court simply changed the claim. Under the Court's reinterpretation, Taylor was

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122 451 U.S. 527 (1981).

123 *Id.* at 529–31.

124 *Id.* at 536–37.

125 *Id.* at 537.

really challenging Nebraska tort law: Taylor wanted a hearing before he was deprived of his packages, not just a tort suit that he could bring after his hobby materials had already been mislaid.<sup>126</sup> The Court explained Nebraska's tort system offered a fair procedural mechanism for Taylor to obtain compensation, and thus his claim failed.<sup>127</sup> Moreover, the Court said, the loss was "not a result of some established state procedure," but of "a random and unauthorized act by a state employee."<sup>128</sup> By this, the Court did not mean that the prison employees had not acted under color of state law, for the Court had stated the opposite conclusion just a few pages before.<sup>129</sup> Instead, the Court meant just that Taylor's now-procedural claim could not be based on misconduct by prison employees.

But of course, a challenge to state procedures could not prevail by showing that state employees had not followed those procedures. That had not been Taylor's claim. Taylor had simply challenged the hobby-center employees' negligent loss of his property. Had the Court distinguished Taylor's due process claim against the conduct of state employees from due process claims about procedure, the answer would have been clear: Taylor had not alleged a deprivation that shocked the conscience. Case dismissed.

Yet, because the Court had no clear framework for categorizing due process claims, the Court instead threw lower courts into confusion.<sup>130</sup> Did all due process claims fail when there were other available state remedies? Were all due process claims based on a state employee's "random and unauthorized acts" meritless, even when the employee had acted under color of law? Wasn't §1983's whole purpose to provide an additional route to relief over and above that provided by states? Had not *Monroe v. Pape*<sup>131</sup> held that official abuse of power violated the Constitution, even when state law did not authorize the abuse?<sup>132</sup>

Other Justices noticed the Court's sleight of hand. The Court had spoken of "due process" in general, but had engaged in purely procedural analysis. Justice Blackmun wrote separately to note that he did "not understand the Court to intimate that the sole content of the Due Process Clause is procedural regularity."<sup>133</sup> Justice Powell, too, noticed that the Court "fail[ed] altogether to discuss the possibility that the kind of state action alleged here

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126 *Id.*

127 *Id.* at 541.

128 *Id.*

129 *Id.*

130 This confusion was widely addressed in the academy. *See generally, e.g.,* Karen M. Blum, *The Implications of Parratt v. Taylor for Section 1983 Litigation*, 16 *URB. LAW.* 363, 369 (1984); Erwin Chemerinsky, *Substantive Due Process*, 15 *TOURO L. REV.* 1501, 1530 (1999); Leon Friedman, *Parratt v. Taylor: Opening and Closing the Door on Section 1983*, 9 *HASTINGS CONST. L.Q.* 545, 546 (1982); Rodney A. Smolla, *The Displacement of Federal Due Process Claims by State Tort Remedies: Parratt v. Taylor and Logan v. Zimmerman Brush Company*, 1982 *U. ILL. L. REV.* 831, 833.

131 365 U.S. 167 (1961).

132 *See id.* at 172.

133 *Parratt*, 451 U.S. at 545 (Blackmun, J., concurring).

constitutes a violation of the substantive guarantees of the Due Process Clause.”<sup>134</sup>

The Court repeated that failure a few years later. The year *Parratt* was decided, Mr. Russell Thomas Palmer was serving time in a Virginia prison, where two prison officers barged into his cell to search for contraband.<sup>135</sup> As they did so, the officers destroyed some of Palmer’s personal things. Like Taylor, Palmer sued the officers on the theory that they had deprived him of property without due process of law.<sup>136</sup> The Fourth Circuit thought the Supreme Court’s holding in *Parratt* surely applied: “[O]nce it is assumed that a postdeprivation remedy can cure an unintentional but negligent act causing injury,” that court reasoned, “then that principle applies as well to random and unauthorized intentional acts.”<sup>137</sup>

The Court approved the Fourth Circuit’s reasoning. Again, the Court’s decision did not distinguish between the different kinds of due process doctrines. It first restated *Parratt*’s holding in general terms: “[T]hat the Due Process Clause of the Fourteenth Amendment is not violated when a state employee negligently deprives an individual of property, provided that the state makes available a meaningful postdeprivation remedy.”<sup>138</sup> And its new holding was just as broadly phrased: “We hold also that, even if petitioner intentionally destroyed respondent’s personal property during the challenged shakedown search, the destruction did not violate the Fourteenth Amendment since the Commonwealth of Virginia has provided respondent an adequate postdeprivation remedy.”<sup>139</sup>

That holding went even further towards eliminating a large swathe of § 1983 cases, as the puzzled lower courts could well see.<sup>140</sup> And then, the Court turned a corner. The case was *Zinerman v. Burch*<sup>141</sup>—which also arose from events that happened the same year the Court decided *Parratt*.<sup>142</sup> Staff at Florida State Hospital committed Mr. Darrell Burch as a “‘voluntary’ mental patient.”<sup>143</sup> The problem was that Burch was incompetent to give his consent.<sup>144</sup> Burch later sued the hospital employees who admitted him because they had not applied state-law procedures for involuntary commitment.<sup>145</sup> Both the district court and a panel of the Eleventh Circuit had applied *Parratt* and *Hudson*, concluding the employees’ errors were random and unauthorized acts, and that Florida’s tort system therefore provided

134 *Id.* at 553 (Powell, J., concurring in the result).

135 *See Hudson v. Palmer*, 468 U.S. 517, 519 (1984).

136 *Id.* at 520.

137 *Palmer v. Hudson*, 697 F.2d 1220, 1223 (4th Cir. 1983).

138 *Hudson*, 468 U.S. at 531.

139 *Id.* at 536.

140 *See, e.g.*, RICHARD H. FALLON ET AL., *HART & WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 1149–51 (4th ed. 1996); Chemerinsky, *supra* note 130, at 1530.

141 494 U.S. 113 (1990).

142 *Id.* at 118.

143 *See id.* at 114–15.

144 *See id.* at 115.

145 *See id.*

Burch all the process he was due.<sup>146</sup> The Eleventh Circuit sitting en banc then reversed the district court, holding Burch's case was unlike *Parratt* because the state could have designed procedures to prevent employees from mistakenly committing people involuntarily.<sup>147</sup>

This time around, the Supreme Court acknowledged the existence of other strands of due process jurisprudence. The Court said there were three strands of due process law: incorporation, substantive due process, and procedural due process.<sup>148</sup> (As we have seen, that formulation is overly simplistic—especially because incorporation may be considered part of substantive due process.) But the important thing here is that the Court separated procedural from substantive due process, and implied the *Parratt* rule did not apply to lawsuits raising a substantive due process claim.<sup>149</sup> The Court suggested Burch could have brought a claim against the employees for unjustifiably depriving him of liberty, but said Burch had raised only a procedural claim.<sup>150</sup> At that point, the Court turned to the procedural claim and confused the *Parratt* rule further, but that is outside the scope of our point here.

We want the attentive reader to glean two things from the ebb and flow of the Court's *Parratt* doctrine. The first is the Court's imprecision and fickleness. The Court will either speak overbroadly—leaving lower courts to guess what limits, if any, apply to its pronouncements—or else it will lay out a rule and then have a change of heart later.<sup>151</sup> And all the while, of course, the Court pretends nothing has changed. Even now, after *Zinermon*, doubt persists as to whether its rule applies to substantive due process cases—doubt that again arose from the Supreme Court's cryptic suggestions in later cases.<sup>152</sup> The second lesson is that confusion might well have been avoided if the Court had a clear framework for treating claims involving misconduct by government officials. We suspect the Court's rule in *Parratt* came about because the Court instinctively thought claims like Mr. Taylor's could not possibly rise to the level of due process violations, but did not know how to go about saying so. Or perhaps some in the majority did not want to give further support to substantive due process as a concept. Either way, had the Court simply applied its already-existing shocks-the-conscience test from *Rochin*, these cases would have been far simpler.

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146 *Id.* at 115–16; *Palmer v. Hudson*, 697 F.2d 1220, 1223 (4th Cir. 1983).

147 *See Zinermon*, 494 U.S. at 115–16.

148 *See id.* at 125–27.

149 *See id.*; Chemerinsky, *supra* note 130, at 1531–32.

150 *See Zinermon*, 494 U.S. at 125–27.

151 *See, e.g.*, Larry Alexander, Essay, *Constitutional Torts, the Supreme Court, and the Law of Noncontradiction: An Essay on Zinermon v. Burch*, 87 NW. U. L. REV. 576, 578–79 (1993); Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 840 (2003).

152 *See Browder v. City of Albuquerque*, 787 F.3d 1076, 1085 (10th Cir. 2015) (Gorsuch, J., concurring).

### B. Which Substantive Due Process?

Just as the Court sometimes blurs the line between different strands of due process, the Court has inconsistently applied its different versions of “substantive” due process. The Justices often speak of “substantive due process” as containing two components: protection against “conduct that ‘shocks the conscience,’” and protection against interference “with rights ‘implicit in the concept of ordered liberty.’”<sup>153</sup> But the Court has flip-flopped on when one of those two components apply; that is, when courts should apply the shocks-the-conscience test and when they should balance the government’s interests against its interference with a fundamental right. To begin, the Court frequently does not say which of those components it is applying. We will provide examples of this later. More important here is the confusion that the Court created in a series of opinions in the late 1990s and 2000s.

One of the most important in that series was Chief Justice Rehnquist’s opinion in *Washington v. Glucksberg*.<sup>154</sup> In it, Rehnquist attempted a sweeping reconceptualization of the Court’s substantive due process caselaw. As already explained, beginning with *Rochin*, the Supreme Court had often asked whether executive conduct violated substantive due process by “shocking the conscience.”<sup>155</sup> But in *Glucksberg*, the Court appeared to roll that approach into the fundamental-rights approach. Citing most of the Court’s big substantive due process cases, the Court said the “established method of substantive-due-process analysis has two primary features.”<sup>156</sup> “First,” the Court said, “we have regularly observed that the Due Process Clause specially protects . . . fundamental rights and liberties.”<sup>157</sup> “Second, we have required in substantive-due-process cases a ‘careful description’ of the asserted fundamental liberty interest.”<sup>158</sup> The Court seemed to imply all substantive due process cases had to do with protection of fundamental rights. And the Court even cited *Rochin* as an example of a case dealing with such a right: namely, the right to bodily integrity.<sup>159</sup>

That unified theory might have its own problems, as we will later discuss.<sup>160</sup> In any case, the unified theory did not last long. In May 1990, two

153 *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) (citations omitted) (quoting *Rochin v. California*, 342 U.S. 165, 172 (1952)); *accord* *Herrera v. Collins*, 506 U.S. 390, 435–36 (1993) (Blackmun, J., dissenting); *Foucha v. Louisiana*, 504 U.S. 71, 125–26 (1992) (Thomas, J., dissenting); *United States v. Salerno*, 481 U.S. 739, 746 (1987).

154 *Washington v. Glucksberg*, 521 U.S. 702 (1997).

155 *See, e.g., Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018); *Collins v. City of Harker Heights*, 503 U.S. 115, 126 (1992); *DeShaney v. Winnebago Cty. Dep’t of Soc. Servs.*, 489 U.S. 189, 197 (1989); *Whitley v. Albers*, 475 U.S. 312, 327 (1986).

156 *Glucksberg*, 521 U.S. at 720.

157 *Id.*

158 *Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)); *see also* *Michael H. v. Gerald D.*, 491 U.S. 110, 127–28 n.6 (1989) (plurality opinion) (in identifying due process rights “[w]e refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified”).

159 *Glucksberg*, 521 U.S. at 720.

160 *See infra* Section IV.B.

police officers saw a motorcycle traveling at high speed.<sup>161</sup> The driver was eighteen-year-old Brian Willard, and behind him rode passenger Philip Lewis, aged sixteen. The officers turned on their lights and yelled at the boys to stop, but Willard maneuvered around the patrol car and sped away. The officers took to the chase at high speed, and Willard weaved in and out of traffic, causing cars to swerve off the road. Then, the motorcycle tipped over. The officer driving close behind slammed on the brakes, but could not avoid skidding right into Lewis—killing him. Lewis's parents sued. They said the officers had been so reckless in their chase that they had deprived Lewis of life without due process of law.<sup>162</sup>

Lewis's case put the *Glucksberg* formulation in the dock. If *Glucksberg* was the "established" test for substantive due process cases, how would it apply here? Did Lewis have a right to be free from the reckless police pursuit that killed him? If so, would not Lewis win under any level of scrutiny? For how could an officers' reckless pursuit be "narrowly tailored" to achieving a "compelling interest"? Or how could a reckless pursuit even have a rational basis?

Now the Court returned to its old friend, abstraction. "Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action," the Court wrote.<sup>163</sup> And then the Court explicitly said that "criteria to identify what is fatally arbitrary differ depending on whether it is legislation or a specific act of a governmental officer that is at issue."<sup>164</sup> But, perhaps embarrassed by the about-face, the Court suggested the fundamental-rights test still applied to executive action, except that it was the second step in the analysis. The first step was to ask whether the government official's conduct shocked the conscience. The Court explained that "a case challenging executive action on substantive due process grounds, like this one, presents an issue antecedent to any question about the need for historical examples of enforcing a liberty interest of the sort claimed."<sup>165</sup> "Thus, in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience," the majority said.<sup>166</sup> It continued:

Only if the necessary condition of egregious behavior were satisfied would there be a possibility of recognizing a substantive due process right to be free of such executive action, and only then might there be a debate about the sufficiency of historical examples of enforcement of the right claimed, or its recognition in other ways.<sup>167</sup>

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161 See *County of Sacramento v. Lewis*, 523 U.S. 833, 836–37 (1998).

162 *Id.* at 837.

163 *Id.* at 845.

164 *Id.* at 846.

165 *Id.* at 847 n.8.

166 *Id.*

167 *Id.*

Justice Scalia didn't withhold his scorn in disagreeing with the majority's approach. He argued the majority had resurrected the "atavistic" shocks-the-conscience test *Glucksberg* put down a few years earlier.<sup>168</sup>

So it seemed the shocks-the-conscience test was back, though for how long was anyone's guess. But although the shocks-the-conscience test had been rehabilitated as a viable method for analyzing substantive due process claims, when that test applied was again unclear.

*Chavez v. Martinez*<sup>169</sup> raised that question and offered no clear answer. Several months before the Court handed down its decision in *Lewis*, police officers in Oxnard, California, were staking out a vacant lot, where they suspected a drug deal would take place. While the officers questioned someone in the vacant lot, they heard the rustle of a bicycle coming their way. They told the rider—Oliviero Martinez—to dismount and place his hands behind his head. One of the officers frisked Martinez. When the officer found a knife, Martinez skirmished to get free. At some point, one of the officers yelled Martinez had taken his gun, and in an instant, the other officer shot Martinez several times, leaving him permanently blinded and paralyzed. In the emergency room, where Martinez struggled for life, the officers continued interrogating him. No charges were ever brought against Martinez, but he later sued the officers, arguing, among other things, that the officers' coercive interrogation while he was suffering from his wounds violated substantive due process.<sup>170</sup>

The Court split, with no full opinion receiving five votes.<sup>171</sup> Indeed, the only thing five Justices could agree on was that "[w]hether Martinez may pursue a claim of liability for a substantive due process violation is . . . an issue that should be addressed on remand, along with the scope and merits of any such action that may be found open to him."<sup>172</sup> Martinez had challenged the conduct of government officials. Thus, under the framework announced in *Lewis*, one would have thought the Court would first ask whether the officers' interrogation shocked the conscience, and if the answer was no, that the case would be over.

Upon reaching the Fourteenth Amendment claim, Justice Thomas began—writing for himself and two others—first by asking whether the interrogation shocked the conscience, and then concluding the "questioning did

168 *Id.* at 861–62 (Scalia, J., concurring in the judgment).

169 538 U.S. 760 (2003).

170 *Id.* at 763–65 (plurality opinion).

171 Justice Thomas wrote a plurality opinion joined in full by Chief Justice Rehnquist and in part by Justices O'Connor and Scalia, which held the questioning and failure to recite Miranda warnings did not violate Martinez's Fifth Amendment right against self-incrimination. Justice Thomas went on to opine, joined by Chief Justice Rehnquist and Justice Scalia, that Martinez's right to due process under the Fourteenth Amendment had not been violated. Justice Souter, in an opinion joined in full by Justice Breyer and in part by Justices Stevens, Kennedy, and Ginsburg, held the viability of Martinez's substantive due process claim should be addressed on remand. Four other opinions were filed, concurring and dissenting in part.

172 *Chavez*, 538 U.S. at 779–80 (plurality opinion).



not violate Martinez's due process rights."<sup>173</sup> But immediately following that conclusion, Justice Thomas went on to discuss the fundamental-rights test, as if it were an alternative way in which interrogation could violate due process: "[T]he Due Process Clause *also* protects certain 'fundamental liberty interest[s]' from deprivation by the government, regardless of the procedures provided, unless the infringement is narrowly tailored to serve a compelling state interest."<sup>174</sup> Under this approach, too, Justice Thomas found Martinez's claim wanting. He explained: "[W]e can find no basis in our prior jurisprudence . . . or in our Nation's history and traditions to suppose that freedom from unwanted police questioning is a right so fundamental that it cannot be abridged absent a 'compelling state interest.'"<sup>175</sup> So it seemed Justice Thomas applied both tests, rather than stopping when Martinez failed to show that the interrogation shocked the conscience.

Other Justices implied the same. Justice Stevens referred to the shocks-the-conscience and fundamental-rights formulas as two different standards.<sup>176</sup> And three Justices who wrote concurring and dissenting opinions briefly suggested the fundamental-rights test applied to Martinez's case. They explained that it was "a simple enough matter to say that use of torture or its equivalent in an attempt to induce a statement violates an individual's fundamental right to liberty of the person."<sup>177</sup>

Once again, lower courts strove to make sense of the Court's imprecision.<sup>178</sup> The Tenth Circuit, for example, at first decided that *Chavez's* clear import was that the shocks-the-conscience and fundamental-rights tests were alternative tests that could be applied in any given case.<sup>179</sup> (In other words, a particular government action could violate due process under either test.) But in a later case, the Tenth Circuit recoiled at the thought of applying the shocks-the-conscience test to legislation and construed its prior reading of

173 *Id.* at 774.

174 *Id.* at 775 (second alteration in original) (emphasis added) (quoting *Chavez*, 521 U.S. at 721).

175 *Id.* at 776.

176 *See id.* at 787 (Stevens, J., concurring and dissenting in part).

177 *Id.* at 796 (Kennedy, J., concurring and dissenting in part). Justice Kennedy was joined by Justices Stevens and Ginsburg in this part of his opinion.

178 *See, e.g.,* *Guertin v. State*, 912 F.3d 907, 946 (6th Cir. 2019) (McKeague, J., concurring and dissenting in part) ("We measure whether the deprivation of a right to bodily integrity—or any other substantive-due-process right—actually occurred by determining whether a defendant's alleged conduct was so heinous and arbitrary that it can fairly be said to 'shock the conscience.' At times we have treated these two elements (deprivation of a constitutional right and conscience-shocking behavior) as separate methods of stating a substantive-due-process claim. At other times we have concluded they are both required." (citation omitted) (quoting *Lillard v. Shelby Cty. Bd. of Educ.*, 76 F.3d 716, 725 (6th Cir. 1996)).

179 *See Seegmiller v. LaVerkin City*, 528 F.3d 762, 769 (10th Cir. 2008) ("[T]he 'shocks the conscience' and 'fundamental liberty' tests are but two separate approaches to analyzing governmental action under the Fourteenth Amendment. They are not mutually exclusive, however. Courts should not unilaterally choose to consider only one or the other of the two strands. Both approaches may well be applied in any given case.").

*Chavez* as dicta on that point.<sup>180</sup> And then, in still another case, the Tenth Circuit went back to the *Lewis* approach.<sup>181</sup> Then Judge Gorsuch, writing for a unanimous panel, explained that “some question lingers about all this,” but that “*Chavez* did not expressly overrule *Lewis*’s holding that the ‘arbitrary or conscience shocking’ test is the appropriate one for executive action so we feel obliged to apply it.”<sup>182</sup>

The Tenth Circuit’s struggle has been replicated many places besides. Several circuits disagree on the correct interpretation of *Lewis*, *Chavez*, and *Glucksberg*.<sup>183</sup> Uncertainty only adds to the difficulty of properly resolving these cases.

### C. What Kind of Right?

#### 1. Fundamental or Not?

Still another problem is the Court’s failure to specify whether a right is fundamental. The Court’s pretrial detention cases are an example. In those cases, the Court often fails to mention crucial details that lower courts need in order to make sense of the holding: for example, whether the Court is applying the shocks-the-conscience standard or the fundamental-rights standard; or, when the Court speaks about a right, whether that right is fundamental or not. Those questions matter, for they determine which level of scrutiny lower courts should use when they confront similar cases.

In the first such case, *Bell v. Wolfish*,<sup>184</sup> a group of people awaiting trial sued a federal prison in New York on the ground that the prison’s conditions violated due process.<sup>185</sup> The Second Circuit held that, because those pretrial detainees were presumed innocent until proven guilty, the government would have to show a compelling governmental interest to justify any part of prison conditions to which the detainees objected (like double bunking).<sup>186</sup>

The Supreme Court rejected that ruling. First off, the Court repudiated the idea that the detainees’ desire to be free from discomfort during impris-

180 See *Dias v. City & County of Denver*, 567 F.3d 1169, 1182 (10th Cir. 2009).

181 See *Browder v. City of Albuquerque*, 787 F.3d 1076, 1078–79 (10th Cir. 2015).

182 *Id.* at 1079 n.1.

183 Compare *Hancock v. County of Rensselaer*, 882 F.3d 58, 65–66 (2d Cir. 2018) (explaining how the court applies the fundamental-rights approach to legislation and the shocks-the-conscience test to executive action), and *Handy-Clay v. City of Memphis*, 695 F.3d 531, 547 (6th Cir. 2012) (explaining the two strands of substantive due process and noting that for executive action to violate substantive due process, it must shock the conscience), with *Slusarchuk v. Hoff*, 346 F.3d 1178, 1181–82 (8th Cir. 2003) (explaining that a plaintiff challenging executive action must satisfy both the rights test and the shocks-the-conscience test to prevail), *Hawkins v. Freeman*, 195 F.3d 732, 738 (4th Cir. 1999) (same), and *Waldman v. Conway*, 871 F.3d 1283, 1292 (11th Cir. 2017) (suggesting both tests could apply as alternatives in any given case).

184 441 U.S. 520 (1979).

185 See *id.* at 523.

186 See *id.* at 531–32.

onment amounted to a "fundamental" right.<sup>187</sup> Instead, the Court thought the relevant right was the "right to be free from punishment."<sup>188</sup> A detainee could show that the prison conditions amounted to unconstitutional punishment before trial if they could show that the prison officials intended the conditions as punishment, or if there was no rational basis for the conditions.<sup>189</sup> The Court did not say whether that right was fundamental, although it seemed to imply as much. Yet the legal standard was not so tough for the government to meet. For even if the right to be free from punishment before trial is fundamental, the Court figured out whether the conditions were punitive by looking for a rational basis.

The *Bell* decision was not so bad, as Supreme Court due process decisions go. The Court had clearly articulated the test that would govern prison conditions for pretrial detainees. True, the Court failed to distinguish between the shocks-the-conscience and fundamental-rights tests. But overall, the opinion seemed clear.

Things became less clear when the Court applied *Bell* in *Schall v. Martin*,<sup>190</sup> in which juveniles challenged a New York statute that provided for their detention before trial.<sup>191</sup> Unlike in *Bell*, the juveniles here challenged not the conditions of confinement, but the confinement itself. The Supreme Court phrased the question on appeal imprecisely: "The question before us," it said, "is whether preventive detention of juveniles . . . is compatible with the 'fundamental fairness' required by due process."<sup>192</sup> Then, the Court went on to perform a freewheeling analysis that it did not care to explain.

First, the Court balanced the deprivation of the juveniles' "undoubtedly substantial" right to freedom with the legitimate state interest in preventing crime and protecting juveniles from their own misdeeds.<sup>193</sup> It concluded, again vaguely, that the state's decision was "compatible" with fundamental fairness.<sup>194</sup> The Court made no mention as to what standard of scrutiny it was applying, nor whether it considered the juveniles' right to be free from detention to be fundamental (though we can guess the Court did not think so, because it noted that juveniles are in the custody of adults most of the time).<sup>195</sup> Next the Court cited the *Bell* rule that pretrial detention cannot be meant as punishment.<sup>196</sup> But the Court was not clear whether the *Bell* rule was a separate rule, or just part of its balancing test. As a preface to its application of the *Bell* rule, the Court said that it was "still necessary to determine whether the terms and conditions of confinement under" the statute "are in

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187 *See id.* at 534.

188 *Id.* at 533-35.

189 *Id.* at 537-38.

190 467 U.S. 253 (1984).

191 *See id.* at 255-56.

192 *Id.* at 263.

193 *Id.* at 265.

194 *Id.* at 268.

195 *Id.* at 265.

196 *Id.* at 269.

fact compatible with” the government’s regulatory purpose.<sup>197</sup> In the end, the Court found New York’s detention scheme had a rational basis unrelated to punishment and thus upheld the law.<sup>198</sup> The Court’s words may be read two ways. The Court may have been applying two separate tests: the first balancing the government’s interest against the defendant’s liberty interest; the second asking whether the government meant to punish. The alternative is that the Court was applying just one test—the *Bell* test. Under this reading, the first part of the Court’s opinion was simply asking what nonpunitive interests the government could possibly have, while the second part asked whether the statute’s particulars were “in fact compatible” with those nonpunitive objectives.

The Court left more questions open too. Was the right to be free from pretrial detention a fundamental right that required the government to meet strict scrutiny? Or was it a lesser right? Or did it depend on whether the detainees were minors or adults? We might make good guesses on these questions, but nothing more.

The same lack of clarity graced the pages of the Court’s decision in *United States v. Salerno*.<sup>199</sup> On March 21, 1986, ambitious prosecutors threw the book at Anthony Salerno, head of the Genovese crime family “La Cosa Nostra,” and Vincent Cafaro, his right-hand man.<sup>200</sup> Together, they faced a twenty-nine-count indictment for a litter of crimes including racketeering, gambling operations, and conspiracy to murder.<sup>201</sup> The government moved to detain the duo before trial, without bail, under the newly minted Bail Reform Act of 1984.<sup>202</sup> That legislation allowed the government to detain defendants without bail if it provided clear and convincing evidence that those defendants were too dangerous to release. Salerno and Cafaro, the government claimed, could not safely go free on bail. After the district court agreed, Salerno and Cafaro argued that the Bail Reform Act violated due process.<sup>203</sup> The government could hardly have asked for better facts in a challenge to the Bail Reform Act, yet the Second Circuit had thought the Bail Reform Act went too far. In the Second Circuit’s view, detention based on “dangerousness,” violated the principle that persons should not be deprived of liberty before being judged guilty, except for the purpose of forcing them to stand trial.<sup>204</sup>

Unlike the cases discussed above, the Court *did* mention the two different strands of substantive due process at the beginning of its analysis. “So-called ‘substantive due process’ prevents the government from engaging in conduct that ‘shocks the conscience,’ or interferes with rights ‘implicit in the

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197 *Id.*

198 *Id.* at 273–74.

199 481 U.S. 739 (1987).

200 *See id.* at 743.

201 *See id.*

202 *See id.* at 742–46.

203 *See id.*

204 *See id.* at 744–45.

concept of ordered liberty,’” the Court explained.<sup>205</sup> But the Court did not say how those strands applied to the case. Instead the Court applied the *Bell* test again, asking whether the Bail Reform Act was meant to punish defendants before trial. It concluded that the Act was just regulatory, not punitive.<sup>206</sup> Moreover, the Court explained, the detention was not “excessive in relation to the regulatory goal Congress sought to achieve.”<sup>207</sup> That language did not seem like anything close to strict scrutiny, and what followed made it seem like it was still part of the *Bell* test. The Court balanced the regulatory interest against the scope of the Act’s restrictions on bail and concluded the Act did not provide for “punishment before trial in violation of the Due Process Clause.”<sup>208</sup>

Adding to the impression that the *Bell* test was all that mattered, the Court then explained that the Second Circuit had “nevertheless concluded” that the Bail Reform Act was unconstitutional.<sup>209</sup> The Second Circuit was wrong, however, because the “regulatory interest in community safety can, in appropriate circumstances, outweigh an individual’s liberty interest.”<sup>210</sup> At this point, the Court used language that implied that it was applying strict scrutiny. The Court said that the “government’s interest in preventing crime by arrestees is both legitimate *and compelling*.”<sup>211</sup> And it explained that “[o]n the other side of the scale . . . [wa]s the individual’s strong interest in liberty”—an interest that was of a “*fundamental* nature.”<sup>212</sup> Perhaps the Court really was recognizing a fundamental right after all.

When all was said and done, the Bail Reform Act’s legality was clear but the Court’s methodology was not. Unsurprisingly, lower courts have interpreted the Court’s decision differently. For example, the Tenth Circuit has been unsure about whether *Salerno* and *Schall* applied something beyond the *Bell* test,<sup>213</sup> whereas the Ninth Circuit has interpreted *Salerno* to require strict scrutiny analysis of all bail regulation.<sup>214</sup> As the reader has likely already noticed, such confusion is par for the course in substantive due process.

205 *Id.* at 746 (first quoting *Rochin v. California*, 342 U.S. 165, 172 (1952); and then quoting *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)).

206 *Id.* at 748.

207 *Id.* at 747.

208 *Id.* at 748.

209 *Id.*

210 *Id.*

211 *Id.* at 749 (emphasis added).

212 *Id.* at 750 (emphasis added).

213 See *Dawson v. Bd. of Cty. Comm’rs*, 732 F. App’x 624, 631 (10th Cir. 2018) (*Salerno* did not apply strict scrutiny), *cert. denied*, 139 S. Ct. 862 (2019); *United States v. Deters*, 143 F.3d 577, 583 (10th Cir. 1998) (*Salerno* did not “articulate[ ] a clear test for determining when pretrial confinement of an accused is permissible under the Due Process Clause”).

214 *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 779–81 (9th Cir. 2014) (en banc) (*Salerno* applied strict scrutiny apart from the *Bell* test).

## 2. Solitary Silos

Things get even more complicated when one considers the specific tests that courts apply to particular contexts. The *Bell* test we just explained is one example: a specific test that applies only to cases involving detention before trial. This development is natural; one should hope that jurisprudence would develop a rule more specific than “don’t shock my conscience.” What becomes problematic is silence about how a more specific test relates to the broader due process framework. We have already noted this problem in cases about pretrial detention; the Court has not made it clear how the *Bell* test relates to the broader substantive due process frameworks.

We can see another example in familial-association claims. In those cases, plaintiffs allege that a government official has purposely tried to interfere with their family relationship, usually involving a child. Circuits vary a bit in their approaches to such claims, but most require that the plaintiff show the official intended to interfere in the familial relationship and did not have a legitimate governmental reason to do so.<sup>215</sup>

But how does that specific test relate to other due process jurisprudence? Does it displace the more generic shocks-the-conscience and fundamental-rights tests? Can plaintiffs choose which theory to pursue? Or must plaintiffs meet both this specific test and one of the normal ones too? Circuits have not agreed on an answer. Some have suggested the more specific test is simply an iteration of the shocks-the-conscience test, or that the plaintiff must meet the specific test *and* show that the official’s conduct shocks the conscience.<sup>216</sup> Others have suggested that the shocks-the-conscience standard applies only when there is no more specific test, or that it is an alternative theory on which a plaintiff can prevail.<sup>217</sup> Again, there is a dire need for order in due process jurisprudence.

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215 See, e.g., *Halley v. Huckaby*, 902 F.3d 1136, 1153–54 (10th Cir. 2018); *Porter v. Osborn*, 546 F.3d 1131, 1139–40 (9th Cir. 2008); *Trujillo v. Bd. of Cty. Comm’rs*, 768 F.2d 1186, 1190 (10th Cir. 1985).

216 See *Halley*, 902 F.3d at 1155 (specific test is an iteration of the shocks-the-conscience test); *Martinez v. Cui*, 608 F.3d 54, 64 (1st Cir. 2010) (“*Lewis* clarified that the shocks-the-conscience test, first articulated in *Rochin v. California*, governs all substantive due process claims based on executive, as opposed to legislative, action”—including familial-association claims (emphasis omitted) (citation omitted)); *Anthony v. City of New York*, 339 F.3d 129, 143 (2d Cir. 2003) (to prevail on a familial-association claim, a plaintiff “must demonstrate that her separation from [her child] was so shocking, arbitrary, and egregious that the Due Process Clause would not countenance it”); see also *United States v. Hollingsworth*, 495 F.3d 795, 802 (7th Cir. 2007) (implying a claim for violation of familial association must show the government conduct shocks the conscience).

217 See *Kolley v. Adult Protective Servs.*, 725 F.3d 581, 585 (6th Cir. 2013) (explaining the shocks-the-conscience standard only applies when a claim does not pertain to a specific substantive due process right, and concluding the shocks-the-conscience standard therefore does not apply to familial-association claims); *Rosenbaum v. Washoe County*, 663 F.3d 1071, 1079 (9th Cir. 2011) (for a familial association claim “[t]o amount to a violation of substantive due process . . . the harmful conduct must ‘shock [ ] the conscience’ or ‘offend the community’s sense of fair play and decency’” (quoting *Rochin v. California*, 342 U.S.

### 3. Distinguishing Genuine Rights

The last problem relates to finding new rights. When litigants come to the courts with a shiny new object in their hands, and claim they found it among the other rights the Court has dug up, how do courts tell if the purported right is genuine? How do courts know whether the litigants indeed assert a right implicit in ordered liberty, or whether they bear a right they should take to their legislatures instead? That subject is perhaps the most contentious of all, so it is not surprising the Supreme Court routinely contradicts itself. Whether we think the Court correct or not in striking down the state laws in each of its blockbuster cases, one thing is certain: the Court has left lower courts little to no guidance in finding “fundamental rights” for themselves.

Let us ask the question directly, then. How do courts of appeals go about identifying new rights? The first approach was that of *Lochner*, later resurrected in *Griswold* and *Roe*—namely, to infer rights from the (abstractly defined) purposes of the Bill of Rights, or from moral intuition.<sup>218</sup> But that approach is difficult to implement in a consistent fashion. It is not surprising the Court later constrained this freewheeling divination in *Washington v. Glucksberg*, which put forward a test grounded in history.<sup>219</sup> Nevertheless, the Supreme Court has so far evaded even this attempt at a limiting principle, once again through abstraction.<sup>220</sup>

## IV. SOLUTIONS

We have now described five different problems with substantive due process caselaw: (1) the Court’s frequent failure to distinguish between the various kinds of due process jurisprudence; (2) confusion about when to apply the various strands of due process cases; (3) the Court’s failure to specify

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165, 172–73 (1952)); *Crowe v. County of San Diego*, 608 F.3d 406, 441 n.23 (9th Cir. 2010) (concluding the shocks-the-conscience standard does not apply to familial-association claims); *Kottmyer v. Maas*, 436 F.3d 684, 691 n.1 (6th Cir. 2006) (suggesting a plaintiff could prevail on a familial-association claim if the conduct shocked the conscience); *Morris v. Dearborne*, 181 F.3d 657, 667–68 (5th Cir. 1999) (apparently treating the shocks-the-conscience standard as one of multiple ways in which a plaintiff could assert a familial association claim).

Many other circuits’ cases simply do not mention the issue. *See, e.g.*, *Brokaw v. Mercer County*, 235 F.3d 1000, 1019 (7th Cir. 2000); *Thomason v. SCAN Volunteer Servs., Inc.*, 85 F.3d 1365, 1371 (8th Cir. 1996).

218 *Roe v. Wade*, 410 U.S. 113, 152–53 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *Lochner v. New York*, 198 U.S. 45, 53 (1905); *see also Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting).

219 521 U.S. 702, 720–21 (1997) (“[T]he [Due Process] Clause specially protects those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition.’” (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion))).

220 *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015) (stating that “rights come not from ancient sources alone” but also from a “better informed understanding of how constitutional imperatives define a liberty”).

when a right is fundamental and therefore triggers strict scrutiny; (4) uncertainty about how the more specific strands of due process caselaw (like cases in the prison context) relate to the more general due process standards; and (5) the lack of a workable standard for recognizing unenumerated rights.

These problems are wide ranging but connected. We would like to briefly describe two possible solutions. The first helps resolve four of the five problems. The Supreme Court should categorize its due process caselaw and clearly identify the standards it is applying in each case. The second possible solution would help with the last problem: the lack of any coherent standard for recognizing unenumerated rights. Absent a major doctrinal course correction, the Court could repackage and relaunch the *Glucksberg* test.

#### A. *Creating a Due Process Flowchart*

The first two problems relate to the Court's lack of specificity as to what strand of due process jurisprudence it is applying. In one sense, the answer could be as simple as saying "be more specific." But we do not think that would do. The problem is not just the caselaw's disorganization, but the lack of a coherent framework for categorizing different kinds of due process cases. That deficiency is no one's fault. Almost by necessity, the Court's due process law has developed in a common-law-like discursion. And so far, the Court has not synthesized the century or so of caselaw that has come before.<sup>221</sup> But failure to synthesize has serious consequences. A vicious cycle ensues: the Court hears a case in a new context (for example, loss of hobby kits in prison), has no framework to address it, engages in freewheeling balancing, and thus does not establish a clear rule to resolve like cases going forward. Repeat this cycle enough times and one is sure to have a judiciary without rules of law to apply. It is a common-law approach without the linear reasoning.

In our brief recounting of the history of due process caselaw, we have tried to demonstrate that due process cases can be usefully categorized into claims against the legislature, claims against executive officials, and claims against judicial action. To repeat our earlier synthesis, different standards do (or should) govern each of those categories. The legislative process does not constitute the "process that is due" when legislation has no rational basis at all, when it is too vague to be reasonable, when it infringes a fundamental right without a compelling reason and narrowly tailored means, or when it enacts egregiously unfair procedures (either in the civil or criminal realm). Executive officials, by contrast, fail to provide the "process that is due" when they deprive persons of life, liberty, or property in conscience-shocking ways. Finally, state courts fail to provide the "process that is due" when they set unfair procedures, or when they render arbitrary decisions impairing the life, liberty, or property of the parties before them.

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<sup>221</sup> In Dworkinian terms, each decision's fit within a larger interpretive framework remains unexplained. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 116, 340–41 (1978).



This framework makes sense. As already alluded to, the fundamental-rights test is ill suited to evaluating particular conduct. That test is quintessentially one for legislation, not executive acts. It asks whether a right is fundamental, and if so, whether the government's interference is narrowly tailored to effect a compelling interest. When an official exercising his authority separates a child from his parents, or intentionally rams into another vehicle at high speed, or destroys a person's reputation, does it make sense to ask whether the officer's actions were narrowly tailored to serve a compelling governmental interest? Unless we are prepared to substantially lower the bar for what counts as a compelling interest, we should not try to superimpose this essentially legislative test on individual conduct. Officers' actions on a given day are subject to all sorts of outside factors—for example, things they don't know, things they reasonably think they know but are mistaken about, and the tension of emergency situations. These factors can excuse or mitigate the ill consequences of executive conduct. Yet those intangible factors are square pegs to the round holes of "compelling interest" and "narrow tailoring."

What is more, applying the fundamental-rights test to executive conduct is likely to constitutionalize too many torts. The Court has often warned of the danger of turning due process into a "font of tort law."<sup>222</sup> It is true that, after the Court's decision in *Daniels v. Williams*,<sup>223</sup> negligent acts never count as "deprivations" of life, liberty, or property.<sup>224</sup> But applying the fundamental-rights test to the conduct of executive officials would still turn all kinds of intentional torts into events of constitutional significance.

The more reasonable approach, by far, is to hold that executive conduct violates due process only when the deprivation is egregious. That approach comes from a commonsense recognition that the ratifiers of the Fourteenth Amendment believed the Amendment's text would curb abuse of official power in the South. As we've tried to show, this standard is the shocks-the-conscience test. Naturally, the inquiry here is fact intensive but accommodating of all those intangible considerations that lower the reading on the outrage barometer.

The reverse is also true: the shocks-the-conscience test is not useful for reviewing legislation. Words on paper generally have a tougher time shocking people than actions. The standard provides few guardrails to prevent judges from falling off either of two ledges: the oversensitivity that leads to enforcing policy preferences as law, and the stoicism that leads to rubber-stamping every Act. The fundamental-rights test provides a comparatively clearer path: examining the burdens legislation places on a right and the potential reasons for burdening that right. No doubt the fundamental-rights test still allows for much subjectivity, but less so. And the fundamental-rights

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222 *County of Sacramento v. Lewis*, 523 U.S. 833, 847–48 & n.8 (1998); *accord Daniels v. Williams*, 474 U.S. 327, 332 (1986).

223 474 U.S. 327.

224 *Id.* at 330–32.

test is better grounded in the theory of evaluating legislation under the Due Process Clause: looking for irrationality in the legislative process.<sup>225</sup>

Similarly, the “arbitrariness” standard that the Supreme Court has espoused for evaluating judicial decisions makes sense. The bar is high enough to prevent federal courts from reviewing all state-law mistakes. And this standard appropriately guides the inquiry: we are only reviewing for unreasoning action, the kind of action that can best be explained as an abuse of power by a state court. Applying the fundamental-rights test in the context of judicial action would often turn into a duplicative analysis of the underlying state law. And again, the shocks-the-conscience test would not fit well. A judicial decision might be truly arbitrary and petty and yet not shock the conscience because the pettiness is small. Likewise, a state judge might be doing what he or she is supposed to, and the result might still be reviling because the underlying law’s application seems unjust.

We recognize that some wish to do away with the shocks-the-conscience test altogether. Judicial conservatives get particularly anxious around the shocks-the-conscience test. It carries a whiff of subjectivity. The very words make plain that judges must use their personal consciences to decide what is or is not lawful. And the test’s heritage is just as disconcerting for them—bearing the mark of some of the Supreme Court’s most activist days and its one-time leading liberal. As Justice Scalia gibed in remonstrance to the *Lewis* majority, the “atavistic” test is “the *ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity.”<sup>226</sup>

Those criticisms surely have truth to them and many judges could live with a doctrinal reevaluation by the Supreme Court. But absent that, the test survived for nearly a century and seems to remain alive and kicking. The question is whether that test should be invoked ad hoc, or pursuant to a defined framework. And, if the test applies exclusively to executive conduct, it will not have the effect that many conservatives fear: judicial interference with democratic decisions. Indeed, the test might even have a salutary effect: its rhetoric limits federal-court oversight of executive officials, for judges will have to say that an officials’ action shocked the conscience with a straight face.

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<sup>225</sup> Courts ought not lightly declare legislation irrational, particularly when it reflects longstanding or deeply-rooted social rules and traditions. Cf. Edmund Burke, *Reflections on the Revolution in France*, in THE PORTABLE EDMUND BURKE 416, 443 (Isaac Kramnick ed., 1999) (1790) (“The science of government being, therefore, so practical in itself, and intended for such practical purposes, a matter which requires experience, and even more experience than any person can gain in his whole life, however sagacious and observing he may be, it is with infinite caution that any man ought to venture upon pulling down an edifice which has answered in any tolerable degree for ages the common purposes of society, or on building it up again without having models and patterns of approved utility before his eyes.”). In the due process context, courts are more likely to err in declaring legislation irrational than in declaring it rational, because statutory enactment requires the assent of numerous legislators—each of whom is endowed with the same natural reason as his or her counterpart in the judiciary.

<sup>226</sup> *Lewis*, 523 U.S. at 861 (Scalia, J., concurring in the judgment) (footnote omitted).

There is also no reason why the shocks-the-conscience test cannot be given more specific legal meaning. In a way, the phrase is already a legal term of art—a shorthand for the idea that the Due Process Clause is concerned with only those cases in which the gravity of the harm and the impropriety of the conduct are especially appalling. And courts can, in common-law fashion, specify particular factors that shock the conscience in various contexts. Courts may, for example, refine the kinds of factors that shock the conscience in cases involving use of force by prison guards. It will be no different than fashioning legal tests for what counts as “cruel and unusual punishment” or “excessive force.”

Put differently, the Supreme Court must take things one step at a time. It should first clarify and consistently apply the correct substantive due process framework to each scenario. Once the appropriate framework is in place, inferior courts can develop a body of caselaw from fact-intensive analysis. That caselaw can provide data points about what “shocks the conscience,” just as it does in other areas of constitutional adjudication.

That brings us to our next point—how to deal with the little silos of orphaned due process caselaw. Those specific areas of law should be adopted under one of the broader due process frameworks. For example, the familial-association cases should be thought of as a child of the shocks-the-conscience framework. We can say that government officials shock the conscience when they purposefully and maliciously interfere with a family relationship. Defining the relationship between the specific standard and the general standard would prevent litigants from arguing that they can win under either standard. True, the same goal can be accomplished by saying the more specific test always applies. But the problem is that in new areas, the question will be whether a specific test should be crafted or whether the general shocks-the-conscience test should be used. To avoid that pitfall, courts should simply state that more specific tests are *applications* of the shocks-the-conscience tests to particular contexts.

The same logic holds for tests that apply to legislation in specific contexts. Those more specific tests should be tied to the general due process framework for legislation. For instance, the *Bell* test, which asks whether pre-trial detention policies are punitive, should be expressly linked to the fundamental-rights test when it is applied to legislation. Persons detained before trial have a right not to be subjected to conditions or procedures that have no rational basis other than punishment.

We have two more points to make before moving on to our second proposed solution. First, the framework proposed here depends on a distinction between legislative acts and executive acts. In most cases, that distinction will be clear. But sometimes the line will be hazy.<sup>227</sup> What about a police department’s written policy? What about an informal policy that is generally applicable? Should courts treat those policies as legislation (and evaluate them for interference with a right), or should they treat them as executive action

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227 See, e.g., *INS v. Chadha*, 462 U.S. 919 (1983).

(and evaluate them under the shocks-the-conscience standard)? We recognize that line drawing on this inherently quixotic distinction is not ideal. Yet we already have legal standards for deciphering which government actions count as legislative actions, particularly in the realm of procedural due process.<sup>228</sup> Those can be transplanted here. We would suggest, however, that the question should turn mostly on whether the challenged action is *conduct* by government officials, or instead a policy that is applicable to more persons.<sup>229</sup> The number of affected persons is usually part of figuring out when actions are legislative or not, and here, the shocks-the-conscience test is best suited only to the conduct that directly affected the litigants. In some cases, surely, a plaintiff will challenge both the official's conduct *and* the policy that authorized that action. In such cases, analysis of the policy, as the more specific, should control. If the policy is constitutional, then acting in accordance with it cannot "shock the conscience."

That brings us to a second point. Once courts give content to the shocks-the-conscience test in specific contexts, the shocks-the-conscience test and fundamental-rights test will sometimes look similar. Take familial-association claims as an example. Courts generally hold that an executive violates due process when he intentionally burdens a family relationship without good reason, and we think that's because courts have effectively decided that such conduct shocks the conscience. But suppose parents challenge a statute that allowed the state to separate them from their children. The fundamental-rights test will lead a court to ask whether the right to undisturbed family relationship with one's children is a fundamental right. And in some way—whether via strict scrutiny or via rational basis—the Court will evaluate the state's justifications for enacting a statute that interferes with that right. That analysis will look a lot like the analysis applied to a case against the government official who interferes with a family relationship.

That similarity comes from the definition of the "liberty" right at issue. When cases deal with abstract rights to liberty—such as the right to undisturbed family relationships or a right to contraception—the shocks-the-conscience and fundamental-rights tests will look similar. That is because an analysis of what should be deemed conscience-shocking involves an assessment of the impropriety of the government's action, which, in turn, will require analyzing the possible reasons for the government's action. But the distinction is worth making for the reasons we have discussed. The shocks-the-conscience and fundamental-rights tests will often look different when

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228 See, e.g., *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915); see also *Onyx Props. LLC v. Bd. of Cty. Comm'rs*, 838 F.3d 1039, 1046 (10th Cir. 2016).

229 The Tenth Circuit confronted this problem in *Abdi v. Wray*, 942 F.3d 1019 (10th Cir. 2019). Formally, Abdi's alleged harm stemmed from executive agency action—inclusion on the FBI's Selectee List and No-Fly List—not an act of Congress. But Abdi did not allege "tortious conduct of an individual agency officer," such as the TSA agents who screened him. *Id.* at 1027. Rather, he asserted a fundamental right to movement. *Id.* at 1024. The court analyzed the case under the fundamental-rights framework, recognizing that Abdi challenged an executive policy akin to a legislative act. See *id.* at 1027–28.

the deprivation is more prosaic: say, a destruction of chattels, bodily injury, or death.

In sum, substantive due process jurisprudence will be well served by categorizing cases as claims against the legislature, claims against government officials, or claims against judicial action. Doing so will provide lower courts with a ready-made framework for tackling tough cases. It will make easy cases easy. And it will naturally lead the Court to greater precision about which rights are fundamental or not; it will then be a term of art and part of the applicable legal standard, rather than a hacky sack tossed around at a casual balancing party.

In short, this framework fits onto past caselaw relatively well, and consistently applying it will foster clarity that will make judges' jobs far easier.

### B. *Clearly Established Unenumerated Rights*

Whatever one thinks of the Court's abstract interpretation of the Due Process Clause, it seems unenumerated rights are here to stay. The question is—how are courts supposed to recognize fundamental but unenumerated rights? As we have explained, the Court has based rights' canonizations on moral intuition, inferences from enumerated rights, and from history. It is this quandary to which we now turn.

The first difficulty is that cataloguing unenumerated rights appears impractical at best and impossible at worst. Federalists and Antifederalists wrestled with this very problem during the debates over the Bill of Rights. James Wilson observed that in none of the legal or political treatises, “nor in the aggregate of them all, can you find a complete enumeration of rights appertaining to the people as men and as citizens.”<sup>230</sup> James Iredell went further: “Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it.”<sup>231</sup> Some critics of enumerated rights argued that if the Constitution was to enumerate every individual right, it would go on “declar[ing] that a man should have a right to wear his hat if he pleased; that he might get up when he pleased, and go to bed when he thought proper” and so on.<sup>232</sup> These innumerable natural rights were “retained by the people,”<sup>233</sup> but which of them are so fundamental to our system of ordered liberty as to implicate the due process of law?

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230 The Debates in the Convention of the State of Pennsylvania on the Adoption of the Federal Constitution (Dec. 4, 1787), in 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 415, 454 (Jonathan Elliot ed., 2d ed. 1996) [hereinafter DEBATES] (remarks of James Wilson).

231 The Debates in the Convention of the State of North Carolina on the Adoption of the Federal Constitution (July 29, 1788), in 4 DEBATES, *supra* note 230, at 1, 167 (remarks of James Iredell).

232 1 ANNALS OF CONG. 759–60 (Joseph Gales ed., 1834) (statement of Rep. Theodore Sedgwick).

233 U.S. CONST. amend. IX.

The second difficulty stems from the first and pertains to the relative institutional competence for enforcing unenumerated rights. Grappling with an analogous problem in the Ninth Amendment context, Justice Scalia argued that acknowledging the existence of unenumerated rights protected by the Constitution “is far removed from affirming any one of them, and even further removed from authorizing judges to identify what they might be.”<sup>234</sup> In his view, the excavation of unenumerated rights—whether from the Due Process Clause or some other provision—lends itself to judicial counterfeiting. Nothing prevents the Court from smuggling its policy preferences into the law, and then claiming to have found them in the mire of morals, inferences, and tradition. For that reason, Justice Scalia preferred to have legislatures define the scope of unenumerated rights rather than courts.

*Glucksberg* offered a partial policing mechanism: making history determinative. History is, of course, somewhat malleable—at least when it comes to writing opinions. And history is at least equally malleable when used to interpret enumerated rights. *Glucksberg*'s approach promised some measure of guidance that would make rights excavation look more like law than armchair philosophizing. It is certainly better than nothing.

But *Glucksberg*'s approach has a more difficult problem. *Glucksberg* tells us to define the right “carefully,” and not too abstractly. Yet it does not—and cannot—tell us the proper level of generality. A recent case in the Tenth Circuit provides a good example.<sup>235</sup> Police arrested and jailed Jerome Dawson for violating a restraining order. Dawson met all the requirements a judge had set for him to be released on bail. To release him, the jail had only one thing left to do: fit him with an ankle bracelet, per the judge's orders. As it happened, though, Dawson paid bail on Friday afternoon. Because fitting people with ankle bracelets involved numerous administrative steps, including the participation of an outside vendor, the County had a policy that any person who met bail on Friday afternoon would have to wait until Monday to get his or her bracelet. Dawson thus stayed in jail for the weekend and then sued the County for violating due process.

The question came down to properly defining the scope of the right. Dawson said the County policy violated his fundamental right to be free from bodily restraint.<sup>236</sup> He argued the jail was in control of the last step necessary to release him and delayed that step for an entire weekend. So long as Dawson's definition of the right was correct, he had a strong argument. The Supreme Court had suggested many times that freedom from “bodily restraint” was a fundamental right.<sup>237</sup> And that makes intuitive sense, too. If “liberty” means anything, it means not being jailed.

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234 *Troxel v. Granville*, 530 U.S. 57, 91 (2000) (Scalia, J., dissenting).

235 *See Dawson v. Bd. of Cty. Comm'rs*, 732 F. App'x 624, 625–31 (10th Cir. 2018).

236 *Id.* at 636–37 (Tymkovich, C.J., concurring).

237 *See, e.g., Zadvydas v. Davis*, 533 U.S. 678, 689–90 (2001) (statute allowed continued detention past an immigration detainee's removal period and the Court held there was an implicit statutory “reasonable time” limitation) (“Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the

Yet could that be the correct level of generality? If it was, federal courts would review bail regulations under strict scrutiny. That would mean that for every single county practice that delayed release of someone on bail, the county would have to show the regulation was narrowly tailored to serve a compelling governmental interest. That result would be surprising, to say the least. Not only that, but it might invalidate a whole host of existing bail regulation. For example, many small towns across the country likely do not accept bail payments on weekends, or even after 5:00 p.m. on weekdays. How could they justify this practice?

So it seemed Dawson's definition couldn't be right. But how specifically should the right be defined? Was Dawson claiming a right to be fitted with an ankle bracelet on the weekend? That definition of the right would seem too specific. A concurrence (authored by Chief Judge Tymkovich, one of the authors of this Article) found Dawson was claiming a right to speedy release once the jail was in control of the last step needed to comply with a judge's order allowing for release on bail.<sup>238</sup>

A similar problem of specificity arose in another pretrial detention case, *Colbruno v. Kessler*.<sup>239</sup> There, Christopher Colbruno sued police officers under § 1983, alleging that during a medical emergency they had unnecessarily walked him nude through public areas of a hospital to his examination room. The officers invoked qualified immunity and argued that brief public exposure was unavoidable because Colbruno had swallowed metal components of the emergency call box in his cell and had irretrievably soiled the smock he was wearing while en route to the hospital.<sup>240</sup>

The panel majority struggled with the problem of abstraction when defining Colbruno's constitutional right. It ultimately settled on a right to be free from "a restriction or condition . . . not reasonably related to a legitimate goal."<sup>241</sup> Although sympathetic to Colbruno's privacy interests, the dissent

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liberty that Clause protects."); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (Louisiana statute allowing continued confinement of insanity acquittee on basis of his antisocial personality violated substantive due process) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause . . ."); *United States v. Salerno*, 481 U.S. 739, 755 (1987) (Bail Reform Act's provision allowing detention of dangerous defendants so long as certain procedural requirements were met was constitutional under substantive due process) ("In our society liberty is the norm, and detention prior to trial or without trial is a carefully limited exception.").

The Supreme Court has "always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty." *Foucha*, 504 U.S. at 80 (quoting *Salerno*, 481 U.S. at 750). The Court has further "said that government detention violates that Clause unless the detention is ordered in a *criminal* proceeding with adequate procedural protections, or, in certain special and 'narrow' nonpunitive 'circumstances.'" *Zadvydas*, 533 U.S. at 690 (quoting *Salerno*, 481 U.S. at 746)); see also *Reno v. Flores*, 507 U.S. 292, 316 (1993) (O'Connor, J., concurring) ("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny.").

238 *Dawson*, 732 F. App'x at 637 (Tymkovich, C.J., concurring).

239 928 F.3d 1155 (10th Cir. 2019).

240 *Id.* at 1159–60.

241 *Id.* at 1165 (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)).

(again authored by Chief Judge Tymkovich) would have applied the shocks-the-conscience test.<sup>242</sup> And the facts alleged did not shock the conscience because there was no allegation of intentional and abusive conduct or punitive intent.<sup>243</sup> In addition, the majority had defined the right with far too much generality. Absent malicious intent, no clearly established law existed that could have alerted the officers to Colbruno's substantive due process right to privacy in that situation.<sup>244</sup>

*Dawson* and *Colbruno* illustrate the trouble with *Glucksberg*—it is helpful, but vague in application. Could we refine a more helpful test, one that does not depend so much on judicial discretion? We think this is possible by approaching the question from a different angle.

The jurisprudence suggests two things. First, rather than try to define abstract rights and then balance them against governmental interests, we should look to whether the law departs from a settled tradition or norm. This test does more easily in one step what the *Glucksberg* tries to do in three. *Glucksberg* tries to sever the question into three steps: carefully define the right, next look at history to see if the right is fundamental, and finally determine whether the law inappropriately burdens the right. We propose obviating the need to define an abstract right or to balance that right against the government's interests. Rather than engaging in those abstract inquiries, we should ask whether the law clearly departs from a settled tradition or norm (words that we here use interchangeably).

Shifting the focus from defining rights to identifying relevant traditions or norms makes sense. As already discussed, in early America, due process meant the law of the land—the traditions of the people. It is easier to look for what our practice has been in specific contexts, than to try to define unenumerated rights. And in any event, it seems likely that a settled tradition or norm often will be based on some perceived right.

Second, to avoid overly general definitions of norms and traditions, we think it is sensible to borrow the “clearly established” concept from qualified-immunity law, which deals with conduct of state officials. For decades now, courts apply a simple test before finding state officials liable for constitutional violations: the right violated must be clearly established by prior court decisions, and the official's action must have clearly violated that right. We can apply a similar test in the realm of unenumerated fundamental rights. Naturally, when a litigant claims an as-yet unrecognized fundamental right, there will be no prior court decisions establishing the right. But we can ask whether the law clearly violates a settled tradition or norm evident from past practice and history. This strict standard is more consistent with the respect for states that the ratifiers of the Fourteenth Amendment by and large wanted to keep. And it is far easier for courts to administer because it would help courts stay away from overly abstract definitions of norms and traditions

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242 *Id.* at 1166–67 (Tymkovich, C.J., dissenting).

243 *Id.* at 1167–68.

244 *Id.* at 1169–70.



that could be applied differently based on a judge's prior preconceived notions.

One question, of course, would be the requirements for a tradition to be "settled." Here we might profitably borrow some guidelines from Professor William Baude's treatment of liquidation.<sup>245</sup> Professor Baude argues past practice settles the meaning of ambiguous constitutional text when there has been a course of deliberate practice and when the question is settled, such that whatever voices dissented have now acquiesced. We might apply a similar concept here: a settled tradition or norm is one that is longstanding, deliberately chosen or deliberately kept, and widely acknowledged by relevant actors such as founding figures, legislatures, or influential commentators. And it must be one that even dissenters have by and large acquiesced in.

What would this "clear violation of a settled tradition or norm" test look like in practice? We think it would look somewhat like the Court's approach when it compares state criminal laws to past practice and current practice among the several states, and (to a lesser extent) like the Court's approach when it decides whether a right in the Bill of Rights has been incorporated.<sup>246</sup> In those cases, the Court has not required all states to do as others do, but has looked for departures from deeply rooted tradition. Courts would look for historical examples of legislation like the one at issue. If there are lots of examples, we would say the plaintiff has failed to show that the challenged legislation clearly violated an unenumerated norm. If the legislation at issue has few historical analogues, the question becomes whether the law is inconsistent with widespread practice based on settled traditions or norms. If so, then we can say that the plaintiff has shown that the challenged law violates "the law of the land." But the plaintiff should not prevail merely by showing that many people condemn similar governmental conduct. If there is disagreement, then the plaintiff surely has not shown that the law violates substantive due process. We must be looking for a tradition or norm that is so widespread and longstanding that it can be called the settled "law of the land." If the challenged legislation is not clearly inconsistent with such a tradition or norm, then respect for states and local governments weighs against finding any violation of substantive due process.

We think this inquiry would better accomplish the precision that *Gluck-sberg* aimed for with its instruction to "carefully" define the right. True, the proposed inquiry looks somewhat like defining the alleged right as specifi-

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245 See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 4 (2019).

246 See, e.g., *Kahler v. Kansas*, No. 18-6135 (U.S. Mar. 23, 2020) (analyzing historical state practices in deciding that Kansas's variation of the insanity defense to murder did not violate due process); *Schad v. Arizona*, 501 U.S. 624 (1991) (comparing various states' definitions of murder throughout history); *id.* at 650 (Scalia, J., concurring in part and concurring in the judgment) (stating that under the procedural and substantive prongs of the Due Process Clause, "[i]t is precisely the historical practices that *define* what is 'due'"); see also *Timbs v. Louisiana*, 139 S. Ct. 682 (2019) (applying incorporation doctrine to the Eighth Amendment's Excessive Fines Clause).

cally as possible. But whereas looking for too specific a right can be silly (for example, asking if there is a fundamental right to obtain an ankle bracelet over the weekend), it is not silly to ask whether a settled norm applies to that specific context. This inquiry is also better in that we skip the step of defining a right in the abstract at all, and also forego balancing. So in Dawson's case, for example, we would simply ask: Does the County's rule clearly violate a settled tradition or norm about bail procedures? The answer would depend on whether similar laws exist, and on the relevant practices of jails across the country and throughout history. It would further depend on the extent to which relevant actors have identified a tradition or norm about how quickly those who post bail should be released.

One could raise several objections to this approach. One is that it runs into a level-of-generality problem similar to *Glucksberg's* because one still needs to figure out how abstractly to define a tradition or norm. But we think the focus on past practice and the requirement that a law must "clearly violate" a settled tradition should minimize that problem. Those guardrails are absent in the *Glucksberg* test.

Another objection is that most of the Supreme Court's decisions vindicating rights involve balancing some identified right against state interests. In contrast, the method we propose would not so much balance rights and interests as look for historical practice that relevant actors have recognized as a tradition or norm. One answer to this objection is that settled traditions are a good proxy for unenumerated rights, as traditions will presumably be based on a balancing of the rights at stake. But aside from that point, we submit balancing rights and interests is a test better suited for cases that involve enumerated rights. In those cases, courts are given a named right, and then they ask how far the right extends and how much the government may interfere with the right. Balancing is thus one means the Supreme Court has used to define the contours of a right in particular circumstances. That endeavor is unnecessary when we are no longer defining the reach of an abstract right. Additionally, when the rights at issue are unenumerated, the subjectivity of the balancing approach is especially unwelcome. For in those cases, courts have discretion to name the right too. We think the approach suggested here involves less subjectivity than first defining a right writ large, and then balancing the right.

Some might also counter that few of the substantive due process rights now existing would pass muster under this test. That might well be true, but that does not mean the test is not the best one for lower courts (and state courts) going forward. Most courts do not have a high-caliber "Supreme Court bar" to fill them in on all the ramifications of discovering a particular "fundamental" right. What courts can do, however, is place the burden on the plaintiff to show that the challenged legislation clearly violates a longstanding and settled tradition or norm.

As an example, consider the patriots during the American Revolution. They thought the British Parliament had violated the "law of the land" because Parliament's "Intolerable Acts" had broken a longstanding, tradi-

tional norm—trial by a jury of one’s peers—the deviation from which British citizens had universally condemned.<sup>247</sup> That is the sort of substantive due process inquiry courts can best undertake when evaluating legislative action, and the kind of inquiry that suffers the least temptation to judicial creativity.

#### CONCLUSION

In conclusion, we wish to indulge in a bit of hyperbole. After King Minos of Crete defeated the Athenians in battle (thus avenging his son), he imposed sadistic terms. Every seven years, he required the Athenians to sacrifice seven maidens and seven young men to the Minotaur. The Minotaur, besides being a formidable monster, lived in a labyrinth. No one who entered his lair could ever find his way out. Ariadne, Minos’s daughter, was keeper of the labyrinth. One day, Theseus, son of King Aegeus, volunteered to deliver the Athenians from the oppression they so long had borne. As happened so often in Greek myths, Ariadne instantly fell in love with the future hero. Slaying the Minotaur would, of course, be a worthy feat, but if Theseus could not find his way out of the labyrinth, he would die alongside the Minotaur. So Ariadne devised a plan; she gave Theseus a golden cord, which he was to lay down as he entered the labyrinth and follow back out. The cord saved Theseus’s life.

If we may be allowed an exaggerated metaphor, we suggest that the Supreme Court has acted much like a heedless, cordless Theseus. In case after case, the Court has stormed into the labyrinth to slay whatever state oppression it found intolerable. But unlike Theseus, the Court has not had to find its way out of the labyrinth. The Court has simply cleared its desk of all remnants of that case and moved on to the next Term. It is the lower courts that have been left without hope of escape. We must follow the Court to the place where it has slain the latest Minotaur, but we have no cord with which to retrace the Court’s steps.

In this Article, we have tried to lay down a cord. Reviewing the history of due process—from before the American Revolution to the twentieth century—reveals the many twists and turns the doctrine has taken. From that history, we have tried to map a way out of the labyrinth. Our approach here has not been revolutionary; we have not tried to knock down any of the labyrinth’s walls, nor have we tried to revive any dead monsters therein. Instead, we have categorized the Court’s cases in a way that we think makes sense and which can help courts with difficult cases going forward.

In sum, we propose the Court adopt a clear framework for addressing the vast universe of due process claims. Those claims may be divided into claims against the legislature, claims against executive officials, and claims against judicial action. Different standards do (or should) govern each of those categories. The legislative process does not constitute the “process that is due” when legislation has no rational basis at all, when it is too vague to be reasonable, when it infringes a fundamental right without a compelling rea-

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247 See Chapman & McConnell, *supra* note 9, at 1700–01.

son and narrowly tailored means, or when it enacts unfair procedures (either in the civil or criminal realm). Executive officials fail to provide the “process that is due” when they deprive persons of life, liberty, or property in conscience-shocking ways. And state courts fail to provide the “process that is due” when they provide unfair procedures or when they render arbitrary decisions affecting the life, liberty, or property of the parties before them.

We have also proposed a few things within the legislative and executive parts of that framework. Within the shocks-the-conscience framework, courts should develop more specific tests that outline what kind of conduct shocks the conscience in particular contexts (for example, what factors combine to shock the conscience when a state official uses his authority to wrongfully remove someone’s child), and courts should also clarify that existing stand-alone tests are mere iterations of the shocks-the-conscience approach. Within the framework for claims against the legislature, we have argued that the standard for identifying “fundamental rights” should be wholly revamped. We should stop struggling with the near-impossible task of identifying a right that bears the Goldilocks-level of specificity. Instead, we should require plaintiffs to show that legislation has clearly violated a longstanding, settled norm. The above framework, we think, would reduce the reign of confusion that has long ruled substantive due process, and due process in general.

We also hope the reader sees something more. These cases have become political battles, ones that destroy boundaries and fence posts that would otherwise guide courts. Above, we have described numerous examples of this phenomenon. Our hope is that the reader sees how poorly politics looks in the judicial sphere and how perniciously it affects courts’ consistency. This Article is a call not so much for theorizing as for problem solving. Our hope is to spawn further brainstorming as to common-sense, easier-to-apply approaches to the Due Process Clause. Perhaps in that way we might restore the clarity and consistency necessary to principled adjudication, without which there can be no justice.

