Florida Law Review

Volume 60 | Issue 3 Article 1

11-18-2012

Reining in Abuses of Executive Power through Substantive Due Process

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Florida Law Review
Founded 1948

Formerly
University of Florida Law Review

VOLUME 60 JULY 2008 NUMBER 3

REINING IN ABUSES OF EXECUTIVE POWER THROUGH SUBSTANTIVE DUE PROCESS

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"'*The touchstone of due process is protection of the individual against arbitrary action of government*.'"[1]

Abstract

Although substantive due process is one of the most confusing and controversial areas of constitutional law, it is well established that the Due Process Clause includes a substantive component that "bars certain arbitrary wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" The Court has recognized substantive due process limitations on law-enforcement personnel, public-school officials, government employers, and those who render decisions that affect our property rights. Government officials who act with intent to harm or with deliberate indifference to our rights have been found to engage in conduct that "shocks the judicial conscience" contrary to the guarantee of substantive due process.

A burgeoning body of case law, however, has limited substantive due process as a viable restraint on the conduct of officials in the executive branch of government. Some appellate courts have restricted substantive due process to claims involving deprivation of a fundamental right. Others have rejected all claims where only deprivation of property is at stake, or they have dismissed such claims where state law provides a remedy, thus confounding the treatment of procedural and substantive due process

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1. County of Sacramento v. Lewis, 523 U.S. 833, 845 (1998) (quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974)).

claims. Further, the courts have narrowly defined the concept of a duty of care to immunize raw abuses of executive power.

This Article asserts that substantive due process should be recognized as a meaningful limitation on arbitrary abuses of executive power and that victims of such abuse should not be relegated to the vagaries and increasing hurdles imposed by state tort law. The Article summarizes the origins and development of substantive due process in the Supreme Court as a limitation on legislative, judicial, and executive power. It then critiques the positions adopted by federal appellate courts regarding substantive due process as a limitation on executive power. It addresses separation of powers and federalism concerns that have been used to justify a crabbed interpretation of substantive due process. Finally, the Article suggests ways for attorneys litigating on behalf of government employees, arrestees and detainees, students, and landowners to invoke substantive due process as a meaningful restraint against misuse of executive power.

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I. INTRODUCTION

Substantive due process is one of the most confusing and most controversial areas of constitutional law.[2] In part, this controversy is due to the Supreme Court's "false start" in using substantive due process to invalidate arguably legitimate economic legislation during the *Lochner* era.[3] In part, it is due to the Court's use of substantive due process to provide extraordinary protection to certain contentious non-textual rights, such as the right to terminate a pregnancy.[4] Substantive due process raises core questions regarding the proper role of the judiciary in reviewing the actions of the other branches of government, both horizontally (legislative and executive) and vertically (state and local government). Yet despite all the controversy, one principle is well established: The Due Process Clause includes a substantive component that "bar[s] certain [arbitrary wrongful] government actions regardless of the fairness of the procedures used to implement them."[5] The late Chief Justice Rehnquist acknowledged

2. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) ("'[S]ubstantive due process' is a contradiction in terms."); Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 63–65 (2006) ("Substantive due process is in serious disarray, with the Supreme Court simultaneously embracing two, and perhaps three, competing and inconsistent theories of decisionmaking."); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 494 (1997) ("[S]ubstantive due process is not just an error but a contradiction in terms."); Nelson Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1557 (2004) (calling substantive due process "the most anticonstitutional branch of constitutional law"); *see also* Mark Tushnet, *Can You Watch Unenumerated Rights Drift?*, 9 U. PA. J. CONST. L. 209 (2006) (discussing the challenges of identifying and enforcing unenumerated rights); Frank I. Michelman, *Unenumerated Rights Under Popular Constitutionalism*, 9 U. PA. J. CONST. L. 121 (2006) (examining the distinction between numerated and unenumerated rights in a vacuum of judicial review); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309 (1993) (using *Parratt v. Taylor*, 451 U.S. 527 (1981), to examine the doctrinal confusion in Supreme Court due process cases).

3. *See infra* notes 20–24 and accompanying text.

4. *See infra* notes 34–45 and accompanying text.

5. Daniels v. Williams, 474 U.S. 327, 331 (1986); *see also* Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 281–82 (2005) ("Although substantive due process doctrine lacks a

> the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, was "intended to secure the individual from the arbitrary exercise of the powers of government[.]" . . . [B]y barring certain government actions regardless of the fairness of the procedures used to implement them, it serves to prevent governmental power from being "used for purposes of oppression."[6]

Determining what is an arbitrary exercise of power that violates substantive due process has never been an easy task. It is, for example, through the Due Process Clause of the Fourteenth Amendment that most of the Bill of Rights were incorporated and applied to the states,[7] but only after years of debate.[8] Eventually, the Court determined that most of the safeguards in the Bill of Rights are substantive values included in the term "liberty," and, therefore, these values are protected from arbitrary state interference.[9] The Court has also used substantive due process to designate non-explicit or non-textual rights as "fundamental" or "core liberty interests," which have been afforded extraordinary

straightforward foundation in the constitutional text, its resilience over time testifies to our legal system's deeply rooted insight that a constitutional culture of individual rights must accommodate substantive protections of essential human activities."); Newell v. Brown, 981 F.2d 880, 885 (6th Cir. 1992) ("Virtually every member of the Court has acknowledged that the Due Process Clause does have a substantive component, however difficult it may be to discern its contours.").

6. *Daniels*, 474 U.S. at 331 (citations omitted) (quoting Hurtado v. California, 110 U.S. 516, 527 (1884) and Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1856)). In *Daniels*, Justice Rehnquist rejected the claim brought by an inmate against a correctional deputy who negligently left a pillow on the stairs causing the inmate injury, reasoning that the Due Process Clause does not "supplant traditional tort law," but Rehnquist did not question the appropriateness of applying due process to "*deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Id.* at 332, 331. Even Justice Scalia, one of the most outspoken opponents of substantive due process, acknowledged in *Michael H. v. Gerald D.*, 491 U.S. 110, 121 (1989), that substantive due process was available to protect rights. Scalia contended that the doctrine should protect only the historic practices of our society and that the liberty interest must be narrowly defined to encompass only rights traditionally protected at common law. *Id.* at 124–27. Under his approach, laws that do not implicate fundamental rights would be subject only to "the ordinary 'rational relationship' test." *Id.* at 131; *see also* Philip Morris USA v. Williams, 127 S. Ct. 1057, 1067 (2007) (Stevens, J., dissenting) ("It is far too late in the day to argue that the Due Process Clause merely guarantees fair procedure and imposes no substantive limits on a State's lawmaking power."); Albright v. Oliver, 510 U.S. 266, 275–76 (1994) (Scalia, J., concurring) (rejecting "the proposition that the Due Process Clause guarantees certain [unspecified] liberties" but conceding that "this Court's current jurisprudence is otherwise").

7. Zinermon v. Burch, 494 U.S. 113, 125 (1990).

8. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW § 6.3.3, at 500–03 (3d ed. 2006) (describing the debate among Justices and commentators over which liberties to include).

9. *Id.* § 6.3.3, at 499–507.

protection.[10] Thus, laws that interfere with marital, procreative, or familial privacy have been subjected to more rigorous scrutiny,[11] but significant disagreement exists about which rights, if any, merit this greater protection. Further, in recent years the Court, in severely splintered opinions, has invoked substantive due process to overturn "grossly excessive" punitive damage awards.[12]

While many commentators have criticized the Court for its substantive due process decisions invalidating legislative enactments and punitive damage awards,[13] commentators have paid less attention to the burgeoning body of case law in the appellate courts addressing the use of substantive due process to limit the conduct of officials in the executive branch. Arguably, their conduct, no less than that of officials in the legislative and judicial branches, must conform to the basic due process standard of reasonableness. The circuits strongly disagree, however, about when substantive due process may be used to challenge arbitrary deprivations of life, liberty, and property by executive officials, such as police officers, prison wardens, public-school educators, public employers, and administrative agencies. Some lower courts have restricted substantive due process to claims involving deprivation of a "fundamental right."[14] Others have rejected all claims involving only deprivation of property[15] or have dismissed such claims where state law provides a remedy, thus confounding the treatment of procedural and substantive due process claims.[16] Further, many appellate courts have narrowly defined the concept of a duty of care to immunize official misconduct.[17]

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10. In *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the Court reaffirmed that it has never accepted the view that the Fourteenth Amendment protects only liberties recognized in the Bill of Rights because that document does not mark "the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects." *Id*. at 847–48. Thus, the Due Process Clause has been used to invalidate arbitrary state laws that violate substantive, fundamental rights even if such rights do not derive from the text of the Constitution. *Id*.

11. CHEMERINSKY, *supra* note 8, §§ 10.2–.3, at 798–844.

12. *See infra* Part II.B. For a recent criticism of these splintered opinions, see F. Patrick Hubbard, *Substantive Due Process Limits on Punitive Damages Awards: "Morals Without Technique"?*, 60 FLA. L. REV. 349 (2008).

13. John F. Basiak, Jr., *The Roberts Court and the Future of Substantive Due Process: The Demise of "Split-the-Difference" Jurisprudence?*, 28 WHITTIER L. REV. 861 (2007) (challenging the development of substantive due process as lacking historical foundation and as an impermissible aggrandizement of judicial power); Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 121 (2005) (arguing that the Court's use of substantive due process to challenge punitive damage awards "appears to be textually untethered"); *see also* commentators cited *supra* note 2.

14. *See infra* Part III.B.

15. *See infra* Part III.C.

16. *See infra* Part III.C.

17. *See infra* Part III.A.

Arguably, it is particularly critical that courts recognize substantive due process violations by executive branch officials to deter and punish abuses of power. Arbitrary deprivations of liberty and property are less likely to occur when a legislative body reaches a deliberate decision or a judge upholds a jury's award of punitive damages. Yet courts have been reluctant to recognize substantive due process claims brought by pretrial detainees, public employees and licensees, public-school students, and landowners, who allege that they have been arbitrarily deprived of their liberty or property by guards, government employers, teachers, or members of administrative agencies. As with all challenges to substantive due process, the defendants raise separation of powers and federalism concerns.

This Article asserts that courts should recognize substantive due process as a meaningful limitation on arbitrary abuses of executive power and that victims of such abuse should not be relegated to the vagaries and increasing hurdles of state tort law. Part II of this Article briefly summarizes the origins and development of substantive due process as a limitation on legislative, judicial, and executive power. Part III critiques the positions adopted by federal appellate courts regarding substantive due process as a limitation on executive power. Finally, Part IV addresses separation of powers and federalism concerns, and suggests ways for government employees, arrestees and detainees, students, and landowners to use substantive due process as a meaningful restraint against misuse of executive power.

II. ORIGINS AND DEVELOPMENT OF SUBSTANTIVE DUE PROCESS IN THE SUPREME COURT

To understand and critique the restricted approach to substantive due process that many lower courts have adopted, it is necessary to first understand how the Supreme Court has interpreted this doctrine. The first two sections briefly explicate the use of substantive due process to limit legislative enactments and punitive damages. These sections provide the backdrop for exploring the Supreme Court's development of substantive due process as a limitation on executive action.

A. *The Use of Substantive Due Process to Limit Legislative Enactments*

The concept of substantive due process has strong historical roots dating back to the Magna Carta and Lockean tradition.[18] History confirms

18. *See supra* note 6 and accompanying text; *see also* Planned Parenthood v. Casey, 505 U.S. 833, 847 (1992) (acknowledging that due process has its roots in the Magna Carta); *In re* Winship, 397 U.S. 358, 379 (1970) (Black, J., dissenting) ("'[T]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in *Magna Charta*.'" (quoting Murray's Lessee v. Hoboken Land & Improvment Co., 59 U.S. (18 How.) 272,

that the Framers intended that natural rights retained by the people be protected and that government be allowed to legislate only for the good of society.[19] The Supreme Court first used substantive due process to invalidate economic legislation that the Court considered unduly restrictive of liberty. In *Allgeyer v. Louisiana*,[20] the Court invalidated a state statute that prohibited obtaining insurance on Louisiana property from any company that failed to comply with state law. The Court reasoned that the law interfered with the liberty of the individual "to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation."[21] *Allgeyer* was the forerunner of the well-known *Lochner v. New York*[22] decision, which invalidated on substantive due process grounds a New York law prohibiting the employment of bakers for more than ten hours per day or sixty hours per week.[23] The *Lochner* Court closely scrutinized the statute and determined that the state lacked any rational justification for the law, which interfered with the right to make a contract.[24]

Although the Supreme Court subsequently repudiated the close scrutiny that it applied to the New York statute in *Lochner*,[25] the concept that substantive due process protects against arbitrary legislation remains intact.[26] As to economic substantive due process, however, the Court today

276 (1856)). In addition, the Magna Carta's influence on the development of constitutional due process rights is described in JOHN V. ORTH, DUE PROCESS OF LAW: A BRIEF HISTORY 7 (2003).

19. *See* Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366 (1911) (discussing the impact of pre-Civil War constitutional law on the Due Process Clause of the Fourteenth Amendment); Henry Paul Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405, 411–14 (1977); Jeffrey S. Koehlinger, Note, *Substantive Due Process Analysis and the Lockean Liberal Tradition: Rethinking the Modern Privacy Cases*, 65 IND. L.J. 723, 734–36 (1990).

20. 165 U.S. 578 (1897).

21. *Id*. at 589.

22. 198 U.S. 45 (1905).

23. *Id*. at 52.

24. *Id*. at 56.

25. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937), signaled the demise of *Lochner*'s economic substantive due process. *See also* Ferguson v. Skrupa, 372 U.S. 726, 729–30 (1963) ("There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. . . . [This] doctrine . . . has long since been discarded.").

26. In his *Lochner* dissent, Justice Oliver Wendell Holmes, Jr., contended that it would pervert the concept of liberty to invalidate democratically adopted statutes "unless it can be said that . . . the statute . . . would infringe [on] fundamental principles as they have been understood by the traditions of our people and our law." *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting). Thus, even the dissenters acknowledged substantive due process but would simply not have invoked it with regard to this type of statute. *See* Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 988 (1979) (noting that during the *Lochner* era the Court "infused that clause with a noneconomic substantive content that has survived subsequent pruning"); Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 877 (1987) (describing the continuing impact that *Lochner* has had on the development of substantive due process).

asks only whether a law "is rationally related to a legitimate state interest."[27] The challenger has the burden to prove that the legislature "acted in an arbitrary and irrational way."[28] Despite stressing the need to apply a highly deferential approach to social or economic legislation, the Court continues to recognize that substantive due process limits the legislative branch of government by prohibiting arbitrary and capricious laws that unduly interfere with life, liberty, or property.[29] Because legislative enactments, at least at the state or federal level, result from lengthy debate, most enactments cannot be successfully attacked as totally arbitrary and capricious. In addition, to avoid the pejorative label of "Lochnerizing," the Court has been extremely deferential to legislative decisions, requiring that the challenger negate every conceivable valid justification for an enactment.[30] Not surprisingly, since the *Lochner* period the Court has not invalidated on substantive due process grounds a statute that implicated only economic rights.[31]

In sharp contrast, where a statute interfered with personal as opposed to economic rights, the Court has rejected this deferential approach.[32] In *Griswold v. Connecticut*,[33] the Court invalidated a state law that banned the use of contraceptives, finding that the statute impermissibly violated marital privacy. In *Eisenstadt v. Baird*,[34] it upheld the right to use contraceptives even outside the confines of marriage, and in *Roe v. Wade*,[35] it held that this privacy right included a woman's decision whether to terminate her pregnancy. In these cases, the Court recognized a fundamental right, even though the right did not exist in the Constitution's text, and the Court subjected all government regulation of the right to strict scrutiny.

In recent years, this fundamental-rights/strict scrutiny analysis appears to have fallen into disfavor. In *Cruzan v. Director, Missouri Department*

27. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (explaining the deferential standard that applies to economic legislation).

28. Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15 (1976).

29. Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 84, 86 (1978).

30. Williamson v. Lee Optical of Okla., 348 U.S. 483, 487–88 (1955).

31. CHEMERINSKY, *supra* note 8, § 8.2.3, at 625; *see also* GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 761 (5th ed. 2005).

32. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), Justice David Souter stated that Justice Harlan's dissent in *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), provided the basis for the modern doctrine of substantive due process and unenumerated rights. *Glucksberg*, 521 U.S. at 762 (Souter, J., concurring). Justice Harlan explained that even if the Magna Carta contemplated only procedural safeguards, the denial of substantive rights, despite the availability of significant procedural safeguards, would lead to the deprivation of life, liberty, or property. He advised that judges should balance competing interests in light of "the traditions from which [this country] developed as well as the traditions from which it broke." *Poe*, 367 U.S. at 542.

33. 381 U.S. 479, 485 (1965).

34. 405 U.S. 438, 443 (1972).

35. 410 U.S. 113, 164 (1973).

of Health,[36] the Court recognized a liberty interest in refusing unwanted medical treatment but did not denominate this interest as a fundamental right that necessarily triggered strict scrutiny.[37] The Court suggested that the liberty interest mandated serious judicial review, but instead of applying strict scrutiny, it balanced the competing interests, ultimately deciding that substantive due process did not prevent a state from insisting that a person's desire to terminate treatment be established by clear and convincing evidence.[38] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[39] the Court refused to overturn *Wade* but spoke instead of a liberty interest,[40] not a fundamental right. The Court abandoned strict scrutiny in favor of an "undue burden" test, which permits, prior to a fetus's viability, state regulation that does not unduly burden the abortion decision.[41] Similarly, in *Troxel v. Granville*,[42] the Court found that substantive due process protects parental rights, which must be accorded significant weight in deciding visitation matters. However, the majority did not use fundamental-rights or strict scrutiny language.[43] Finally, in *Lawrence v. Texas*,[44] the Court recognized a liberty interest in intimate homosexual relationships, but it did not assert fundamental-right status or the need to apply strict scrutiny. The *Lawrence* Court did, however, closely scrutinize the challenged sodomy prohibition, determining that the Texas law violated substantive due process because the statute criminalized "the most private human conduct, sexual

36. 497 U.S. 261 (1990).

37. *Id*. at 278–80 & n.7. In *Washington v. Harper*, 494 U.S. 210 (1990), the Supreme Court recognized a liberty interest in avoiding the unwanted administration of antipsychotic drugs but ruled that, in the prison context, the strict scrutiny standard was inappropriate. *Id.* at 211–13. Instead, the Court held that a decision to administer drugs only had to be reasonably related to legitimate penological interests. *Id*.

38. *Cruzan*, 497 U.S. at 279, 284.

39. 505 U.S. 833 (1992).

40. *Id*. at 846, 851–53; *see also* Reno v. Flores, 507 U.S. 292, 315–16 (1993) (O'Connor, J., concurring) (explaining that a state threatens a person's "core liberty interest" by restraining her freedom to act on her own behalf).

41. *Casey*, 505 U.S. at 874. Most recently, in *Gonzales v. Carhart*, 127 S. Ct. 1610, 1619 (2007), the Supreme Court upheld the federal Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531 (Supp. IV 2004), which prohibits "intact" dilation and evacuation procedures whereby the fetus is partially outside the womb before it is destroyed. The Court reasoned that neither the congressional purpose nor the effect of the Act was "to place a substantial obstacle in the path of a woman seeking an abortion," because the Act allowed a commonly used and generally accepted method of terminating a pregnancy and simply prohibited doctors from attempting to deliver the fetus to "an anatomical landmark." *Gonzales*, 127 S. Ct. at 1632.

42. 530 U.S. 57, 66–67 (2000).

43. Only Justice Thomas clearly stated that strict scrutiny was the appropriate standard for judging the validity of a law that interfered with the fundamental right of parents to guide the upbringing of their children. *Id*. at 80 (Thomas, J., concurring).

44. 539 U.S. 558, 578 (2003).

behavior," and thus deprived homosexuals of the liberty to choose their personal relationships.[45]

The Supreme Court's rejection in recent years of a rigid approach—which required challengers of legislative enactments to identify a fundamental right before government action would be subject to any meaningful review—should inform the discussion of substantive due process challenges to misconduct by members of the executive branch.[46] Contrary to the approach adopted by some appellate courts,[47] these cases demonstrate that substantive due process analysis does not necessarily hinge on recognition of a fundamental right. Instead, the Court appears willing to engage in a more nuanced balancing approach to determine whether government action should be struck as arbitrary and unreasonable, depending on the significance of the right at stake and the asserted justifications for the intrusion.[48]

B. *The Use of Substantive Due Process to Restrict Punitive Damage Awards*

Despite reluctance to protect purely economic rights from legislative intrusion under the rubric of substantive due process, the Court has actively intervened to stop at least some deprivations of property by the judiciary.[49] In 1996, in *BMW of North America, Inc. v. Gore*,[50] the Supreme Court held that a $2 million punitive damage award against BMW for repainting automobiles without disclosure to customers was "grossly excessive" and thus violated the corporation's substantive due process right not to be arbitrarily deprived of its property. This case marked the first time that the Supreme Court found substantive, and not just procedural, limitations on punitive damage awards.[51] Subsequently, in *State Farm Mutual Automobile Insurance Co. v. Campbell*,[52] the Court

45. *Id*. at 567.

46. *See infra* Part III; *see also* Conkle, *supra* note 2, at 76 (noting the Court's shift from strict scrutiny to a more open-ended balancing test).

47. *See infra* Part III.B.

48. The modern role played by substantive due process has been broadly described as a requirement that "government must treat individuals with some minimal level of concern and respect for their well-being." Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 230 (1984).

49. *See* Tushnet, *supra* note 2, at 210, 213 (asserting that the punitive damages cases provide the classic example of the contemporary conservative Justices' use of substantive due process to protect unenumerated rights).

50. 517 U.S. 559, 574–75 (1996).

51. *See* Hubbard, *supra* note 12, at 376; Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83, 86 (2007); A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. CAL. L. REV. 1085, 1088 (2006).

52. 538 U.S. 408, 412, 418 (2003).

ruled that a $145 million punitive damage award was grossly excessive in a case where the jury awarded only $1 million in compensatory damages.

Most recently, in *Philip Morris USA v. Williams*,[53] the Court ruled that due process prohibits imposing punitive damages upon a defendant for injuring persons not before the Court. Focusing primarily on procedural concerns, Justice Breyer reasoned that, where a defendant has no opportunity to defend against alleged injuries to non-parties, the risk of arbitrary, uncertain awards imposed without notice is magnified.[54] Although these decisions were all controversial five-to-four opinions, they demonstrate that substantive due process may be used to challenge arbitrary deprivations of property—not just liberty—establishing an important principle in reviewing executive branch misconduct.

C. *The Use of Substantive Due Process to Challenge Abuse of Power by the Executive Branch*

In 1952, the Supreme Court officially recognized that substantive due process protects against government official misconduct. In *Rochin v. California*,[55] the Court invoked substantive due process defensively in a criminal proceeding to exclude evidence that was obtained by pumping the defendant's stomach.[56] The Court stated that substantive due process is violated by state conduct that "shocks the conscience" or constitutes force that is "brutal" and "offend[s] even hardened sensibilities."[57] The "shocks the conscience" standard emerged as the test for determining whether misconduct by executive branch officials is so aggravated that it violates substantive due process.[58]

Rochin involved interference with liberty in its most pristine form—freedom from physical restraint, clearly a fundamental right. The Court decided *Rochin* before incorporating the Fourth Amendment, which prohibits states from conducting unreasonable searches and seizures, into the Fourteenth Amendment.[59] The Court has subsequently clarified that it will reject any substantive due process claim that falls under a more explicit constitutional guarantee, such as the Fourth or Eighth Amendment.[60] However, the Court has recognized that pretrial detainees,

53. 127 S. Ct. 1057, 1063 (2007).

54. *Id*. at 1064.

55. 342 U.S. 165 (1952).

56. *Id*. at 173.

57. *Id*. at 172–73.

58. United States v. Salerno, 481 U.S. 739, 746 (1987) ("'[S]ubstantive due process' prevents the government from engaging in conduct that 'shocks the conscience' . . . ." (quoting *Rochin*, 342 U.S. at 172)); Whitley v. Albers, 475 U.S. 312, 327 (1986) (quoting *Rochin* with approval).

59. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961) (overruling Wolf v. Colorado, 338 U.S. 25, 33 (1949)).

60. Graham v. Connor, 490 U.S. 386, 388 (1989) (holding that the standards of the Fourth

who are not protected under the Eighth Amendment, have a liberty interest in being free from arbitrary punishment and that substantive due process creates a duty to provide detainees with protection and needed medical care.[61]

In addition, the Court has recognized that those committed to state mental institutions have a "'historic liberty interest'" in personal security that is "protected substantively by the Due Process Clause."[62] Further, involuntarily committed patients "are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."[63] Although recognizing that the decisions of qualified professionals should be deemed presumptively valid, the Court nonetheless acknowledged that the liberty interest implicated required the state "to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint."[64] Balancing the competing concerns, the Court ruled that substantive due process is violated if professional decisions constitute "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[65]

In 1998, the Court, in *County of Sacramento v. Lewis*,[66] revisited the meaning of substantive due process as a limitation on executive power. At

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Amendment, rather than substantive due process, decide a claim of excessive force); *Whitley*, 475 U.S. at 326–27 (stating that the Eighth Amendment is "the primary source of substantive protection" for a prisoner shot in the leg during the quelling of a riot); *see also* Russo v. City of Bridgeport, 479 F.3d 196, 206–09 (2d Cir. 2007) (reasoning that although the Supreme Court in *Baker v. McCollan*, 443 U.S. 137, 145 (1979), suggested that a lengthy detention stemming directly from law enforcement officials' refusal to investigate exculpatory evidence was rooted in substantive due process, more recent Supreme Court cases require that the right be analyzed under the Fourth Amendment because physical detention following arraignment is a seizure and the Fourth Amendment provides an explicit textual source of constitutional protection); Pagan v. Calderon, 448 F.3d 16, 33–34 (1st Cir. 2006) (holding that the plaintiff could not proceed under substantive due process in challenging a government-operated bank's denial of a loan based on political affiliation—such a claim must be pursued under the First Amendment regardless of whether the complaining party would be successful under this more specific provision); Willis v. Town of Marshall, 426 F.3d 251, 266 (4th Cir. 2005) (holding that a recreational dancer's substantive due process claim that the town banned her from a town-sponsored musical concert allegedly due to complaints about her lewd dancing was not cognizable because the claim completely overlapped with her equal protection claim, and thus the specific amendment with its explicit textual source must control).

61. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983); Bell v. Wolfish, 441 U.S. 520, 535–36, 539 (1979).

62. Youngberg v. Romeo *ex rel.* Romeo, 457 U.S. 307, 315 (1982) (quoting Ingraham *ex rel.* Ingraham v. Wright, 430 U.S. 651, 673 (1977)).

63. *Id*. at 321–22.

64. *Id*. at 318–19.

65. *Id*. at 323.

66. 523 U.S. 833 (1998).

issue was the alleged reckless conduct of a deputy sheriff who conducted a deadly high-speed chase of two boys riding a motorcycle after they failed to obey an officer's command to stop.[67] Philip Lewis, the passenger, was struck and killed.[68] The Court confirmed that substantive due process could be used to challenge abuses of executive power: "Since the time of our early explanations of due process, we have understood the core of the concept to be protection against arbitrary action . . . ."[69] The majority cautioned, however, that the "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."[70] With regard to the latter, only "the most egregious official conduct can be said to be 'arbitrary in the constitutional sense.'"[71] Thus, invoking *Rochin*, the Court ruled that only an abuse of power that "shocks the conscience" will be actionable.[72]

In *Lewis*, the Court further refined the *Rochin* test. The *Lewis* Court reasoned that government officials who act with deliberate indifference to constitutional rights "shock[] the conscience"—for example, prison guards who are deliberately indifferent to the medical needs of pretrial detainees.[73] However, because deliberate indifference implies the opportunity for actual deliberation, the Court determined that the standard could not reasonably apply to police officers who face a situation calling for fast action. Thus, the Court held that injuries resulting from "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment."[74] Because the deceased's family members did not allege

67. *Id.* at 836–37.

68. *Id*. at 837.

69. *Id*. at 845–46. The Court rejected the argument that the plaintiffs' substantive due process claim should be analyzed as a Fourth Amendment seizure pursuant to *Graham v. Connor*, 490 U.S. 386, 395 (1989), because the defendant's conduct could not be considered a seizure of Lewis. *Lewis*, 523 U.S. at 842–44; *see also* Ciminillo v. Streicher, 434 F.3d 461, 465 (6th Cir. 2006) (citing Brower v. County of Inyo, 489 U.S. 593, 596–97 (1989)) (explaining that a Fourth Amendment seizure occurs only when government terminates freedom of movement through means intentionally applied; thus, where police simply tried to stop a suspect by flashing lights and continued pursuits, no seizure had occurred).

70. *Lewis*, 523 U.S. at 846.

71. *Id*. (quoting Collins v. City of Harker Heights, 503 U.S. 115, 129 (1992)).

72. *Id*.

73. *Id*. at 849–50. The Court also cited *Youngberg* as establishing a substantive due process violation where personnel at a state mental institution fail to provide minimally adequate training and habilitation to those who are involuntarily committed. *Id.* at 852 n.12 (citing Youngberg v. Romeo *ex rel.* Romeo, 457 U.S. 307, 319–25 (1982)).

74. *Id*. at 854. The Court adopted the same Eighth Amendment standard used to impose liability for harm caused in a riot case. *Id*.; *see also* Lombardi v. Whitman, 485 F.3d 73, 79–85 (2d Cir. 2007) (reasoning that EPA officials who allegedly made affirmative assurances to site workers engaged in search-and-rescue efforts after 9/11 that the air in Lower Manhattan was safe to breathe—thereby creating a false sense of security that induced the workers to forgo protective

that the deputy acted with "intent to harm," they failed to meet the shocks-the-conscience test.[75] Although reaffirming *Rochin*'s stringent shocks-the-conscience standard, this holding also clarified that a "deliberate indifference" test should govern claims alleging abuse of executive power in a non-emergency situation.[76]

Outside the law enforcement context, the Supreme Court has also recognized a limited right to bring substantive due process challenges to

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gear—did not violate substantive due process because the defendants were required to make decisions using rapidly changing information in a context in which there were competing obligations, and even if officials knew they were disclosing inaccurate information, their poor choice could not be considered conscience-shocking); Terrell v. Larson, 396 F.3d 975, 979 (8th Cir. 2005) (reasoning that because police officers responding to highly unpredictable domestic disturbances are precluded "'the luxury . . . of having time to make unhurried judgments,'" the intent-to-harm, rather than the deliberate-indifference, standard governs (alteration in original) (quoting *Lewis*, 523 U.S. at 853)).

75. *Lewis*, 523 U.S. at 855.

76. The lower courts have consistently applied a deliberate-indifference test in non-emergency situations. *See, e.g.*, Estate of Owensby v. City of Cincinnati, 414 F.3d 596, 602–03 (6th Cir. 2005) (applying the deliberate-indifference test to a pretrial detainee's claim that he was denied adequate medical care); Bradich v. City of Chicago, 413 F.3d 688, 690–92 (7th Cir. 2005) (denying defendants summary judgment regarding claims that members of jail staff acted with deliberate indifference in failing to seek outside assistance for ten minutes after finding an arrestee hanging in a jail cell); Hernandez *ex rel.* Hernandez v. Tex. Dep't of Protective & Regulatory Servs., 380 F.3d 872, 880–81 (5th Cir. 2004) (holding that although the deliberate-indifference standard requires that officials consciously disregard a known and excessive risk to a victim's health and safety, officials need not be warned of a specific danger provided they know of facts from which an inference can be drawn that substantial risk of harm exists); Davis v. Hall, 375 F.3d 703, 718–19 (8th Cir. 2004) (holding that the plaintiff's evidence might demonstrate that prison officials had actual knowledge that the plaintiff had completed his sentence and yet acted with deliberate indifference by ignoring or reprimanding him when he tried to bring his sentence order to their attention); A.M. *ex rel.* J.M.K. v. Luzerne County Juvenile Det. Ctr., 372 F.3d 572, 579–81 (3d Cir. 2004) (holding that the deliberate-indifference, rather than the malicious-and-sadistic, standard applies to a claim brought by a detainee at a county juvenile detention center, alleging that the center failed to prevent assaults by other residents during a five-week period); Nicini v. Morra, 212 F.3d 798, 810–11, 812 (3d Cir. 2000) (en banc) (recognizing that where a social worker has time to make unhurried judgments, decisions made with deliberate indifference to individual rights could shock the conscience but holding that the defendant's conduct did not rise to that level); Payne *ex rel.* Hicks v. Churchich, 161 F.3d 1030, 1040–42 (7th Cir. 1998) (noting that, although *Lewis* rejected negligence as a standard, deliberate indifference should be employed whenever actual deliberation is practical); *cf.* Shieber v. City of Phila., 320 F.3d 409, 419 (3d Cir. 2003) (reasoning that a higher culpability standard applies both when a state actor must act in haste and under pressure, and when the state actor must "judg[e] between competing, legitimate interests"); Cummings v. McIntire, 271 F.3d 341, 345–46 (1st Cir. 2001) (holding that a police officer's unprovoked and angry shove of a person who asked for directions while the officer was directing traffic, resulting in severe spinal injury, did not shock the conscience because, even if the officer unnecessarily used physical force, he did not do so maliciously and sadistically for the purpose of causing harm; finding that these facts fell within a middle ground "neither so tense and rapidly evolving as a high-speed police pursuit nor so unhurried and predictable as the ordinary custodial situation").

arbitrary employment and educational decisions. In *Harrah Independent School District v. Martin*,[77] the Court conceded that, unlike freedom of choice in areas of family, marriage, and procreation, employment is not a fundamental right.[78] Thus, rather than applying strict scrutiny, courts should analyze a school board's employment decisions under the traditional "arbitrary and capricious" standard.[79] In the area of education, the Court has ruled that corporal punishment or other disciplinary action may be so severe or so inspired by malice that the action violates substantive due process. Although the Court rejected the procedural due process claim brought in *Ingraham ex rel. Ingraham v. Wright*,[80] the Court nonetheless recognized that imposition of corporal punishment by a public school deprives the student of liberty.[81] Similarly, in *Board of Curators v. Horowitz*[82] and *Regents of the University of Michigan v. Ewing*,[83] the Court assumed, without deciding, that students have a constitutionally protected property interest in their continued enrollment in a university and that federal courts can review academic decisions under a substantive due process standard. Although the Court in both cases determined that the dismissals were not the product of arbitrary action[84] and cautioned courts to be especially wary in using substantive due process to invalidate academic decisions,[85] the Court nonetheless recognized that substantive due process protects against raw abuse of government power.[86]

The Supreme Court has also recognized that substantive due process protects property rights. More specifically, in 1926, in *Village of Euclid v.*

77. 440 U.S. 194 (1979).

78. *Id.* at 198–99.

79. *Id*. at 198. The Court reasoned that the employee could not show that there was "no rational connection between the [school board's] action and its conceded interest in providing its students with competent, well-trained teachers." *Id.* The Court has also recognized substantive due process as prohibiting arbitrary interference with a continuing employment relationship. *See, e.g.*, Fed. Deposit Ins. Corp. v. Mallen, 486 U.S. 230, 240 (1988) (finding that the FDIC's suspension of an indicted bank president did not arbitrarily interfere with an employment property right protected by the Fifth Amendment's Due Process Clause); Greene v. McElroy, 360 U.S. 474, 492, 508 (1959) (reversing the revocation of a government contractor's security clearance on grounds that neither the President nor Congress authorized deprivation of confrontation and cross-examination rights for appeal hearing).

80. 430 U.S. 651, 672 (1977).

81. *Id*.

82. 435 U.S. 78, 91–92 (1978).

83. 474 U.S. 214, 223 (1985).

84. *Horowitz*, 435 U.S. at 92; *Ewing*, 474 U.S. at 227–28.

85. *Horowitz*, 435 U.S. at 92; *Ewing*, 474 U.S. at 225.

86. Applying the analysis adopted in *Youngberg*, *see supra* note 65 and accompanying text, the Court in *Ewing* determined that the decision was not a "substantial departure from accepted academic norms [demonstrating] that the person or committee responsible did not actually exercise professional judgment." 474 U.S. at 225. The Court stated that so long as the dismissal was supported by a reason "not beyond the pale of reasoned academic decision-making," no substantive due process violation would be found. *Id*. at 227–28.

Ambler Realty Co.,[87] the Court held that government action affecting real property violates substantive due process if such action is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."[88] Subsequently, in *Nectow v. City of Cambridge*,[89] the Court invalidated a zoning ordinance that did not bear a substantial relation to public health, safety, and morals, thereby unjustifiably invading protected property rights.[90] This standard came to provide the governing principle regarding challenges to zoning and building permits.

In all these cases the Supreme Court recognized that substantive due process serves as a check on executive power, even though litigants must prove an egregious violation to succeed. Demanding that a defendant's conduct "shock the conscience" imposes a high threshold for parties who challenge misuse of government power. This high threshold, however, is not the only restraint that the Court has imposed on litigants who claim that government officials have arbitrarily deprived the litigants of their life, liberty, or property. The Court has also established that the Due Process Clause does not mandate any type of affirmative duty for the government to provide services or to protect citizens from the tortious acts of others.[91] Unless the government significantly limits the individual's freedom or impairs his or her ability to act, no constitutional requirement to care and protect will be found.[92]

DeShaney v. Winnebago County Department of Social Services[93] best illustrates the Supreme Court's refusal to hold government officials liable on a "failure to act" theory. The Court rejected a substantive due process claim brought against county welfare department employees for failing to intervene to protect a young child from the risk of abuse by his father.[94] Although the child's caseworkers knew that he had been hospitalized several times for injuries inflicted by a brutal father, the Court held that a

87. 272 U.S. 365 (1926).

88. *Id*. at 395.

89. 277 U.S. 183 (1928).

90. *Id*. at 188–89 (citing *Ambler Realty*, 272 U.S. at 395) ("[G]overnmental power to interfere by zoning regulations with the general rights of the land owner . . . is not unlimited . . . . [Where police power justification] is wanting, the action of the zoning authorities . . . cannot be sustained.").

91. *See* Martinez v. California, 444 U.S. 277, 285 (1980) (rejecting a due process claim brought by the estate of a fifteen-year-old girl who was tortured and murdered by a parolee five months after his release from prison).

92. Compare *Youngberg v. Romeo ex rel. Romeo*, 457 U.S. 307, 315 (1982), wherein the defendant state officials conceded that the state must provide adequate medical care to involuntarily committed state hospital patients. As stated in *Lewis*, "The combination of a patient's involuntary commitment and his total dependence on his custodians obliges the government to take thought and make reasonable provision for the patient's welfare." 523 U.S. 833, 852 n.12 (1998).

93. 489 U.S. 189 (1989).

94. *Id.* at 191.

state's "failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[95] The Court reasoned that unless government officials, by an affirmative exercise of power, restrain an individual's liberty, rendering him unable to protect himself, there is no cause of action under the Due Process Clause.[96] Even if the state knew the dangers faced by the child, the Court asserted that the state did not create the danger or render the child more vulnerable to any danger.[97] Thus, no matter how arbitrary or capricious the welfare department employees' omissions appeared, no federal guarantee was implicated. Although *DeShaney* severely restricts due process by protecting only those whom the state actually takes into custody or those whose situation has been rendered more dangerous by government intervention, *DeShaney* does not affect claims of harm that are more directly attributable to government misconduct.

In short, during the past few decades, the Supreme Court, while recognizing substantive due process as a limitation on executive power, has placed significant obstacles in the path of plaintiffs seeking to impose government liability for substantive due process violations. The Court's precedents indicate that substantive due process challenges to government misconduct will be rejected (1) where the action fails to meet the shocks-the-conscience standard, (2) where plaintiffs seek to hold the government liable for failing to protect against private violence in the absence of a special custodial relationship or a situation where government officials created or exacerbated the danger, or (3) where the claim falls under a more explicit constitutional guarantee, such as the Fourth or Eighth Amendment.[98]

95. *Id*. at 197.

96. *Id*. at 201.

97. *Id*. This narrow view of the Constitution has been challenged by many constitutional scholars. *See, e.g.*, Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2273 (1990) (arguing that when "conclusory incantation[s]"—such as "[g]overnment inaction is not actionable"—allow "so many harms to flourish unchecked by the Constitution," then "the language, and the concepts it describes, must be scrutinized with care"); Laura Oren, *Some Thoughts on the State-Created Danger Doctrine:* DeShaney *Is Still Wrong and* Castle Rock *Is More of the Same*, 16 TEMP. POL. & CIV. RTS. L. REV. 47 (2006) (discussing the distinction between passivity and action that underlies the state-created danger doctrine).

98. The third restriction may mean no remedy at all because, for example, the Eighth Amendment test for recovery is likely more stringent than that governing substantive due process. *See infra* Part IV.B (discussing rights of pretrial detainees). On the other hand, the reasonableness standard imposed by the Fourth Amendment might prove to be equally if not more protective. *See infra* Part IV.C (discussing rights of students).

III. SUBSTANTIVE DUE PROCESS CHALLENGES TO EXECUTIVE ACTION IN THE LOWER COURTS: FURTHER OBSTACLES AND CONFUSION

The federal appellate courts have been increasingly unreceptive to substantive due process challenges to executive misconduct. Some have extended the Supreme Court's *DeShaney* decision to deny relief in failure-to-act cases by narrowly construing the concept of a custodial relationship, or by rejecting or severely limiting the danger-creation theory.[99] In addition, many appellate courts have imposed their own impediments on plaintiffs seeking to bring substantive due process claims by extracting snippets from Supreme Court dicta or statements made in concurring opinions. For example, some circuits have misconstrued Supreme Court precedent as foreclosing substantive due process claims unless the claim identifies a fundamental right.[100] Other circuits have rejected claims involving only property, or they have inappropriately borrowed from procedural due process analysis to reject substantive due process claims where an "adequate state remedy" is available.[101] This Part discusses these approaches to substantive due process and explains why they are ill-founded.

A. *Expanding* DeShaney*'s Duty-of-Care Requirement to Insulate Official Misconduct*

As discussed in Part II.C, the Supreme Court has ruled that if a government official does not place a person in a position of danger, but merely fails to adequately protect victims as members of the general public, a substantive due process claim may not proceed. In *DeShaney*, the Court explained that unless the government, by an affirmative exercise of power, restrains an individual's liberty to protect himself, there is no cause of action under the Due Process Clause.[102]

Many lower courts have been reluctant to find the existence of a so-called "custodial relationship," which would trigger the duty to protect.[103] For example, in the public-school context, most courts have found no duty to protect students from their classmates despite mandatory education laws.[104] Moreover, even in residential school programs, which restrict

99. *See infra* Part III.A.

100. *See infra* Part III.B.

101. *See infra* Part III.C.

102. *DeShaney*, 489 U.S. at 201.

103. *See* Karen M. Blum, DeShaney*: Custody, Creation of Danger, and Culpability*, 27 LOY. L.A. L. REV. 435, 471 (1994) (noting the lack of a clear consensus about the criteria for defining when a constitutional duty arises, the meaning of "in custody" and "state-created danger," and the difference between "sins of omission or commission").

104. *See* Hasenfus v. LaJeunesse, 175 F.3d 68, 71–73 (1st Cir. 1999) (recognizing that the circuits have uniformly rejected the argument that compulsory school attendance laws create a duty

students' liberty and arguably create a duty to protect, most courts have held that voluntarily admitted students cannot avail themselves of the custodial-relationship exception.[105] Thus, even if a state institution has undertaken to care for children, it will not be liable for failing to provide a safe educational environment despite conduct that demonstrates deliberate indifference to student welfare.[106]

In addition to recognizing a duty of care in a custodial setting, the Supreme Court in *DeShaney* acknowledged liability under a "danger creation" theory. The Court explained that the government could not be liable for a child's injury because, while the government officials may have been aware of the dangers he faced, it neither created these dangers nor did anything to render him more vulnerable to these dangers.[107] At worst, the defendants "stood by and did nothing when suspicious circumstances dictated a more active role for them."[108] Thus, the Court clearly suggested that where government officials through their *own affirmative* conduct actually create or contribute to the danger, a constitutional duty to protect is triggered.

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of care on the part of school authorities); *see also* Nix v. Franklin County Sch. Dist., 311 F.3d 1373, 1378–79 (11th Cir. 2002), *cert. denied*, 538 U.S. 946 (2003); Soper *ex rel.* Soper v. Hoben, 195 F.3d 845, 853 (6th Cir. 1999); Doe *ex rel.* Doe v. Hillsboro Indep. Sch. Dist., 113 F.3d 1412, 1415 (5th Cir. 1997); Seamons v. Snow, 84 F.3d 1226, 1236 (10th Cir. 1996).

105. Lee v. Pine Bluff Sch. Dist., 472 F.3d 1026, 1030–31 (8th Cir. 2007) (holding that school officials have no duty to protect students participating in voluntary school-related activities, and thus a parent of a junior-high student who died after falling ill on a school band trip could not maintain a substantive due process action against the school band director; there was no allegation that the trip was compulsory or that the student was prohibited from leaving the trip at any time or that the chaperone denied the student the opportunity to contact her parent, and the state's constitutional duty does not arise from its knowledge of the individual's predicament or from its expression of intent to help him, but only where the state actually limits an individual's freedom to act on her own behalf); Stevens v. Umsted, 131 F.3d 697, 703–04 (7th Cir. 1997) (holding that a disabled student was not in custody for purposes of a claim arising from assault by other students because the student was voluntarily admitted to school); Walton v. Alexander, 44 F.3d 1297, 1305 (5th Cir. 1995) (asserting that the state owes no duty to protect students who are voluntarily in the state's custodial care, and thus a deaf student in a residential special-education program has no claim for failure to protect from sexual assault by a classmate).

106. For other examples of courts narrowly construing the custodial-relationship rule, see Hudson *ex rel.* Davis v. Hudson, 475 F.3d 741, 745 (6th Cir. 2007) (holding that a court-issued protective order did not create a special custodial relationship between the police and the person who sought protection so as to render the officers liable on a substantive due process theory for her death, which was allegedly due to non-enforcement of the order); Carver v. City of Cincinnati, 474 F.3d 283, 286 (6th Cir. 2007) (holding that the fact that the police exercised control over an environment is alone insufficient to demonstrate that a person is in custody—where officers neither imposed physical restraint over an unconscious person nor directed any actions toward him when they secured the area to conduct an investigation into the death of another individual, the custody exception is inapplicable).

107. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 201 (1989).

108. *Id*. at 203.

Despite this language, at least one circuit has explicitly rejected the state-created danger theory, at least in dictum.[109] Other courts have stressed that to recognize a substantive due process claim the harm to specific victims must be foreseeable and the defendants must recklessly disregard the danger.[110] Further, courts have rejected claims based on a finding that the danger was not substantial or that government officials did not act with the requisite level of culpability to meet the shocks-the-conscience test.[111]

109. Beltran v. City of El Paso, 367 F.3d 299, 307–08 (5th Cir. 2004) ("This court has consistently refused to recognize a 'state-created danger' theory of § 1983 liability . . . ."). *But see* Breen v. Tex. A&M Univ., 485 F.3d 325, 336–37 (5th Cir. 2007) (calling the relevant quote in *Beltran* dictum and finding that *Scanlan v. Texas A&M University*, 343 F.3d 533 (5th Cir. 2003), had impliedly recognized the state-created danger doctrine as a valid legal theory, and that the doctrine was the law of the case for the instant set of appeals).

110. *See* Koulta v. Merciez, 477 F.3d 442, 445–47 (6th Cir. 2007). In *Koulta*, the court held that officers who ordered a suspect to immediately leave a homeowner's property could not be held liable for the death of a motorist killed in a collision with the suspect even though the suspect was visibly drunk and the officers failed to administer a breathalyzer test. *Id.* The plaintiff failed to show that the officers' conduct amounted to an affirmative act that increased the danger or that the conduct specifically placed the deceased at risk, as distinguished from a risk that affected the public at large. *Id*. The court ruled that to impose liability under a state-created danger theory, the plaintiff must show (1) an affirmative act by the state that either created or increased the risk that the plaintiff would be exposed to harm by a third party, (2) a special danger to the plaintiff as distinguished from a risk that affects the public at large, and (3) that the official knew or should have known that his actions specifically endangered the plaintiff. *Id.* at 445–47. The defendant's proclivity to drink and drive had "blossomed long before the officers arrived" on the scene, their order to the defendant to leave the homeowner's property immediately did not require the defendant to drive home if she lacked the capacity to do so. *Id.* at 446. Because the defendant's behavior endangered every driver and passenger on the road that evening, her conduct did not create a risk that was specific to the deceased. *Id.* at 447.

See also Johnson v. City of Seattle, 474 F.3d 634, 639–41 (9th Cir. 2007) (holding that (1) to prevail under the danger-creation exception, a plaintiff must show that government officials affirmatively placed the plaintiff in a position of danger by exposing her to a dangerous situation that she would not have otherwise faced, (2) the fact that police had a more aggressive operational plan that might have more effectively controlled crowds at a Mardi Gras celebration does not mean that alteration of the plan was affirmative conduct that placed the plaintiffs in danger, because it put plaintiffs in no worse position than had the police not acted at all, and (3) plaintiffs who were assaulted and injured by a crowd at the celebration could not hold the defendants liable for violating the plaintiffs' substantive due process rights); Estate of Smith v. Marasco, 318 F.3d 497, 506–07 (3d Cir. 2003) (holding that under the state-created danger theory, a plaintiff must prove harm ultimately caused was foreseeable and fairly direct, and that the defendant's conduct "shocks the conscience"); Currier v. Doran, 242 F.3d 905, 918 (10th Cir. 2001) (explaining that to establish state-created danger, a plaintiff must demonstrate that the state increased the plaintiff's vulnerability to the danger; that the plaintiff was a member of a limited and specifically definable group; that the defendant's conduct put the plaintiff at substantial risk of serious, immediate, and proximate harm; that the risk was obvious or known; that the defendant acted recklessly in conscious disregard of that risk; and that such conduct was, "when viewed in total," conscience-shocking).

111. *See* Lombardi v. Whitman, 485 F.3d 73, 81, 85 (2d Cir. 2007) (holding that, even assuming federal officials knowingly misled emergency workers responding to the 9/11 terror

The refusal of the lower courts to impose liability where government officials recklessly create or increase the danger to citizens impermissibly extends *DeShaney*.[112] Nonetheless, many courts have fashioned multi-pronged tests that render this theory virtually impossible to use. The Tenth Circuit, for example, requires a plaintiff to demonstrate not only that the state increased the plaintiff's vulnerability to the danger but also that the plaintiff was a member of a limited and specifically definable group; that the defendant's conduct put the plaintiff at substantial risk of serious, immediate, and proximate harm; that the risk was obvious or known; that the defendant acted recklessly in conscious disregard to that risk; and that the conduct was conscience-shocking.[113] Other circuits have adopted similar multi-pronged tests.[114]

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attacks in New York City into forgoing use of respirators that would have prevented lung injuries from airborne contaminants, the officials cannot be held liable for breach of substantive due process because their action did not "shock the contemporary conscience"; actionable conduct must be "brutal and offensive to human dignity"; and liability should not be imposed when government officials face conflicting obligations and have to make decisions using rapidly changing information); Coyne v. Cronin, 386 F.3d 280, 287–88 (1st Cir. 2004) (holding that because the plaintiff did not allege that the government agent deliberately exposed his identity and thus enhanced his danger in the prison community, the substantive due process claim must be dismissed); Avalos *ex rel.* Vasquez v. City of Glenwood, 382 F.3d 792, 799–801 (8th Cir. 2004) (observing that plaintiffs must prove that the defendants acted despite a risk that was known or obvious, that they acted recklessly in conscious disregard of the risk, and that the conduct shocks the conscience); Lewis v. Anderson, 308 F.3d 768, 773, 775 (7th Cir. 2002) (observing that although social workers may have been negligent in performing background checks, the plaintiffs could not establish that the defendants actually knew of or suspected the existence of child abuse in prospective adoptive family so as to be liable for subsequent abuse), *cert. denied*, 538 U.S. 908 (2003); Ewolski v. City of Brunswick, 287 F.3d 492, 508–13 (6th Cir. 2002) (holding that police did not violate the substantive due process rights of a wife and son who were killed by her mentally deranged husband who armed himself and barricaded his family inside his home despite allegations that police conduct unnecessarily provoked the husband and escalated the confrontation, because the officers' conduct did not shock the conscience); Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3d Cir. 1995) (noting that application of the state-created danger theory in other cases involved "discrete, grossly reckless acts committed by the state or state actors using their peculiar positions as state actors, leaving a discrete plaintiff vulnerable to foreseeable injury").

112. *See* Blum, *supra* note 103, at 471; *see also* Erwin Chemerinsky, *The State-Created Danger Doctrine*, 23 TOURO L. REV. 1, 15–17 (2007) (discussing the circuit split on formulating the doctrine).

113. *Currier*, 242 F.3d at 918.

114. The Sixth Circuit has adopted a three-prong test, requiring that a plaintiff assert an affirmative act by the state that either created or increased the risk that plaintiff would be exposed to violence by a third party, that the misconduct focused on the plaintiff, as distinguished from a risk that affects the public at large, and that the state knew or should have known that its actions specifically endangered the plaintiff. Jones v. Reynolds, 438 F.3d 685, 690 (6th Cir. 2006). Further, the Eighth Circuit has come up with a five-prong test requiring plaintiffs to prove that (1) they were members of a limited, precisely definable group, (2) the government's conduct put them at significant risk of serious, immediate, and proximate harm, (3) the risk was obvious or known to the government, (4) the government acted recklessly in conscious disregard of the risk, and (5) the government's conduct shocks the conscience. Hart v. City of Little Rock, 432 F.3d 801, 805 (8th

In light of these draconian tests, unsurprisingly, courts often reject claims on summary judgment despite compelling factual circumstances.[115] For example, in *Flowers v. City of Minneapolis*,[116] a police lieutenant targeted an African-American family that rented a home in his neighborhood. The lieutenant learned that the new neighbor had been arrested for disorderly conduct and resisting arrest, and the lieutenant suspected that one of the members of the family might be a gang member.[117] On the lieutenant's own initiative, he distributed the arrest record to patrol officers and offered a steak dinner for any officer who made an arrest that led to the conviction or eviction of anyone living at the residence.[118] As a result of this edict, passing cruisers shined lights into the plaintiff's home and frightened his family for about a month, a window was broken at the home shortly after a police squad car was seen driving by, and the family lost business at its daycare center.[119] The directed patrol did not end until the plaintiff sued the department. The Eighth Circuit nonetheless reasoned that the plaintiff could not pursue his claim because, although the directed patrols may have constituted harassment, they did not put the family in danger of significant harm.[120] This incident reflects egregious abuse of official power and deliberate indifference to individual rights—causing a family a month-long nightmare of police harassment—and yet the court found the claims were not actionable under substantive due process.

These appellate court decisions fail to distinguish between affirmative acts of government officials that create or exacerbate a dangerous situation, and cases truly founded on a mere failure to act. For example,

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Cir. 2005).

115. *See, e.g.*, Ye v. United States, 484 F.3d 634, 642–43 (3d Cir. 2007) (holding that assurances made by a doctor at a city-run health clinic that a patient was fine and had nothing to worry about made the patient more vulnerable to danger because the patient's son testified that he would have taken his father to the emergency room but for such assurances; however, mere assurances do not constitute affirmative action necessary to form the basis of a state-created danger claim); D.R. *ex rel.* L.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364, 1373–76 (3d Cir. 1992) (finding that plaintiff school children could not hold the school liable for sexual assaults by other students because the conduct of school officials—which included failure to assign an experienced teacher to the classroom, failure to supervise the classroom, failure to investigate, and failure to report abuse to parents or other authorities—constituted only "indefensible passivity," and "nonfeasance . . . do[es] not rise to the level of a constitutional violation").

116. 478 F.3d 869, 871–72 (8th Cir. 2007).

117. *Id.* at 871.

118. *Id*. at 872.

119. *Id*.

120. *Id.* at 875. In addition, the court determined that no fundamental right was implicated because the surveillance of the house and the unwarranted direction of suspicion toward this household did not deprive the occupants of any "unenumerated constitutional right to 'personal safety' recognized by our Nation's history and traditions." *Id.* at 873. Part III.B critiques this fundamental-rights requirement.

where a lieutenant invites police officers to target an African-American family that has moved into his neighborhood and the harassment is perpetrated by police officers acting "under color of state law," reliance on *DeShaney* is clearly misplaced: The deprivation of liberty was caused only by government officials' affirmative acts, not private wrongdoers.[121] Further, although the Supreme Court in *Lewis* confirmed that a plaintiff must satisfy a shocks-the-conscience test in substantive due process challenges to abuse of executive power, the Court explained that government officials "shock[] the conscience" when they have the opportunity to reflect and yet act with deliberate indifference to the rights of citizens.[122] Outside the emergency context of high-speed chases or prison riots, courts should apply a meaningful deliberate-indifference standard to effectively restrain arbitrary, unreasonable government misconduct.[123]

B. *Limiting Substantive Due Process Claims to Those Involving Fundamental Rights*

As discussed in Part II.A, the Supreme Court—in analyzing substantive due process challenges to legislation—generally asks whether a fundamental right is implicated because the answer to this question determines the appropriate standard of review.[124] For example, in *Washington v. Glucksberg*,[125] the Court described the "threshold

121. *See id.* at 871–75; *cf.* Lombardi v. Whitman, 485 F.3d 73, 79–82 (2d Cir. 2007) (holding that although EPA officials had no affirmative duty to protect 9/11 workers who performed search-and-rescue tasks from exposure to environmental contaminants, allegations that defendants assured site workers that the air in Lower Manhattan was safe to breathe, thereby creating a false sense of security that induced them to forgo protective gear, might be actionable under the danger-creation theory).

122. County of Sacramento v. Lewis, 523 U.S. 833, 849–50 (1998).

123. *See, e.g.*, Currier v. Doran, 242 F.3d 905, 918 (10th Cir. 2001) (holding that a social worker who transferred custody of a child from the mother to the father, who subsequently killed the child, could be held liable under the state-created danger theory because the child would not have been exposed to danger but for the affirmative acts of the social worker); Munger v. City of Glasgow Police Dep't, 227 F.3d 1082, 1087 (9th Cir. 2000) (holding that police officers who kicked a man out of a bar and took away his keys could be held liable when the man died of hypothermia); Davis v. Brady, 143 F.3d 1021, 1027 (6th Cir. 1998) (holding that police who took away a driver's keys and left him on the side of the road in a dark area could be held liable for injuries he subsequently suffered when a vehicle struck him); Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 915 (3d Cir. 1997) ("[T]he dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or an omission.").

124. *See* Lupu, *supra* note 26, at 1030 ("Most liberties lacking textual support are of the garden variety—like liberty of contract—and thus their deprivation is constitutional if rationally necessary to the achievement of a public good. Several select liberties, on the other hand, have attained the status of 'fundamental' or 'preferred,' with the consequence that the Constitution permits a state to abridge them only if it can demonstrate an extraordinary justification.").

125. 521 U.S. 702 (1997).

requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action."[126] However, the Court has not always followed this strict analysis, as reflected in cases such as *Lawrence* and *Casey*, where admittedly heightened scrutiny was applied despite the Court's failure to identify a fundamental right.[127] More significantly for this discussion, the Court has never ruled that the absence of a fundamental right ends the constitutional inquiry. As *Glucksberg* explained, this simply means that government action will be tested by a lower level of scrutiny.[128]

With regard to claims of executive misconduct, the Supreme Court never clearly articulated the fundamental-rights approach. Although forced stomach-pumping arguably involves the core liberty interest of bodily integrity, the Court in *Rochin* invoked the shocks-the-conscience test without first identifying a fundamental right.[129] Indeed, the Court did not mandate that any "liberty" or "property" interest first be identified, and some courts read the decision to permit plaintiffs to establish a substantive due process violation *either* by proving violation of a specific liberty or property interest *or* by showing that the state's conduct "shocks the conscience."[130] Obviously, the importance of the right will inform the shocks-the-conscience test because the deprivation of fundamental liberty interests will be more likely to upset our sensibilities. Nonetheless, the Court has never ruled that without a fundamental right all judicial inquiry must cease.

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126. *Id*. at 722. The Court noted that the fundamental right or liberty interest had to be objectively "'deeply rooted in this Nation's history and tradition,' and 'implicit in the concept of ordered liberty,'" and that the case had to provide a "'careful description' of the asserted fundamental liberty interest." *Id.* at 720–21 (citations omitted) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 503 (1977), Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969), and Reno v. Flores, 507 U.S. 292, 302 (1993)).

127. *See supra* notes 36–45 and accompanying text.

128. *Glucksberg*, 521 U.S. at 722.

129. *See supra* notes 55–58 and accompanying text.

130. *See* Martinez v. City of Oxnard, 337 F.3d 1091, 1092 (9th Cir. 2003) ("The Fourteenth Amendment's Due Process Clause protects individuals from state action that either 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.'" (citation omitted) (quoting Rochin v. California, 342 U.S. 165, 172 (1952), and *Palko*, 302 U.S. at 325)); Singleton v. Cecil, 176 F.3d 419, 425 (8th Cir. 1999) (reasoning that the plaintiff may establish a substantive due process violation either by proving deprivation of a liberty interest or by asserting that the government's actions shocked the conscience); Pittsley v. Warish, 927 F.2d 3, 6 (1st Cir. 1991) ("The Supreme Court has enunciated two alternative tests by which substantive due process is examined. Under the first theory, it is not required that the plaintiffs prove a violation of a specific liberty or property interest; however, the state's conduct must be such that it 'shocks the conscience.'"); *see also* Patricia C. Cecil, Case Note, *Section 1983 and State Postdeprivation Remedy for Liberty Loss:* Wilson v. Beebe*, 770 F.2d 578 (6th Cir. 1985)*, 55 U. CIN. L. REV. 257, 262 (1986) (commenting that a substantive due process claim "derives validity from showing either a violation of the Bill of Rights or a demonstration of egregious conduct by a state actor").

One year after *Glucksberg*, the confusion in this area was fueled by the Supreme Court's analysis in *County of Sacramento v. Lewis*.[131] Justice Souter's opinion stated that the criteria for judging a substantive due process claim differ depending on whether the plaintiff challenges executive or legislative action: "While due process protection in the substantive sense limits what the government may do in both its legislative and its executive capacities, 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."[132] Justice Souter recognized the inherent conflict between *Glucksberg*, which begins its analysis by asking whether a fundamental right is implicated, and the analysis in *Lewis*, which asks whether misconduct shocks the conscience.[133] Specifically, he explains in a footnote:

> [E]xecutive action challenges raise a particular need to preserve the constitutional proportions of constitutional claims, lest the Constitution be demoted to what we have called a font of tort law. Thus, in a due process challenge to executive action, the threshold question is whether the behavior of the government officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. That judgment may be informed by a history of liberty protection, but it necessarily reflects an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them. 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.[134]

131. 523 U.S. 833 (1998).

132. *Id*. at 846 (citations omitted). In contrast, Justice Scalia commented that he did not understand why substantive due process "protects some liberties against executive officers but not against legislatures." *Id*. at 862 n.2 (Scalia, J., joined by Thomas, J., concurring); *see also* Robert Chesney, *Old Wine or New? The Shocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action*, 50 SYRACUSE L. REV. 981, 1003–17 (2000) (contending that there are no viable constitutional or prudential reasons for treating legislative and executive challenges differently).

133. *Lewis*, 523 U.S. at 846.

134. *Id*. at 847 n.8; *see also* Christensen v. County of Boone, 483 F.3d 454, 462 n.2 (7th Cir. 2007) (explaining that when a plaintiff complains of abuse of executive power, the "'conscience shocking'" test determines liability, rather than the traditional strict scrutiny standard used to measure the constitutionality of legislative acts; thus, even if a fundamental right is identified and has been impaired, a court must then determine whether the governmental action can be characterized as arbitrary or conscience-shocking in a constitutional sense); DePoutot v. Raffaelly, 424 F.3d 112, 118 (1st Cir. 2005) ("[T]he question of whether the challenged conduct shocks the

Justice Souter argued that the test for executive misconduct must be particularly stringent to prevent litigants from converting all torts into constitutional torts. Thus, he imposed a threshold test of egregious misbehavior. His footnote, however, cannot be interpreted to mean that absent a fundamental right egregious behavior can never be conscience-shocking. Justice Kennedy, with Justice O'Connor, in their concurring opinion in *Lewis*, acknowledged that the challenged action implicated an explicit fundamental liberty interest because a life was lost.[135] Then they asserted that the shocks-the-conscience test "can be used to mark the beginning point in asking whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning."[136] Thus, regardless of whether a plaintiff challenges legislative or executive action, "objective considerations, including history and precedent, are the controlling principle."[137]

Justice Kennedy's concurring opinion seeks to incorporate *Glucksberg*'s historical approach, which determines whether a statute's interference with a nontextual liberty interest is "'so rooted in the traditions and conscience of our people as to be ranked as fundamental,'" thus triggering strict review of the legislative enactment.[138] However, the requirement that history and precedent be consulted in assessing whether government conduct shocks the conscience does not mean that only the deprivation of a right specifically designated by the Court as fundamental is actionable under substantive due process. *Glucksberg* recognized that the Due Process Clause also prohibits the arbitrary deprivation of non-fundamental liberty interests.[139]

The various opinions in *Lewis* have led lower courts to disagree about whether the shocks-the-conscience standard *replaces* the fundamental-rights analysis set forth in *Glucksberg* when executive action is challenged, or whether the standard *supplements* the historical inquiry into

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contemporary conscience is a threshold matter that must be resolved before a constitutional right to be free from such conduct can be recognized."); Parrish v. Cleveland, 372 F.3d 294, 302 (4th Cir. 2004) (noting that courts must ask the threshold question whether the government's action shocks the conscience); United States v. Al-Hamdi, 356 F.3d 564, 574 (4th Cir. 2004) (asserting that the first inquiry is whether the action shocks the conscience, and if it does not, there is no need to inquire into the "'nature of the asserted liberty interest'" (quoting Hawkins v. Freeman, 195 F.3d 732, 738 (4th Cir. 1999)); Ewolski v. City of Brunswick, 287 F.3d 492, 510 (6th Cir. 2002) (holding that the initial inquiry in a case concerning executive misconduct must be whether the alleged action is conscience-shocking).

135. *Lewis*, 523 U.S. at 857 (Kennedy, J., concurring).

136. *Id*.

137. *Id*. at 858.

138. Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

139. *Id*. at 722.

the nature of the asserted liberty interest, as Justice Kennedy's concurrence suggests.[140] Under Justice Souter's approach, the question whether particular behavior shocks the conscience would depend in part on a historical review of traditional executive practices. However, once executive misconduct shocks the conscience, a violation of substantive due process has occurred and further inquiry into the fundamental nature of the right is unnecessary. This was the analysis in *Rochin*, which Justice Souter affirmed as still-controlling precedent.[141] Indeed, in his concurring opinion, Justice Scalia opined that Justice Souter's approach will result in greater, not lesser, substantive due process protection against the actions of executive officers than against the actions of legislatures, apparently because Justice Souter's analysis abandoned the strict fundamental-rights approach articulated in *Glucksberg*.[142]

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140. *Lewis*, 523 U.S. at 857–58 (Kennedy, J., concurring); *see* Bonebrake v. Norris, 417 F.3d 938, 943 (8th Cir. 2005) (noting that the shocks-the-conscience determination "should be answered in light of 'an understanding of traditional executive behavior, of contemporary practice, and of the standards of blame generally applied to them,'" and only then should the court analyze the right at issue (quoting *Lewis*, 523 U.S. at 847 n.8)); Galdikas v. Fagan, 342 F.3d 684, 690 n.3 (7th Cir. 2003) ("The principal ambiguity is whether the 'shocks the conscience' standard replaces the fundamental rights analysis set forth in *Glucksberg* whenever executive conduct is challenged or whether the 'shocks the conscience' standard supplements or informs the *Glucksberg* paradigm in such situations."), *cert. denied*, 540 U.S. 1183 (2004), *abrogated on other grounds by* Spiegla v. Hull, 371 F.3d 928, 941–42 (7th Cir. 2004); Hawkins v. Freeman, 195 F.3d 732, 739 n.1 (4th Cir. 1999) (commenting that while Justice Souter was unclear whether the shocks-the-conscience test should be employed without consideration of the history and tradition of the right involved, Justice Kennedy's concurrence more appropriately teaches that "courts seeking faithfully to apply the *Lewis* methodology in executive-act cases properly may look to history for revelations about traditional executive practices and judicial responses in comparable situations by way of establishing context for assessing the conduct at issue").

141. *See* Rochin v. California, 342 U.S. 165, 172–74 (1952); *Lewis*, 523 U.S. at 846–47; *see also* Chesney, *supra* note 132, at 999 (opining that Justice Souter's footnote 8 implies that *Glucksberg*'s "requirements of a 'careful description' of the asserted fundamental right and a demonstration that the right is grounded in past practice, does not necessarily control the next stage of the analysis of a substantive due process challenge to execution action" (footnote omitted)). Notably, some courts have interpreted *Rochin* as enunciating an alternative test whereby substantive due process violations are established whenever a plaintiff proves that the state's conduct "shocks the conscience." Under this view, it is not necessary to identify any property or liberty interest, much less a fundamental right, provided that the government misconduct shocks the conscience. *See* cases cited *supra* note 130; *cf. Hawkins*, 195 F.3d at 738 (discussing the various opinions in the *Lewis* case and concluding that after a plaintiff meets the threshold test of culpability, the "inquiry must turn to the nature of the asserted interest, hence to the level of protection to which it is entitled").

142. *See Lewis*, 523 U.S. at 862 n.2 (Scalia, J., concurring) ("[I]t is a puzzlement why substantive due process protects some liberties against executive officers but not against legislatures."); *cf. The Supreme Court, 1997 Term—Leading Cases*, 112 HARV. L. REV. 122, 202 (1998) ("[T]his position seems flatly inconsistent with the majority's assertion in footnote 8 that fulfilling 'the necessary condition' of egregious, conscience-shocking behavior is a hurdle that litigants must overcome before even beginning the *Glucksberg* inquiry. Perhaps Justice Scalia believes that the 'threshold question' of egregiousness will overwhelm any consideration of the

Regardless of how one views the debate between Justice Souter and Justice Kennedy, neither of the opinions asserts that absent identification of a fundamental right, substantive due process cannot be invoked to challenge abuses of power by the executive branch. Nonetheless, many lower courts have misconstrued these cases to mandate this requirement.[143]

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historical inquiry, and that courts interpreting *Lewis* will assume that any egregious, conscience-shocking executive conduct also violates a historically rooted right.").

143. *See, e.g.*, Khan v. Gallitano, 180 F.3d 829, 834–36 (7th Cir. 1999) (holding that *Lewis*'s shocks-the-conscience standard applies only in special circumstances comparable to the high-speed chase at issue there and that fundamental-rights analysis alone governs other substantive due process challenges to executive action; thus, an attorney had no substantive due process right to be free from tortious interference in her contract with clients by village officials because such a right was not a fundamental one deeply rooted in history and tradition); *see also* Christensen v. County of Boone, 483 F.3d 454, 462 (7th Cir. 2007) (holding that a couple who alleged they were stalked and trailed by an officer in his squad car as a result of a personal vendetta could not establish a substantive due process violation unless they identified a fundamental right, proved that the government interfered directly and substantially with that right, and that the deprivation was conscience-shocking in a constitutional sense); Flowers v. City of Minneapolis, 478 F.3d 869, 872–74 (8th Cir. 2007) (reasoning that a police lieutenant's conduct in directing his officers to conduct a month-long patrol of a residence and routine spotlighting did not violate substantive due process absent a showing that this misconduct violated a fundamental constitutional right and that the conduct shocked the "contemporary conscience"); Hill v. Borough of Kutztown, 455 F.3d 225, 234 n.12 (3d Cir. 2006) (holding that a plaintiff who alleged constructive discharge and injury to future ability to earn a living failed to state a substantive due process claim because he did not establish a fundamental property or liberty right); Rivera v. Rhode Island, 402 F.3d 27, 33–34 (1st Cir. 2005) (holding that to establish a substantive due process claim, it is not enough to assert that government action shocked the conscience when the plaintiff has failed to meet the threshold requirement of identifying a fundamental right at issue); Slusarchuk v. Hoff, 346 F.3d 1178, 1181–82 (8th Cir. 2003) (finding that the district court erred in asserting that substantive due process liability may be imposed either where there is "an abuse of government power 'that shocks the conscience'" or where there is an interference with "'rights implicit in the concept of ordered liberty'"; rather, "this court sitting en banc held that a substantive due process plaintiff 'must demonstrate *both* that the official's conduct was conscience-shocking, *and* that the official violated one or more fundamental rights that are deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty'" (quoting the district court opinion and Moran v. Clarke, 296 F.3d 638, 651 (8th Cir. 2002) (en banc) (Bye, J., concurring))), *cert. denied*, 541 U.S. 988 (2004); Gikas v. Wash. Sch. Dist., 328 F.3d 731, 735–37 (3d Cir. 2003) (noting that in the Third Circuit only "fundamental" property interests trigger substantive due process protection); Wozniak v. Conry, 236 F.3d 888, 891 (7th Cir. 2001) (holding that substantive due process applies only to decisions affecting fundamental rights, and that the complaining professor lacked a fundamental right to teach without following a university's grading curve); C.B. *ex rel.* Breeding v. Driscoll, 82 F.3d 383, 387 (11th Cir. 1996) (holding that a student suspended for alleged inappropriate behavior in school cannot assert a claim for substantive due process because the right to attend public school is not fundamental and noting that the Eleventh Circuit has held that executive action contravenes substantive due process only if the right is "implicit in the concept of ordered liberty"); LRL Props. v. Portage Metro Hous. Auth., 55 F.3d 1097, 1111 (6th Cir. 1995) (asserting that substantive due process is simply "'not concerned with the garden variety issues of common law contract'" and that the "right to participate in a federal housing funds program simply does not rise to the level of a right 'so rooted in the traditions and conscience . . . as to be ranked as fundamental'" (quoting Sutton v. Cleveland Bd. of Educ., 958 F.2d 1339, 1350–51 (6th Cir. 1992))); Newman v. Burgin,

Admittedly, in *Glucksberg* the Court held that only the deprivation of a fundamental right will trigger strict scrutiny of a legislative enactment. However, even absent a fundamental right, courts will analyze federal and state laws to ensure that the laws are neither arbitrary nor capricious.[144] Arguably the standard is very deferential, and a plaintiff will have difficulty proving that a legislative body knowingly and deliberately enacted an arbitrary, capricious provision.[145] The possibility for arbitrary action by executive branch officials, however, is much more likely, resulting in the concern that substantive due process challenges may be regularly brought whenever government officials misbehave. Recognizing this concern, the *Lewis* Court imposed a high threshold level of culpability but did not alter *Rochin*'s holding that conscience-shocking executive misconduct violates substantive due process.[146]

Interpreting substantive due process to protect only fundamental rights is misguided for several reasons. First, this interpretation allows courts to dismiss claims involving liberty depending upon how broadly or narrowly the liberty claim is characterized. Many have recognized this problem in challenges to legislative enactments.[147] For example, in *Michael H. v. Gerald D.*,[148] a biological father challenged California's law that created an irrebuttable presumption that a married woman's husband was the father of the child. The Court ruled that a biological father who had established a relationship with the child had no right to a hearing to determine paternity and that he could be denied all parental rights.[149] Justice Brennan, in dissent, argued that it was well established that fathers

930 F.2d 955, 961–62 (1st Cir. 1991) ("[U]nless a fundamental liberty protected elsewhere in the Constitution . . . is at stake, the primary concern of the due process clause is *procedure*, not the substantive merits of a decision."); Mangels v. Pena, 789 F.2d 836, 839 (10th Cir. 1986) ("Rights of substantive due process are founded not upon state provisions but upon deeply rooted notions of fundamental personal interests derived from the Constitution.").

144. *See Glucksberg*, 521 U.S. at 728. Even Justice Scalia, an outspoken critic of substantive due process, acknowledged that laws that do not implicate a fundamental right are subject to "the ordinary 'rational relationship' test." *See* Michael H. v. Gerald D., 491 U.S. 110, 131 (1989); *see also* Wroblewski v. City of Washburn, 965 F.2d 452, 457 (7th Cir. 1992) (recognizing that "substantive due process has been held to protect a broad sphere of 'harmless liberties' (as well as fundamental rights)").

145. Nonetheless, this standard may be met as reflected in the Court's holding in *Lawrence v. Texas*, 539 U.S. 558, 567 (2003). *See supra* text accompanying notes 44–45.

146. *Lewis*, 523 U.S. at 847.

147. *See* Tushnet, *supra* note 2, at 216 (contending that "questions about unenumerated rights are questions about the level of abstraction on which we are to understand constitutional language" and that "there is no *analytic* basis for selecting one rather than another level of generality or specificity"); *see also* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058 (1990) ("The selection of a level of generality necessarily involves value choices.").

148. 491 U.S. 110, 113 (1989).

149. *Id*. at 124–27.

have a fundamental interest in their biological children.[150] Justice Scalia, however, asserted that the specific liberty interest implicated was the alleged right of a father to a child who is conceived as a result of an adulterous relationship with a married woman—a right that has not traditionally been recognized and thus cannot be viewed as fundamental.[151]

The same characterization problem surfaced in *Lewis* in the context of deprivations of life, liberty, and property, by executive officials. The right at stake in *Lewis*, where officers killed a youth on a motorcycle during a high-speed chase, could be defined broadly as implicating the fundamental right to life, as Justice Kennedy did,[152] or, more narrowly, as a "right to be free from 'deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender,'" which Justice Scalia found not to be rooted in history or tradition and thus not protected under substantive due process.[153]

In addition to characterization problems, the fundamental-rights approach causes trouble because it requires courts to assess which nontextual interests should be viewed as "super protected." Because the legislature can almost never justify depriving such rights, the Supreme Court has been wary about recognizing new fundamental interests.[154] In fact, it has narrowed its protection of previously recognized fundamental rights.[155] The difficulty of identifying exactly what rights enjoy this status is reflected in many appellate court decisions. For example, in *Flowers v. City of Minneapolis*,[156] the Eighth Circuit, which follows the fundamental-rights approach, asserted that the right to engage in "'the common occupations of life'" is a fundamental right, at least if one has been completely prohibited from engaging in a calling.[157] In the post-*Lochner* world, most courts would not view this right as fundamental for purposes of challenging legislation, although this right would be considered a

150. *Id*. at 141–45 (Brennan, J., dissenting).

151. *Id*. at 127 (majority opinion).

152. County of Sacramento v. Lewis, 523 U.S. 833, 856 (1998) (Kennedy, J., concurring).

153. *Id*. at 862–63 (Scalia, J., concurring) (quoting *id.* at 836 (majority opinion)).

154. *See* Washington v. Glucksberg, 521 U.S. 702, 720–21 (1997) ("We must therefore 'exercise the utmost care whenever we are asked to break new ground in this field,' lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court." (citation omitted) (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977))).

155. *See supra* notes 36–45 and accompanying text.

156. 478 F.3d 869 (8th Cir. 2007).

157. *Id*. at 874 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). The plaintiff contended that a police lieutenant who directed officers to direct a month-long patrol outside his residence caused a slow down in his child care business in violation of his substantive due process right to earn a livelihood. Although recognizing a fundamental right to engage in one's chosen occupation, the court found that the temporary interference did not rise to the level of a deprivation of this fundamental right. *Id.* at 874; *see also infra* note 235.

protected liberty interest for purposes of procedural due process.[158] The point is that superimposition of a fundamental-rights threshold question simply adds uncertainty and confusion to the inquiry.[159]

Critical to this discussion is the principle that even without a fundamental right, substantive due process limits legislative and executive action. The Fourteenth Amendment does not say that government cannot deprive persons of a "fundamental right"; rather, it prohibits all deprivations of "life, liberty and property, without due process of law."[160] Further, the Supreme Court has acknowledged that the scope of "liberty" protected by the Due Process Clause is broad: "[A] rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ."[161]

The Court has never repudiated the broad definition of "liberty" first enunciated during the *Lochner* period as encompassing a wide range of interests "recognized at common law as essential to the orderly pursuit of happiness by free men."[162] The Court's decision in *Lawrence v. Texas*[163] implicitly recognizes this "continuum approach." The majority refused to follow the strict fundamental-rights analysis that the Court had enunciated in *Glucksberg*.[164] *Lawrence* is noteworthy because generally where no fundamental right is implicated, legislative enactments are presumed valid and will be struck down only if totally arbitrary and capricious.[165] Nonetheless, the Court invalidated Texas's sodomy law as arbitrarily interfering with the liberty interests of individuals to enter into personal relationships,[166] and the Court rejected the notion that substantive due process requires a specific basis in tradition.[167]

158. Conn v. Gabbert, 526 U.S. 286, 291–92 (1999) (recognizing that the Liberty Clause of the Fourteenth Amendment protects a generalized right to choose one's occupation, although noting that the right is subject to reasonable government regulation).

159. Justice Scalia's concurrence in *Lewis* attacked the notion that "substantive due process protects some liberties against executive officers but not against legislatures." County of Sacramento v. Lewis, 523 U.S. 833, 861 n.2 (1998) (Scalia, J., concurring).

160. U.S. CONST. amend. XIV, § 1.

161. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting), *quoted in* Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) (plurality opinion). Ironically, some of the appellate courts that have limited challenges to executive action to those involving fundamental rights have then broadly construed the meaning of a fundamental right. *See* Flowers v. City of Minneapolis, 478 F.3d 869, 874 (8th Cir. 2007) (acknowledging a "fundamental right to engage in one's chosen occupation").

162. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

163. 539 U.S. 558 (2003).

164. *Id*. at 586 (Scalia, J., dissenting) (criticizing the majority's failure to articulate *any* standard of review).

165. *See* Washington v. Glucksberg, 521 U.S. 702, 722 (1997).

166. *Lawrence*, 539 U.S. at 567. Justice Kennedy asserted that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct." *Id*. at 562.

167. *Id*. at 571–72. Although Justice Kennedy went to great length to rebut the argument that

Many constitutional scholars have suggested that *Lawrence* may mark the demise of *Glucksberg*'s two-tier analysis.[168] In any event, lower courts that have interpreted *Glucksberg* to preclude *any* review of executive misconduct absent a fundamental right are misguided—such interpretations deny the existence of the "second tier" of the *Glucksberg* analysis and thereby deprive litigants of the opportunity to show that, even absent a fundamental right, they have been subjected to "substantial arbitrary impositions and purposeless restraints" on liberty.[169] Government interference with any form of liberty will not necessarily trigger strict scrutiny, but this does not mean that government officials, including those in the executive branch, may violate rights with impunity. The essence of substantive due process is protection of individuals from the exercise of

there was a tradition to outlaw homosexual sodomy, *id.* at 568–71, ultimately he concluded that an examination of history and tradition is not the exclusive criterion for recognizing liberty interests, *id.* at 572 ("'[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.'" (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring))); *see also* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269–79 (1990); Conkle, *supra* note 2, at 67–68 (arguing that substantive due process should not be confined to historical liberties but, rather, as suggested in *Lawrence*, should include protection of all rights that are supported by an objective determination of contemporary national values).

168. *See* Conkle, *supra* note 2, at 65 (contending that *Lawrence* "includes untapped insights . . . that might inform a substantial reconceptualization and reformation of substantive due process"); Magarian, *supra* note 5, at 285 ("*Lawrence* dramatically shifted the tide, reinvigorating substantive due process both by sharpening the doctrine's affirmative rationale and by tightening the restrictions it imposes on government regulation."); *see also* Randy E. Barnett, *Justice Kennedy's Libertarian Revolution:* Lawrence v. Texas, 2002–2003 CATO SUP. CT. REV. 21, 41 (2003) (recognizing *Lawrence* as a case adopting a libertarian interpretation of the Constitution that creates a "presumption of liberty" whereby all laws that restrict "liberty" are presumptively unconstitutional); Lino A. Graglia, Lawrence v. Texas*: Our Philosopher-Kings Adopt Libertarianism as Our Official National Philosophy and Reject Traditional Morality as a Basis for Law*, 65 OHIO ST. L.J. 1139, 1149–50 (2004) (criticizing Justice Kennedy's analysis in *Lawrence* as writing "libertarianism into the Constitution" and stating that "the Court will no longer feel called upon to announce discovery of a new 'fundamental right' before disallowing a policy choice of which it disapproves as a violation of 'substantive due process'"); Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1899 (2004) ("*Lawrence* significantly altered the historical trajectory of substantive due process . . . ."). *But see* Basiak, *supra* note 13, at 896–902 (arguing that the Supreme Court under the leadership of Chief Justice Roberts will abandon what he calls a "split-the-difference" jurisprudence reflected in the *Lawrence* and *Casey* decisions in favor of a consistent rules-based approach to substantive due process).

169. Another example of the distinction between fundamental rights and "garden variety" liberty interests that enjoy less protection is found in the right-to-travel cases. The Supreme Court has held that the right to interstate travel is a fundamental right that triggers strict scrutiny review, Shapiro v. Thompson, 394 U.S. 618, 638 (1969), but "international travel has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment," Califano v. Aznavorian, 439 U.S. 170, 176–77 (1978). More recently, the Court has recognized that the validity of durational residency requirements should be analyzed under the Fourteenth Amendment's Privileges and Immunities Clause. Saenz v. Roe, 526 U.S. 489, 502–03 (1999).

government power without reasonable justification.[170] Although negligent misconduct will never meet the shocks-the-conscience standard, where actions intentionally injure without any justifiable interest or where government officials act with deliberate indifference to the serious harm their actions might cause, the guarantee of substantive due process has been violated and a remedy should be available.

Another concern with limiting challenges of executive misconduct to the deprivation of fundamental rights is that most claims involving property will be automatically rejected because property rights, and economic interests in general, have not been treated as fundamental rights, at least since the demise of *Lochner*.[171] Thus, courts will dismiss claims involving particularly egregious denials of employment, licenses, or educational benefits, or egregious actions regarding real property, regardless of how conscience-shocking the actions may be. The next section explores this concern.

C. *Rejecting Substantive Due Process Claims Where Only Property Rights Are Implicated*

In addition to rejecting substantive due process claims in the absence of a fundamental right, other courts have reasoned that where only property rights are at stake no substantive due process claims can exist, or that such claims must be dismissed whenever state law provides a remedy for the deprivation.[172] This rejection of claims involving "merely" property may stem, in part, from Justice Powell's concurring opinion in *Regents of*

170. *See* Christensen v. County of Boone, 483 F.3d 454, 468–69 (7th Cir. 2007) (Ripple, J., concurring in part and dissenting in part) (arguing that the majority erred in failing to recognize that the "essence of substantive due process is *protection of the individual from the exercise of governmental power* without reasonable justification," and that government officials who not only act unreasonably in the execution of their duties, but who also use their positions "not in connection with any official duty but for [their] own purposes" have abused their power in a manner that shocks the conscience).

171. *See supra* Part II.A.

172. *See, e.g.*, Ali v. Ramsdell, 423 F.3d 810, 814 (8th Cir. 2005) (finding allegations that police officers seized and kept about $5,000 while executing a search warrant did not state a claim against the officer for violation of substantive or procedural due process because the plaintiff's state law conversion claim provided an adequate remedy for the alleged injury); Lee v. City of Chi., 330 F.3d 456, 467 (7th Cir. 2003) (holding that where a substantive due process challenge involves only property, the plaintiff must show either the inadequacy of state law remedies or an independent constitutional violation before the court will even engage in the deferential rational-basis/arbitrary-conduct review); Love v. Pepersack, 47 F.3d 120, 123 (4th Cir. 1995) (holding that where a denial of handgun application is fully rectified in state court, invoking federal due process would trivialize the doctrine; due process is violated only when state courts cannot rectify an injury); United of Omaha Life Ins. Co. v. Solomon, 960 F.2d 31, 35 (6th Cir. 1992) (rejecting a substantive due process claim because the plaintiff's loss of a government contract did not implicate a fundamental right and because the injury could easily be remedied in state court).

the University of Michigan v. Ewing.[173] The majority opinion assumed, without deciding, that the plaintiff possessed a constitutionally protected property interest in his continued enrollment in a medical-school program and that the substantive component of the Due Process Clause protects this property interest.[174] The Court proceeded to find that the decision to dismiss Ewing from the program was made "conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing's academic career," and thus the dismissal did not constitute "such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."[175]

In a concurrence, Justice Powell maintained that "substantive due process rights are created only by the Constitution."[176] He reasoned that Ewing's interest in continued enrollment in the school was essentially a state law contract right that bore "little resemblance to the fundamental interests that previously have been viewed as implicitly protected by the Constitution."[177] Justice Powell's opinion appears to confuse the doctrine that substantive due process provides "heightened" protection to so-called fundamental rights with the more basic concept that substantive due process protects against all arbitrary or capricious deprivations of life, liberty, *and property*. As noted, the consequences of finding a fundamental right are serious because the government must then demonstrate a compelling interest for its regulation, which must not restrict anymore than necessary.[178] However, the Supreme Court has consistently held that property rights may have their source in state law when assessing whether a procedural due process violation has occurred.[179] Further, in *Logan v*

173. 474 U.S. 214 (1985); *see* Charles v. Baesler, 910 F.2d 1349, 1354 (6th Cir. 1990) (asserting that Justice Powell's concurrence in *Ewing* led to a split in the circuits over whether substantive due process "protects run-of-the-mill state-created contractual property interests" but acknowledging that the majority view would reject such claims).

174. *Ewing*, 474 U.S. at 222–23.

175. *Id*. at 225.

176. *Id.* at 229 (Powell, J., concurring).

177. *Id*. at 229–30; *cf.* Harrah Indep. Sch. Dist. v. Martin, 440 U.S. 194, 199 (1979) (holding that non-renewal of a tenured teacher's contract may be reviewed under a substantive due process analysis).

178. *See supra* Part II.A.

179. In *Roth v. Board of Regents*, 408 U.S. 564 (1972), the Court reasoned that property interests are not created by the Constitution but are "defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id*. at 577. Applying this approach, the Supreme Court has held that continued employment may be a property right, Perry v. Sindermann, 408 U.S. 593, 601 (1972), as well as welfare benefits, Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970), continued receipt of an education, Goss v. Lopez, 419 U.S. 565, 574 (1975), and continued electrical and water service, Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11 (1978). This Article contends that all of these forms of property should be protected substantively and not just procedurally, and thus their arbitrary deprivation is actionable.

Zimmerman Brush Co.,[180] the Court asserted that "the types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact.'"[181] There is no reason to interpret the term "property" more narrowly when a plaintiff raises a substantive due process claim. Thus, any restriction of substantive due process to some category of federally protected, fundamental property rights is inappropriate and misguided.[182]

Several appellate courts have ruled that even if deprivations of property are theoretically actionable under substantive due process, courts should dismiss such claims unless the litigant can prove that the state failed to afford an available remedy.[183] The notion that the existence of a state remedy should defeat a federal claim has been adopted by the Court only in the context of certain procedural due process violations. In *Parratt v. Taylor*,[184] prison authorities failed to deliver a package of hobby materials that an inmate had ordered through the mail.[185] The Supreme Court held that the random, unauthorized deprivation of the prison inmate's property could not give rise to a procedural due process claim where the state provided an adequate post-deprivation remedy.[186] The Court reasoned that in cases involving random, unauthorized official misconduct, the state provides all the process that is feasible if it affords the individual a post-deprivation remedy.[187] Procedural due process often presents a timing question, whether pre- or post-deprivation process is necessary—and the impossibility of providing pre-deprivation process then defeats the federal claim. Substantive due process, however, does not focus on the state's failure to provide sufficient process. Rather, it is the raw abuse of power that violates the Constitution, and such abuse is complete at the time of the act and is unaffected by the existence of state remedies.

In *Zinermon v. Burch*,[188] the Supreme Court distinguished the three categories of due process—namely, claims arising out of the incorporation of specific protections defined in the Bill of Rights, claims alleging a violation of the "substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them,'" and claims asserting procedural due process violations.[189] As to the first two types of claims, the Court explained that

180. 455 U.S. 422 (1982).

181. *Id*. at 430 (quoting Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 646 (1949) (Frankfurter, J., dissenting)).

182. *See supra* Part II.A.

183. *See supra* note 172.

184. 451 U.S. 527 (1981).

185. *Id*. at 529–30.

186. *Id*. at 543.

187. *Id*. at 543–44.

188. 494 U.S. 113 (1990).

189. *Id*. at 125–26 (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

the constitutional violation was complete when the wrongful act occurred, and thus state tort remedies were irrelevant.[190] Only with regard to procedural due process claims does a state tort remedy become relevant. Nonetheless, some lower courts have reasoned that the availability of state remedies defeats the federal substantive due process claim, at least where only a property interest is at stake.[191] For example, the Seventh Circuit, in *Galdikas v. Fagan*,[192] held that even if university officials acted arbitrarily and irrationally in misleading students about the accreditation status of a social work program, because state law provided an adequate remedy for violation of this state-created contract right, no substantive due process violation occurred.[193]

Rejecting claims involving "only property" ignores the history and development of substantive due process. The Founders were deeply concerned with deprivations of property as reflected in the Takings and Contract Clauses of the Constitution.[194] Early on, the Supreme Court invoked substantive due process to challenge improper zoning decisions,[195] as well as laws that arbitrarily interfered with the right to contract and to earn a livelihood.[196] Indeed, the Court broadly defined "liberty" to encompass what some characterize today as "mere" property rights.[197] Further, by the 1960s, spearheaded by an important article by Professor Charles Reich,[198] federal courts began to recognize that government benefits such as education, welfare, social security, licenses, and jobs are relied upon by people and should be treated the same as traditional property rights.[199] As Professor Reich noted in a subsequent article:

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190. *Id*.

191. *See supra* note 172.

192. 342 F.3d 684 (7th Cir. 2003), *cert. denied*, 540 U.S. 1183 (2004), *abrogated on other grounds by* Spiegla v. Hull, 371 F.3d 928 (7th Cir. 2004).

193. *Id*. at 689–91.

194. U.S. CONST. art. 1, § 10 (Contract Clause); *id.* amend. V (Takings Clause); *see also* CHEMERINSKY, *supra* note 8, § 8.3.1, at 629–30 (Contract Clause); *id.* § 8.4.1, at 640–41 (Takings Clause).

195. Nectow v. City of Cambridge, 277 U.S. 183, 188–89 (1928); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); *see also* Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one. . . . The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a 'personal' right . . . ."); Norman Karlin, *Back to the Future: From* Nollan *to* Lochner, 17 SW. U. L. REV. 627, 637–38 (1988) (acknowledging that the Bill of Rights was cut from a single constitutional cloth and that at common law, "[o]wnership of property was evidence of liberty").

196. *See supra* text accompanying notes 22–26 (discussing *Lochner*).

197. *See* Allgeyer v. Louisiana, 165 U.S. 578, 590 (1897) ("'[T]he privilege of . . . acquiring, holding, and selling property, is an essential part of [the defendant's] rights of liberty and property, as guarantied by the fourteenth amendment.'" (quoting Powell v. Pennsylvania, 127 U.S. 678, 684 (1888))).

198. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

199. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970); *see also* cases cited

> Society today is built around entitlement. . . . Many of the most important of these entitlements now flow from government . . . . Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity.[200]

The recent Supreme Court decisions invoking substantive due process to protect the property rights of corporate America from excessive punitive damage awards refute the notion that "mere property" rights are not protected from "conscience-shocking" misconduct.[201] Contrary to the finding of some lower courts, the Constitution does not read that government cannot deprive you of a "fundamental right" or a liberty interest without due process of law; rather, the Constitution states that government cannot deprive individuals of life, liberty, *or property*, without due process of law.

Further, courts that have dismissed claims based on the existence of an adequate state remedy have confused substantive with procedural due process. Procedural due process focuses on whether the state has provided sufficient protection for an interest through the state's own procedures, whereas substantive due process focuses on abuse of power.[202] Litigants should not be permitted to avoid the limitations of *Parratt* by characterizing an essentially procedural due process violation as a substantive due process claim. But when it is clear that plaintiffs are challenging the egregiousness of the government misconduct or the arbitrariness of a government decision—and not to the procedures that have been used—the substantive due process claim should be recognized and permitted to proceed.

IV. PRESERVING SUBSTANTIVE DUE PROCESS AS A MEANINGFUL GUARANTEE AGAINST MISUSE OF EXECUTIVE POWER

In large part, the concerns that have motivated the Supreme Court to constrict the use of substantive due process and that, in turn, have influenced the lower courts, are twofold. First, several Justices have expressed concerns about judicial activism in an area where there are few

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supra note 179.

200. Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1255 (1965).

201. *See supra* Part II.B.

202. Daniels v. Williams, 474 U.S. 327, 331 (1986) (stating that procedural due process "promotes fairness," whereas substantive due process "serves to prevent governmental power from being 'used for purposes of oppression'" (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1856))).

objective guideposts. Opponents complain that allowing substantive due process challenges means that more areas of the law will be "federalized" and that judges, based only on their own subjective preferences, will second-guess executive or administrative decisions.[203] Second, the Court has opined that fashioning federal remedies where state remedies already exist violates core principles of federalism. The Court has frequently expressed a reluctance to displace state courts and state tort law with federal courts and federal law,[204] and the lower federal courts have followed its lead.[205]

As to the concern for judicial activism, Justice Scalia has opined that "'[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'"[206] When the judiciary strikes down democratically enacted laws it thwarts the will of the people.[207] In contrast, when plaintiffs use substantive due

203. *See, e.g.*, Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992) ("[G]uideposts for responsible decisionmaking in this uncharted area are scarce and open-ended."); Griswold v. Connecticut, 381 U.S. 479, 507–13 (1965) (Black, J., dissenting) (challenging substantive due process as a mechanism whereby Supreme Court Justices may interject their own predilections and determine what they believe to be fair); United States v. Logan, 453 F.3d 804, 806 (7th Cir. 2006) ("Laws are not 'harsh' or 'pointless' in any value-free framework; they seem harsh or pointless by reference to a given judge's beliefs about how things ought to work, which is why a claim of power to revise 'harsh' or 'pointless' laws elevates the judicial over the legislative branch and must be resisted."); Gumz v. Morrissette, 772 F.2d 1395, 1404–06 (7th Cir. 1985) (Easterbrook, J., concurring) (asserting that substantive due process has no support in the language or history of the Constitution and instead is a "shorthand for a judicial privilege to condemn things the judges do not like or cannot understand"), *overruled on other grounds by* Lester v. Chicago, 830 F.2d 706 (7th Cir. 1987); Adamson v. California, 332 U.S. 46, 75, 89, 92 (1947) (Black, J., dissenting) (arguing that substantive due process in essence permits the judiciary to amend the Constitution without using the deliberate amendment process); *see also* AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 385–86 (2005) (questioning whether the "discovery" of unenumerated rights unjustifiably expands judicial power); *supra* note 2.

204. *See, e.g.*, Martinez v. California, 444 U.S. 277, 282 (1980) (observing that each state has a paramount interest "in fashioning its own rules of tort law"); Paul v. Davis, 424 U.S. 693, 701 (1976) (cautioning that the Court should resist making the Due Process Clause "a font of tort law to be superimposed" on state systems); *see also* William Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 544 (1989) (alleging that many due process claims are merely state tort actions "masquerading" as civil rights suits).

205. *See, e.g.*, Christensen v. County of Boone, 483 F.3d 454, 464–65 (7th Cir. 2007) (reasoning that *Lewis* calls for judicial restraint in implementing a program of constitutional torts and mandates that official misconduct, which may be harmful and unjustified by any legitimate interest, must be left to ordinary tort litigation unless it can be characterized as truly conscience-shocking).

206. Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) (quoting Gregg v. Georgia, 428 U.S. 153, 175 (1976)).

207. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–18 (1962) (describing judicial review as a "deviant institution" in American democracy and coining the phrase "counter-majoritarian difficulty" to describe the

process to remedy raw abuses of government power by its officials, no harm befalls democratically enacted laws. When a member of the executive branch violates a constitutional duty and deprives an individual of life, liberty, or property, a judicial remedy does not undermine democracy. Jurors decide whether government conduct was motivated by bad faith or bias and thus merits judicial relief.[208] Further, when federal judges determine that government officials have engaged in arbitrary, conscience-shocking behavior, no plausible counter-majoritarian difficulty exists.

As to federalism concerns, the existence of tort remedies should not determine the fate of federal constitutional violations. In *Monroe v. Pape*,[209] the Supreme Court held that the federal remedy for vindicating constitutional deprivations supplements state remedies. Further, federal rights displace (preempt) state remedies in many situations.[210] Because courts already severely restrict substantive due process violations, allowing federal claims to proceed for truly egregious violations by executive branch officials should not be relegated to the vagaries of state tort law.[211] A related argument developed by Professor Fallon emphasizes that substantive due process should be used only to correct government action involving laws that have a broad impact on society, rather than to correct individual injustices that can be vindicated through individual tort actions.[212] This distinction ignores the concern that the actions of law

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tension he perceived). *But see* Erwin Chemerinsky, *Seeing the Emperor's Clothes: Recognizing the Reality of Constitutional Decision Making*, 86 B.U. L. REV. 1069, 1075 (2006) ("[T]he United States is not a pure democracy; it is a constitutional democracy where the acts of all government officers are subordinate to the Constitution.").

208. *See* Parkway Garage, Inc. v. City of Phila., 5 F.3d 685, 692 (3d Cir. 1993) (asserting that the determination whether a government official's actions in a particular case were motivated by bias, bad faith, or improper motive is a question of fact for the jury to decide in a substantive due process case), *overruled on other grounds by* United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392 (3d Cir. 2003).

209. 365 U.S. 167, 183 (1961), *overruled in part on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

210. *See* CHEMERINSKY, *supra* note 8, § 5.1, at 390.

211. *See* Conkle, *supra* note 2, at 94 (arguing that substantive due process "serves a nationalizing function" because "[w]hen the Court recognizes substantive due process rights, they are national rights that every state and locality must honor"); Chesney, *supra* note 132, at 1013 ("[I]t makes little sense to define the scope of the constitutional right with reference to the availability of tort remedies . . . merely on the ground that the federal civil damages remedy through which the right might be asserted appears to overlap with tort concepts."); *see also* Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI.-KENT L. REV. 661, 681 (1997) (contending that attempts to prevent overlap with state tort law have resulted in decisions that limit the substantive scope of constitutional rights).

212. *See* Fallon, *supra* note 2, at 327; *see also The Supreme Court, 1997 Term—Leading Cases*, *supra* note 142, at 199 ("[S]ubstantive due process analysis is on its firmest footing when applied to systematic governmental action.").

enforcement officials, government employers, government educators, and other members of the executive branch may have a significant and broad corrosive impact, thereby raising the same systemic concerns triggered by legislative action.

Arguably, the largely undefined labels "arbitrary" and "capricious" or "conscience-shocking" can be attached to all sorts of government misconduct, potentially creating an undue strain on federal judicial resources, as well as on state–federal relations.[213] However, as previously discussed, the Supreme Court has already imposed significant limitations on substantive due process through cases such as *DeShaney*, *Lewis*, and *Graham*.[214] These decisions require that plaintiffs establish a breach of an affirmative duty and not merely a failure to act, and that claims be limited to truly egregious misconduct that cannot be challenged under any more specific constitutional provision. Courts must determine whether the deprivation resulted from an abuse of government power sufficient to raise an ordinary tort to the stature of a constitutional violation.[215] And while the shocks-the-conscience standard appears subjective, the Court in *Lewis* made clear that the standard is objective in nature, "asking whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning."[216]

Further, the Supreme Court has protected against vexatious, frivolous litigation by awarding fees to prevailing defendants pursuant to the Civil Rights Attorney's Fees Awards Act of 1976,[217] as well as by imposing sanctions under Rule 11 of the Federal Rules of Civil Procedure.[218] Together with a much more effective use of summary judgment procedures, weak cases are disposed of at the earliest stages in litigation.[219]

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213. In his concurrence in *Lewis*, Justice Scalia demonstrated his disdain for the majority's analysis by stating that "today's opinion resuscitates the *ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity, th' ol' 'shocks-the-conscience' test." County of Sacramento v. Lewis, 523 U.S. 833, 861 (1998) (Scalia, J., concurring) (footnote omitted). *But see id.* at 847 (majority opinion) ("While the measure of what is conscience shocking is no calibrated yard stick, it does, as Judge Friendly put it, 'poin[t] the way.'" (alteration in original) (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973))).

214. *See supra* Part II.C.

215. Executive 100, Inc. v. Martin County, 922 F.2d 1536, 1541 (11th Cir. 1991).

216. *Lewis*, 523 U.S. at 857 (Kennedy, J., concurring).

217. 42 U.S.C. § 1988 (2000). The statute provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." *Id.* § 1988(b). Where the defendant prevails, fees may be awarded where the suit is "vexatious, frivolous, or brought to harass or embarrass the defendant." Hensley v. Eckerhart, 461 U.S. 424, 429 n.2 (1983).

218. Rule 11 of the Federal Rules of Civil Procedure requires that an attorney who signs "a pleading, written motion, or other paper" thereby certifies that "the factual contentions have evidentiary support" and that the claims are "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law." FED. R. CIV. P. 11(b).

219. Celotex Corp. v. Catrett, 477 U.S. 317, 322–23 (1986) (holding that to avoid summary

In addition, the doctrines of absolute and qualified immunity, which safeguard individual officials, mitigate damage liability concerns.[220] Also, the Court's rejection of the doctrine of *respondeat superior* in § 1983 litigation insulates government entities from monetary liability unless a policymaker's conduct is challenged or a custom or policy is established.[221]

In light of these significant safeguards and limitations on liability, federal courts should not be reluctant to recognize substantive due process claims provided the plaintiff identifies a property or liberty interest within the broad, historic meaning of those terms and demonstrates that the misconduct shocks the judicial conscience. Conscience-shocking conduct must reflect deliberate indifference to victims' rights where there is time to deliberate or an intent to harm where deliberation is not feasible. Applying this analysis, substantive due process would continue to play a vital role in remedying abuses of government power in several areas of the law, including those described in this Part.[222]

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judgment an opposing party must show a genuine issue of material fact that impinges upon a decisive question of law); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 251–52 (1986) (holding that to survive summary judgment, the non-movant must present a "genuine factual dispute"—i.e., one that "presents a sufficient disagreement to require submission to a jury"); *see also* Pearson v. City of Grand Blanc, 961 F.2d 1211, 1222 (6th Cir. 1992) ("[I]t is extremely rare for a federal court properly to vitiate the action of a state administrative agency as a violation of substantive due process. The vast majority of such attacks may readily be disposed of on summary judgment . . . thus keeping interference by federal courts with local government to a salutary minimum.").

220. Scheuer v. Rhodes, 416 U.S. 232, 244–45 (1974) (holding that absolute immunity extends to judges, legislators, and prosecutors performing their duties, whereas qualified immunity shields most executive officials from damage liability unless they violate clearly established law). Legislative immunity in the context of land use regulation is discussed *infra* Part IV.D.

221. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978) ("[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.").

222. The areas discussed do not purport to be exhaustive. This Article argues that substantive due process protects individuals from the exercise of government power without reasonable justification. Thus, whenever government officials use their power not in connection with any official duty but for their own illicit purposes, a substantive due process violation has occurred. *See, e.g.*, Christensen v. County of Boone, 483 F.3d 454, 467, 469 (7th Cir. 2007) (Ripple, J., concurring in part and dissenting in part) (maintaining that a deputy who embarked on a personal vendetta against the plaintiffs—including following the plaintiffs while they were driving lawfully, parking his squad car near one plaintiff's place of employment and conducting surveyance of her lawful activities, and generally carrying out a "pervasive plan of intimidation" with the intent to harm the plaintiffs—demonstrated "a perverse use of police authority" that "shocks the judicial conscience," and thus asserting that the majority erred in not recognizing a cause of action for this raw abuse of power). The areas discussed, however, appear to generate most of the litigation in this area.

A. *Government Employment*

Several courts have ruled that arbitrary employment decisions, no matter how egregious, do not give rise to substantive due process claims because employment is not a fundamental right.[223] Other courts, like the Seventh Circuit, have held that a plaintiff may bring substantive due process claims based on mere property rights only if the plaintiff can demonstrate the unavailability of any state remedies.[224] These decisions clearly contradict Supreme Court precedent dating back to the 1950s.

In *Greene v. McElroy*,[225] the Court acknowledged that an employee who loses her job may sometimes allege either deprivation of a property right in her particular job or a liberty interest in practicing her chosen profession.[226] A property interest is recognized when the government creates a legal claim of entitlement through its contracts, its statutes, or its

223. *See, e.g.*, Young v. Twp. of Green Oak, 471 F.3d 674, 684–86 (6th Cir. 2006) ("'Absent the infringement of some fundamental right,' however, this court has held that 'the termination of public employment does not constitute a denial of federal substantive due process.'" (quoting Sutton v. Cleveland Bd. of Educ., 958 F.2d 1339, 1351 (6th Cir. 1992))); Silva v. Bieluch, 351 F.3d 1045, 1047 (11th Cir. 2003) (holding that deputy sheriffs who alleged arbitrary transfer could not state a due process claim because employment rights are state-created and not "fundamental" rights protected by the Constitution, and thus no substantive due process protection exists); Nicholas v. Pa. State Univ., 227 F.3d 133, 142–43 (3d Cir. 2000) (observing that the great majority of courts of appeals have concluded that a public employee's interest in continued employment is not so "fundamental" as to be protected by substantive due process); Indep. Enters. v. Pittsburgh Water & Sewer Auth., 103 F.3d 1165, 1180 (3d Cir. 1997) (holding that a contractor whose bids were allegedly arbitrarily rejected by a city did not assert "the sort of 'fundamental' interest entitled to the protection of *substantive* due process"); Zorzi v. County of Putnam, 30 F.3d 885, 895 (7th Cir. 1994) (holding that occupational liberty is protected only by procedural due process not by substantive due process); Charles v. Baesler, 910 F.2d 1349, 1353–55 (6th Cir. 1990) (arguing that most state-created contract rights, while protected by procedural due process, enjoy no protection under substantive due process).

224. Galdikas v. Fagan, 342 F.3d 684, 691 (7th Cir. 2003) (holding that even if officials acted arbitrarily and irrationally, because state law provides an adequate remedy for violation of a state-created contract right, no substantive due process violation may be found: "'Supreme Court precedent requir[es] plaintiffs complaining of arbitrary deprivation of their property to seek redress through state remedies'" (quoting Contreras v. City of Chi., 119 F.3d 1286, 1295 (7th Cir. 1997))), *cert. denied*, 540 U.S. 1183 (2004), *abrogated on other grounds by* Spiegla v. Hull, 371 F.3d 928 (7th Cir. 2004); Khan v. Gallitano, 180 F.3d 829, 834–35 (7th Cir. 1999) (rejecting an attorney's substantive due process claim that village officials interfered with her contract with a client because she could not demonstrate why her state-law remedies were constitutionally inadequate); Swartz v. Scruton, 964 F.2d 607, 611 n.6 (7th Cir. 1992) (holding that employment contract claims that merely allege deprivation of protected property interests are not actionable unless some other substantive right is asserted or state remedies are inadequate); *see also Charles*, 910 F.2d at 1355 ("[T]he availability of an adequate state remedy . . . suggest[s that the court] should not recognize [an employee's] contractual promotion right as fundamental and hence protected by substantive due process.").

225. 360 U.S. 474 (1959).

226. *Id*. at 492.

conduct.[227] Thus, in *Harrah Independent School District v. Martin*,[228] the Court reviewed the non-renewal of a tenured teacher's contract under a substantive due process analysis.[229] In addition, the Liberty Clause of the Fourteenth Amendment has, since the early twentieth century, been interpreted to include the right to engage in a lawful calling.[230] Moreover, in 1999, in *Conn v. Gabbert*,[231] the Court recognized a "generalized due process right to choose one's field of private employment."[232]

Following these Supreme Court cases, a few appellate courts have permitted substantive due process challenges brought, for example, by tenured teachers or professors who are terminated for arbitrary reasons and thus are deprived of an identified property interest.[233] Other appellate courts have recognized a substantive due process violation where an individual, due to arbitrary, irrational government action, is totally deprived of a liberty interest in pursuing an occupation.[234] Indeed, the Eighth Circuit, which has restricted substantive due process claims to the

227. *See supra* note 179 (discussing *Roth*).

228. 440 U.S. 194 (1979).

229. *Id.* at 197–99. Although the Supreme Court found no substantive due process violation because it determined that the action was not irrational on the merits, the appellate courts inferred from the analysis in *Harrah* that "the Court necessarily recognized a substantive due process right to be free from arbitrary and capricious state action in this particular context." Moore v. Warwick Pub. Sch. Dist. No. 29, 794 F.2d 322, 329 (8th Cir. 1986); *cf.* Singleton v. Cecil, 176 F.3d 419, 425–26 (8th Cir. 1989) (reasoning that *Harrah* established that continued employment is not so "fundamental" as to be protected under substantive due process).

230. *See supra* Part II.A.

231. 526 U.S. 286 (1999).

232. *Id*. at 291–92.

233. *See, e.g.*, Morris v. Clifford, 903 F.2d 574, 577 (8th Cir. 1990) (holding that a tenured college professor "has a substantive due process right to be free from discharge for reasons that are 'arbitrary and capricious,' or in other words, for reasons that are . . . unrelated to the education process, or wholly unsupported by a basis in fact"); Newman v. Massachusetts, 884 F.2d 19, 25 (1st Cir. 1989) (holding that a tenured school teacher who was subjected to an arbitrary and capricious decision significantly affecting his employment status stated a viable substantive due process claim); Gargiul v. Tompkins, 704 F.2d 661, 668 (2d Cir. 1983) (holding that substantive due process requires any action impairing a teacher's property interest in continued employment to have "a rational relation to a proper governmental purpose"), *cert. granted*, *judgment vacated on other grounds*, 465 U.S. 1016 (1984); Brenna v. S. Colo. State Coll., 589 F.2d 475, 476 (10th Cir. 1978) (holding that a tenured professor had a property interest "deserving of the procedural and substantive protections of the Fourteenth Amendment"); *cf.* Nicholas v. Pa. State Univ., 227 F.3d 133, 140–43 (3d Cir. 2000) (holding that a professor's property interest in his tenured professorship was not entitled to substantive due process protection because he had not been deprived of a fundamental property right).

234. *See* Engquist v. Or. Dep't of Agric., 478 F.3d 985, 996 (9th Cir. 2007) (holding that an employee "stated a valid claim . . . under substantive due process by alleging that Defendants' actions prevented her from pursuing her profession"), *cert. granted on other grounds*, 128 S. Ct. 977 (2008); Silverstein v. Gwinnett Hosp. Auth., 861 F.2d 1560, 1566 (11th Cir. 1988) (holding that staff privileges at a public hospital constitute a protected liberty interest because they implicate the right to engage in a common occupation of life).

deprivation of fundamental rights, has acknowledged a "fundamental right to engage in one's chosen occupation."[235] The First Circuit has taken the most liberal approach, interpreting Supreme Court precedent to permit any employee to bring a substantive due process claim *either* by identifying a specific property or liberty interest *or* by showing that the state's conduct "shocks the conscience."[236]

The vast majority of courts, however, reject the First Circuit's position and require employees to identify a protected property or liberty interest in their jobs.[237] Moreover, as noted, many recent cases have explicitly rejected employment claims as not founded on any fundamental right.[238] Proving a state-created property interest or complete denial of the right to pursue one's calling, and that the deprivation was so arbitrary that it "shocks the conscience," will be very difficult. However, decisions from

235. Flowers v. City of Minneapolis, 478 F.3d 869, 874 (8th Cir. 2007). The court explained, however, that this fundamental right does not encompass a brief interruption of work in a desired occupation but only the "'complete prohibition of the right to engage in a calling.'" *Id.* (quoting *Conn*, 526 U.S. at 291–92); *cf.* Singleton v. Cecil, 176 F.3d 419, 428 (8th Cir. 1999) (holding that occupational liberty is never protected by substantive due process, but only under procedural due process, because "[a]n at-will public employee's 'occupational liberty' should not be utilized as a vehicle for a federal court to interfere with employment decisions under the rubric of substantive due process").

236. Coyne v. City of Somerville, 972 F.2d 440, 443 (1st Cir. 1992); *see also* Santiago de Castro v. Morales Medina, 943 F.2d 129, 131–32 (1st Cir. 1991) (recognizing these two alternative ways of proving a substantive due process violation but concluding that the plaintiff's "right to pursue her employment free from emotional health risks resulting from her supervisor's verbal harassment" did not warrant substantive due process protection because such protection "would embroil federal courts in everyday workplace disputes between employers and their employees").

237. *See* Hawkins v. Freeman, 195 F.3d 732, 749 (4th Cir. 1999) ("There is no general liberty interest in being free of even the most arbitrary and capricious government action; the substantive component of the due process clause only protects from arbitrary government action that infringes a specific liberty interest."); Nunez v. City of L.A., 147 F.3d 867, 873 (9th Cir. 1998) ("There is no general liberty interest in being free from capricious government action."); Valot v. Se. Local Sch. Dist. Bd. of Educ., 107 F.3d 1220, 1233 (6th Cir. 1997) ("[M]erely to state that the Due Process Clause was 'intended to secure the individual from the arbitrary exercise of the powers of government' . . . does nothing to state a claim under the substantive component of the Due Process Clause." (quoting Albright v. Oliver, 510 U.S. 266, 272 (1994))); Movers Warehouse, Inc. v. City of Little Can., 71 F.3d 716, 718 (8th Cir. 1995) ("The possession of a protected life, liberty, or property interest is . . . a condition precedent to [any due process claim.]"); Dover Elevator Co. v. Ark. State Univ., 64 F.3d 442, 445–46 (8th Cir. 1995) ("Analysis of either a procedural or substantive due process claim must begin with an examination of the interest allegedly violated."); Zorzi v. County of Putnam, 30 F.3d 885, 895 (7th Cir. 1994) ("Thus, in the absence of a life, liberty or property interest [the officer] could be terminated for arbitrary and capricious reasons."). The courts that mandate plaintiffs, as a threshold matter, to assert a liberty or property interest often cite the Supreme Court's decision in *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985): "'the Court has no license to invalidate legislation which it thinks merely arbitrary or unreasonable.'" *Id.* at 226 (quoting Moore v. City of E. Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting)).

238. *See supra* note 223 and accompanying text.

the more liberal circuits demonstrate that government officials do make capricious employment decisions, and when this occurs, the officials should be held accountable.[239] Government employees and licensees do not give up their right to be free from hostile, arbitrary, or malicious treatment by the government.[240]

These cases all involve negative employment decisions, such as demotions, suspensions, and terminations. Other substantive due process issues arise from decisions that adversely affect the work environment, such as those that create a hazardous workplace. These cases are particularly difficult because the Supreme Court has specifically refused to find that the substantive component of the Due Process Clause requires a safe work environment. In *Collins v. City of Harker Heights*,[241] the Court found that neither the text nor history of the Due Process Clause supports a governmental duty to provide a safe working environment.[242] Relying on its earlier *DeShaney* decision, the Court emphasized that the Constitution is a charter of negative liberties and that the Constitution does not impose affirmative obligations on the government unless it has deprived the victim of the ability to protect herself.[243] Thus, sending the plaintiff down a manhole without proper equipment to protect him from deadly gases could not be regarded as a deprivation of life and liberty.[244] Several lower courts have relied on the *Collins* analysis to reject claims that government officials acted with deliberate indifference in failing to address a dangerous work environment.[245]

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239. *See, e.g.*, Hawkins v. Holloway, 316 F.3d 777, 786–87 (8th Cir. 2003) (holding that a sheriff who pointed his loaded gun at his employees at close range, while making direct and forceful threats to kill them or inflict grievous bodily injury, was deliberately using his power as a means of oppressing those employed in his department, thereby elevating his conduct to the arbitrary and conscience-shocking level prohibited by substantive due process); *see also* cases cited *supra* notes 233–34.

240. *Cf.* Garcetti v. Ceballos, 547 U.S. 410, 417 (2006) (noting that "public employees do not surrender all their First Amendment rights by reason of their employment" but holding that where government employees speak in the context of their job duties, their speech is not protected by the First Amendment).

241. 503 U.S. 115 (1992).

242. *Id*. at 126.

243. *Id.* at 126–27; *see supra* notes 93–97 and accompanying text (discussing *DeShaney*).

244. *Collins*, 503 U.S. at 117, 127–28.

245. *See* Lombardi v. Whitman, 485 F.3d 73, 74, 85 (2d Cir. 2007) (holding that federal officials who allegedly misled emergency workers to forgo the use of respirators following the 9/11 attacks in New York City could not be held liable, because a failure to warn employees of a known danger is not actionable under substantive due process and because their action did not "shock the contemporary conscience"); Estate of Phillips v. Dist. of Columbia, 455 F.3d 397, 403–07 (D.C. Cir. 2006) (holding that because the Due Process Clause does not require a public employer to protect employees from inherent job-related risks, a firefighter who died and those who were injured in a fire due to a failure to provide adequate training could not assert a substantive due process claim); Upsher v. Grosse Pointe Pub. Sch. Sys., 285 F.3d 448, 453 (6th Cir. 2002) (holding that, in the employment context, evidence that the defendant employer was deliberately indifferent

However, the *DeShaney*/*Collins* line of cases recognizes that the Due Process Clause demands protection if the state disables its employees from protecting themselves or if the state creates or exacerbates a danger to them.[246] Thus, government employers should be held accountable if they created a dangerous situation and acted with deliberate indifference, not mere negligence, to the safety of employees. A few courts have recognized this distinction.[247] Most courts, however, have failed to differentiate between mere inaction and affirmative government decisions that render a work environment more dangerous. For example, in *Witkowski v. Milwaukee County*,[248] the Seventh Circuit held that a decision to allow a dangerous inmate into the courtroom without a stun belt cannot provide the basis for alleging danger creation when the inmate grabs a gun and shoots the guard. The court reasoned that the injured guard had chosen "to enter a snake pit or a lion's den for compensation," and thus he could not

to an unreasonable risk of harm does not give rise to a violation of substantive due process); Martinez v. Uphoff, 265 F.3d 1130, 1133 n.3 (10th Cir. 2001) (holding that a prison guard who was murdered by prison inmates did not have a "special relationship" with his employer because the relationship was consensual in nature); Tucker v. City of Hot Springs, 204 F.3d 783, 783–84 (8th Cir. 2000) (requiring an employee to enter and inspect buildings that were dangerous, unsanitary, and unhealthy, although special safety equipment had not yet arrived, does not violate substantive due process, because the employee was not in a custodial setting, nor was he ordered to enter the building under threat of losing his job); White v. Lemacks, 183 F.3d 1253, 1257–58 (11th Cir. 1999) (holding that even the risk that an employee would lose her job if she did not submit to unsafe job conditions does not convert a voluntary employment relationship into a custodial relationship, nor does it entitle an employee to substantive due process protection from workplace hazards; thus, the plaintiff's claim that she was beaten by a county jail inmate while working in the jail infirmary was not actionable); Wallace v. Adkins, 115 F.3d 427, 429–30 (7th Cir. 1997) (holding that a prison guard who was stabbed by an inmate who had previously threatened this guard failed to state a substantive due process claim because he had no custodial relationship with his employer).

246. *See supra* Part III.A.

247. *Lombardi*, 485 F.3d at 79–82 (holding that although EPA officials had no affirmative duty to protect 9/11 workers who performed search-and-rescue tasks from exposure to environmental contaminants, allegations that defendants assured site workers that the air in Lower Manhattan was safe to breathe—thereby creating a false sense of security that induced them to forgo protective gear might be actionable under danger-creation theory); Sperle v. Mich. Dep't of Corrs., 297 F.3d 483, 492 (6th Cir. 2002) (holding that although the plaintiff could not allege a custodial relationship because she voluntarily sought her job as a storekeeper at state prison, the court should determine whether the defendants created a risk of harm to the plaintiff or rendered her more vulnerable to danger); Eddy v. V.I. Water & Power Auth., 256 F.3d 204, 212–13 (3d Cir. 2001) (holding that the substantive due process right to be free from treatment that shocks the conscience applies to a governmental employer's treatment of its employees; thus, the employee should be given the opportunity to prove that he was forced to work in unsafe conditions, which caused his injury); L.W. v. Grubbs, 92 F.3d 894, 896 (9th Cir. 1996) (holding that substantive due process rights are implicated where responsible officials act with deliberate indifference to the safety of employees in the presence of a state-created danger).

248. 480 F.3d 511, 511–12 (7th Cir. 2007).

complain: "higher wages compensate people whose jobs are risky."[249] The court declined to transform a claim of mere inaction into an "active" abuse-of-power case that triggers liability for bad decision-making.[250] Admittedly, the Supreme Court has warned that "[t]he federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies."[251] But where government officials through their affirmative acts and decisions create a dangerous situation reflecting such deliberate indifference to the welfare of employees that it shocks the conscience, courts should not hesitate to impose liability.

B. *Treatment of Arrestees and Detainees*

Arrestees and pretrial detainees whose claims do not fall under the Fourth Amendment or the Eighth Amendment may pursue relief under substantive due process. In *Bell v. Wolfish*,[252] the Supreme Court held that the Due Process Clause, rather than the Eighth Amendment, governs challenges to the conditions of confinement of pretrial detainees. Further, in *Graham v. Connor*,[253] the Court acknowledged "that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment."[254] Unlike the situation of government employees or licensees, courts can readily identify a liberty interest in bodily integrity and a duty to protect because of the custodial relationship between arrestees and their captor.[255] Rather, the difficult question has been ascertaining the appropriate standard of review.

In *Wolfish*—the seminal case on substantive due process claims of pretrial detainees—the Supreme Court focused on whether the particular misconduct was punitive because pretrial detainees who have not been convicted of a crime cannot be punished in any manner.[256] The Court then admonished that "if a restriction or condition [of pretrial detention] is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua*

249. *Id*. at 513.

250. *Id*.

251. Bishop v. Wood, 426 U.S. 341, 349–50 (1976).

252. 441 U.S. 520, 535–37 & n.16 (1979).

253. 490 U.S. 386 (1989).

254. *Id*. at 395 n.10; *see also* Petta v. Rivera, 143 F.3d 895, 900–03 (5th Cir. 1998) (holding that when a plaintiff's excessive-force claim—whether the plaintiff is a prisoner, arrestee, detainee, or an innocent bystander—falls outside the specific protection of the Bill of Rights, that plaintiff may seek redress under the Due Process Clause of the Fourteenth Amendment).

255. *But see* Palmer v. Marion County, 327 F.3d 588, 591–93 (7th Cir. 2003) (holding that there is no requirement that jail officials ensure the safety of their inmates, even though the case involved claims brought by pretrial detainees who were severely beaten by other inmates).

256. *Wolfish*, 441 U.S. at 523.

detainees."[257] Thus, where the government purposefully imposes disabilities, the *Wolfish* "punitive" inquiry is appropriate.[258] Where a punitive motive is not inferable, *Lewis* appears to provide the standard for challenges to prison conditions.[259] Under *Lewis*, the deprivation of liberty must shock the conscience in order to be actionable, but plaintiffs may meet this standard in a non-emergency situation provided that plaintiffs show deliberate indifference to their rights.[260] Arguably, arrestees and pretrial detainees are entitled to greater protection than convicted prisoners, but the Supreme Court has not definitively answered this question.[261]

Guided by *Wolfish*, some courts have acknowledged that although prison officials may act to maintain order and security in a detention facility, officials cannot punish pretrial detainees or arrestees. Thus, arbitrary or purposeless restrictions or conditions should be found unconstitutional.[262] Recognizing this distinction, the Seventh Circuit has held that, unlike convicted prisoners bringing Eighth Amendment claims, detainees do not have to prove an "intent to punish" to establish a substantive due process violation.[263] Even where the plaintiff cannot prove an intent to punish, a substantive due process violation will be found when (1) a restriction does not rationally relate to a legitimate, non-punitive government purpose, (2) a restriction is excessive in light of that purpose, or (3) prison officials are deliberately indifferent to a substantial risk to a detainee's safety.[264] Similarly, the Eleventh Circuit has reasoned that even if intent to punish is required, it "may be inferred when[ever] a condition of pretrial detention is not reasonably related to a legitimate government[al] goal."[265] Unlike the Eighth Amendment, which precludes

257. *Id.* at 539.

258. Iqbal v. Hasty, 490 F.3d 143, 169 (2d Cir. 2007); *see also Wolfish*, 441 U.S. at 537–38 (listing factors for determining whether a condition of confinement is punitive, such as "'[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment . . . , whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.'" (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168–69 (1963))).

259. *Iqbal*, 490 F.3d at 169 (reasoning that a deliberate-indifference standard applies).

260. County of Sacramento v. Lewis, 523 U.S. 833, 849–50 (1998).

261. *See* Whitley v. Albers, 475 U.S. 312, 327 (1986) (noting that this is an open question).

262. O'Connor v. Huard, 117 F.3d 12, 16 (1st Cir. 1997).

263. *See* Hart v. Sheahan, 396 F.3d 887, 892–94 (7th Cir. 2005) (holding that if brutal treatment of pretrial detainees is gratuitous, even if the motive is not punishment, "due process in its substantive sense has been violated"; thus, inmates confined to their cells for forty-eight to fifty hours at a time with no observation by guards stated an actionable claim).

264. Rapier v. Harris, 172 F.3d 999, 1005–06 (7th Cir. 1999) (citing Bell v. Wolfish, 441 U.S. 520, 538 (1979)).

265. McMillian v. Johnson, 88 F.3d 1554, 1564 (11th Cir. 1996).

only "cruel and unusual" punishment, substantive due process protects pretrial detainees from *any* punishment;[266] thus, the standard should be different.

Nonetheless, the trend in the appellate courts is to impose significant restrictions on arrestees and detainees who bring substantive due process claims. In the Fifth Circuit, for example, to prove constitutionally impermissible excessive force, the plaintiff must show (1) that the actions are "grossly disproportionate to the need for action[,] . . . inspired by malice rather than merely careless or unwise excess of zeal," such that they amounted to "abuse of official power that shocks the conscience," and (2) that, as a result, the plaintiff suffered injuries, which need not necessarily be severe.[267] Similarly, the Tenth Circuit has reasoned that the conduct "'must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power . . . . [It] must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking.'"[268] In addition, the Fourth Circuit has required both a showing of the requisite state of mind—i.e., deliberate indifference—and that the injury be more than *de minimis*.[269] These requirements help ensure that federal courts will not be swamped with similar claims demanding the courts to scrutinize "minutiae of state detention activities" contrary to the Supreme Court's admonition that "the Constitution is not a 'font of tort law.'"[270]

Further, several appellate courts have made it more difficult for arrestees and detainees to win substantive due process claims by treating arrestees and detainees the same as convicted felons. The Supreme Court has ruled that in a failure-to-protect case an Eighth Amendment violation will be found only if prison officials acted with both objective and subjective deliberate indifference, thus requiring evidence that prison

266. Hubbard v. Taylor, 399 F.3d 150, 163–66 (3d Cir. 2005); *see also* Surprenant v. Rivas, 424 F.3d 5, 13–14 (1st Cir. 2005) (holding that a pretrial detainee has the right to be free from any punishment prior to conviction and thus any discipline imposed during the detention period must be roughly proportionate to the gravity of the infraction; prison officials' fabrication of a serious charge knowing that it would lead to the plaintiff's immediate placement in segregation without any intervening hearing was arbitrary punishment that violated substantive due process); Slade v. Hampton Roads Reg'l Jail, 407 F.3d 243, 250 (4th Cir. 2005) (conceding that due process rights of a pretrial detainee are in one sense greater than those afforded under the Eighth Amendment—a convicted prisoner is entitled only to protection against cruel and unusual punishment, whereas pretrial detainees must not be subjected to any form of punishment); Benjamin v. Fraser, 343 F.3d 35, 49–50 (2d Cir. 2003) (reasoning that because they have not been convicted of a crime, pretrial detainees "may not be punished in any manner—neither cruelly and unusually nor otherwise").

267. Petta v. Rivera, 143 F.3d 895, 902 (5th Cir. 1998).

268. Becker v. Kroll, 494 F.3d 904, 922–23 (10th Cir. 2007) (alterations in original) (quoting Livsey v. Salt Lake County, 275 F.3d 952, 957–58 (10th Cir. 2001)).

269. Riley v. Dorton, 115 F.3d 1159, 1167 (4th Cir. 1997).

270. *Id.* (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

officials knew of and disregarded a substantial risk of serious harm.[271] This "subjective recklessness" standard allows an official to escape liability even when he fails "to alleviate a significant risk that he should have perceived[,] but did not."[272] Further, in *Whitley v. Albers*,[273] the Court ruled that inflicting pain while securing a prison does not constitute cruel and unusual punishment unless the plaintiff proves an "'unnecessary and wanton infliction of pain'" in light of the circumstances confronted by the prison official.[274]

Initially, many appellate courts rejected these restrictive decisions, relying on the Supreme Court's statement that those not convicted of a crime must receive protection "*at least as great* as the Eighth Amendment protections available to a convicted prisoner."[275] However, several recent appellate decisions maintain that the Eighth Amendment and substantive due process standards are identical.[276]

271. Farmer v. Brennan, 511 U.S. 825, 831, 837–38 (1994).

272. *Id*. at 838–40.

273. 475 U.S. 312 (1986).

274. *Id*. at 319 (quoting Ingraham *ex rel.* Ingraham v. Wright, 430 U.S. 651, 670 (1977)).

275. City of Revere v. Mass. Gen. Hosp., 463 U.S. 239, 244 (1983) (emphasis added); *see also* Spencer v. Bouchard, 449 F.3d 721, 727–29 (6th Cir. 2006) (holding that the Due Process Clause provides pretrial detainees with protection that equals, if not exceeds, that afforded under the Eighth Amendment, and then finding that allegations that detainees were subjected to cold cells with leaking ceilings for several months and that officials confiscated inmates' blankets when they complained about the cold—and even tore down garbage bags that cellmates had attached to the ceiling in an attempt to catch the leaks—raised serious fact issues about whether officials acted with deliberate indifference to a serious deprivation and thus the district court erred in dismissing the lawsuit); Hartsfield v. Colburn, 371 F.3d 454, 456–57 (8th Cir. 2004) (ruling that a detainee's claim that prison officials were deliberately indifferent to his need for dental care should have been analyzed under the Due Process Clause rather than the Eighth Amendment; thus, the district court erred in granting summary judgment where there were factual questions about whether jail personnel acted with deliberate indifference when they did not arrange dental treatment until more than six weeks after the detainee's written request, causing him to suffer further pain and infection).

276. *See* Andujar v. Rodriguez, 486 F.3d 1199, 1203–04 (11th Cir. 2007) (revised opinion) (reasoning that the standard that governs claims of deliberate indifference to serious medical needs of pretrial detainees is the same as the standard that covers convicted prisoners under the Eighth Amendment, and thus a detainee must establish an objectively serious medical need and that government officials acted with deliberate indifference to that need; therefore, even if paramedics knew of risk of serious harm and yet disregarded that risk when, contrary to agency protocol, they failed to treat the detainee's serious dog-bite wounds until after booking, a two-hour delay did not prove deliberate indifference); Butler v. Fletcher, 465 F.3d 340, 344–45 (8th Cir. 2006) (asserting that, although the Supreme Court in *Bell* held that unlike the Eighth Amendment, the Due Process Clause restricts punishing detainees prior to an adjudication of guilt, the same deliberate-indifference standard applies to "claims that prison officials unconstitutionally ignored a serious medical need or failed to protect [a] detainee from a serious risk of harm"; thus, even if prison policies do not reasonably relate to legitimate government objectives, no substantive due process violation existed unless the county sheriff acted with deliberate indifference to a serious health risk that tuberculosis posed to detainees in the county jail); Pietrafeso v. Lawrence County, 452 F.3d 978, 982–84 (8th Cir. 2006) (holding that the Eighth Amendment deliberate-indifference standard applies to pretrial detainees, and absent evidence that a jailer actually knew of and recklessly disregarded a risk of serious harm to a detainee in denying him access to his prescribed

medications, the deliberate-indifference standard cannot be met); Drake *ex rel.* Cotton v. Koss, 445 F.3d 1038, 1042 (8th Cir. 2006) (holding that, to find a prison official liable for deliberate indifference to a suicide risk, the plaintiff must show that the official actually knew that the detainee faced a substantial risk of serious harm and yet failed to reasonably respond to abate that risk); Vaughn v. Greene County, 438 F.3d 845, 850 (8th Cir. 2006) (recognizing that, although some decisions from the Eighth Circuit have stated a lighter burden for pretrial detainees than for convicted prisoners, and this circuit has yet to establish a clear standard, the circuit has repeatedly applied the same deliberate-indifference standard used in Eighth Amendment analysis; thus, the plaintiff must prove that the official actually knew of the risk and yet deliberately disregarded it); Bozeman v. Orum, 422 F.3d 1265, 1271–73 (11th Cir. 2005) (holding that, although claims involving mistreatment of pretrial detainees are governed by due process rather than the Eighth Amendment, the applicable standards are the same, but ultimately finding that correction officers' conduct in subduing an unruly pretrial detainee by holding him face down on his bunk until he became unconscious and then waiting fourteen minutes before calling for medical assistance was actionable as both excessive force and deliberate indifference to medical needs); Snow *ex rel.* Snow v. City of Citronelle, 420 F.3d 1262, 1268–69 (11th Cir. 2005) (holding that liability for suicide of a pretrial detainee is analyzed under the Fourteenth, rather than the Eighth, Amendment, and requires showing that the defendants were deliberately indifferent to a strong likelihood that the deceased would commit suicide while in jail, yet determining that employees who lacked subjective knowledge of the detainee's potential for suicide could not be held liable); Fisher v. Lovejoy, 414 F.3d 659, 661–64 (7th Cir. 2005) (holding that, although substantive due process protects pretrial detainees from punishment and requires jail officials to protect detainees from violence, a violation will be found only where the officials actually knew that inmates faced a substantial risk of serious harm but disregarded that risk by failing to take reasonable measures); Cook v. Sheriff of Monroe County, 402 F.3d 1092, 1115 (11th Cir. 2005) (holding that the due process standard is the same as the Eighth Amendment standard regarding claims that pretrial detainees have been denied basic necessities such as medical care, and thus plaintiffs must show that jail officials deliberately disregarded a strong likelihood, not a possibility, that self-inflicted harm would occur); Gray v. City of Detroit, 399 F.3d 612, 616 (6th Cir. 2005) (holding that a pretrial detainee's right to adequate medical treatment is the same as that afforded prisoners under the Eighth Amendment, and thus a plaintiff must show that the defendants acted with deliberate indifference to his suicidal behavior and that the defendant actually knew the detainee was at risk of committing suicide); Estate of Moreland v. Dieter, 395 F.3d 747, 758 (7th Cir. 2005) (holding that due process claims of pretrial detainees are evaluated under the same legal standard as an Eighth Amendment claim, and thus a plaintiff must demonstrate that the sheriff made a deliberate decision to disregard the detainee's safety), *cert. denied*, 545 U.S. 1115 (2005); Ledbetter v. City of Topeka, 318 F.3d 1183, 1188 (10th Cir. 2003) (holding that the Eighth Amendment provides the benchmark for due process claims brought by a pretrial detainee, and thus a plaintiff must prove that officials knew of and disregarded an excessive risk to health and safety and that the deprivation was "sufficiently serious"); Burrell v. Hampshire County, 307 F.3d 1, 7–8 (1st Cir. 2002) (holding that, although pretrial detainees are protected under the Due Process Clause rather than the Eighth Amendment, the standard is the same—namely, a pretrial detainee must demonstrate that he was incarcerated under conditions imposing a substantial risk of serious harm and that prison officials were deliberately indifferent in that they were subjectively aware of facts from which an inference of substantial risk could be drawn and they actually drew such an inference); Gibbs v. Grimmette, 254 F.3d 545, 548–50 (5th Cir. 2001) (holding that there is no significant distinction between pretrial detainees and convicted inmates concerning basic human needs, and in both cases the same deliberate-indifference standard applies, i.e., a pretrial detainee must show that the state official knew of and disregarded an excessive risk to the inmate's health or safety); Brown v. Harris, 240 F.3d 383, 388–89 (4th Cir. 2001) (asserting that regardless of whether plaintiff is a pretrial detainee or convicted prisoner the standard is the same in determining deliberate indifference to serious medical needs: the deprivation must be objectively sufficiently serious and the official must have culpable state of mind in the sense of subjective recklessness); Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir. 2000) (conceding

Only the Second,[277] Third,[278] and Ninth[279] Circuits have consistently held that the standard of deliberate indifference that applies to those not yet convicted of any crimes need not meet the draconian subjective-state-of-mind requirements of the Eighth Amendment.

Although the Supreme Court has not further clarified the analysis that should govern arrestees' and detainees' claims where the "intent to punish" standard from *Wolfish* is inapplicable or inappropriate,[280] no reason exists to vary from the standard set forth in *Lewis*—namely, government officials who act with "objectively" deliberate indifference to the well-being of arrestees or detainees, in a situation where there is time

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that because a pretrial detainee may not be punished, the Due Process Clause rather than the Eighth Amendment applies, but holding, nonetheless, that the Eighth Amendment test should be used when pretrial detainees sue under the Due Process Clause); Cottrell v. Caldwell, 85 F.3d 1480, 1490–91 (11th Cir. 1996) (finding that claims involving mistreatment of arrestees or pretrial detainees are governed by due process rather than the Eighth Amendment but that the applicable standard is the same—plaintiffs must meet *Farmer*'s standard of subjective and objective deliberate indifference to a substantial risk of serious harm).

277. Iqbal v. Hasty, 490 F.3d 143, 169 (2d Cir. 2007) ("We explicitly rejected analogies to the Eighth Amendment that would require a showing of wantonness on the part of the prison official, or a showing that the alleged conditions were so inhumane as to constitute cruel and unusual punishment." (citations omitted)).

278. Hubbard v. Taylor, 399 F.3d 150, 154,163–66 (3d Cir. 2005) (holding that in assessing a pretrial detainee's challenge to conditions of confinement, which included triple-celling of detainees in a cell designed to be occupied by a single person, the district court should have employed a due process analysis, rather than the Eighth Amendment standard, which mandates only that punishment not be cruel and unusual; whereas Eighth Amendment is designed to protect those convicted of crimes, pretrial detainees cannot be punished at all under the Due Process Clause); Natale v. Camden County Corr. Facility, 318 F.3d 575, 582 (3d Cir. 2003) (holding that due process affords a pretrial detainee a right to adequate medical attention; thus, a detainee who shows serious medical need and acts or omissions by prison officials that indicate deliberate indifference to that need have stated a cause of action under substantive due process).

279. Jones v. Blanas, 393 F.3d 918, 931 (9th Cir. 2004) (holding that the district court erred in using the Eighth Amendment, rather than the substantive due process standard in judging a claim brought by an individual detained while awaiting civil commitment proceedings; "'due process requires that the nature and duration of [a] commitment bear [a] reasonable relation to the purpose for which the individual is committed'" (quoting Jackson v. Indiana, 406 U.S. 715, 738 (1972))), *cert. denied*, 546 U.S. 820 (2005); Or. Advocacy Ctr. v. Mink, 322 F.3d 1101, 1120–22 (9th Cir. 2003) (holding that the deliberate-indifference standard demanded under the Eighth Amendment should not govern whether a state hospital is liable for due process violations of an incapacitated criminal defendant who has not yet been convicted of a crime; the state mental hospital violated substantive due process by delaying admission of incapacitated criminal defendants for evaluation and treatment); *see also* Hydrick v. Hunter, 466 F.3d 676, 697–99 (9th Cir. 2006) (holding that sexual offenders civilly committed to a state psychiatric hospital stated a claim for violation of their substantive due process right to safe confinement where they alleged that they were intentionally exposed to feces, urine, and blood in the hospital courtyards, bathrooms, and hallways, and that they were subjected to verbal harassment, physical abuse, and sexual assaults by other detainees).

280. *See* Whitley v. Albers, 475 U.S. 312, 327 (1986); *see also supra* note 261 and accompanying text.

to deliberate, should be held accountable for their wrongdoing.[281] A standard of "wanton" infliction of pain is unnecessary because detainees and arrestees cannot constitutionally be punished. Further, a test of "knew or should have known" of a risk to safety, rather than an "actual knowledge" test, should be applied because arrestees and detainees are entitled to greater protection than those who have been convicted of a crime.[282] The Court has recognized that in a custodial setting, government officials owe a duty of care to those who have been deprived of liberty.[283] Officials who act with deliberate indifference to this duty of care should be held liable for their conscience-shocking behavior. A showing of objective deliberate indifference, combined with some showing of more than *de minimis* injury, shocks the conscience and thus should sustain a substantive due process claim.

C. *Public Education*

In many cases, students bringing substantive due process claims have alleged deprivations of liberty, usually in the form of corporal punishment, sexual abuse, or verbal or physical harassment perpetrated by school officials or fellow classmates. As to the last allegation, school officials generally are not liable for the conduct of fellow students in light of Supreme Court precedent refusing to recognize a duty to protect absent a custodial relationship.[284] As previously discussed, the lower courts have unanimously rejected claims alleging a "mere" failure to protect from private violence, even in a residential public-school environment, unless the student was involuntarily placed in that environment.[285] Nonetheless, sexual abuse by teachers and other school officials violates the fundamental right to bodily integrity and thus is actionable.[286] Other cases

281. *See supra* Part II.C.

282. *See, e.g.*, Miller v. Calhoun County, 408 F.3d 803, 819–22 (6th Cir. 2005) (recognizing that less flagrant conduct than required under *Farmer* may constitute deliberate indifference in medical treatment cases brought by pretrial detainees and that a doctor's provision of medical care may amount to deliberate indifference if it is "'so grossly incompetent, inadequate, or excessive as to shock the conscience'" (quoting Terrance v. Northville Reg'l Psychiatric Hosp., 286 F.3d 834, 844 (6th Cir. 2001))); Armstrong v. Squadrito, 152 F.3d 564, 577 (7th Cir. 1998) (rejecting *Farmer*'s definition of deliberate indifference in favor of a test requiring "'conscious disregard of known or obvious dangers' [or] . . . 'a deliberate choice to avoid an obvious danger . . . if the choice results in harm to a protected interest, even though the defendant obtusely lacks actual knowledge of the danger.'" (quoting West *ex rel.* Norris v. Waymire, 114 F.3d 646, 651 (7th Cir. 1997))).

283. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 199–200 (1989).

284. *See supra* notes 91–97 and accompanying text.

285. *See supra* notes 103–06 and accompanying text. *But cf.* Meeker v. Edmundson, 415 F.3d 317, 321–23 (4th Cir. 2005) (holding that a student could maintain a substantive due process claim against a wrestling coach for intentionally encouraging team members to beat the plaintiff—where the facts alleged more than a mere failure to protect—and a coach cannot escape liability simply because he did not personally administer the beatings).

286. Plumeau v. Sch. Dist. No. 40 County of Yamhill, 130 F.3d 432, 438 (9th Cir. 1997)

involve disciplinary action taken against students for alleged misconduct or for academic deficiency whereby a student is deprived of a property interest in education. As in the other areas discussed, the appellate courts strongly disagree whether substantive due process claims may be brought by students and, if so, about what standard to apply in assessing whether a violation has occurred.

The most well-accepted substantive due process claims involve corporal punishment. In *Ingraham ex rel. Ingraham v. Wright*,[287] the Supreme Court recognized that imposing corporal punishment may constitute a deprivation of liberty.[288] Several courts have held that where educators use excessive force, or any force without justification, they have violated substantive due process.[289] However, a growing number of courts have asserted that the Fourth Amendment, rather than substantive due

(holding that substantive due process protects a child's right to be free from sexual abuse by school employees while attending public school); Doe v. Claiborne County *ex rel.* Claiborne County Bd. of Educ., 103 F.3d 495, 506 (6th Cir. 1996) (noting that every appellate court that has considered the issue has recognized that the right to be free from sexual abuse at the hands of a public school teacher is clearly protected by the Due Process Clause); Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 451 (5th Cir. 1994) (finding that a substantive due process right to bodily integrity is necessarily violated when school officials sexually abuse a student).

287. 430 U.S. 651 (1977).

288. *Id.* at 674–80. The Court found a liberty interest in being free from any "appreciable physical pain," *id.* at 674, but then concluded that state common-law remedies satisfied procedural due process, *id.* at 682. The plaintiffs did not plead a substantive due process claim. *Id.* at 653.

289. Kirkland *ex rel.* Jones v. Greene County Bd. of Educ., 347 F.3d 903, 904 (11th Cir. 2003) (holding that a high-school principal who repeatedly struck a thirteen-year-old student in head, neck, and ribs with a metal cane—when the student was not armed or physically threatening in any manner—violated the student's substantive due process right to be free from excessive corporal punishment; corporal punishment is arbitrary, capricious, and conscience-shocking when school officials intentionally use an amount of force that is obviously excessive under the circumstances and the force presented a reasonably foreseeable risk of serious bodily injury); Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 251–52 (2d Cir. 2001) (holding that a student assaulted by a gym teacher stated a claim under substantive due process where the force used far surpassed anything that could reasonably be characterized as serving legitimate governmental ends); Neal *ex rel.* Neal v. Fulton County Bd. of Educ., 229 F.3d 1069, 1076 (11th Cir. 2000) (holding that the district court improperly dismissed a substantive due process claim against a high-school football coach who allegedly struck a student with a metal weight lock, causing the student to lose the use of one eye); P.B. v. Koch, 96 F.3d 1298, 1303–04 (9th Cir. 1996) (finding that school instructors who use excessive or unjustified force for malicious reasons violate substantive due process; thus, a principal who physically assaulted his students, causing pain, bruising, and emotional injury, when there was no need for force, was liable for substantive due process violations); Metzger *ex rel.* Metzger v. Osbeck, 841 F.2d 518, 520–21 (3d Cir. 1988) (reasoning that if a physical-education instructor restrained students, resulting in broken bones and other injuries with the intent to cause harm, the defendant is liable for crossing the "constitutional line" separating common-law tort from deprivation of substantive due process); Garcia v. Miera, 817 F.2d 650, 653–54 (10th Cir. 1987) (holding that corporal punishment that is so grossly excessive that it shocks the conscience violates a student's substantive due process rights), *cert. denied*, 485 U.S. 959 (1988).

process, should govern any excessive-force claims involving seizure of a student.[290] These cases rely on the Supreme Court decision in *New Jersey v. T.L.O.*,[291] where the Court applied a Fourth Amendment analysis to determine the validity of random drug searches in the school context. The Court rejected a rigid probable-cause standard and instead determined that school searches should be judged under a reasonableness test, which looks to "the age and sex of the student and the nature of the infraction."[292]

In addition, the Court in *Graham v. Connor*[293] directed courts to analyze claims of excessive force raised in the context of a search or seizure under the more specific constitutional provision—the Fourth Amendment—rather than the general notion of substantive due process.[294] Although *Graham* arose in the criminal context, some courts have cited *Graham* to support using the Fourth Amendment, rather than substantive due process, in the school context.[295] In light of the reluctance of many lower courts to recognize substantive due process violations and to impose a draconian shocks-the-conscience standard, plaintiffs might be well advised to explore the Fourth Amendment and its reasonableness standard to buttress their claims of abuse of government power.[296]

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290. Preschooler II v. Clark County Sch. Bd. of Trs., 479 F.3d 1175, 1180 (9th Cir. 2007) ("The consequences of a teacher's force against a student at school are generally analyzed under the 'reasonableness' rubric of the Fourth Amendment, although courts historically applied substantive due process analysis under the Fourteenth Amendment's 'shocks the conscience' test."); *see also* Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010, 1016 (7th Cir. 1995); Hassan v. Lubbock Indep. Sch. Dist., 55 F.3d 1075, 1079 (5th Cir. 1995); Edwards v. Rees, 883 F.2d 882, 884 (10th Cir. 1989); *cf.* Dubbs v. Head Start, Inc., 336 F.3d 1194, 1203 (10th Cir. 2003) (holding that, although claims by children subjected to intrusive physical examinations on school premises are best addressed by the Fourth Amendment, not by substantive due process, parents' claims alleging deprivation of their right to direct and control the medical treatment of their children should be adjudicated under the substantive due process clause), *cert. denied*, 540 U.S. 1179 (2004).

291. 469 U.S. 325, 327–28 (1985).

292. *Id*. at 342.

293. 490 U.S. 386 (1989).

294. *Id*. at 388.

295. *See, e.g.*, Doe *ex rel.* Doe v. State of Haw. Dep't of Educ., 334 F.3d 906, 908 (9th Cir. 2003).

296. *See Preschooler*, 479 F.3d at 1180 (holding that a teacher used excessive force in violation of the Fourth Amendment by seizing, slapping, slamming, and forcing a preschooler to participate in self-beating—the teacher's conduct was unreasonable in light of the child's age and disability); Gray *ex rel.* Alexander v. Bostic, 458 F.3d 1295, 1305–06 (11th Cir. 2006) (holding that, although a sheriff's deputy serving as school resource officer had reason to seize and interrogate a nine-year-old student after he observed her threatening her teacher, his handcuffing of the student simply to punish her and teach her a lesson violated the student's Fourth Amendment rights because the punishment was not reasonably related to the scope of the circumstances that justified the initial investigatory stop), *cert. denied*, 127 S. Ct. 2428 (2007); *Doe*, 334 F.3d at 909–10 (holding that an elementary-school vice principal who taped a second-grade student's head to a tree for disciplinary purposes acted unreasonably and thus violated the Fourth Amendment); *see also* Kathryn R. Urbonya, *Determining Reasonableness Under the Fourth Amendment: Physical Force to Control and Punish Students*, 10 CORNELL J.L. & PUB. POL'Y 397, 440–52 (2001)

In cases where school officials do not act for an investigatory or administrative purpose, some courts have reasoned that the Fourth Amendment cannot apply and thus substantive due process provides the only protection.[297] Unfortunately, here again the trend has not favored plaintiffs. Many courts have rejected substantive due process claims brought in the school context based on a finding that either an adequate remedy already exists or that the harm inflicted does not shock the conscience. For example, the Fifth Circuit has asserted that so long as the state provides an adequate remedy, public-school students cannot claim denial of substantive due process based on excessive corporal punishment, irrespective of the severity of the injuries.[298] The Eleventh Circuit has similarly suggested that if a remedy may be pursued under state tort law, the federal courthouse door should be closed to substantive due process claims.[299] As previously discussed,[300] reliance on state tort remedies to defeat these claims confounds procedural with substantive due process. The Supreme Court has clearly stated that state tort remedies are irrelevant when substantive due process challenges are brought because the deprivation of liberty is "complete" when it occurs and does not depend upon the existence of state tort remedies.[301]

(contending that, whereas the Fourth Amendment gives public-school authorities broad discretion to use physical force to control students, the authorities lack discretion to use such force as "punishment," and thus the Fourth Amendment should be interpreted to bar corporal punishment in the schools); Kathryn R. Urbonya, *Public School Officials' Use of Physical Force as a Fourth Amendment Seizure: Protecting Students from the Constitutional Chasm Between the Fourth and Fourteenth Amendments*, 69 GEO. WASH. L. REV. 1, 38–41 (2000) (examining the history and difficulty of students' substantive due process claims challenging school officials' use of physical force).

297. *See Doe*, 334 F.3d at 909 ("[I]t may be possible for a school official to use excessive force against a student without seizing or searching the student, and that the Fourth Amendment would not apply to such conduct.").

298. *See* Moore v. Willis Indep. Sch. Dist., 233 F.3d 871, 874–75 (5th Cir. 2000) (stating that injuries resulting from corporal punishment do not give rise to Due Process Clause claims if there are adequate state remedies to redress the harm inflicted); Fee v. Herndon, 900 F.2d 804, 807–08 (5th Cir. 1990) (acknowledging that, although a child hospitalized as a consequence of corporal punishment was forced to spend six months in a psychiatric ward at a cost of $90,000, "injuries sustained incidentally to corporal punishment, irrespective of the severity of these injuries or the sensitivity of the student, do not implicate the due process clause *if* the forum state affords adequate post-punishment civil or criminal remedies for the student to vindicate legal transgressions").

299. Dacosta v. Nwachukwa, 304 F.3d 1045, 1048–49 (11th Cir. 2002) (finding that a battery perpetrated by an instructor upon a college student did not shock the conscience and concluding that remedies for this type of battery should be pursued under state tort law), *cert. denied*, 538 U.S. 908 (2003).

300. *See supra* notes 183–90 and accompanying text.

301. Zinermon v. Burch, 494 U.S. 113, 124–25 (1990); *see also* Mark R. Brown, *De-Federalizing Common Law Torts, Empathy for* Parratt*,* Hudson*, and* Daniels, 28 B.C. L. REV. 813, 819 (1987) ("Substantive due process, in contrast [to procedural due process], assesses the propriety of a state's substantive decision. . . . The rationale . . . is that there are certain normative decisions the state simply cannot make regardless of the majority's wishes and regardless of any process.");

In addition to the reliance on the existence of state tort remedies to defeat corporal-punishment claims, other courts have imposed an unnecessarily high threshold regarding conscience-shocking behavior. As with all substantive due process claims, even arbitrary deprivations of liberty require a showing of something more than *de minimis* injury to shock the conscience.[302] On the other hand, a close examination of the appellate court decisions suggests that the courts impose an unduly restrictive standard. For example, the Sixth Circuit has held that corporal punishment does not violate substantive due process unless the student proves that "'the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.'"[303] Thus, a teacher's beating of a student, which involved five licks of the paddle on the student's buttocks, causing bruises, was not so severe or so inspired by malice or sadism as to shock the conscience.[304] Decisions from the Fourth and Tenth Circuits have similarly imposed this "malice or sadism" test.[305] In other cases involving

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Irene Merker Rosenberg, *A Study in Irrationality: Refusal to Grant Substantive Due Process Protection Against Excessive Corporal Punishment in the Public Schools*, 27 HOUS. L. REV. 399, 424–37 (1990) (reasoning that state remedies are no more relevant to substantive due process claims involving corporal punishment than they are to the racially discriminatory application of corporal punishment: "[I]n *Ingraham* the state criminal and tort remedies were legally relevant only to plaintiffs' argument that they were entitled to a hearing prior to the infliction of appreciable physical pain").

302. Smith *ex rel.* Smith v. Half Hollow Hills Cent. Sch. Dist., 298 F.3d 168, 172–73 (2d Cir. 2002) (holding that, although there is no per se rule that a single slap from a teacher can never be sufficiently brutal to shock the conscience, and conceding that striking a student without any pedagogical or disciplinary justification is undeniably wrong, not all wrongs perpetrated by school officials violate due process, and here the action could not be fairly viewed as so brutal or offensive to human dignity as to shock the conscience); Gottlieb *ex rel.* Calabria v. Laurel Highlands Sch. Dist., 272 F.3d 168, 174–75 (3d Cir. 2001) (holding that an assistant principal who pushed a student on the shoulder when the student was brought into the office did not meet the shocks-the-conscience standard, even though the assistant principal failed to offer any justification for his use of force, because (1) no reasonable jury could find that the assistant principal intended to harm the student, (2) the student testified that she believed the principal did not intend to injure her—and the plaintiff conceded that the push was slight, and (3) to be actionable, it is the harm, and not the mere contact, that must be intended).

303. Ellis *ex rel.* Pendergrass v. Cleveland Mun. Sch. Dist., 455 F.3d 690, 700 (6th Cir. 2006) (quoting Webb v. McCullough, 828 F.2d 1151, 1158 (6th Cir. 1987)).

304. Saylor v. Bd. of Educ., 118 F.3d 507, 515 (6th Cir. 1997).

305. *See* Harris *ex rel.* Harris v. Robinson, 273 F.3d 927, 930–31 (10th Cir. 2001) (holding that a teacher's action was not inspired by malice or sadism and, to "shock the conscience," the "'plaintiff must demonstrate a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking'" (quoting Uhlrig v. Harder, 64 F.3d 567, 574 (10th Cir. 1995))); Hall *ex rel.* Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) ("[T]he substantive due process inquiry in school corporal punishment cases must be whether the force applied caused

humiliating disciplinary action—such as requiring a ten-year-old, mild-to-moderately retarded boy to clean out a toilet with his bare hands[306]—federal judges have found that undeniably outrageous behavior did not shock the conscience.[307] In addition, courts have been reluctant to find a substantive due process violation for mere verbal abuse, but this reluctance fails to recognize that emotional harm can devastate as much as physical harm.[308]

These decisions confirm that the Fourth Amendment reasonableness standard, unencumbered by notions of malice or sadism, may provide greater protection to students where a "search or seizure" has occurred. The thesis of this Article, however, is that substantive due process should protect against all abuses of official power, and a remedy should not turn on whether a plaintiff can show a "seizure" within the meaning of the Fourth Amendment. It is particularly unjust to deny children the safeguards afforded adults who are being "seized" by law enforcement officials. No less than in the Fourth Amendment context, juries should be permitted to balance the extent of force in relation to need and the extent

injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.").

306. *Harris*, 273 F.3d at 931.

307. *See* London *ex rel.* Avery v. Dirs. of the DeWitt Pub. Schs., 194 F.3d 873, 876–77 (8th Cir. 1999) (holding that a teacher who removed a student from the cafeteria and banged the student's head against a pole did not violate the student's substantive due process rights because the severity of the injury was questionable and the district court was unable to find that the teacher's actions were motivated by bad faith or ill will so as to qualify as conscience-shocking behavior); Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 725–26 (6th Cir. 1996) (holding that neither a single slap of a student nor rubbing of a student's stomach, accompanied by a teacher's remark that could reasonably be interpreted as sexually suggestive, "amount[ed] to 'a brutal and inhumane abuse of . . . official power, literally shocking to the conscience'" (alteration in original) (quoting *Webb*, 828 F.2d at 1159)); *cf. Ellis*, 455 F.3d at 700 (holding that a student successfully stated a substantive due process violation by alleging that, simply because she forgot to bring a pencil to class, her teacher grabbed her, slammed her head against the board, threw her on the ground, and choked her for approximately one minute, resulting in contusions on her neck and post-traumatic stress disorder).

308. Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916, 919, 921 (8th Cir. 2001) (holding that a student who was called "retarded" and "stupid" in front of her classmates by her band teacher, who also struck the student in the face with a notebook, failed to establish that the conduct was sufficiently shocking to state a substantive due process claim and thus summary judgment was appropriate); Doe v. Gooden, 214 F.3d 952, 955 (8th Cir. 2000) (finding that a teacher's verbal abuse of students, including allegedly yelling and screaming at them, using foul language, and calling them names, was not actionable because use of patently offensive language is not a constitutional violation); Abeyta *ex rel.* Martinez v. Chama Valley Indep. Sch. Dist., No. 19, 77 F.3d 1253, 1254–58 (10th Cir. 1996) (finding that a teacher who called a student a prostitute and permitted her classmates to taunt her over a period of weeks, even if done with the deliberate intent to cause psychological harm, did not act with the high level of brutal and inhumane abuse of official power that shocks the conscience as required to state a substantive due process violation).

of the injury, as well as improper motive, to determine whether a teacher's or principal's misconduct amounts to an abuse of official power that shocks the conscience.

Just as the appellate courts have been reluctant to find substantive due process violations in the absence of physical brutality, they have been similarly reluctant to impose liability on school officials for arbitrary decisions to suspend or expel students from public school. Despite the Supreme Court's recognition in *Goss v. Lopez* of a property interest in continued education,[309] some courts have refused to recognize a substantive due process violation where students are deprived only of a state-created right to attend school.[310] Thus, at the elementary- and secondary-school level, federal judges, while conceding that school officials may have exercised questionable judgment or overreacted in some cases, have nonetheless concluded that the officials' response was not conscience-shocking.[311]

The reluctance to review disciplinary decisions is particularly strong for academic decision-making at the university level. As noted, the Supreme Court assumed without deciding that university students have a constitutionally protected property interest in their continued enrollment in a university and that federal courts may review academic decisions under a substantive due process standard.[312] However, in making such an

309. 419 U.S. 565, 574 (1975). The Court also found a liberty interest in not being stigmatized by a disciplinary suspension. *Id.* at 575–76.

310. C.B. *ex rel.* Breeding v. Driscoll, 82 F.3d 383, 387 (11th Cir. 1996) (holding that because a decision to suspend a student is executive action, any deprivation of this state-created right is protected only by the guarantee of procedural, not substantive, due process).

311. *See, e.g.*, Tun v. Whitticker, 398 F.3d 899, 900–04 (7th Cir. 2005) (holding that a school's decision to expel a student for public indecency and possession of pornography, although perhaps an overreaction and an impermissible reading of the school district's behavior code, did not shock the conscience and thus did not violate substantive due process); Butler *ex rel.* Butler v. Rio Rancho Pub. Sch. Bd. of Educ., 341 F.3d 1197, 1199–201 (10th Cir. 2003) (holding that a one-year suspension of a high-school student who drove a car in which a gun, knife, and drug paraphernalia were found, was not arbitrary or capricious even if the student denied knowledge of the items); Remer *ex rel.* M.R. v. Burlington Area Sch. Dist., 286 F.3d 1007, 1013–14 (7th Cir. 2002) (finding that even if the substantive due process analysis applied to a school's disciplinary decisions, permanent expulsion of a high-school student who allegedly participated in a conspiracy to enter the school with guns and to shoot students and school officials was justified by the district's interest in providing a safe and stable learning environment); Dunn v. Fairfield Cmty. High Sch. Dist. No. 225, 158 F.3d 962, 965–66 (7th Cir. 1998) (holding that federal courts should not review school disciplinary decisions or set them aside simply because they are arbitrary, capricious, or an abuse of discretion, because this would be contrary to the Supreme Court's clear instruction that substantive due process regarding executive action requires an extraordinary departure from established norms); *cf.* Seal v. Morgan, 229 F.3d 567, 575 (6th Cir. 2000) (holding that the suspension or expulsion of a student for weapons possession, pursuant to a zero-tolerance policy, even if the student did not knowingly possess any weapon, would not be rationally related to any legitimate interest and thus violated substantive due process).

312. *See* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 223 (1985); Bd. of Curators

assumption, the Court warned that courts should give substantial deference to academic decisions.[313] The same approach is clearly reflected in decisions of the lower courts.[314]

Although courts should give due deference to academic decisions, as established by the Supreme Court's analysis in *Horowitz* and *Ewing*, these decisions do not mandate total abdication of judicial review. Those opinions that have refused even to recognize a substantive due process claim for "state created education rights" have erroneously followed Justice Powell's concurrence in *Ewing*, not the majority opinion.[315] Justice Powell argued that property rights derived solely from state law should not constitute substantive due process rights protected by the Constitution.[316] According to Justice Powell, such state law contract rights "bear[] little resemblance to the fundamental interests" deemed protected by the Constitution, and thus should not receive federal substantive due process protection.[317]

Justice Powell's analysis, which did not reflect the majority's position, appeared to confuse the doctrine that substantive due process provides

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v. Horowitz, 435 U.S. 78, 84–85 (1978); *see also* cases discussed *supra* notes 82–86 and accompanying text.

313. *See Ewing*, 474 U.S. at 223; *Horowitz*, 435 U.S. at 84–85.

314. *See, e.g.*, Salehpoor v. Shahinpoor, 358 F.3d 782, 786–87 (10th Cir. 2004) (holding that even if a student has a substantive property right in continued enrollment in a Ph.D. program, the university's decision was not arbitrary and capricious, and discharge occurred only after efforts were made to resolve the situation), *cert. denied*, 543 U.S. 812 (2004); Richmond v. Fowlkes, 228 F.3d 854, 859 (8th Cir. 2000) (holding that to succeed on a substantive due process claim, a student must show that there was "no rational basis for the College's decision or that dismissal was motivated by bad faith or ill will unrelated to academic performance[,] . . . [and] 'judges . . . should show great respect for the faculty's professional judgment'" (quoting *Ewing*, 474 U.S. at 225)); Wheeler v. Miller, 168 F.3d 241, 250 (5th Cir. 1999) (asserting that academic decisions that are "'not beyond the pale of reasoned academic decision-making'" are consistent with due process (quoting *Ewing*, 474 U.S. at 227–28)); Disesa v. St. Louis Cmty. Coll., 79 F.3d 92, 95–96 (8th Cir. 1996) (holding that a nursing student who received a failing grade "must show that there was no rational basis for the College's decision or that the decision was motivated by bad faith or ill will"); Megenity v. Stenger, 27 F.3d 1120, 1125 (6th Cir. 1994) (cautioning that, especially in the area of judicial review of academic decisions, courts should defer to university authorities, and a student must clearly allege why or how an academic decision was arbitrary and capricious); *cf.* Gossett v. Okla. *ex rel.* Bd. of Regents for Langston Univ., 245 F.3d 1172, 1181–82 (10th Cir. 2001) (finding that a student presented sufficient evidence to prove that the decision to require his withdrawal from his nursing program was motivated by impermissible discrimination, and thus the district court erred in granting summary judgment; "judicial deference to academic decisions loses force when . . . the decisionmaker is 'accused of concealing nonacademic or constitutionally impermissible reasons.'" (quoting *Ewing*, 474 U.S. at 225)).

315. *See, e.g.*, C.B. *ex rel* Breeding v. Driscoll, 82 F.3d 383, 387 (11th Cir. 1997) ("The right to attend a public school is a state-created, rather than a fundamental, right for the purposes of substantive due process. . . . Therefore, the 'right' to avoid school suspension may be abridged as long as proper procedural protections are afforded . . . .").

316. *Ewing*, 474 U.S. at 229–30 (Powell, J., concurring).

317. *Id*.

"heightened" protection to so-called fundamental rights with the generic concept that substantive due process protects against all types of arbitrary, capricious government decision-making that deprives individuals of their liberty. As to the former, the Supreme Court has clearly applied an exceedingly stringent test and, as discussed previously, has thus been reluctant to identify rights as "fundamental."[318] Traditional substantive due process analysis, however, has always permitted the challenger, even in the absence of a fundamental right, to prove the total arbitrariness of the government conduct.[319] Further, the Court has moved away from this stringent two-tier analysis in reviewing legislative enactments under the Due Process Clause in favor of a more nuanced balancing approach.[320] Therefore, the analysis of student claims should not be prematurely truncated by an artificially narrow definition of property or liberty.

In addition, requiring that an educator's conduct be inspired by malice or sadism to meet the shocks-the-conscience test proves unwarranted in light of *Lewis*'s explanation that a deliberate-indifference standard governs except in an emergency situation.[321] Further, in *Youngberg*, the Supreme Court held that, although a state hospital's decisions affecting involuntarily committed patients are "presumptively valid," those decisions may trigger liability if they reflect "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[322] Similarly, courts should not hesitate to find a violation of substantive due process where a school official's misconduct reflects a substantial breach of sound educational judgment.

D. *Land Regulation*

In 1926, the Supreme Court established that the government violates substantive due process when its regulation of real property is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[323] In 1928, the Court ruled that a zoning ordinance that did not bear a substantial relation to public welfare violated substantive due process.[324] Recent Supreme Court decisions acknowledge the continued vitality of these decisions. In 2005, in *Lingle*

318. *See supra* Part II.A.

319. *See supra* note 143 and accompanying text.

320. *See supra* notes 36–45 and accompanying text.

321. *See supra* notes 73–76 and accompanying text.

322. Youngberg v. Romeo *ex rel.* Romeo, 457 U.S. 307, 323 (1982). The Court also asserted that patients who are "involuntarily committed are entitled to more considerate treatment . . . than criminals." *Id*. at 321–22. Certainly the same is true of students in state educational institutions.

323. Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926).

324. Nectow v. City of Cambridge, 277 U.S. 183, 188–89 (1928).

v. Chevron U.S.A. Inc.,[325] the Court cited these cases for the proposition that substantive due process prohibits land regulation that does not substantially advance a government interest: "[A] regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."[326] While rejecting the "substantially advances" test as part of a Takings Clause analysis, the Court explained that this test stems from due process, which provides an independent and legitimate basis for attacking government deprivations of property.[327] Indeed, in a concurring opinion, Justice Kennedy acknowledged that the rejection of the takings claim "does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process."[328] Some legal commentators have asserted that the Court's recent property decisions, including its punitive damages decisions, suggest that economic substantive due process is making a comeback.[329]

Although some of the Court's property decisions may have technically involved legislative rather than executive action, the opinions do not distinguish between legislative or administrative regulation in applying a substantive due process analysis.[330] The lower courts, however, appear

325. 544 U.S. 528 (2005).

326. *Id*. at 542.

327. *Id*. at 540–42.

328. *Id*. at 548 (Kennedy, J., concurring); *see also* E. Enters. v. Apfel, 524 U.S. 498, 550 (1998) (Kennedy, J., concurring in the judgment and dissenting in part). Although rejecting the plurality's opinion that a federal statute that demanded compensation for harms to coalminers' health constituted a takings violation, Justice Kennedy concurred in the judgment, reasoning that the legislation was void because it violated substantive due process. *E. Enters.*, 524 U.S. at 550 (Kennedy, J., concurring in the judgment and dissenting in part). Further, four dissenting Justices, in an opinion by Justice Breyer, agreed that a substantive due process analysis was appropriate, although they determined there was no violation. *Id.* at 556, 566–68 (Breyer, J., dissenting).

329. *See supra* Part II.B; *see also* Michael J. Phillips, *The Slow Return of Economic Substantive Due Process*, 49 SYRACUSE L. REV. 917, 924–26 (1999) (suggesting that economic substantive due process is making a resurgence); Randall T. Shepard, *Land Use Regulation in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 CATH. U. L. REV. 847 (1989) (asserting that substantive due process, rather than the Takings Clause, provides a better tool for assessing the validity of land use regulation).

330. *See* Pennell v. City of San Jose, 485 U.S. 1, 13–14 (1988). The distinction between legislative and administrative conduct does, however, have implications for relief. The Supreme Court in *Bogan v. Scott-Harris*, 523 U.S. 44, 52 (1998), ruled that local government officials, including mayors and city council members, enjoy absolute immunity when they engage in legislative activity. In a unanimous opinion, the Court reasoned that "[r]egardless of the level of government the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability." *Id*. Further, illicit motive was irrelevant because immunity "turns on the nature of the act, rather than on the motive or intent of the official performing it." *Id*. at 54. It suffices that a decision reflects a discretionary, policymaking choice that applies prospectively and affects a large number of constituents. *Id.* at 55–56.

Many lower courts have relied on *Bogan* to grant absolute legislative immunity to local zoning board members or members of other administrative agencies when they act in a legislative capacity,

more concerned about this distinction. Some courts consider all zoning decisions legislative and thus subject to only the most limited review; some apply a rationality standard, without differentiating between legislative or administrative actions; whereas others classify the decisions by local legislative bodies as legislative and the decisions of administrative boards as administrative.[331] Arguably, courts should give less deference to administrative decisions of those government officials who have not been elected, thereby reducing the counter-majoritarian argument. In addition,

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regardless of the arbitrariness or improper motivations of the decisions. *See* Biblia Abierta v. Banks, 129 F.3d 899, 905 (7th Cir. 1997) (holding that city aldermen enjoyed absolute legislative immunity for introducing and voting on a zoning ordinance that prevented churches from purchasing particular parcels of property in the aldermen's wards, even if the conduct was based on improper motive, because such activities were elements of a core legislative process); Acierno v. Cloutier, 40 F.3d 597, 611–15 (3d Cir. 1994) (granting absolute immunity to members of a county council with regard to a zoning decision because the decision was both substantively and procedurally legislative in character—it required policymaking and was done pursuant to established legislative procedures, even if the decision was directed at a small group rather than the community at large); Fry v. Bd. of County Comm'rs, 7 F.3d 936, 942 (10th Cir. 1993) (upholding absolute legislative immunity on behalf of county commissioners despite allegations that they and landowners jointly conceived and executed a plan to vacate a road in retaliation for property owners' exercise of their First Amendment rights, because individual motive is irrelevant when a decision is made following an open public meeting in which all parties are heard); Brown v. Crawford County, 960 F.2d 1002, 1012 (11th Cir. 1992) (holding that county commissioners enjoy absolute immunity for their conduct in imposing a temporary moratorium on issuance of permits for mobile homes because such was a legislative function even if conspiracy or bad motive could be proved).

On the other hand, while *Bogan* holds that motive is irrelevant to the immunity question, the Court also distinguished between decisions that have broad prospective implication and those that apply only to a particular individual. 523 U.S. at 55–56. Thus, some courts have reasoned that, although improper motive does not eliminate immunity, a decision will not be characterized as legislative when it applies only to particular individuals and does not concern broad policymaking. *See, e.g.*, Thornton v. City of St. Helens, 425 F.3d 1158, 1163–64 (9th Cir. 2005) (holding that a city manager and a city planner did not enjoy legislative immunity from a claim that they improperly delayed processing a wrecking-yard owner's applications for city approval of his license renewal because processing an individual application pursuant to an established policy is not a legislative function); Bryan v. City of Madison, 213 F.3d 267, 273 (5th Cir. 2000) (holding that a mayor's repeated vetoes of a developer's site plans and the use of delaying tactics to prevent approval of the developer's plans were not protected by legislative immunity because the decisions did not involve broad policymaking); Corn v. City of Lauderdale Lakes, 997 F.2d 1369, 1392 (11th Cir. 1993) (distinguishing the promulgation of zoning ordinances and general moratoriums on development plans, which trigger absolute immunity, from a land use decision that simply applies policy to a specific party and thus is not insulated by legislative immunity).

Finally, note that although *Bogan* immunizes local government officials sued individually for damages, the local government entity enjoys no such immunity, and thus, substantive due process claims seeking prospective injunctive relief and damages should not be dismissed despite the "legislative" nature of the decision-making. *See* Langford v. City of Atlantic City, 235 F.3d 845, 849 (3d Cir. 2000) (joining several circuits in holding that absolute legislative immunity is not available to a municipality even for decisions that are legislative in character).

331. *See* Pearson v. City of Grand Blanc, 961 F.2d 1211, 1220–21 (6th Cir. 1992) (discussing the various opinions in the appellate courts).

decisions affecting individual property owners, rather than broad prospective policy-based determinations, raise a heightened risk of improper motivation, warranting closer judicial scrutiny.[332] In any event, arbitrary decisions that lack a legitimate basis or a proper motive violate substantive due process.

Despite the apparent trend in the Supreme Court to protect property rights, the lower courts have imposed numerous barriers to challenging land use regulation. Some decisions state that these claims involve merely state-created rights that substantive due process does not protect.[333] Similarly, several appellate courts have rejected substantive due process challenges based on a theory that landowners have neither a property interest in an existing zoning classification nor particular development rights where government officials retain discretion to grant or withhold permission.[334] The Seventh Circuit has imposed its own unique

332. This distinction has been recognized by the Supreme Court and lower courts in assessing legislative immunity. Whereas broad, prospective policy-based determinations are shielded by immunity, decisions implementing policy or affecting a single individual do not enjoy such immunity. *See supra* note 330. In addition, the Court has acknowledged that individuals who have been subjected to selective or unequal enforcement of local development rules may bring a "class of one" equal-protection challenge. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). Justice Breyer cautioned that the "irrationality and wholly arbitrary" standard is extremely difficult for a plaintiff to meet in a zoning dispute. *Id.* at 565–66 (Breyer, J., concurring). It is doubtful that the standard is any less stringent than that needed to show a substantive due process violation. *See, e.g.*, Eichenlaub v. Twp. of Ind., 385 F.3d 274, 287 (3d Cir. 2004), *cert. denied*, 128 S. Ct. 201 (2007).

333. *See* DeKalb Stone, Inc. v. County of DeKalb, 106 F.3d 956, 959–60 (11th Cir. 1997) (holding that land use rights are state-created rights protected only by procedural and not substantive due process and thus the arbitrary and capricious deprivation of landowner's right to use his land did not violate substantive due process); Nestor Colon Medina & Sucesores, Inc. v. Custodio, 964 F.2d 32, 45–47 (1st Cir. 1992) (holding that substantive due process normally should not give rise to claims regarding local planning disputes, nor do allegations of political interference with the permit process give rise to a substantive due process violation).

334. *See* O'Mara v. Town of Wappinger, 485 F.3d 693, 700 (2d Cir. 2007) (reasoning that to establish a protected property interest for purposes of substantive due process property owners must show a clear entitlement to a land benefit over which the issuing authority has no discretion, and because a certificate of occupancy fails to meet this standard, landowners could not assert that its denial violated a cognizable property interest); George Wash. Univ. v. Dist. of Columbia, 318 F.3d 203, 206–07 (D.C. Cir. 2003) (acknowledging that the Second, Fourth, Eighth, Tenth, and Eleventh Circuits have determined that the existence of a property interest for substantive due process purposes depends on the degree of discretion exercised by government officials in granting or withholding the relevant permission, whereas the Third Circuit has found that any ownership interest in the land qualifies as a protected property interest), *cert. denied*, 540 U.S. 824 (2003); Prater v. City of Burnside, 289 F.3d 417, 432 (6th Cir. 2002) (holding that a city's decision to develop a dedicated roadway did not violate a church's reversionary property interest because the land was always subject to the city's superior right to develop the roadway for a public purpose, and the absence of a property right meant there could be no violation of substantive due process); Bryan v. City of Madison, 213 F.3d 267, 274–76 (5th Cir. 2000) (holding that a developer who signed a contract to purchase land on which to develop an apartment complex and who put money down on the contract did not have a property right to build the apartment when the mayor blocked

requirement, consistently ruling that landowners may not bring a substantive due process claim unless they allege that state remedies are inadequate.[335] Still, other circuits have imposed an extremely stringent shocks-the-conscience standard, asserting that to meet this high threshold landowners must show more than that decisions are arbitrary or capricious, or improperly motivated.[336] Finally, some courts have thrown out

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the developer's ability to obtain a building permit); DLC Mgmt. Corp. v. Town of Hyde Park, 163 F.3d 124, 130–33 (2d Cir. 1998) (holding that the plaintiff could not establish a substantive due process right to an existing zoning classification nor to approvals that were necessary for constructing a shopping center in light of the zoning board's wide discretion to deny permits).

335. Centres, Inc. v. Town of Brookfield, 148 F.3d 699, 704 (7th Cir. 1998) (holding that the arbitrary, capricious denial of a building permit failed to state a substantive due process claim because the plaintiff did not demonstrate that state remedies were inadequate); Contreras v. City of Chi., 119 F.3d 1286, 1295 (7th Cir. 1997) (holding that even if the city's suspension of a license after a warrantless inspection was arbitrary and irrational, the plaintiff did not show the inadequacy of state law remedies, a necessary element of a substantive due process violation); Doherty v. City of Chi., 75 F.3d 318, 325–26 (7th Cir. 1996) (rejecting the view that political bias in land use decisions may give rise to a substantive due process claim despite the adequacy of state remedies).

336. Ferran v. Town of Nassau, 471 F.3d 363, 369–70 (2d Cir. 2006) (holding that although a town's use of a landowner's parcel as a turnaround for snow plows in the winter and its paving of a road that encroached on the property was incorrect or ill-advised, it was not the type of conscience-shocking behavior that implicates substantive due process rights); Torromeo v. Town of Fremont, 438 F.3d 113, 118 (1st Cir. 2006) (holding that the threshold for establishing the requisite abuse of government power in land use disputes is exceedingly high and is limited to truly horrendous situations; thus, even though a town unjustifiably delayed issuing a permit, contrary to state procedures, such conduct was not conscience-shocking), *cert. denied*, 127 S. Ct. 257 (2006); SFW Arecibo, Ltd. v. Rodriguez, 415 F.3d 135, 141 (1st Cir. 2005) (holding that a planning board's erroneous decision to revoke a permit in violation of state law could not be categorized as "truly horrendous" and thus failed to meet the threshold for alleging a substantive due process violation); *Eichenlaub*, 385 F.3d at 285–86 (holding that allegations that officials selectively applied subdivision requirements, pursued unannounced and unnecessary enforcement and inspection actions, delayed permits and approvals, improperly increased tax assessments, and maligned landowners, are examples of typical land disputes that frequently arise in planning and are insufficient to shock the conscience), *cert. denied*, 546 U.S. 1075 (2005); United Artists Theatre Circuit, Inc. v. Twp. of Warrington, 316 F.3d 392, 400–02 (3d Cir. 2003) (rejecting precedent that allowed substantive due process challenges to land use decisions where officials allegedly acted with improper motive, joining several other circuits in holding that landowners must establish that officials' actions shocked the conscience, and stating that land disputes should not be transformed into substantive due process claims based only on allegations of improper motive); Harlen Assocs. v. Incorporated Vill. of Mineola, 273 F.3d 494, 503–05 (2d Cir. 2001) (holding that substantive due process does not forbid government actions that might fairly be deemed arbitrary or capricious, but rather the standard is "'violated only by conduct that is so outrageously arbitrary as to constitute a gross abuse of governmental authority'" (quoting Natale v. Town of Ridgefield, 170 F.3d 258, 263 (2d Cir. 1999))); Crider v. Bd. of County Comm'rs, 246 F.3d 1285, 1289–90 (10th Cir. 2001) (holding that a plaintiff must show that the government's purpose has no conceivable rational relation to the existence of the state's traditional police power, and thus, even assuming that the defendants acted with improper motive—such as a conspiracy to obtain the plaintiff's property at a decreased cost—no cognizable substantive due process claim exists because actual motivations are irrelevant if some rational basis is asserted for the challenged action); Barrington Cove Ltd. P'ship v. R.I. Hous. & Mortgage Fin. Corp., 246 F.3d 1, 7 (1st Cir. 2001) (holding that even if a

substantive due process claims by maintaining that the Takings Clause of the Fifth Amendment preempts such claims.[337]

In light of the Supreme Court's recent reaffirmation of substantive due process as a limitation on arbitrary, capricious government decisions regarding land regulation, the various obstacles imposed by the appellate courts appear unjustified. First, courts should recognize an ownership interest in land as a protected property interest, rather than focusing on the question whether the plaintiff has a property right to a certain building permit or zoning decision.[338] The argument that landowners have no rights because regulatory decisions are discretionary is misplaced because the discretionary nature of land use decisions makes the decisions susceptible to substantial abuse and unfairness.[339] Second, the Seventh Circuit's position is misguided because state remedies are irrelevant to the question whether a substantive due process violation has occurred.[340] Third, the

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state housing director violated regulations in requiring a developer to make a sizeable contribution to a housing trust fund and made comments about the developer that might be characterized as harsh and callous, the director's conduct did not "shock the conscience" for substantive due process purposes); Bituminous Materials, Inc. v. Rice County, 126 F.3d 1068, 1070–71 (8th Cir. 1997) (holding that allegations that a county board's restrictions on a contractor's permit were motivated by the personal animus of three county commissioners were insufficient to support a substantive due process claim); Norton v. Vill. of Corrales, 103 F.3d 928, 931–32 (10th Cir. 1996) (cautioning that federal courts should be reluctant to interfere in zoning disputes and should not look beyond a stated legitimate government interest for evidence that government officials acted out of personal animosity or bias).

337. *See, e.g.*, Squaw Valley Dev. Co. v. Goldberg, 375 F.3d 936, 948–50 (9th Cir. 2004) (holding that allegations of arbitrary and capricious land use decision-making cannot be challenged under substantive due process whenever the Takings Clause applies, even if the takings claim would be unsuccessful); Banks v. City of Whitehall, 344 F.3d 550, 554 (6th Cir. 2003) (holding that the Fifth Amendment, not substantive due process, generally provides the basis for challenging government action with respect to property); S. County Sand & Gravel Co. v. Town of S. Kingstown, 160 F.3d 834, 835–36 (1st Cir. 1998) (holding that a suit challenging an ordinance that prohibited excavation in certain areas without a special-use permit was a "garden-variety" regulatory-takings claim and not a substantive due process claim); Bickerstaff Clay Products Co. v. Harris County *ex rel.* Bd. of Comm'rs, 89 F.3d 1481, 1490 (11th Cir. 1996) (holding that a takings claim subsumes landowners' substantive due process claims, and thus, a challenge to the validity of a zoning classification lies only under the Takings Clause); Gosnell v. City of Troy, 59 F.3d 654, 658 (7th Cir. 1995) (cautioning that developers cannot move land use disputes into federal courts simply by asserting a substantive due process claim rather than a takings claim).

338. *See* George Wash. Univ. v. Dist. of Columbia, 318 F.3d 203, 207 (D.C. Cir. 2003) (noting that the Second, Fourth, Eighth, Tenth, and Eleventh Circuits have determined that the existence of a property interest for substantive due process purposes depends on the degree of discretion exercised by government officials in granting or withholding the relevant permission, whereas the Third Circuit has found that *any* ownership interest in the land qualifies as a protected property interest), *cert. denied*, 540 U.S. 824 (2003).

339. *See* Mark W. Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 NOTRE DAME L. REV. 161, 168 (1989) ("[T]he ad hoc, discretionary nature of [zoning] decisions makes them subject to substantial abuse and unfairness.").

340. *See supra* notes 183–90 and accompanying text; *see also* Southview Assocs. v. Bongartz,

takings–preemption argument ignores the Supreme Court's admonitions that the "substantially advances" inquiry of substantive due process "is logically prior to and distinct from the question whether a regulation effects a taking" and that government action may be so arbitrary that it violates due process regardless of any amount of compensation that might be paid.[341]

Finally, using a draconian shocks-the-conscience standard that mandates more than a showing that a decision is arbitrary, capricious, or motivated by political or other improper reasons, is unwarranted. The Supreme Court has consistently held that substantive due process protects against land use decisions that are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[342] Further, the Court acknowledged in 2005 that "[t]he 'substantially advances' formula . . . has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause."[343] The Court may ultimately reject a requirement that land regulation "*substantially* advance" a legitimate government interest.[344] But the Court should recognize that, at a minimum, decision-making that is not rationally related to legitimate government interests or that is motivated by bias, bad faith, or improper motive, violates substantive due process regardless of the availability of a takings claim or state remedies.

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980 F.2d 84, 96–97 (2d Cir. 1992) (holding that any requirement that a landowner first seek compensation in state courts is derived from the Takings Clause and is unrelated to substantive due process, which is premised on arbitrary and capricious government conduct); Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1407–08 (9th Cir. 1989) (holding that the existence of state remedies does not affect a landowner's claim that the defendant violated the landowner's right to substantive due process by breaching a dam that adversely affected the property), *cert. denied*, 494 U.S. 1016 (1990); Littlefield v. City of Afton, 785 F.2d 596, 607 (8th Cir. 1986) (holding that the placement of arbitrary conditions on granting a building permit may violate substantive due process regardless of the existence of state remedies).

341. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 543 (2005); *see also* Action Apartment Ass'n v. Santa Monica Rent Control Opinion Bd., 509 F.3d 1020, 1025 (9th Cir. 2007) (recognizing that *Lingle* effectively overruled the portion of *Squaw* finding a blanket prohibition on substantive due process claims based on deprivations of real property).

342. Vill. of Euclid v. Ambler Realty, 272 U.S. 365, 395 (1926).

343. *Lingle*, 544 U.S. at 542.

344. *See id.* at 545. The plurality in *Lingle* cautioned against using a "heightened means–end review" of regulations affecting private property: "[W]e have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation." *Id*. *But see* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987) (holding that conditional grants that mandate the conveyance of real property must "substantially advance" a legitimate state interest to avoid a finding of a regulatory taking).

Even applying the stringent shocks-the-conscience standard, the Supreme Court in *Lewis* clarified that where government officials have time to deliberate yet act with deliberate indifference to individual rights, they have engaged in conscience-shocking behavior that triggers liability.[345] The volume of cases in which those courts that have recognized substantive due process protection in the area of land use regulation have actually found that government officials acted arbitrarily, capriciously, or for improper motives, confirms the importance of this safeguard.[346]

345. *See supra* notes 73–76 and accompanying text.

346. *See, e.g.*, Buckeye Cmty. Hope Found. v. City of Cuyahoga Falls, 263 F.3d 627, 641–44 (6th Cir. 2001) (holding that the district court erred in dismissing a substantive due process case where there were material fact issues as to whether the city's denial of a developer's plan for a low-income housing project was arbitrary and irrational because government officials who deny a landowner the benefit of a general zoning scheme, despite knowledge that the property use is entirely consistent with that scheme, violate the Due Process Clause), *rev'd in part, vacated in part*, 538 U.S. 188 (2003); Conroe Creosoting Co. v. Montgomery County, 249 F.3d 337, 341–42 (5th Cir. 2001) (holding that the plaintiff's allegations that state officials signed false affidavits in support of a tax warrant and authorized the complete disbursement of a company's assets without legal authority constituted oppressive executive action that violated substantive due process); Woodwind Estates Ltd. v. Gretkowski, 205 F.3d 118, 123–25 (3d Cir. 2000) (holding that the district court erred in dismissing a substantive due process claim where there was evidence that the defendants denied the developers' building plan based upon an improper motive); Catanzaro v. Weiden, 140 F.3d 91, 95 (2d Cir. 1998) (holding that the mayor and county commissioner's decision to order immediate emergency demolition of the owner's buildings allegedly pursuant to a predisposition to destroy all buildings in a deteriorated community would be constitutionally oppressive and thus sufficient to violate substantive due process); Blanche Rd. Corp. v. Bensalem Twp., 57 F.3d 253, 267–68 (3d Cir. 1995) (holding that allegations that defendants deliberately and improperly interfered with the process whereby a township issues permits based on reasons that were unrelated to the application would, if proven, establish a substantive due process violation); Villager Pond, Inc. v. Town of Darien, 56 F.3d 375, 377, 379 (2d Cir. 1995) (holding that the district court improperly dismissed a developer's claim that his due process rights were violated when the town withheld occupancy permits to coerce the developer to convey condominium units to the town, because such a decision would be arbitrary and thus a violation of due process); DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 600–601 (3d Cir. 1995) (holding that the district court erred in dismissing a landowner's claim where there was a genuine fact issue as to whether the zoning decision was influenced by the zoning secretary's personal financial interest in the resolution of the landowner's zoning problems); Reserve, Ltd. v. Town of Longboat Key, 17 F.3d 1374, 1379–80 (11th Cir. 1994) (holding that the district court erroneously granted summary judgment where the plaintiff alleged that he was deprived of a constitutionally protected property interest for an improper motive through pretextual, arbitrary, and capricious means); Parkway Garage, Inc. v. City of Phila., 5 F.3d 685, 692 (3d Cir. 1993) (holding that a substantive due process violation is proven either if the government's actions are not rationally related to the government's interest or if the government's actions in a particular case are motivated by bias, bad faith, or improper motive); Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496, 1508 (9th Cir. 1990) (holding that the plaintiff stated a viable substantive due process claim by alleging that city council members approved the plaintiff's project with fifteen conditions and then after the conditions were met abruptly changed course and rejected the plan due to pressure from neighbors and illegitimate regulatory concerns); Marks v. City of Chesapeake, 883 F.2d 308, 312 (4th Cir. 1989) (holding that if the city council denied the plaintiff's permit application solely to placate religious objections made by some members of the public, then the council acted arbitrarily and capriciously in violation of the Due Process Clause).

Substantive due process claims will serve both to deter such wrongdoing and to provide a remedy when wrongdoing occurs.

V. CONCLUSION

Historically, substantive due process has been available to challenge egregious deprivations of property and liberty, whether perpetrated through legislative enactments or by the misconduct of government officials. The Supreme Court has broadly defined the term "liberty" to deter and punish abuses of government power, and has continued to recognize substantive due process as an important guarantee against arbitrary deprivations of property. Although some recent Supreme Court decisions have significantly curtailed the reach of substantive due process as a protection for personal liberty, many appellate courts have adopted an unduly expansive interpretation of Supreme Court precedent and have created new obstacles lacking basis under current doctrine. Too often, federal courts have denied relief in cases alleging abuse of government power by erroneously finding that substantive due process does not apply, either because of the absence of a "constitutionally protected" property or fundamental liberty interest, or because of the existence of state remedies. Other appellate courts have refused to find that an official's conduct "shocks the conscience," no matter how egregious, thereby ignoring the Supreme Court's reaffirmation of the deliberate-indifference standard in all cases where there is time to deliberate.

There is no justification for the lower courts' restrictive construction of the substantive due process guarantee. When a plaintiff can establish that government officials have abused their power by arbitrarily depriving her of a property or liberty interest within the historically broad meaning of those terms, federal courts should not hesitate to recognize substantive due process as an established guarantee "against arbitrary action of government."