CONSTITUTIONAL LAW—FOURTH AMENDMENT—ALL CLAIMS OF EXCESSIVE FORCE IN SEIZING FREE CITIZENS ANALYZED UNDER OBJECTIVE REASONABLENESS STANDARD—*Graham v. Connor*, 109 S. Ct. 1865 (1989).

The fourth amendment to the United States Constitution provides in part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . . ."[1] The United States Supreme Court has long interpreted the fourth amendment as proscribing unreasonable seizures by federal actors.[2] In 1961, the Court determined that the fourth amendment was applicable to state officials as well.[3] Subsequently, the Court extended the amendment's zone of protection to any restraint on the liberty of a citizen.[4] Although the fourth amendment's reasonableness standard should govern all seizures of the person,[5] the majority of federal circuit and district courts have utilized a fourteenth amendment due process analysis in addressing all excessive force claims brought against law enforcement officials under 42 U.S.C. § 1983.[6]

The lower federal courts' use of a substantive due process standard appears to be a relic of the days before the fourth amendment was made applicable to the states.[7] The United States Supreme Court has continued to apply the fourth amend-

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1 U.S. CONST. amend. IV.

2 *See* Boyd v. United States, 116 U.S. 616 (1886); Wolf v. Colorado, 338 U.S. 25, 26 (1949).

3 Mapp v. Ohio, 367 U.S. 643, 655 (1961).

4 Terry v. Ohio, 392 U.S. 1 (1968).

5 *See id.* at 19 n.16.

6 Graham v. Connor, 109 S. Ct. 1865, 1870 (1989) (citing Freyermuth, *Rethinking Excessive Force*, 1987 DUKE L.J. 692, 694-96, & nn.16-23 (surveying excessive force cases)).

42 U.S.C. § 1983 (1982) provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

7 *See, e.g.*, Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973) (use of due process standard to review excessive force claim brought by pre-trial detainee against guard of detention facility).

The court of appeals in *Glick* relied upon the United States Supreme Court's decision in Rochin v. California, 342 U.S. 165 (1952), which was decided before the fourth and fifth amendments were made applicable to the states. *Glick*, 481 F.2d at 1032-33. In *Rochin*, the Court used the due process clause of the fourteenth

ment standard whenever there is a claim of excessive force in making a seizure.[8] Recently, the Supreme Court in *Graham v. Connor*[9] announced that the fourth amendment standard of objective reasonableness must be applied by the courts whenever they are confronted with claims alleging that law enforcement personnel have utilized excessive force in making an investigatory stop, arrest, or other seizure of a free citizen.[10] Thus, whenever a free citizen is accosted by a law enforcement official, he can invoke the fourth amendment's protection against unreasonable seizures.[11]

In 1984, Dethorne Graham was subjected to an investigatory stop of the vehicle in which he was riding.[12] Prior to the stop, Graham, a diabetic, entered a convenience store to purchase some juice in an attempt to counteract an insulin reaction.[13] When he went into the store, he observed several people in the check-out line ahead of him.[14] Concerned about the delay in obtaining the juice, he quickly left the store to get the juice elsewhere.[15] His rapid departure from the store aroused the suspicion of Officer Connor of the Charlotte, North Carolina Police Department.[16] Officer Connor detained Graham while he determined what had happened at the store; meanwhile several other officers arrived on the scene in response to Connor's request for backup.[17] The officers, despite being told Graham was suffering from a sugar reaction, mistook his behavior for drunkenness.[18] Consequently, the officers handcuffed Graham, placed him face down on the hood of the car, and forcibly put him into

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amendment to void a state conviction where the evidence was obtained by pumping the defendant's stomach. *Rochin*, 342 U.S. at 174.

8 *See* Tennessee v. Garner, 471 U.S. 1 (1985).

9 109 S. Ct. 1865 (1989).

10 *Id.* at 1871.

11 *Id.* at 1867.

12 *Id.* at 1868.

13 *Id.* The United States Court of Appeals for the Fourth Circuit noted that "[f]or a diabetic such as Graham a reaction caused by a drop in blood sugar can cause nausea, dizziness, and disorientation. Left untreated the reaction can lead to coma or even death." Graham v. City of Charlotte, 827 F.2d 945, 946 (4th Cir. 1987), *vacated sub nom.* Graham v. Connor, 109 S. Ct. 1865 (1989).

14 *Graham*, 109 S. Ct. at 1868.

15 *Id.*

16 *Id.*

17 *Id.*

18 *Id.* Additionally, Chief Justice Rehnquist noted that during the encounter Graham had requested some sugar and "asked the officers to check in his wallet for a diabetic decal that he carried." *Id.* The officers, however, did not permit Graham to drink orange juice that a friend had brought. *Id.*

the police car.[19] Upon learning that nothing had happened at the store, the officers drove Graham home and released him.[20] During the course of the encounter Graham received several physical injuries.[21] Graham subsequently brought suit in federal court in the Western District of North Carolina against the officers and the City of Charlotte, North Carolina pursuant to 42 U.S.C. § 1983.[22] Graham alleged that the officers had used excessive force in violation of his rights under the fourteenth amendment and § 1983.[23]

The United States District Court for the Western District of North Carolina granted the officers' motion for a directed verdict at the close of Graham's evidence.[24] The United States Court of Appeals for the Fourth Circuit affirmed, ruling that the substantive due process test applied to all constitutional excessive force claims.[25] Realizing that the majority of the circuit courts were improperly applying the due process test to all § 1983 damage claims,[26] the Supreme Court granted certiorari.[27] The *Graham* majority ruled that all § 1983 claims of excessive force are not governed by a single generic standard, however, all claims that law enforcement officials used excessive force in the course of making a seizure of a free citizen are properly analyzed under the fourth amendment's objective reasonableness standard.[28] Thus, the Court ruled that a § 1983 claimant, such as Graham, need only establish that the force used to effect the seizure was objectively unreasonable.[29]

To fully appreciate the Court's holding in *Graham*, it is essen-

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19 *Id.*

20 *Id.*

21 *Id.* Specifically, "Graham sustained a broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder; he also claims to have developed a loud ringing in his right ear that continues to this day." *Id.*

22 *Id.* Graham subsequently abandoned his claim against the city. *See id.* at 1865.

23 *Id.* at 1868.

24 *Id.* at 1869. In reviewing the motion, the district court applied a substantive due process standard to analyze Graham's excessive force claim. *Id.* at 1868-69. The court determined that the force was applied in good faith, and therefore, ruled that the incident did not give rise to a cause of action under 42 U.S.C. § 1983 (1982). *Id.*

25 *Id.* at 1869.

26 Freyermuth, *supra* note 6, at 693 (recognizing that only the Seventh Circuit had rejected substantive due process analysis of excessive force claims during arrest in Lester v. City of Chicago, 830 F.2d 706, 713 (7th Cir. 1987)).

27 Graham v. Connor, 109 S. Ct. 54 (1988).

28 Graham v. Connor, 109 S. Ct. at 1865, 1870-71 (1989).

29 *Id.*

tial to recognize the jurisprudential dichotomy in the application of the Bill of Rights to federal and state criminal justice. The Supreme Court has traditionally applied the fourth amendment to federal actions.[30] The fourth amendment, however, was repeatedly held inapplicable to the states.[31] To compensate, the Court incorporated into the fourteenth amendment's due process clause those rights which are implicit in the concept of ordered liberty.[32] It was in this environment that the Court decided, in *Rochin v. California*,[33] whether the admission of evidence that was illegally obtained was violative of the fourteenth amendment's due process clause.[34]

In *Rochin*, the State of California had prosecuted an individual for possession of morphine.[35] The State's key evidence was two capsules containing morphine which were obtained by pumping the petitioner's stomach.[36] The petitioner was convicted in spite of his objection that the evidence was illegally obtained.[37] The United States Supreme Court reversed the conviction, holding that the evidence was obtained in violation of the due process clause of the fourteenth amendment.[38] Specifically, the Court refused to make the constitutional protections of

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30 *See* Wolf v. Colorado, 338 U.S. 25, 26 (1949); Boyd v. United States, 116 U.S. 616 (1886).

31 *Wolf*, 338 U.S. at 26. Justice Frankfurter opined that "[t]he notion that the 'due process of law' guaranteed by the Fourteenth Amendment is short hand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration." *Id.* (citations omitted).

32 *Id.* at 27. The expression "implicit in the concept of ordered liberty" was first used by Justice Cardozo in Palko v. Connecticut, 302 U.S. 319, 324-25 (1937).

While the *Wolf* Court refused to incorporate the provisions of the fourth amendment, the Court determined that arbitrary intrusion into a citizen's privacy by the police is prohibited by the due process clause of the fourteenth amendment. *Wolf*, 338 U.S. at 27-28.

33 342 U.S. 165 (1952).

34 *Id.* at 168. Three years prior to *Rochin*, the Court in *Wolf* ruled that "in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." *Wolf*, 338 U.S. at 33.

35 *Rochin*, 342 U.S. at 166.

36 *Id.*

37 *Id.*

38 *Id.* at 172. Justice Frankfurter, writing for the Court in *Rochin*, opined:

> The faculties of the Due Process Clause may be indefinite and vague, but the mode of their ascertainment is not self-willed. In each case "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, on a judgment not *ad hoc* and episodic but duly mindful of

the Bill of Rights applicable to the states.[39]

Nine years after *Rochin*, the Court applied the fourth amendment to the states via the fourteenth amendment in *Mapp v. Ohio*.[40] In *Mapp*, the appellant was convicted in a state court of knowingly possessing lewd books, despite the fact that the evidence was obtained by an unreasonable search.[41] In reversing the conviction, the *Mapp* Court overruled prior decisions that permitted the admission of evidence obtained in violation of the due process clause.[42] Thus, the Court determined that the evidence was inadmissible in a state court, thereby making the entire fourth amendment applicable to the states.[43]

The Supreme Court further extended the fourth amendment in *Terry v. Ohio*.[44] The petitioner in *Terry* was convicted of possession of concealed weapons which were seized by an officer during a stop and frisk.[45] The Court recognized that the fourth amendment governs all seizures of individuals by police officers.[46] Chief Justice Warren, writing for the majority, also reasoned that a seizure occurs whenever there is a restraint on the liberty of an individual by either a show of authority or by physical force.[47] Consequently, the Court rejected the notion that the fourth

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> reconciling the needs both of continuity and of change in a progressive society.
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> Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience.

Id. (citation omitted).

39 *See id.* at 175 (Black, J., concurring).

40 367 U.S. 643 (1961).

41 *Id.* at 645.

42 *Id.* at 654-55.

43 *Id.* at 655. The provisions of the fourth amendment had been made applicable to the states in *Wolf*, but evidence obtained in violation of the fourth amendment was held admissible in a state proceeding, even though it would not be admissible in a federal proceeding. *Id. Mapp* overruled *Wolf* to the extent that the evidence would be inadmissible in state and federal courts. *Id.* at 654-55.

44 392 U.S. 1 (1968).

45 *Id.* at 30-31.

46 *Id.* at 16. The majority stated:

> It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—arrests in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person.

Id.

47 *Id.* at 19 n.16.

amendment does not apply until there has been an arrest.[48] The *Terry* Court reiterated that the fourth amendment applies to people, not merely to places.[49] The Court reasoned, however, that the petitioner was protected only against *unreasonable* searches and seizures.[50]

Turning to the issue of reasonableness, the *Terry* Court ruled that the officers' actions must be judged against an objective standard.[51] Further, the majority endorsed, as the proper test of reasonableness, the balancing of the need for the seizure against the intrusion which the seizure entails.[52] In upholding the conviction, the Court concluded that the governmental interest at stake outweighed the invasion upon the constitutionally protected rights of the petitioner.[53]

Six years following *Terry*, the United States Court of Appeals for the Second Circuit applied the *Rochin* substantive due process test to a pre-trial detainee's 42 U.S.C. § 1983 claim of brutality by a prison guard.[54] In *Johnson v. Glick*,[55] the majority declined to apply either the fourth or the eighth amendment to a claim by a post-arrest, pre-trial detainee.[56] The court instead applied the *Rochin* substantive due process test, holding that the use of excessive force by law officers deprived a detainee of liberty without

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48 *Id.* at 19.

49 *Id.* at 9 (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

50 *Id.*

51 *Id.* at 21. The Court justified the standard as follows:

> [W]ould the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. And simple " 'good faith on the part of the arresting officer is not enough . . . .' If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."

Id. at 21-22 (citations and footnotes omitted).

52 *Id.* at 21 (quoting Camara v. Municipal Court, 387 U.S. 523, 534-35, 536-37 (1967)).

53 *Id.*

54 Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973).

55 *Id.*

56 *Id.* at 1032-33. The court posited that "[t]he solution lies in the proposition that, both before and after sentence, constitutional protection against police brutality is not limited to conduct violating the specific command of the Eighth Amendment or, as in Monroe v. Pape, 365 U.S. 167 (1961), of the Fourth." *Id.* at 1032.

affording him due process of law.[57] The court relied on the fact that most lower federal courts dealing with claims of undue force by pre-trial detainees had utilized the due process clause in their inquiries.[58]

Judge Friendly, writing for the majority, next formulated a test to determine whether the due process clause had been violated.[59] The court posited that courts must consider whether the force was applied in good faith or whether it was applied maliciously for the purpose of causing harm.[60] After the decision in *Glick*, the majority of federal courts have applied *Glick's* due process test to all claims of excessive force.[61]

In 1985, the United States Supreme Court in *Tennessee v. Garner*,[62] announced that apprehension by deadly force constitutes a seizure subject to analysis under the fourth amendment's reasonableness requirement.[63] Justice White, writing for the majority, focused on the reasons for abandoning the common law rule permitting the use of whatever force was necessary to stop a fleeing felon,[64] and considered the new standard to evaluate the use of deadly force to effect an arrest.[65] In particular, the Court affirmed the application of the fourth amendment's reasonableness test to any restraint on an individual's liberty, as well as the use of the balancing test to determine whether a seizure is reasonable.[66]

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57 *Id.*

58 *Id.* at 1033 (citing Anderson v. Nosser, 456 F.2d 835 (5th Cir. 1972), *cert. denied* 409 U.S. 848 (1972); Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Cal. 1972); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971); Jones v. Wittenberg, 323 F. Supp. 93 (N.D. Ohio 1971), *aff'd*, 456 F.2d 854 (6th Cir. 1972)).

59 *Id.*

60 *Id.* The majority stated:

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of the injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

Id.

61 Graham v. Connor, 109 S. Ct. 1865, 1870 (1989).

62 471 U.S. 1 (1985).

63 *Id.* at 7.

64 *Id.* at 12.

65 *Id.* at 11. The Court opined that "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force." *Id.*

66 *Id.* at 7-8. Justice White stated that "[t]o determine the constitutionality of a seizure 'we must balance the nature and quality of the intrusion on the individuals Fourth Amendment interests against the importance of the governmental interests

Acknowledging the dual nature of a seizure, the majority opined that reasonableness depends not only on when the seizure occurs, but also on how it is executed.[67] Thus, the *Garner* Court held that the fourth amendment commands that in order to seize a person a police officer must be reasonable in his belief that the person has committed a crime and reasonable in the manner in which the seizure was conducted.[68]

While the fourth amendment standard was applied in *Terry*[69] and *Garner*,[70] the Court had yet to expressly provide when that standard was appropriate. Recognizing that federal courts were applying different standards to excessive force claims brought under 42 U.S.C. § 1983, the United States Supreme Court in *Graham v. Connor*[71] addressed the excessive force analysis of the seizure of a free citizen.[72]

Chief Justice Rehnquist, writing for the majority in *Graham*, first rejected the idea that all § 1983 excessive force claims must be analyzed by a single generic standard.[73] The Court posited that many courts had incorrectly assumed that a right to be free from excessive force existed independently under § 1983, although not grounded in any specific constitutional provision.[74] In rejecting this notion, Chief Justice Rehnquist emphasized that prior decisions had made it clear that § 1983 does not confer any substantive rights, but simply provides a cause of action for violations of federal rights.[75] The majority established that the first step in addressing a § 1983 excessive force claim was to determine which constitutional right had allegedly been infringed.[76] The Court noted that this constitutional provision will usually be

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alleged to justify the intrusion.' " *Id.* at 8 (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

67 *Id.* (citing United States v. Ortiz, 422 U.S. 891, 895 (1975); Terry v. Ohio, 392 U.S. 1, 28-29 (1968)).

68 *Id.* at 7-8.

69 *Terry*, 392 U.S. at 28-29.

70 Tennessee v. Garner, 471 U.S. 1, 7-8 (1985).

71 109 S. Ct. 1865 (1989).

72 *Id.* at 1870.

73 *Id.*

74 *Id.* (quoting Justice v. Dennis, 834 F.2d 380, 382 (4th Cir. 1987), *cert. granted, judgment vacated*, 109 S. Ct. 2461 (1989) (case remanded in light of *Graham*)).

75 *Id.* The Court opined "as we have said many times, [§] 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' " *Id.* (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)).

76 *Id.* In support of this conclusion the *Graham* Court relied on *Baker*, 443 U.S. at 140, which determined that the first inquiry in a 42 U.S.C. § 1983 (1982) action is to isolate the precise constitutional violation. *Graham*, 109 S. Ct. at 1870.

either the fourth amendment's proscription of unreasonable seizures, or the eighth amendment's prohibition against cruel and unusual punishment.[77] As a result, Chief Justice Rehnquist concluded that a free citizen's claim of excessive force during an investigative stop is properly analyzed under the fourth amendment which provides an explicit source of constitutional protection.[78] In support of this conclusion, the Court relied upon its ruling in *Garner* which analyzed, solely under a fourth amendment standard, the constitutionality of applying deadly force to apprehend a fleeing felon.[79]

The majority declined to resolve the question of whether excessive force claims brought by pre-trial detainees should be analyzed under a fourth amendment standard.[80] The Court did, however, observe that in such a context the due process clause prohibits excessive force if it amounts to punishment.[81] Further, Chief Justice Rehnquist explained that subsequent to the defendant's conviction the eighth amendment is the proper standard of analysis because after conviction due process protection is merely redundant.[82]

The *Garner* Court next affirmed the use of the balancing test to determine whether the force used was reasonable.[83] Chief Justice Rehnquist noted that prior cases had recognized the right to

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77 *Id.*

78 *Id.*

79 *Id.* Chief Justice Rehnquist recognized that the petitioner in *Garner* had alleged both a fourth amendment and a due process clause violation. *Id.* at 1871.

The *Graham* majority stated:

> Today we make explicit what was implicit in *Garner*'s analysis, and hold that *all* claims that law enforcement officials have used excessive force—deadly or not—in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard, rather than under a 'substantive due process' approach.

Id. (emphasis in original).

80 *Id.* at 1871 n.10.

81 *Id.*

82 *Id.* (citing Whitley v. Albers, 475 U.S. 312, 327 (1986)). Chief Justice Rehnquist stated that "[a]ny protection that 'substantive due process' affords convicted prisoners against excessive force is, we have held, at best redundant of that provided by the Eighth Amendment." *Id.*

83 *Id.* at 1871. Chief Justice Rehnquist opined that "[d]etermining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Id.* (citation omitted) (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

use some degree of force to effect a seizure.[84] Thus, the majority emphasized that the test of reasonableness demands careful attention to the facts and circumstances presented in each particular case.[85] Specifically, the Court ruled that the reasonableness of each individual use of force should be judged from the viewpoint of a reasonable police officer on the scene, instead of with the perfect vision of hindsight.[86] Consequently, Chief Justice Rehnquist concluded that every push or shove does not violate the fourth amendment.[87] The Court further recognized that allowance must be made for the fact that police officers are frequently forced to make instantaneous decisions concerning the amount of force required in a particular situation.[88]

The *Garner* Court determined that all fourth amendment inquiries must be reviewed under an objective standard.[89] Chief Justice Rehnquist observed that an officer's subjective motivations have no bearing on whether a seizure is reasonable.[90] Consequently, the majority concluded that the court of appeals erred in its analysis because the court applied the *Glick* test, which required consideration of the individual officers' subjective motivations.[91] The Court ruled that any consideration of subjective motivation was incompatible with a proper fourth amendment analysis.[92]

Chief Justice Rehnquist rejected the court of appeals' sug-

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84 *Id.* (citing Terry v. Ohio, 392 U.S. 1 (1968)).

85 *Id.* at 1871-72. The Court noted that the factors for courts to consider include "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 1872.

86 *Id.* (citing *Terry*, 392 U.S. at 1).

87 *Id.* (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973)).

88 *Id.* The majority here appears to incorporate the dissenting opinion in *Garner*, where Justice O'Connor, joined by Chief Justice Burger and Justice Rehnquist, stated that "[t]he Court's silence on critical factors in the decision to use deadly force simply invites second-guessing of difficult police decisions that must be made quickly, in the most trying of circumstances." Tennessee v. Garner, 471 U.S. 1, 32 (1985)(O'Connor, J., dissenting).

89 Graham v. Connor, 109 S. Ct. 1865, 1872 (1989) (citing Scott v. United States, 436 U.S. 128, 137-39 (1978); *Terry*, 392 U.S. at 21).

90 *Id.* The *Graham* Court did note that an officer's subjective motivations might be considered "in assessing the credibility of the officer's account of the circumstances that prompted the use of force." *Id.* at 1873 n.12.

91 *Id.* at 1872 (quoting *Glick*, 481 F.2d at 1033). The test applied in *Glick* required a determination of whether the "force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." *Id.*

92 *Id.*

gestion that conduct which was malicious and sadistic was the equivalent of objectively unreasonable conduct.[93] The Supreme Court characterized this analogy as making relevant the individual officer's subjective motivations.[94] Because these motivations have no bearing on a fourth amendment inquiry, the majority ruled that the court of appeals reviewed the district court's grant of a directed verdict under an erroneous standard.[95] The Court also rejected the conclusion that because the officer's subjective motivations were of central importance in an eighth amendment inquiry, it could not be reversible error to merely consider them in a fourth amendment inquiry.[96] Chief Justice Rehnquist posited that different standards apply because the Constitution couched the two amendments' prohibitions in different terms.[97] In particular, the majority stressed that the terms "cruel" and "punishment" clearly suggest some inquiry into one's subjective state of mind, whereas the term "unreasonable" does not.[98] Furthermore, the Court reasoned that the eighth amendment is less protective and that it only applies after conviction.[99]

Chief Justice Rehnquist concluded by preserving the question of whether an officer's good faith belief that he had not violated the fourth amendment had any bearing on the availability of a qualified immunity defense to an action brought under 42 U.S.C. § 1983.[100] Because the qualified immunity defense had not been raised, the Court declined to express a view on its relevance in a fourth amendment excessive force inquiry.[101]

Justice Blackmun, in a concurring opinion joined by Justices Brennan and Marshall, refused to adopt the Court's holding that all excessive force claims raised by free citizens were to be analyzed under the fourth amendment.[102] The concurrence contended that the choice of analysis was properly left to the party as

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93 *Id.*

94 *Id.*

95 *Id.* at 1872-73.

96 *Id.* at 1873 (citing Whitley v. Albers, 475 U.S. 312, 320-21 (1986)). The United States Court of Appeals for the Fourth Circuit stated that "[i]t is unreasonable, however, to suggest that a conceptual factor could be central to one type of excessive force claim but reversible error when merely considered by the court in another context." Graham v. City of Charlotte, 827 F.2d 945, 948 n.3 (4th Cir. 1987).

97 Graham v. Connor, 109 S. Ct. at 1865, 1873 (1989).

98 *Id.*

99 *Id.* (quoting Ingraham v. Wright, 430 U.S. 651, 671 n.40 (1977)).

100 *Id.* at 1873 n.12 (citing Anderson v. Creighton, 483 U.S. 635 (1987)).

101 *Id.*

102 *Id.* at 1873 (Blackmun, J., concurring).

a matter of litigation strategy.[103] Justice Blackmun advocated leaving the question of whether substantive due process is applicable to a pre-arrest case until the court was faced with a situation where the force applied was reasonable, thereby satisfying the fourth amendment.[104]

Justice Blackmun's concurrence further contested the majority's suggestion that the Court's decision in *Garner* implicitly held that all claims of excessive force in effecting a seizure were to be analyzed under the fourth amendment.[105] Justice Blackmun noted that the use of a substantive due process standard was neither discussed, nor rejected as the proper method of analysis in the *Garner* opinion.[106]

The concurrence agreed with the Court's ruling that the fourth amendment acts as the primary tool in the analysis of excessive force claims in the pre-arrest context.[107] Justice Blackmun joined the majority in their judgment to remand the case for reconsideration of the petitioner's allegations under a reasonableness standard.[108]

Prior to the Supreme Court's decision in *Mapp v. Ohio*, the Court utilized the due process clause of the fourteenth amendment to invalidate state action that deprived an individual of liberty without due process of law.[109] The lower federal courts adopted the *Glick* substantive due process test and, lacking direction from the Supreme Court,[110] continued to apply it indiscrimi-

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103 *Id.* at 1874 (Blackmun, J., concurring).

104 *Id.* Justice Blackmun, aware that the case came to the Court following a directed verdict, noted:

> [T]he Court would have done better to leave that question for another day. I expect that the use of force that is not demonstrably unreasonable under the Fourth Amendment only rarely will raise substantive due process concerns. But until I am faced with a case in which that question is squarely raised, and its merits are subjected to adversary presentation, I do not join in foreclosing the use of substantive due process analysis in pre-arrest cases.

Id.

105 *Id.* at 1873-74 (Blackmun, J., concurring) (citing Tennessee v. Garner, 471 U.S. 1 (1985)).

106 *Id.* at 1874 (Blackmun, J., concurring).

107 *Id.* at 1873 (Blackmun, J., concurring).

108 *Id.*

109 *See, e.g.*, Rochin v. California, 342 U.S. 165 (1952) (utilizing due process clause of fourteenth amendment to reverse conviction based on evidence obtained from petitioner's person by a stomach pump).

110 *See* Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973). In *Glick*, the Supreme Court denied certiorari after the court of appeals analyzed a pre-trial detainee's 42 U.S.C. § 1983 (1982) excessive force claim under a substantive due process standard. *Id.*

nately to all claims of constitutionally excessive force brought under 42 U.S.C. § 1983.[111] *Graham* provided the Court with an opportunity to determine what standard governed claims that law enforcement officials used excessive force in effecting a seizure of a free citizen.[112] Chief Justice Rehnquist and a majority of the Court responded that all such claims must be analyzed under the objective reasonableness standard of the fourth amendment.[113] In so ruling, the majority reconciled the jurisprudence of the lower federal courts with that of the Supreme Court.

The Court's ruling in *Graham* makes explicit what should have been apparent since *Mapp*. Namely, the fourth amendment prohibits all unreasonable seizures by law enforcement officials and, consequently, the fourth amendment's reasonableness standard governs all pre-arrest excessive force claims. The use of a substantive due process standard, although necessary before *Mapp*, has no place in modern constitutional jurisprudence. As the *Graham* Court observed, the fourth amendment provides "an explicit textual source of constitutional protection,"[114] and therefore, it should be utilized by the courts when considering an improper seizure.

The unfortunate confusion in the federal courts is a part of the legacy left by the pre-Warren Court's chronic reluctance to find the Bill of Rights applicable to the states.[115] The lower federal courts' previous reliance upon a substantive due process standard owes itself to the Court's reluctance to incorporate the fourth amendment into the fourteenth amendment due process clause. Indeed, before *Graham*, the Court left the area of excessive force claims brought by post-arrest, pre-trial detainees to the protections of the due process clause. Specifically, in *Rochin*, the Court applied a substantive due process analysis to allegations of an improper seizure by a state official.[116] The *Rochin* substantive due process analysis, a product of the Court's resistance to incorporation, was used by the court of appeals in *Glick*.[117] The Supreme Court denied the petition for certiorari in *Glick*, thereby giving tacit approval to the court of appeals' utilization of the

111 Graham v. Connor, 109 S. Ct. 1865, 1870 (1989).
112 *Id.* at 1867.
113 *Id.*
114 *Id.* at 1871.
115 *See* Freyermuth, *supra* note 6, at 707.
116 Rochin v. California, 342 U.S. 165 (1952).
117 Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), *cert. denied*, 414 U.S. 1033 (1973).

substantive due process test in the pre-trial detainee context.[118] The Court's failure to provide direction in that instance precipitated the lower federal courts' application of the substantive due process standard in all excessive force actions which arose under 42 U.S.C. § 1983. Similarly, the *Graham* Court did not reach the question of what standard to apply to excessive force claims brought by pre-trial detainees.[119] As a consequence, the ruling in *Graham* shed little light on the proper standard to assess a pretrial detainee's claim unless the excessive force "amounts to punishment," thereby implicating the due process clause.[120] The judicial restraint exercised by the Court in *Graham* is reminiscent of the Court's denial of certiorari in *Glick*. While the holding in *Graham* mandates the use of the objective reasonableness standard to assess excessive force claims by free citizens, thereby clarifying that area, the circuit and district courts are left to grope at substantive due process when analyzing pretrial detainees' excessive force claims.

In his concurrence, Justice Blackmun aptly identified that some plaintiffs might prefer to invoke the protections of substantive due process.[121] Justice Blackmun, however, failed to address the fact that the lower federal courts have been applying the substantive due process test indiscriminately to all § 1983 excessive force claims, regardless of the circumstances under which they arose. In this regard, the majority opinion in *Graham* made practical sense. The fourth amendment does, as the majority noted, provide explicit, rather than generalized, constitutional protection.[122] By its plain language, the amendment should govern all claims of excessive force in effecting a seizure. The majority's ruling in *Graham* clearly set forth a standard and consequently guaranteed that the same constitutional standard will be applied uniformly by all the federal courts; a result that the concurrence would not have achieved.

The concurrence did raise an important issue by alluding to the fact that the *Graham* case was not fully and fairly litigated.[123] Consequently, the Court did not have the opportunity to put the stamp of constitutional approval on the facts that will be determined on remand. As a result, the lower courts have no new ex-

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118 *See* Johnson v. Glick, 414 U.S. 1033 (1973).
119 Graham v. Connor, 109 S. Ct. 1865, 1871 n.10 (1989).
120 *Id.*
121 *Id.* at 1874 (Blackmun, J., concurring).
122 *Id.* at 1871.
123 *Id.* at 1874 (Blackmun, J., concurring). *See supra* note 104.

ample of objective reasonableness and are limited to the Supreme Court's decisions in *Terry*[124] and *Garner*[125] to guide them.

The holding in *Graham* nonetheless guaranteed that the petitioner's claim will be reviewed on remand against the more protective fourth amendment and its objective reasonableness standard.[126] Furthermore, the ruling apprised free citizens of the standard by which their excessive force claims, lodged under 42 U.S.C. § 1983, will be adjudicated. Any loss in substantive rights occasioned by the *Graham* decision is more than offset by the increased protection that the fourth amendment will provide in the vast majority of cases.

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[124] Terry v. Ohio, 392 U.S. 1 (1968) (utilizing fourth amendment to analyze constitutionality of police officer's stop and frisk). For a discussion of the *Terry* decision, see *supra* notes 44-53 and accompanying text.

[125] Tennessee v. Garner, 471 U.S. 1 (1985) (utilizing fourth amendment to analyze constitutionality of police officer's use of deadly force to seize a fleeing felon). For a discussion of the *Garner* decision, see *supra* notes 62-68 and accompanying text.

[126] *Graham*, 109 S. Ct. at 1873.