CONSTITUTIONAL LAW—FOURTEENTH AMENDMENT—THE FOURTH AMENDMENT, RATHER THAN SUBSTANTIVE DUE PROCESS, MUST BE USED TO JUDGE A § 1983 CLAIM ALLEGING A VIOLATION OF AN INDIVIDUAL'S RIGHT TO FREEDOM FROM PROSECUTION WITHOUT PROBABLE CAUSE—*Albright v. Oliver*, 114 S. Ct. 807 (1994).

Substantive due process[1] comprises one of the most indeterminable categories in constitutional law.[2] Resisting any uniform set of controlling principles, substantive due process analysis has undergone both expansive and narrow interpretations, resulting in obscure and, oftentimes, contradictory holdings, widespread de-

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[1] The Due Process Clause of the Fourteenth Amendment states: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

The Due Process Clause embodies substantive rights in addition to procedural protections from deprivations of life, liberty, and property by the government. *See generally* Rosalie B. Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. DAYTON L. REV. 313 (1991). The Court has used substantive due process to incorporate most of the Bill of Rights into the Fourteenth Amendment, thereby making those rights applicable to the states. *Id.* at 313 (footnote omitted). Similarly, the Court has used substantive due process to establish rights not explicit in the text of the amendments, but which the Court has designated as "fundamental" and deserving of extraordinary protection. *Id.* at 313-14. In establishing these rights, the Court has acted largely without any legislative direction and has relied on the Justices' conceptions of "'history and tradition'" to determine which rights are "fundamental" and which are not. *See id.* at 314 (footnote omitted). The Court has also used substantive due process to guard against arbitrary government action, even where nonfundamental rights are concerned. *Id.* (citing Daniels v. Williams, 474 U.S. 327, 331 (1986) (declaring that the Due Process Clause "bar[s] certain government action regardless of the fairness of the procedures used to implement them"); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (explaining that substantive due process prohibits the government from interfering with a citizen's liberty for purely arbitrary reasons)) (other citations omitted).

For a comprehensive explanation of where the doctrine of substantive due process came from and a history of its application by the Court until the mid-1980s, see generally FRANK R. STRONG, SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE (1986).

[2] *See, e.g.*, Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 314 (1993) (footnote omitted) ("Substantive due process is widely viewed as the most problematic category in constitutional law."). According to Professor Fallon, the Court sometimes appears to use a two-tier framework in deciding substantive due process issues. *Id.* (footnote omitted). Under that framework, government infringement upon a "fundamental" right deserves strict scrutiny; government infringement upon a nonfundamental right, by contrast, requires only that the government act bear a rational relationship to a legitimate government objective. *Id.* at 314-15 (footnotes omitted). Professor Fallon intimated that this framework is not nearly as simple as the Court would have us believe, and is used to "limit both the appearance and the danger of relatively unbridled judicial power." *Id.* at 314.

bate, and general perplexity.[3]

A particularly enigmatic area of substantive due process analysis involves the credibility of tort-based causes of action brought under 42 U.S.C. § 1983.[4] Originally intended to afford a federal remedy for violations of rights guaranteed by the Fourteenth

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[3] Commentators have noted that the two-tier framework is inadequate and confusing. *See, e.g., The Supreme Court, 1991 Term—Leading Cases*, 106 HARV. L. REV. 210, 211 (1992) (contending that the Court "has neither adhered in practice to its formal framework for analyzing substantive due process claims nor applied a coherent standard of scrutiny in its departures"); Fallon, *supra* note 2, at 322 (positing that "substantive due process law defies reduction to any elegant set of controlling substantive principles").

Others have criticized the logical and textual underpinnings of the doctrine of substantive due process itself. *See, e.g.*, ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 32 (1990) (arguing that "the text of the Due Process Clause simply will not support judicial efforts to pour substantive rather than procedural meaning into it").

Cognizant of the weaknesses in its analysis to date, the Court has taken to limiting the scope of the substantive due process doctrine. *See, e.g.*, Collins v. City of Harker Heights, 112 S. Ct. 1061, 1068 (1992) (citation omitted) ("As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."); DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 195 (1989) (stating that the Due Process Clause "forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means"); Bowers v. Hardwick, 478 U.S. 186, 192 (1986) (holding that there is no fundamental right to engage in homosexual sodomy).

Bowers and its ilk have led at least one commentator to herald the possible death of substantive due process review. *See* Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 IND. L.J. 215, 215 (1987) (asserting that *Bowers* "may portend the second death of substantive due process"). Professor Conkle noted that substantive due process experienced its first death in the 1930s with the abandonment of review of economic regulations, but was reborn in *Griswold v. Connecticut*, which generated the privacy rights recognized today. *Id.* (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

[4] *See* Michael Wells & Thomas A. Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201, 201 (1984) (citing Monroe v. Pape, 365 U.S. 167 (1961), *overruled on other grounds*, Monell v Department of Social Servs., 436 U.S. 658 (1978)) (other citation omitted) (stating that the Court has struggled to delineate the proper boundaries between common law torts and "constitutional torts" arising under § 1983 ever since *Monroe v. Pape*).

Section 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof 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.

42 U.S.C. § 1983 (1988).

Amendment,[5] § 1983 claims proliferated after the United States Supreme Court interpreted the statute in terms of classical tort principles.[6]

Sharply withdrawing from this commitment, the Court has since held that Congress did not intend § 1983 to act as a "font of tort law," available to every citizen with a grievance against state officials.[7] Similarly, the Court has contracted considerably the reach of substantive due process in an effort to maintain judicial

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[5] Section 1983 was originally drafted as § 1 of the Ku Klux Klan Act of 1871. *Monroe*, 365 U.S. at 171 (citation omitted). Responding to atrocious acts committed against blacks and white republicans after the Civil War, Congress passed the Civil Rights Act of 1871. *See* Thadd J. Llaurado, Comment, 69 MARQ. L. REV. 599, 603-04 (1986) (footnotes omitted). Llaurado stated:

> Section 1 [of the Civil Rights Act] was commonly referred to as the Ku Klux Klan Act. The primary purpose of the Act was to enforce the fourteenth amendment through the imposition of civil liability. Although one target of the Act was the Ku Klux Klan, its principle [sic] focus was against those who represented the state in some capacity and who were unable or refused to enforce state laws.

Id. at 604-05 (footnotes omitted).

The Ku Klux Klan Act became, with minor alterations, § 1979 of the Revised Statutes, which in turn became 42 U.S.C. § 1983. *Monroe*, 365 U.S. at 204 (Frankfurter, J., dissenting) (citation omitted). Section 1983 was intended to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Id.* at 172 (citations omitted). The Court interpreted the statute to create a remedy against "those who representing a State in some capacity were *unable* or *unwilling* to enforce a state law." *Id.* at 175-76. For a more in depth discussion of § 1983, see *infra* notes 6, 44-45 and accompanying text.

For the sake of consistency, references to § 1979 of the Revised Statutes and § 1 of the Civil Rights Act of 1871 will be uniformly referred to as § 1983 throughout this Note.

[6] *See Monroe*, 365 U.S. at 187 (stating that the statute "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions"). In *Monroe*, the Court rejected the proposition that a § 1983 violation must be done "'willfully.'" *Id.* *Monroe* has been cited as the birth of constitutional tort and has led to the recognition that "many harms inflicted by government may amount to constitutional violations as well as ordinary torts." Wells & Eaton, *supra* note 4, at 201 (footnote omitted).

[7] Paul v. Davis, 424 U.S. 693, 701 (1976). For a discussion of *Paul*, see *infra* notes 47-52 and accompanying text.

The Court has reconsidered the language in *Monroe* that refused to require "willfulness" on the part of the government actor and held that negligence generally does not give rise to a § 1983 claim. *See* Llaurado, *supra* note 5, at 615 (citations omitted). *But cf.* Michael J. Phillips, *The Nonprivacy Applications of Substantive Due Process*, 21 RUTGERS L.J. 537, 541 (1990) (footnote omitted) (noting that the Court has not decided whether "reckless, deliberately indifferent, or grossly negligent conduct is enough to trigger due process protections").

Professor Fallon inferred three reasons for the Court's recent attempts to curtail the availability of tort actions involving substantive due process under § 1983: (1) a concern about burgeoning federal dockets; (2) the likelihood that the Court would need to develop standards defining state officials' responsibilities and liabilities; and (3) a reluctance to "displace traditional state authority and thereby alter longstanding

credibility and to avoid the appearance of after-the-fact policymaking.[8] While the disappearance of tort-based causes of action under § 1983 and of the substantive due process doctrine itself does not appear imminent,[9] the Court has recently shown a marked aversion to the fusion of the two; i.e., to § 1983 tort claims framed as infringements upon individuals' substantive due process rights.[10]

In a recent wrongful prosecution suit brought under § 1983, *Albright v. Oliver*,[11] the United States Supreme Court dealt a considerable blow to § 1983 claims grounded upon alleged substantive due process rights.[12] The *Albright* Court held that the Fourth

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balances of power in the federal system." Fallon, *supra* note 2, at 348-50 (footnotes omitted).

8 *See* Phillips, *supra* note 7, at 597 (footnote omitted) ("Perhaps the most important reason for the Court's recent cutback of substantive due process was the doctrine's antimajoritarian implications."). Additionally, Professor Phillips cited the Court's own language in *Bowers v. Hardwick*, indicating that the "Court is most vulnerable and comes closest to illegitimacy when it deals with judge-made law having little or no cognizable roots in the language or design of the constitution." *Id.* at 597 n.318 (alteration in original) (quoting Bowers v. Hardwick, 478 U.S. 186, 194 (1986)).

In the substantive due process arena, Professor Conkle opined, "the Court's decisionmaking appears to rest on little more than ad hoc policymaking, hardly a defensible practice in the exercise of judicial review." Conkle, *supra* note 3, at 216. Professor Phillips agreed with Conkle's assertion and listed the most common forms of "Low-Level Substantive Due Process Review." Phillips, *supra* note 7, at 575-77 (footnotes omitted). Phillips described six tests used in substantive due process review: (1) rational basis review; (2) "The Arbitrary or Capricious Standard;" (3) a "'Shocks the Conscience'-like Standard;" (4) a factor balancing test used in excessive force claims; (5) "Deference to Professional Standards and the Exercise of Professional Judgment;" and (6) a recklessness or deliberate indifference standard. *Id.* at 575-77 (footnotes omitted).

9 Professor Phillips articulated to a number of reasons the Court will continue to utilize substantive due process review. *See* Phillips, *supra* note 7, at 596-97 (footnotes omitted). The author suggested several reasons not to abandon the doctrine, including: (1) "the magnitude of such an undertaking," considering the principle of *stare decisis* and the voluminous number of cases the Court would have to overrule; (2) the fact that the "relaxed review employed in most other nonprivacy applications of substantive due process does not unduly burden the capacities of the courts;" and (3) the sentiment that the "doctrine is simply too handy and versatile a part of the judicial tool kit for instrumentalist courts to resist." *Id.* at 596-99, 601.

In *Albright v. Oliver*, Justice Kennedy explained why constitutional torts will retain their vitality. *See* Albright v. Oliver, 114 S. Ct. 807, 819 (1994) (Kennedy, J., concurring) (citation omitted). Recognizing the "important role federal courts have assumed in elaborating vital constitutional guarantees against arbitrary or oppressive state action," the Justice asserted that the Court "want[s] to leave an avenue open for recourse where we think the federal power ought to be vindicated." *Id.* (citation omitted).

10 See *infra* notes 69-75 and accompanying text for a recent example of the Court's treatment of such claims.

11 114 S. Ct. 807 (1994).

12 *See supra* notes 7-8 and *infra* notes 151, 154, and accompanying text (discussing the Court's aversion to § 1983 claims grounded upon substantive due process).

Amendment,[13] not substantive due process, furnished the proper standard by which to judge the petitioner's claim of prosecution without probable cause.[14] According to the Court, where a particular amendment to the Constitution provides a specific textual source of protection against a certain type of government behavior, that amendment, not the generalized concept of substantive due process, provides the proper guide for evaluating the claim.[15]

In October, 1987, Kevin Albright turned himself into the Macomb, Illinois police after learning that an arrest warrant had been issued against him for sale of a "look alike" substance, in violation of an Illinois statute.[16] The police based the warrant upon unsubstantiated information given by an informant to Detective Oliver of the Macomb Police Department.[17] Before trial, the circuit court

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[13] The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and affects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[14] *Albright*, 114 S. Ct. at 811.

[15] *Id.* at 813 (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

[16] Albright v. Oliver, 975 F.2d 343, 344 (7th Cir. 1992). An Illinois state grand jury indicted Albright under a state statute that forbade the sale of "look alike" substances, that is, substances that look like illegal drugs. *Id.* (citation omitted).

[17] *Id.* Oliver hired Veda Moore, a cocaine addict, as an informant; Moore sought police protection from a narcotics dealer to whom she owed money. *Id.* In return for protection and money, Moore was to buy cocaine and identify the sellers to Oliver. *Id.* Moore used the money she received from Oliver to purchase cocaine for herself. *Id.*

In June of 1987, Moore reported that she had purchased drugs at a local hotel from one John Albright, Jr. *Id.* Moore gave the "cocaine" to Oliver. *Id.* The substance, however, was actually baking soda. *Id.* Oliver, without further investigation, testified before an Illinois grand jury about the transaction; the grand jury subsequently indicted John Albright, Jr. for selling a "look alike" substance. *Id.*

Oliver next went to the home of John Albright, Jr. to arrest him, but discovered that Albright was a respectable, elderly gentleman who seemed unlikely to have sold the substance. *Id.* Upon questioning Albright, Oliver learned that Albright had two sons, John David Albright and Kevin Albright, a student at Western Illinois University. *Id.* Oliver went to arrest John Albright, but learned that he had been out of town at the time the alleged offense took place. *Id.* Oliver called Moore, asking if Kevin Albright might be the person from whom she had purchased the baking soda. *Id.* Moore agreed that it was Kevin. *Id.*

Oliver obtained an arrest warrant for Kevin Albright, who, although proclaiming innocence, turned himself in to police upon learning of the warrant. *Id.* Albright was booked and required to post a bond; one condition was that he remain in the state unless he obtained court permission to leave. *Id.* (citation omitted). At the preliminary hearing, Oliver testified about Moore's information but did not disclose his earlier attempts to arrest Albright's father and brother. *Id.* Based on this testimony, the

dismissed the action against Albright,[18] who subsequently filed a malicious prosecution suit under § 1983.[19] Prior to the dismissal, however, Albright's prosecution received media attention.[20]

The district court dismissed the complaint for failure to state a claim.[21] The United States Court of Appeals for the Seventh Circuit heard Albright's appeal and affirmed the district court's judgment.[22] The court of appeals held that incarceration or some other "palpable" consequence must accompany a claim of malicious prosecution in order to give rise to a constitutional tort, actionable under § 1983.[23]

The United States Supreme Court granted certiorari[24] and affirmed the lower court's determination, but on different grounds.[25] According to the Court, the Fourth Amendment, not substantive due process, provided the appropriate standard for judging Albright's claim that Detective Oliver deprived him of his liberty interest in freedom from criminal prosecution without probable cause.[26] The Court stated that where a particular Constitutional amendment supplies a textual source of protection against a specific type of government conduct, that amendment, and not

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judge concluded that there was probable cause to hold Kevin Albright over for trial. *Id.*

Prior to this instance, Moore had reported 50 persons to Oliver as drug traffickers, none of whom were successfully prosecuted. *Id.* at 345.

18 *Id.* at 344. The Seventh Circuit was unable to determine why the trial court dismissed the case against Albright for failure to state an offense. *Id.*

19 *Id.* The suit was instituted against Oliver and the city of Macomb "one day short of two years after the dismissal of the prosecution." *Id.*; *see supra* notes 95-97 and accompanying text for a brief discussion of the statute of limitations issues in *Albright.*

20 *Albright*, 975 F.2d at 344. In addition to the media coverage, Albright missed an out-of-state job interview. *Id.* Albright claimed that he missed the interview because, under the conditions of the bond, he was not permitted to leave the state. *Id.* Albright did not, however, ask the court for permission to leave, as allowed by the bond's terms. *Id.*

21 *Id.*

22 *Id.* at 348.

23 *Id.* at 347. The United States Supreme Court recharacterized the claim from one of malicious prosecution to that of an alleged violation of the right "to be free from criminal prosecution except upon probable cause." *See* Albright v. Oliver, 114 S. Ct. 807, 810-11 (1994) (footnote omitted); *cf. Albright*, 975 F.2d at 345. "Prosecution without probable cause" will be used to describe Albright's claim in the remainder of this Note.

The Seventh Circuit noted in dicta that the complaint could plausibly contain a claim for false arrest. *Albright*, 975 F.2d at 344. The court of appeals observed, however, that this claim would be barred by the statute of limitations because Albright failed to file suit within two years of his arrest. *Id.* at 345 (citations omitted).

24 Albright v. Oliver, 113 S. Ct. 1382 (1993).

25 *Albright*, 114 S. Ct. at 811.

26 *Id.* at 810-11 (footnote omitted), 811.

the general concept of substantive due process, must govern a court's analysis.[27] The Court explained that it was reluctant to expand the substantive due process doctrine because of the limited and open-ended guideposts for decisionmaking in this largely unchartered area of the law.[28] Therefore, the Court held that substantive due process could not support Albright's claim.[29]

The Supreme Court ignited the substantive due process debate at least as early as 1905, when it decided *Lochner v. New York*.[30] In *Lochner*, the petitioner sought to invalidate a New York labor law that limited the number of hours employees could work in bakeries.[31] The Court agreed with the petitioner and reversed, holding that the labor law violated the freedom to contract as protected by the Fourteenth Amendment.[32] Importantly, the Court concluded that a Fourteenth Amendment liberty interest protected the right to sell or purchase labor.[33] Moreover, the Court found that the

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27 *Id.* at 813 (footnote omitted) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

28 *Id.* at 812 (quoting Collins v. City of Harker Heights, 112 S. Ct. 1061, 1068 (1992)).

29 *Id.* at 813-14 (citation and footnote omitted).

30 198 U.S. 45 (1905). According to Chief Justice Blackmar of the Supreme Court of Missouri, *Lochner* provided the initial "bad name" for substantive due process. Hon. Charles B. Blackmar, *Neutral Principles and Substantive Due Process*, 35 ST. LOUIS U. L.J. 511, 513 (1991). The justice stated that "[f]rom that time to this the majority opinion has been held out as an example of judicial usurpation of the legislative function, based on the 'inarticulate major premises' of the judges." *Id.* (footnote omitted).

31 *Lochner*, 198 U.S. at 52. The statute allowed a maximum of 10 hours of labor a day, and no more than 60 hours per week. *Id.* (citation omitted).

The employer was indicted for violating the statute. *Id.* On appeal, the New York Supreme Court, Appellate Division, affirmed, with two of five judges dissenting. *Id.* at 58. The state's highest court, the New York Court of Appeals, also affirmed, with three of seven judges dissenting. *Id.* The court of appeals upheld the act as a health law act, authorized via the police power of the state. *Id.*

32 *Id.* at 53 (citation omitted), 64-65.

33 *Id.* at 53. The Court stated that the "general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution." *Id.* (citing Allgeyer v. Louisiana, 165 U.S. 578, 589 (1897)).

According to one commentator, *Lochner* "heralded the Court's first sustained commitment to the use of substantive due process." Conkle, *supra* note 3, at 216. Professor Conkle contended that it was at that point that the "due process clause thus took on substantive meaning, protecting, in essence, the economic philosophy of laissez faire." *Id.* at 216-17. Substantive due process was later eliminated as a serious constitutional challenge in *West Coast Hotel Co. v. Parrish*, shortly after Roosevelt "unveiled his infamous 'Court-packing' plan." *Id.* at 217 (footnotes omitted) (citing West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)). It would not be resurrected until *Griswold v. Connecticut* almost 30 years later. *Id.* at 219 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

State's assertion of its police power, absent a showing of a direct relationship between its act and an appropriate and legitimate end, could not supersede this liberty interest.[34]

In *Rochin v. California*,[35] the Court confronted the issue of what restrictions the Due Process Clause of the Fourteenth Amendment imposes on states conducting criminal proceedings.[36] In *Rochin*, the petitioner appealed to the United States Supreme Court objecting that his conviction for possession of morphine was based on evidence obtained in violation of his due process rights.[37] The Court agreed and reversed the conviction, explaining that the procedures used to obtain the verdict "shock[ed] the conscience" and offended the general requirement of due process that states respect the "decencies of civilized conduct" in their prosecutions.[38] While the Court advised using caution when applying the Due Process Clause against the states in their administration of their criminal justice systems,[39] the Court posited that the considerations of due process, which are rooted in reason and legal tradition, occa-

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[34] *Lochner*, 198 U.S. at 57-58. In deciding the validity of the statute, the Court asked: "Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an *unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty* . . . ." *Id.* at 56 (emphasis added). The Court found "no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker." *Id.* at 57. The Court concluded that the State's "mere assertion" that its acts were remotely related to the public health was not sufficient to justify such a law. *Id.*

[35] 342 U.S. 165 (1952).

[36] *Id.* at 168. According to the Court, these limitations concerned restrictions upon the "manner in which the States may enforce their penal codes," rather than upon the states' power to define crime. *Id.*

[37] *See id.* at 166-68. On July 1, 1949, three Los Angeles deputy sheriffs entered Rochin's home through an open door and forced their way into Rochin's room. *Id.* at 166. Questioned about two capsules lying on a night stand near the bed, Rochin suddenly grabbed the capsules and placed them in his mouth. *Id.* Unable to extract the capsules by force, the deputies handcuffed Rochin, took him to a hospital, and instructed a doctor to forcibly insert a tube into Rochin's stomach. *Id.* This procedure induced vomiting and yielded two capsules that were found to contain morphine. *Id.* Rochin was subsequently convicted based on this evidence. *Id.*

[38] *Id.* at 172-73, 174. The Court declared that "[d]ue process of law is a summarized constitutional guarantee of respect for those personal immunities which . . . are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental,' . . . or are 'implicit in the concept of ordered liberty.'" *Id.* at 169 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Palko v. Connecticut, 302 U.S. 319, 325 (1937)) (footnote omitted).

While an argument can be made that *Rochin* involved procedural due process, Professor Phillips stated that it is generally considered a substantive due process decision. Phillips, *supra* note 7, at 550 (footnotes omitted).

[39] *Rochin*, 342 U.S. at 168 (citations omitted). The Court observed that the administration of the criminal justice system is largely committed to the individual states. *Id.* With this in mind, the Court warned that due process of law should not be "turned

sionally require the exercise of judicial power so that convictions are not obtained by methods that offend "'a sense of justice.'"[40]

In the landmark case of *Monroe v. Pape*,[41] the Court opened the door to constitutional tort litigation by holding that § 1983 created a federal forum for claims against state officials who violated the Fourteenth Amendment while acting under color of state law.[42] In *Monroe*, a Chicago family alleged that the police invaded their home and subsequently arrested and detained Mr. Monroe without a warrant or arraignment, thereby depriving them of their rights under the Due Process Clause of the Fourteenth Amendment

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into a destructive dogma against the States in the administration of their systems of criminal justice." *Id.* Rather, the Court reasoned, the Due Process Clause

> 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 reconciling the needs both of continuity and of change in a progressive society.

Id. at 172 (citation omitted).

[40] *Id.* at 171-73 (citation omitted). As Justice Black's concurrence succinctly stated: "What the majority hold is that the Due Process Clause empowers this Court to nullify any state law if its application 'shocks the conscience,' offends 'a sense of justice' or runs counter to the 'decencies of civilized conduct.'" *Id.* at 175 (Black, J., concurring).

Professor Phillips explained that *Rochin* has led to a substantive due process application of tests in excessive force cases. *See* Phillips, *supra* note 7, at 550-53 (footnotes omitted). These cases began to proliferate in the 1960s and 1970s. *Id.* at 551 (footnote omitted). Relying on *Rochin*, the Second Circuit developed a four-part substantive due process test in *Johnson v. Glick*. *See* Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973); E. Bryan MacDonald, Note, Graham v. Connor: *A Reasonable Approach to Excessive Force Claims Against Police Officers*, 22 PAC. L.J. 157, 166-67 (1990) (footnotes omitted). For an outline of the four-part test, see *infra* note 65.

[41] 365 U.S. 167 (1961), *overruled on other grounds*, Monell v. Department of Social Servs., 436 U.S. 658, 663 (1978). Section 1983 was, apparently, seldom used for the first 90 years after its enactment. Patricia C. Cecil, Case Note, *Section 1983 and State Postdeprivation Remedy for Liberty Loss*: Wilson v. Beebe, 55 U. CIN. L. REV. 257, 259 (1986). *Monroe*, however, has been described as giving both "a new breath of life" and "a new vitality" to § 1983. Llaurado, *supra* note 5, at 606; Cecil, *supra*, at 259.

[42] *Monroe*, 365 U.S. at 171-72 (citations omitted), 174. According to Professors Wells and Eaton, *Monroe v. Pape* stands for the birth of constitutional torts. Wells & Eaton, *supra* note 4, at 201 (footnote omitted). Constitutional torts arise from infringements of specific constitutional rights. *See id.* at 202. In contrast, common law torts refer to violations of state statutory and judge-made law. *Id.* at 201 n.2.

Black's Law Dictionary defines "color of law" as:

> The appearance or semblance, without the substance, of legal right. Misuse of power, possessed by virtue of state law and made possible only because wrongdoer is clothed with authority of [the] state . . . . Action taken by private individuals may be "under color of state law" for purposes of 42 U.S.C.A. § 1983 governing deprivation of civil rights when significant state involvement attaches to action.

BLACK'S LAW DICTIONARY 265-66 (6th ed. 1990) (citations omitted).

made applicable by § 1983.[43] The Court reasoned that because Congress meant for § 1983 to enforce the provisions of the Fourteenth Amendment, which incorporated the Fourth Amendment's prohibition of unreasonable searches and seizures,[44] a litigant could bring a claim alleging unreasonable search and seizure in federal court under § 1983.[45] In addition, the Court further en-

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[43] *Monroe*, 365 U.S. at 170. According to the complaint, 13 Chicago police officers wrongfully entered the Monroes' home, roused the family out of bed, and forced them to stand naked in their living room while the officers ransacked their house. *Id.* at 169. Further, the complaint alleged that Mr. Monroe was taken to and detained at the police station for 10 hours, where he was interrogated concerning a recent murder without being taken before a magistrate or permitted an attorney. *Id.* The Monroe family brought claims against the police and the municipality of Chicago. *See id.* at 169-70. The Court dismissed the claim against Chicago, finding that Congress had not intended municipalities to qualify as "persons" within the meaning of § 1983. *Id.* at 191-92 (footnote omitted).

This aspect of the Court's judgment was overruled in *Monell v. Department of Social Services*. Monell v. Department of Social Servs., 436 U.S. 658, 663, 690 (1978) (footnotes omitted). The *Monell* Court held that municipalities were "persons" within the meaning of the statute. *Id.* (footnote omitted). The Court declared:

> Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the § 1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other § 1983 "person," by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decisionmaking channels.

Id. at 690-91 (footnote omitted).

[44] *Monroe*, 365 U.S. at 171 (citing Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) (making the Fourth Amendment applicable to the states by reason of the Due Process Clause of the Fourteenth Amendment)) (other citation omitted).

[45] *Id.* at 171-72, 174 (citations omitted). The Court stated:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.

Id. at 180.

The Court enumerated several purposes of § 1983. *See id.* at 173-74. First, the Court asserted that the statute was meant to "override certain kinds of state laws." *Id.* at 173. Second, the Court continued, § 1983 allowed a federal remedy when the state law was insufficient. *Id.* Third, the Court concluded, the statute was intended to afford a federal remedy in the situation where, though an adequate state remedy existed in theory, that remedy "was not available in practice." *Id.* at 174.

The Court found that Congress enacted § 1983 by virtue of "the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amend-

larged the availability of federal remedies for constitutional tort violations by holding that the federal cause of action supplemented any existing state remedy.[46]

The Court first attempted to limit the scope of constitutional torts in *Paul v. Davis*.[47] In *Paul*, the respondent asked the Court to uphold a defamation claim that he had brought against the petitioner under § 1983, alleging a violation of his due process rights.[48] The Court, wary that a judgment in favor of the respondent would allow any state tort claim to be brought in the federal courts under § 1983 whenever the tortfeasor was a state actor, reversed.[49] Justice Rehnquist, writing for the Court, noted that such a reading would

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ment." *Id.* at 171 (footnote omitted). Section five of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

[46] *Monroe*, 365 U.S. at 183. The Court concluded: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.*

According to Professors Wells and Eaton, constitutional torts are significantly different from common law torts because "state legislatures and common law courts cannot modify or abrogate a plaintiff's right to recover constitutional tort damages" as they could state statutory and common law torts. Wells & Eaton, *supra* note 4, at 201-02 (footnote omitted). Thus, constitutional torts offer stronger protections to the injured plaintiff because they are "more unyielding to legitimate governmental interests in limiting liability." *Id.* at 202.

[47] 424 U.S. 693 (1976). Some commentators have criticized the Court for failing to define the scope of constitutional torts, claiming that the Court has chosen instead to sidestep the issue by disposing of *Paul* and similar cases on different grounds. *See* Wells & Eaton, *supra* note 4, at 205 (maintaining that although the Court has claimed to address the scope of constitutional torts, it "actually has disposed of the cases on other grounds or has written opinions that are too incoherent to provide any guidance"); Llaurado, *supra* note 5, at 610 & n.53 (asserting that "the Supreme Court on a number of occasions skirted the question of whether negligence was actionable under section 1983").

[48] *Paul*, 424 U.S. at 694. The police chief circulated flyers containing photographs of persons arrested for shoplifting in order to alert local retailers to possible shoplifters. *Id.* at 694-95. The respondent's photograph appeared on the flyers because he had been arrested for shoplifting. *Id.* at 695. The respondent pleaded not guilty, and "the charge had been 'filed away with leave [to reinstate],' a disposition which left the charge outstanding." *Id.* at 695-96 (alteration in original). Thus, the respondent's guilt or innocence was never resolved. *Id.* at 696.

At the time the flyers were circulated, the respondent worked as a photographer for a local newspaper. *Id.* His supervisor noticed his picture and questioned him, warning that he "'had best not find himself in a similar situation' in the future." *Id.*

Shortly thereafter, the respondent brought a § 1983 action against the police chief in federal district court, alleging a violation of his rights under the Fourteenth Amendment. *Id.* The district court granted the police chief's motion to dismiss, but the United States Court of Appeals for the Sixth Circuit reversed, concluding that the respondent had presented a claim under § 1983. *Id.* at 696-97 (citation omitted).

[49] *Id.* at 701, 714. In rejecting the petitioner's claim, the Court reasoned that harm to "reputation alone, apart from some more tangible interests such as employ-

render the Fourteenth Amendment a "font of tort law," thereby creating a class of federal torts to be superimposed upon the pre-existing state systems.[50] Attempting to draw a line between common law torts and constitutional torts under the Due Process Clause, the Court explained that prior cases allowing the latter claims to be asserted were limited to rights already recognized by the states or those guarantees of the Bill of Rights incorporated by the Fourteenth Amendment.[51] Of significant interest, the Court used a footnote to qualify its analysis, confining its opinion to considerations of procedural due process and not substantive rights.[52]

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ment," did not qualify as liberty or property within the meaning of the Due Process Clause. *Id.* at 701.

50 *Id.* The Court indicated that if the respondent's claim could support a § 1983 action, all torts committed by state actors would qualify. *Id.* at 698-99. In criticizing the respondent's position the majority reasoned:

> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and shepherded the adoption of that Amendment to learn that it worked such a result . . . .

Id.

51 *Id.* at 710-11 & n.5 (citations omitted). The Court explained:

> It is apparent from our decisions that there exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the State seeks to remove or significantly alter that protected status.

Id. at 710-11 (footnote omitted). Justice Rehnquist noted that in *Bell v. Burson*, the Court held that the state, which had previously created a right to operate a vehicle by issuing drivers' licenses, could not revoke this right without providing the petitioner with due process. *Id.* at 711 (citing Bell v. Burson, 402 U.S. 535, 539 (1971)). Further, the Justice observed, the Court in *Morrissey v. Brewer* required certain procedural safeguards to be met before the state could change the status of parolees for alleged violations; the state previously had allowed the parolees to remain free as long as they did not violate the conditions of parole. *Id.* (citing Morrissey v. Brewer, 408 U.S. 471, 482 (1972)).

52 *Id.* at 711 n.5. At least two commentators have found the Court's assertion that its analysis was limited to procedural due process rather mystifying. *See* Wells & Eaton, *supra* note 4, at 216-17 (footnotes omitted). According to Wells and Eaton, "[t]he Court apparently meant that there is no constitutional requirement of notice or a hearing before the police can defame someone, but that it was not deciding whether or not there are any substantive constitutional limits on government power to ruin someone's reputation." *Id.* at 217.

The Court did conduct a brief substantive due process analysis, but only insofar as the respondent's complaint also alleged violations of the right to privacy guaranteed by the Fourteenth Amendment. *See Paul*, 424 U.S. at 712-13 (citations omitted).

In *Parratt v. Taylor*,[53] the Court once more struggled to limit the actionability of tort-like claims under § 1983.[54] In *Parratt*, prison officials lost an inmate's property.[55] Despite the existence of a state tort remedy for state acts resulting in the negligent deprivation of property, the prisoner brought a § 1983 suit claiming that the loss of his property violated his due process rights.[56] The Court framed the respondent's action in terms of procedural due process and held that the availability of a state post-deprivation remedy provided all the process due to the prisoner.[57] In rejecting the respondent's claim, the Court noted that the Constitution allows for deprivations of life, liberty, and property as long as accompanied by due process of law.[58] While admitting that this usually requires pre-deprivation hearings, the Court held that some "random and unauthorized" acts were impossible to foresee, thereby foreclosing the opportunity for any meaningful hearing before the deprivation occurred.[59] In instances such as this, the Court continued, where the loss is not the result of state procedure and where the state

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The Court, relying on *Roe v. Wade* and its progeny, admitted that privacy rights exist under substantive due process but quickly pointed out that those rights must be "'fundamental'" or "'implicit in the concept of ordered liberty'" to warrant constitutional protection. *Id.* at 712-13 (citing Roe v. Wade, 410 U.S. 113, 152 (1973); Palko v. Connecticut, 302 U.S. 319, 325 (1937)). Furthermore, the Court emphasized that the activities typically included within the right to privacy included "matters relating to marriage, procreation, contraception, family relationships, and child rearing and education." *Id.* at 713. Concluding that the respondent's "privacy interest" would amount to a prohibition upon the states to "publicize a record of an official act such as an arrest," and convinced that "[n]one of our substantive privacy decisions hold this or anything like this," the Court rejected that aspect of the complaint also. *Id.*

53 451 U.S. 527 (1981).

54 *See* Wells & Eaton, *supra* note 4, at 207-08 (footnotes omitted). A number of authors have commented that the *Parratt* Court's effort to curtail the number of tort claims allowed into federal courts has come at the expense of the doctrinal clarity of the Due Process Clause. *See, e.g.*, Fallon, *supra* note 2, at 344-46 (1993) (contending that *Parratt* was both "mistakenly reasoned and wrongly decided" because the case actually involved substantive due process); Wells & Eaton, *supra* note 4, at 215 (stating that *Parratt* is "virtually worthless" in determining the scope of constitutional torts because the decision failed to clarify whether it involved substantive or procedural due process or both).

55 *Parratt*, 451 U.S. at 529. The respondent was an inmate at a Nebraska penitentiary. *Id.* Prison officials lost hobby materials, valued at $23.50, that the respondent had ordered by mail. *Id.*

56 *Id.* at 529, 543 (footnote and citation omitted). A Nebraska statute provided a remedy for "persons who believe they have suffered a tortious loss at the hands of the State." *Id.* at 543 (citation omitted).

57 *Id.* at 537, 543; *see supra* note 54 (listing commentators who have asserted that *Parratt* should have been decided on substantive due process grounds).

58 *Parratt*, 451 U.S. at 537.

59 *Id.* at 540-41 (footnote omitted). The Court stated that the "fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity

cannot anticipate when the loss will take place, a post-deprivation remedy that affords adequate relief is appropriate.[60] Because the state post-deprivation remedy was adequate, the Court concluded, the respondent had not suffered any violation of his due process rights that could trigger a § 1983 claim.[61]

In *Graham v. Connor*,[62] the Court introduced a new strategy, simultaneously limiting substantive due process while actively narrowing the scope of available claims under § 1983.[63] In *Graham*, the petitioner sought recovery for injuries allegedly sustained through police officers' use of excessive force during an investigatory stop.[64] The Court, discouraged with the lower courts' appar-

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which must be granted at a meaningful time and in a meaningful manner.'" *Id.* at 540 (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

Commentators have noted that *Parratt*'s holding is "seemingly inconsistent" with *Monroe*'s. *See, e.g.*, Wells & Eaton, *supra* note 4, at 211. The authors asserted, however, that the decisions may be reconciled when it is realized that the "danger of constitutional tort taking over matters best left to the common law is greater when the claim asserts a general injury to life, liberty, or property than when a more specific constitutional right . . . is at issue." *Id.* at 211-12. Wells and Eaton also offered a more technical distinction between the two cases:

> The *Monroe* Court held that, if the plaintiff alleged a constitutional violation by a state officer, that violation was committed "under color of" state law within the terms of the statute, even though state law made it illegal and provided a remedy. In *Parratt*, the Court held that deprivations of property are not constitutional violations at all when a state remedial scheme is provided. For in that event, there is no deprivation "without due process of law" within the terms of the fourteenth amendment. In short, the *Parratt* Court brings its holding into harmony with *Monroe* by taking state remedies into account in determining whether the plaintiff has shown a constitutional violation, and not whether an established violation is "under color of" state law under the statute.

Id. at 212 (footnote omitted).

60 *Parratt*, 451 U.S. at 541. The Court emphasized that it was difficult to imagine how a state could provide a pre-deprivation hearing in a case such as *Parratt*, where the loss was not the result of a state procedure, but rather was beyond the state's control. *Id.* Additionally, the Court noted that the respondent did not argue that the procedures of the state's post-deprivation statute were themselves inadequate. *Id.* at 543. Finally, the Court concluded that although the state remedy may not afford the respondent all the relief that a § 1983 claim could, such as punitive damages, the remedy could compensate the respondent fully for the property he lost and was, therefore, adequate. *Id.* at 543-44.

61 *Id.* at 544. The Court reiterated its fear, stated in *Paul v. Davis*, that a contradictory holding would allow no "logical stopping place" to torts brought under § 1983, thereby making it "'a font of tort law'" and contradicting the drafters' vision of the Fourteenth Amendment. *Id.* (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)).

62 490 U.S. 386 (1989).

63 *See* MacDonald, *supra* note 39, at 157-58 (footnotes omitted) (stating that, until recently, federal courts had applied "a fourteenth amendment substantive due process test, a fourth amendment reasonableness standard, or a combination of the two, to assess the constitutionality of the police officer's conduct").

64 *Graham*, 490 U.S. at 388. The facts of *Graham* are enlightening and deserve to

ent assumption that *Rochin* had generated a generic substantive due process right to be free from excessive force, instructed that all excessive force claims involving arrest, investigatory stop, or any other seizure are properly examined under the Fourth Amendment and not substantive due process.[65] The Court emphasized that § 1983 does not generate any substantive rights, but rather provides a means to vindicate rights conferred elsewhere.[66] Accordingly, the Court reasoned, the validity of an excessive force

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be set forth in some detail. In 1984, Graham, a diabetic, sensed an impending insulin reaction. *Id.* A friend drove him to a nearby store to get orange juice to avert the reaction. *Id.* Graham entered the store but found a long line. *Id.* at 388-89. Worried that the wait would be too long, he rushed out and asked his friend to take him to another friend's house. *Id.* at 389. Meanwhile, Connor, a North Carolina police officer, saw Graham rush in and out of the store. *Id.* He became suspicious, followed the car, and stopped it less than a mile away. *Id.* After being told that Graham was suffering a "'sugar reaction,'" Connor told them to wait while he investigated what had occurred at the store. *Id.* While Connor returned to his car to get backup, Graham got out of his friend's car and ran around it twice before sitting on the curb and passing out briefly. *Id.*

A number of other officers arrived and rolled Graham over, cuffing his hands behind his back. *Id.* Ignoring Graham's friend's objections that Graham only needed some sugar, the officers lifted Graham up and placed him face down on the hood. *Id.* When Graham regained consciousness, he told the officers to check his wallet for his diabetic decal. *Id.* The officers told him to "'shut up'" and thrust his face into the hood. *Id.* Meanwhile, another friend of Graham's had shown up with orange juice but was not allowed to give it to Graham. *Id.* Connor finally learned that nothing irregular had occurred at the store, and the police drove Graham home. *Id.* From this encounter, Graham sustained a "broken foot, cuts on his wrists, a bruised forehead, and an injured shoulder; he also claim[ed] to have developed a loud ringing in his right ear that continues to this day." *Id.* at 390.

[65] *Id.* at 393, 395. Apparently the lower courts, reasoning that *Rochin*'s "shocks the conscience" standard provided a basis for a substantive due process test, created four factors to determine whether excessive force was used in police actions. *Id.* at 392-93 (citing Rochin v. California, 342 U.S. 165, 172, 174 (1952); Johnson v. Glick, 481 F.2d 1028, 1032-33, 1033 (2d Cir.), *cert. denied*, 414 U.S. 1033 (1973)) (footnote omitted). The *Graham* Court observed that the lower courts used the factors to determine when excessive force could give rise to a cause of action under § 1983 and examined:

> (1) the need for the application of force; (2) the relationship between that need and the amount of force that was used; (3) the extent of the injury inflicted; and (4) "[w]hether the force was applied in a good faith effort to maintain and restore discipline or maliciously and sadistically for the very purpose of causing harm."

Id. at 390 (alteration in original) (quotation omitted). Using this test, a divided United States Court of Appeals for the Fourth Circuit affirmed the district court's dismissal of Graham's complaint. *Id.* at 391 (citations omitted).

One commentator asserted that the elimination of this standard will "provide much needed consistency in analyzing excessive force claims brought by arrestees against police officers." Jill I. Brown, Comment, *Defining "Reasonable" Police Conduct:* Graham v. Connor *and Excessive Force During Arrest*, 38 UCLA L. REV. 1257, 1269 (1991).

[66] *Graham*, 490 U.S. at 393-94 (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)). The Court noted that the first step in any § 1983 action is "'to isolate the

claim must be determined with reference to the explicit constitutional standard that controls the right, rather than to an amorphous due process standard.[67] The majority concluded that the Fourth Amendment's reasonableness standard was implicated in Graham's claim and therefore remanded the case to the lower court for reconsideration under that doctrine.[68]

In *Collins v. City of Harker Heights*,[69] the Court expressed its extreme aversion to novel § 1983 claims brought under substantive due process.[70] In *Collins*, the issue was whether § 1983 provided a remedy for a city employee who was killed on the job because of the city's failure to warn about known hazards in the work area.[71]

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precise constitutional violation with which [the defendant] is charged.'" *Id.* at 394 (alteration in original) (footnote omitted) (quoting *Baker*, 443 U.S. at 140).

67 *Id.* After discerning the particular constitutional violation that is alleged, the Court stated, "[t]he validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized 'excessive force' standard." *Id.* (citing Tennessee v. Garner, 471 U.S. 1, 7-22 (1985)) (other citation omitted).

The Court rephrased this point in an important way in its holding. *See id.* at 395. Specifically, the Court declared that "[b]ecause the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing these claims." *Id.* (footnote omitted).

68 *Id.* at 399 (footnote omitted). The Court's requirement that the Fourth Amendment be used substantially alleviated the obstacles that Graham had to face because "[t]he Fourth Amendment inquiry is one of 'objective reasonableness' under the circumstances, and subjective concepts like 'malice' and 'sadism' have no proper place in that inquiry." *See id.* (footnote omitted). The Fourth Amendment was applicable because Graham's excessive force claim derived from police action involving an investigatory stop and thus was included within the Court's new mandate that "*all* claims that law enforcement officers 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.* at 395.

69 112 S. Ct. 1061 (1992).

70 *Id.* at 1068; *see also* Regents of the Univ. v. Ewing, 474 U.S. 214, 225-26 (1985) (quotation omitted) (expressing reluctance to expand substantive due process).

71 *Collins*, 112 S. Ct. at 1064. Larry Michael Collins worked for the sanitation department of Harker Heights, Texas. *Id.* He was asphyxiated after he entered a manhole to unstop a sewage line. *Id.* His widow alleged that Harker Heights did not provide safety equipment or safety warnings, and did not alert its employees to the dangers associated with working in manholes and sewer lines. *Id.* The widow's complaint, brought under § 1983, alleged that Collins "'had a constitutional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the city of Harker Heights' custom and policy of deliberate indifference toward the safety of its employees.'" *Id.* (quotation omitted). Her complaint also alleged that the city had prior notice of the dangers associated with the sewer lines and had "systematically and intentionally failed to provide the equipment and training required by a Texas statute." *Id.* at 1064-65 (footnote and citation omitted).

Interpreting the petitioner's claim as asserting that substantive due process requires a city to maintain minimum levels of safety in the work area, the Court rejected the petitioner's claim.[72] According to the Court, Congress intended the Due Process Clause to secure against the government's affirmative abuse of power, not to guarantee minimal levels of security and safety.[73] In reaching this conclusion, the Court stressed its reluctance to expand the substantive due process doctrine because of the paucity of guidance in this ill-defined area of law.[74] In addition, the Court relied on the doctrine of judicial self-restraint, which calls for the Court to exercise inordinate care when asked to "break new ground" in the substantive due process field.[75]

From this base of judicial precedent emerged the United States Supreme Court's decision in *Albright v. Oliver*.[76] The issue before the Court was whether the Due Process Clause of the Fourteenth Amendment confers a substantive right to freedom from prosecution without probable cause.[77] Chief Justice Rehnquist, writing for a plurality of the Court, held that the petitioner's claim alleging prosecution without probable cause was properly analyzed

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[72] *Id.* at 1069. The Court recognized that a municipality could be held liable if the city itself acted wrongfully, but considered it another matter entirely to hold a city liable for its failure to act in a certain manner. *Id.* (quoting DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 195 (1989)).

The Court identified another aspect of the petitioner's substantive due process claim: "that the city's 'deliberate indifference' to Collins' safety was arbitrary Government action that must 'shock the conscience' of federal judges." *Id.* (quotation omitted). The Court was not persuaded that Harker Heights's failure to train or warn its employees about known risks was either arbitrary or "conscience-shocking, in a constitutional sense." *Id.* at 1070. The Court admitted that the city may have breached a duty of care but considered this to be a typical common law state tort that should not be supplanted by the Due Process Clause. *Id.* (quoting Daniels v. Williams, 474 U.S. 327, 332 (1986)).

[73] *Id.* at 1069 (quoting *DeShaney*, 489 U.S. at 195). The Court emphasized that neither the history nor the text of the Due Process Clause could sustain the petitioner's claim that the substantive aspect of due process imposes on municipalities a duty to provide safe working conditions to its employees. *Id.* The Court stated that the "'Due Process Clause of the Fourteenth Amendment was intended to prevent government "from abusing [its] power, or employing it as an instrument of oppression."'" *Id.* (alteration in original) (quoting *DeShaney*, 489 U.S. at 196).

[74] *Id.* at 1068 (citing *Ewing*, 474 U.S. at 225-26).

[75] *Id.*

[76] 114 S. Ct. 807 (1994).

[77] *Id.* at 812. The Court stated that the petitioner's claim was a very narrow one, limited to substantive due process. *Id.* According to the Court, the petitioner had not alleged a violation of either his procedural due process rights or his Fourth Amendment right to be free from unreasonable searches and seizures. *Id.* (citations and footnote omitted).

under the Fourth Amendment and not substantive due process.[78]

The Chief Justice immediately pointed out that § 1983 does not, on its own, generate any substantive rights, but merely provides a means to vindicate federal rights granted elsewhere.[79] Accordingly, the Court determined, the first step in analyzing any § 1983 claim is to pinpoint the specific constitutional right alleged to have been infringed, which in the case at hand was substantive due process.[80]

Beginning its analysis of the petitioner's claim, the Court emphasized that it has always been wary about expanding the scope of substantive due process because of the ill-defined nature of the doctrine.[81] Chief Justice Rehnquist acknowledged earlier decisions of the Court that held that the Due Process Clause of the Fourteenth Amendment was intended, in part, to protect the individual from arbitrary exercises of governmental power.[82] The Chief Justice stated, however, that these cases did not imply that the only inquiry to be made in criminal prosecutions was whether the government act at issue was arbitrary.[83] Rather, Chief Justice Rehnquist explained, the Court has substituted the guarantees of

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[78] *Id.* at 810, 813-14 (footnote and quotation omitted). The Chief Justice was joined by Justices O'Connor, Scalia, and Ginsburg. *Id.* at 810. Chief Justice Rehnquist acknowledged that there existed "'an embarrassing diversity of judicial opinion'" over the extent to which a malicious prosecution claim is available under § 1983. *Id.* at 811 n.4 (quoting Albright v. Oliver, 975 F.2d 343, 345 (7th Cir. 1992)). The Chief Justice noted that the Third Circuit had held that the elements of malicious prosecution under § 1983 are equivalent to the common-law tort. *Id.* (citations omitted). The Court contrasted the Third Circuit's holding with decisions of other circuits that either required "a showing of some injury or deprivation of a constitutional magnitude in addition to the traditional elements of common-law malicious prosecution." *Id.* (citations omitted). The Chief Justice concluded that *Albright* represented the view that "substantive due process may not furnish the constitutional peg on which to hang such a 'tort.'" *Id.*

[79] *Id.* at 811 (quoting Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979)).

[80] *Id.* at 811-12 (citing Graham v. Connor, 490 U.S. 386, 394 (1989); *Baker*, 443 U.S. at 140).

[81] *Id.* at 812 (quoting Collins v. City of Harker Heights, 112 S. Ct. 1061, 1068 (1992)). The Court stated that substantive due process protection has generally been reserved for matters relating to marriage, procreation, family, and bodily integrity. *Id.* (citing Planned Parenthood v. Casey, 112 S. Ct. 2791, 2805-06 (1992)).

[82] *Id.* (citing United States v. Salerno, 481 U.S. 739, 746 (1987); Daniels v. Williams, 474 U.S. 327, 331 (1986); Hurtado v. California, 110 U.S. 516, 527 (1884)). The petitioner relied on *Hurtado*'s assertion that the words "'by the law of the land' from the Magna Carta were 'intended to secure the individual from the arbitrary exercise of the powers of government.'" *Id.* (quoting *Hurtado*, 110 U.S. at 527). The Court conceded the general principle that substantive due process prohibited arbitrary government action, but contended that *Hurtado* did nothing to define the proper scope of substantive due process. *Id.*

[83] *Id.*

specific provisions of the Bill of Rights for the generalized notion of substantive due process.[84]

Expanding on this proposition, the Court posited that where a specific Constitutional amendment addresses the type of government action at issue, that amendment must be used to analyze the claim and not substantive due process.[85] The Chief Justice concluded that this principle was applicable in the case *sub judice* and held that the petitioner's claim should have been raised under the Fourth Amendment.[86] The Court bolstered its conclusion by quoting the Fourth Amendment and noting its protections against unreasonable seizures.[87] The Chief Justice explained that the Fourth Amendment's applicability to deprivations of liberty "go hand in hand" with criminal prosecutions and that the Amendment requires probable cause in cases involving extended restraints on liberty subsequent to an arrest.[88]

Having concluded that the petitioner's claim should have been pursued under the Fourth Amendment, the Court reiterated its holding that the ill-defined area of substantive due process could afford petitioner no relief.[89] Therefore, the Court affirmed the judgment of the court of appeals, dismissing Albright's suit.[90]

Filing a brief concurrence, Justice Scalia proffered that the petitioner's pretrial arrest provided the only foundation for a deprivation of liberty claim.[91] This fact, the Justice indicated, placed the case within the ambit of the Fourth Amendment rather than the

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84 *Id.* at 813. The Court cited a long list of incorporation cases in which various aspects of the Bill of Rights were made applicable to the states by virtue of the Due Process Clause of the Fourteenth Amendment. *Id.* at 812-13 (citations omitted). The Court stated that these decisions preserved the means whereby the Framers "sought to restrict the exercise of arbitrary authority by the Government in particular situations." *Id.* at 813. For a general overview of the rights that have been incorporated and the Court's rationale for incorporation, see LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 11-2, at 772 (2d. ed. 1988).

85 *Albright*, 114 S. Ct. at 813 (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)) (footnote omitted).

86 *Id.* at 813-14 (quoting Collins v. City of Harker Heights, 112 S. Ct. 1061, 1068 (1992)) (footnote omitted).

87 *Id.* at 813 (quoting U.S. CONST. amend. IV); *see supra* note 13 (quoting the text of the Fourth Amendment). The Court maintained that the "Framers considered the matter of pretrial deprivations of liberty, and drafted the Fourth Amendment to address it." *Albright*, 114 S. Ct. at 813.

88 *Albright*, 114 S. Ct. at 813 (citing Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (holding that "the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest")).

89 *Id.* at 813-14 (quoting *Collins*, 112 S. Ct. at 1068) (footnote omitted).

90 *Id.* at 814. The Court expressed no opinion as to whether the petitioner's claim would have prevailed under the Fourth Amendment. *Id.* at 813.

91 *Id.* at 814 (Scalia, J., concurring).

Due Process Clause.[92] Justice Scalia also objected to the concept of substantive due process itself.[93] While the Justice acknowledged the existence of substantive due process, Justice Scalia emphasized that, as applied to state criminal proceedings, the procedural protections set out in the Bill of Rights were adequate and were not to be supplemented by substantive due process.[94]

Justice Ginsburg, concurring, wrote to explain why the petitioner filed suit under substantive due process rather than the Fourth Amendment.[95] Justice Ginsburg conjectured that the petitioner may have thought a Fourth Amendment suit was either barred by the statute of limitations or beyond the scope of a seizure insofar as the Fourth Amendment characterizes the term.[96] Rationalizing that the petitioner's arrest and the requirements of the bond effectively seized the petitioner within the meaning of the Fourth Amendment, and that the statute of limitations would not begin to run until dismissal of the charges, Justice Ginsburg con-

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92 *Id.* Justice Scalia stated that it was "unlikely that the procedures constitutionally 'due,' with regard to an arrest, consist of anything more than what the Fourth Amendment specifies." *Id.*

93 *Id.* Justice Scalia rejected "the proposition that the Due Process Clause guarantees certain (unspecified) liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty." *Id.* (citing TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711, 2726-27 (1993) (Scalia, J., concurring)). Justice Scalia acknowledged, however, that the "Court's current jurisprudence is otherwise." *Id.* (citing Michael H. v. Gerald D., 491 U.S. 110, 121 (1989) (opinion of Scalia, J.) ("It is an established part of our constitutional jurisprudence that the term 'liberty' in the Due Process Clause extends beyond freedom from physical restraint.")). For an account of Justice Scalia's attempt to limit substantive due process, see Gregory C. Cook, Note, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process*, 14 HARV. J.L. & PUB. POL'Y 853 (1991). Cook asserted that Justice Scalia accepts that substantive due process exists as a current legal doctrine, but seeks to limit its application; the Justice articulated this approach in footnote 6 of the opinion in *Michael H.*. *Id.* at 861; *see Michael H.*, 491 U.S. at 127 n.6. According to Cook,

> Justice Scalia takes three steps in his quest to place a limit on substantive due process. First, he concedes the existence of the concept of substantive due process. Second, he emphasizes the Court's repeated use of tradition in substantive due process jurisprudence and in constitutional interpretation generally. Finally, he argues that the Court should use only the most specific level of tradition it can identify in order to determine whether a particular right or liberty is to be protected.

Cook, *supra*, at 861.

94 *Albright*, 114 S. Ct. at 814 (Scalia, J., concurring) (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

95 *Id.* at 815 (Ginsburg, J., concurring) (footnote omitted).

96 *Id.* Justice Ginsburg noted that the petitioner had originally invoked the Fourth Amendment in his application to the Court but had subordinated the claim during his presentation to the Court, relying instead on substantive due process. *Id.* at 814-15 (Ginsburg, J., concurring) (footnote and citations omitted).

cluded that the petitioner was mistaken on both counts.[97] Therefore, the Justice agreed with the Court that the petitioner's claim was properly analyzed under the Fourth Amendment.[98] Noting that the Court will not assert petitioners' rights for them, Justice Ginsburg agreed that the suit was properly dismissed.[99]

Justice Kennedy, joined by Justice Thomas, concurred in the holding that a claim alleging arrest without probable cause invokes the Fourth Amendment and not substantive due process.[100] Justice Kennedy differed with the plurality, however, in the characterization of the petitioner's claim.[101] According to Justice Kennedy, the petitioner had raised a due process issue because his claim concerned the "malicious initiation of a baseless criminal prosecution."[102]

Finding no provision in the Bill of Rights concerning the initiation of a prosecution, Justice Kennedy submitted that a criminal procedure or rule that does not contravene the Bill of Rights may still violate the Due Process Clause if it infringes upon a fundamental principle of justice.[103] The Justice concluded that there exists

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97 *Id.* at 815-16, 816 (Ginsburg, J., concurring) (footnote and citation omitted). Justice Ginsburg gave the Fourth Amendment an expansive interpretation and noted that the common law may be used to define the term "seizure." *Id.* at 815 (Ginsburg, J., concurring) (citation omitted). The Justice observed that, at common law, "an arrested person's seizure was deemed to continue even after release from official custody." *Id.* (citations omitted). According to the Justice, a person on bond, who "is required to appear in court at the state's command" and who must seek permission before leaving the state, is "'seized' in the constitutionally relevant sense." *Id.* at 815, 815-16 (Ginsburg, J., concurring). Additionally, the Justice stated that because the seizure lasts until dismissal of the charges, the date of dismissal should trigger the statute of limitations. *Id.* at 816 (Ginsburg, J., concurring) (citation omitted). Apparently, the Justice observed, the petitioner and the court of appeals assumed the statute of limitations would begin to run upon arrest. *Id.* (citations and footnote omitted). The Justice stated that these assumptions were incorrect and that the petitioner's Fourth Amendment claim was not time-barred. *Id.*

98 *Albright*, 114 S. Ct. at 814 (Ginsburg, J., concurring).

99 *Id.* at 816-17 (Ginsburg, J., concurring). The Justice stated that the "principle of party presentation cautions decisionmakers against asserting" petitioners' claims for them. *Id.*

100 *Id.* at 817 (Kennedy, J., concurring).

101 *Id.*

102 *Id.* Justice Kennedy stated that the first question presented was "whether the due process requirements for criminal proceedings include a standard for the initiation of a prosecution." *Id.* The Justice explained that no specific provision of the Bill of Rights dictates any standard for initiating a prosecution or for weighing the evidence during a pretrial hearing. *Id.* (citing Gerstein v. Pugh, 420 U.S. 103, 119 (1975) (concluding that "a judicial hearing is not prerequisite to prosecution by information"); Costello v. United States, 350 U.S. 359, 363 (1956) (holding that an "indictment returned by a legally constituted and unbiased grand jury . . . is enough to call for trial of the charge on the merits")).

103 *Id.* (quoting Medina v. California, 112 S. Ct. 2572, 2573 (1992)). Specifically,

no due process standard to govern the initiation of criminal prosecutions.[104]

Justice Kennedy left open the possibility that the common law tort of malicious prosecution may deserve some protection under the Due Process Clause.[105] Assuming, arguendo, that such was the case here, Justice Kennedy stated that the existence of an adequate state post-deprivation remedy denied the petitioner a cause of action under § 1983.[106] Justice Kennedy relied on *Parratt v. Taylor*, interpreting *Parratt*'s holding to mean that some questions of tort law are best decided by the states' legal systems, without recourse to the federal courts.[107] Justice Kennedy maintained that if the state had not provided an adequate post-deprivation remedy, the petitioner's claim likely would have been cognizable under

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Justice Kennedy explained that the Due Process Clause may be violated if the criminal rule or procedure "'"offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."'" *Id.* (quoting *Medina*, 112 S. Ct. at 2573).

104 *Id.* at 818 (Kennedy, J., concurring). Justice Kennedy distinguished the petitioner's case from cases in which the Court recognized due process requirements that were not delineated in the Bill of Rights. *Id.* (Kennedy, J., concurring). The due process requirements upheld in those cases, the Justice contended, "ensured the fundamental fairness in the determination of guilt at *trial*." *Id.* (emphasis added) (citing *In re* Winship, 397 U.S. 358, 368 (1970); Mooney v. Holohan, 294 U.S. 103, 112 (1935)).

105 *Id.* (citations omitted). Justice Kennedy noted that the common law has recognized that malicious prosecution can cause "unjustified torment and anguish—both by tarnishing one's name and by costing the accused money in legal fees and the like." *Id.* (citations omitted). Likewise, the Justice asserted that the Court has held that the Due Process Clause safeguards rights other than the right to be free from physical restraint. *Id.* (citing Michael H. v. Gerald D., 491 U.S. 110, 121 (1989)).

106 *Id.* (citations omitted).

107 *Id.* Citing *Parratt*, the Justice stated that "our precedents make clear that a state actor's random and unauthorized deprivation of that interest cannot be challenged under 42 U.S.C. § 1983 so long as the State provides an adequate postdeprivation remedy." *Id.* (citing Parratt v. Taylor, 451 U.S. 527, 535-44 (1981)) (other citations omitted). Justice Kennedy explained that a "contrary approach 'would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under "color of law" into a violation of the Fourteenth Amendment cognizable under § 1983,'" thereby making the Fourteenth Amendment "'"a font of tort law to be superimposed upon whatever systems may already be administered by the States."'" *Id.* (quoting *Parratt*, 451 U.S. at 544). The Justice maintained that *Parratt*'s rationale comported with the intent of § 1983 and properly respected the fine balance between federal and state courts. *Id.* at 818-19 (Kennedy, J., concurring) (citing *Parratt*, 451 U.S. at 531-32).

Justice Kennedy noted that both the Supreme Court and the lower courts have been hesitant to apply *Parratt* because they recognize "the important role federal courts have assumed in elaborating vital constitutional guarantees against arbitrary or oppressive state action." *Id.* at 819 (Kennedy, J., concurring) (citation omitted). In Albright's case, however, the Justice concluded that *Parratt*'s precedential weight must be recognized. *Id.*

§ 1983.[108] Because the state did afford such a remedy, however, Justice Kennedy concurred in the judgment of the Court.[109]

Justice Souter also concurred in the judgment, writing separately to reconcile the Chief Justice's opinion with Court precedent.[110] According to Justice Souter, the Court had previously repudiated the theory that a specific constitutional provision that protects against certain infringements preempts another, more general constitutional provision that protects against the same infringements.[111] Some wrongs, the Justice elaborated, may trigger more than one of the protections guaranteed by the Constitution.[112] In such an instance, the Justice maintained, precedent urged the Court to evaluate each constitutional guarantee in turn.[113]

Justice Souter, however, countenanced a different approach to such an overlap when it involves substantive due process.[114] In those situations, Justice Souter advocated, the doctrine of judicial restraint cautions against utilizing substantive due process to merely duplicate protections already available within a more specific provision of the Constitution.[115] The Justice posited that substantive due process could be used, however, if the government act

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108 *Id.* (citations omitted).

109 *Id.*

110 *Id.* at 820 n.2 (Souter, J., concurring) (citations omitted).

111 *Id.* at 820 (Souter, J., concurring) (citing United States v. James Daniel Good Real Property, 114 S. Ct. 492, 499 (1993) ("We have rejected the view that the applicability of one constitutional amendment preempts the guarantees of another."); Soldal v. Cook County, 113 S. Ct. 538, 548 (1992) (holding that "[c]ertain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands")).

112 *Id.* (quoting *Soldal*, 113 S. Ct. at 548).

113 *Id.* (quoting *Soldal*, 113 S. Ct. at 548). Similarly, the Justice explained, the Court has also "rejected the view that incorporation of the substantive guarantees of the first eight amendments of the Constitution defines the limits of due process protection." *Id.* (citing Adamson v. California, 332 U.S. 46, 89-92 (1947)).

114 *See id.* Justice Souter quoted Justice Harlan to define the scope of substantive due process: "'[T]he full scope of the liberty guaranteed by the Due Process Clause . . . is not a series of isolated points . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . .'" *Id.* (alterations in original) (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)).

115 *Id.* Justice Souter stated that the doctrine of judicial restraint requires the exercise of extreme caution whenever the Court is asked to "'break new ground in [the] field' of substantive due process." *Id.* (alteration in original) (quoting Collins v. City of Harker Heights, 112 S. Ct. 1061, 1068 (1992)). The Justice posited that "[j]ust as the concept of due process does not protect against insubstantial impositions on liberty, neither should the 'rational continuum' be reduced to the mere duplication of protections adequately addressed by other constitutional provisions." *Id.* Justice Souter concluded that the Court was "not free to infer that [substantive due process] was

imposes a substantial burden on the liberty involved, beyond the parameters of the specific amendment's protection.[116]

The Justice next examined whether any substantial burden on liberty had been imposed on the petitioner beyond what the Fourth Amendment was already thought to redress.[117] First, Justice Souter asserted that because the petitioner's claim for prosecution without probable cause had focused on the initiation of the prosecution, and not the arrest, only those burdens flowing from the initiation of the prosecution itself were relevant to the inquiry.[118] Concluding that the petitioner had not shown that the mere initiation of the prosecution created a substantial deprivation of liberty to the petitioner, the Justice refused to supplement the protections of the Fourth Amendment with substantive due process.[119] Rather, the Justice found that the doctrine of judicial restraint was applicable and concurred in the judgment of the Court.[120]

In a lengthy dissent, Justice Stevens, joined by Justice Blackmun, attempted to establish one major point: "the Due Process Clause of the Fourteenth Amendment constrains the power of state

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meant to be applied without thereby adding a substantial increment to protection otherwise available." *Id.*

In other words, substantive due process should be reserved for substantial infringements on liberty that are not already fully protected by a specific amendment. *See id.* Justice Souter noted that anything else would result in a redundant application of substantive due process and would "subject[ ] government actors to two (potentially inconsistent) standards for the same conduct and needlessly impos[e] on trial courts the unenviable burden of reconciling well-established jurisprudence under the . . . Amendments with the ill-defined contours of some novel due process right." *Id.* (footnote omitted).

116 *See id.* at 820-21 (Souter, J., concurring).

117 *Id.*

118 *Id.* at 821 (Souter, J., concurring). Justice Souter posited that by "framing his claim of infringement of a liberty interest in freedom from the initiation of a baseless prosecution, petitioner has chosen to disclaim any reliance on the Fourth Amendment seizure that followed when he surrendered himself into police custody." *Id.* The Justice opined that, under the petitioner's framing of his claim, only those injuries flowing from the initiation of the prosecution itself could be redressed. *Id.* Justice Souter contended that the petitioner did not claim that any of his alleged injuries resulted from the issuance of the prosecution. *Id.* Thus, Justice Souter concluded, the petitioner failed to demonstrate "a substantial deprivation of liberty from the mere initiation of prosecution." *Id.*

119 *Id.* at 820-21 (Souter, J., concurring).

120 *Id.* at 820-21, 822 (Souter, J., concurring) (footnote omitted). Justice Souter did leave open the possibility that the initiation of a prosecution may, in some exceptional case, cause a substantial deprivation of liberty separate from the arrest. *Id.* at 822 (Souter, J., concurring). The Justice did not find that the initiation of prosecution in *Albright* worked such a substantial deprivation, however, and left for another day the issue of whether, in the rare situation, such a claim could be brought under substantive due process. *Id.* (footnote omitted).

governments to accuse a citizen of an infamous crime."[121] As a preliminary matter, Justice Stevens suggested that the Fifth Amendment provided the standard for issuing criminal accusations, and was, therefore, more applicable to the petitioner's claim than the Fourth Amendment's seizure standard.[122]

Commencing the analysis, Justice Stevens declared that the respondent did not have probable cause to arrest the petitioner.[123] The Justice opined that the facts of *Albright* gave rise to two issues: (1) does the initiation of criminal proceedings against a person deprive that person of a liberty interest protected by the Fourteenth Amendment; and (2) if so, are the requirements of due process satisfied by mere compliance with procedural formalities that usually protect against prosecution without probable cause?[124]

Justice Stevens answered the first question affirmatively.[125] According to the Justice, Court precedent established that the Due Process Clause protects more than the freedom from improper criminal convictions.[126] Likewise, the Justice posited, the Clause's protections extend well beyond restrictions on physical restraint.[127] Because the institution of a criminal prosecution is a public act, causing an abrupt intrusion into everyday life, Justice Stevens concluded that a liberty interest to be free from the initiation of a base-

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121 *Id.* at 822, 835 (Stevens, J., dissenting).

122 *See id.* at 822 (Stevens, J., dissenting) (footnote omitted). The Fifth Amendment states, in pertinent part: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ." U.S. CONST. amend. V. Justice Stevens interpreted that Amendment to mean that "no accusation may issue except on a grand jury determination that there is probable cause to support the accusation." *Albright*, 114 S. Ct. at 822 (Stevens, J., dissenting) (footnote omitted). For Justice Stevens's reasoning concerning the probable cause requirement, see *infra* note 129 and accompanying text.

123 *Albright*, 114 S. Ct. at 823 (Stevens, J., dissenting). Justice Stevens stated that it was plain that the respondent "either knew or should have known that he did not have probable cause to initiate criminal proceedings" against the petitioner. *Id.* The Justice supported this assertion by highlighting numerous facts, including: (1) evidence that the informer had been incorrect about what substance she had purchased; (2) that the informer was addicted to cocaine; (3) that the informer had falsely implicated more than 50 other individuals in criminal activity; (4) that the respondent had made no attempt to corroborate the informant's accusations; and (5) that the respondent knew that the informant had initially misidentified two others already in the same case. *Id.* at 823 nn.3-5 (Stevens, J., dissenting).

124 *Id.* at 823 (Stevens, J., dissenting).

125 *Id.* at 824-25 (Stevens, J., dissenting) (citations and footnote omitted).

126 *Id.* at 824 (Stevens, J., dissenting).

127 *Id.* The Justice noted that the Court had held that there exists a liberty right "to make basic decisions about the future; to participate in community affairs; to take advantage of employment opportunities; to cultivate family, business, and social relationships; and to travel from place to place." *Id.* at 824 & n.6 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

less criminal prosecution was strong enough to merit constitutional protection.[128]

Examining how much due process is required to deprive an individual of such a liberty interest, Justice Stevens concluded that, at a minimum, a finding of probable cause is a prerequisite to criminal prosecution.[129] The Justice emphasized that the petitioner's claim was not that the procedures, if done correctly, were inadequate.[130] Rather, the Justice explained, the petitioner's claim was that, because the respondent used wholly unsupported evidence and suppressed relevant facts during his testimony before the grand jury, the petitioner had *substantively* been deprived of due process of law.[131] The Justice emphasized that precedent firmly established the proposition that compliance with procedural forms will not preserve a conviction based upon purposeful deception or

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128 *Id.* at 824-25 (Stevens, J., dissenting) (quoting Young v. United States *ex rel.* Vuitton et Fils S. A., 481 U.S. 787, 814 (1987); United States v. Marion, 404 U.S. 307, 320 (1971)) (footnote omitted). Justice Stevens asserted that the commencement of formal criminal proceedings is "quintessentially" the type of state action that "may not be taken arbitrarily, or without observing procedural safeguards." *Id.* (footnotes omitted).

Justice Stevens refuted the notion that the Court's holding in *Paul v. Davis*, that defamation is not actionable under § 1983, should dispose of the petitioner's case. *Id.* at 825 n.9 (Stevens, J., dissenting) (citing Paul v. Davis, 424 U.S. 693, 701 (1976)). The Justice distinguished *Paul* by explaining that while reputation alone may not qualify as a constitutional liberty interest, the commencement of a criminal prosecution impinges on other interests, such as restrictions on movement imposed by bail and the anxieties related to a criminal proceeding. *Id.* at 824-25 & n.9 (Stevens, J., dissenting) (citing *Paul*, 424 U.S. at 701) (other citation omitted).

129 *Id.* at 825 (Stevens, J., dissenting). The Justice reasoned that historical and societal interests requiring "proof of guilt beyond a reasonable doubt" in a criminal conviction were analogous to those interests requiring a showing of probable cause before a criminal prosecution could be initiated. *Id.* (citing *In re* Winship, 397 U.S. 358, 361-64 (1970)). The Justice noted that "the probable cause requirement serves valuable societal interests, protecting the populace from the whim and caprice of governmental agents without unduly burdening the government's prosecutorial function." *Id.* (footnote omitted).

130 *Id.* at 825-26 (Stevens, J., dissenting).

131 *Id.* at 826 (Stevens, J., dissenting). Justice Stevens posited that the petitioner's claim required a consideration of "whether a state's compliance with facially valid procedures . . . without regard to the substance of the resulting probable cause determination," is sufficient to meet the requirements of due process. *Id.* The Justice answered this question in the negative, noting that prior cases had "rejected such a formalistic approach to the Due Process Clause." *Id.* (citing Mooney v. Holohan, 294 U.S. 103, 112 (1935) (holding that "mere notice and hearing" are insufficient protections if conducted with deception or perjured testimony)). The Justice cited numerous cases in accord with *Mooney*, holding that without regard to the adequacy of the procedure, "the Due Process Clause is violated by the knowing use of perjured testimony or the deliberate suppression of evidence favorable to the accused." *Id.* (footnote omitted).

false evidence.[132] The Justice maintained that this principle was equally applicable to the initiation of a prosecution.[133]

Justice Stevens next highlighted what the Justice perceived as weaknesses in the plurality and concurring opinions.[134] The Justice objected to Chief Justice Rehnquist's and Justice Scalia's opinions on two grounds: (1) that those opinions attached unwarranted significance to the substantive due process label the petitioner had placed on the claim; and (2) that the opinions seemed to assume that the incorporation cases have somehow substituted the provisions included in the Bill of Rights for the generalized language construing the Fourteenth Amendment in the Court's earlier cases.[135]

Briefly, Justice Stevens argued that a claim's merits should not be so rigidly construed.[136] The Justice noted that although the Fourteenth Amendment includes two categories of due process, these categories are not "mutually exclusive, and their protections often overlap."[137] As for the second objection, Justice Stevens found that the scope of liberties protected under the Due Process Clause was not limited to the Bill of Rights.[138]

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132 *Id.*

133 *Id.* at 827 (Stevens, J., dissenting).

134 *See id.* at 827-35 (Stevens, J., dissenting).

135 *Id.* at 827, 830 (Stevens, J., dissenting) (footnote omitted). Justice Stevens did not interpret the Chief Justice's and Justice Scalia's opinions to deny that the petitioner had suffered an infringement on his liberty. *Id.* at 827 (Stevens, J., dissenting). Rather, Justice Stevens posited, the two opinions rejected the petitioner's claim because it relied on substantive due process. *Id.*

136 *Id.* (citation omitted).

137 *Id.* Justice Stevens noted that the Fourteenth Amendment "contains only one Due Process Clause." *Id.* For doctrinal clarity, Justice Stevens explained, procedural and substantive due process have been distinguished. *Id.* (citing Daniels v. Williams, 474 U.S. 327, 337-40 (1986) (Stevens, J., concurring)). Justice Stevens observed that the Fourth Amendment also contains both substantive and procedural protections. *Id.* The Justice concluded, however, that

> whether the analogous probable cause standard urged by petitioner is more appropriately characterized as substantive or procedural is not a matter of overriding significance. In either event, the same Due Process Clause operates to protect the individual against the abuse of governmental power, by guaranteeing that no criminal prosecution shall be initiated except on a finding of probable cause.

Id. at 828 (Stevens, J., dissenting).

138 *Id.* at 828-29 (Stevens, J., dissenting). Justice Stevens noted that the view taken by the Chief Justice and Justice Scalia was previously adopted by Justice Black in a dissenting opinion and had never been accepted by a majority of the Court. *Id.* at 828 (Stevens, J., dissenting) (citing Adamson v. California, 332 U.S. 46, 89-92 (1947) (Black, J., dissenting)) (footnote omitted). Instead, Justice Stevens maintained, the Court has repeatedly recognized violations of the Due Process Clause that do not fall within the Bill of Rights. *Id.* at 828-29 (Stevens, J., dissenting). Indeed, the Justice

Justice Stevens next criticized Justice Ginsburg's concurrence for assuming that no liberty was deprived unless a seizure occurred.[139] On the contrary, Justice Stevens argued, a right to be free from unfounded accusations exists independent of the right to be free from unreasonable seizures.[140] Therefore, Justice Stevens concluded, the petitioner's waiver of his seizure claim did not signal an abandonment of his claim for injuries arising from the initiation of a baseless criminal proceeding against him.[141]

Justice Stevens faulted Justice Souter's concurrence for implying that the petitioner's claim required the Court to "break new ground."[142] According to Justice Stevens, the right to be free from unfounded accusations has existed since at least the signing of the Magna Carta and has been well documented in the lower courts.[143] Therefore, the Justice reasoned, judicial restraint was not called for in the case *sub judice*.[144] Additionally, Justice Stevens argued that it was irrelevant whether due process was used to duplicate the protections already covered under another amendment; the Justice opined that this would only be a factor when computing damages.[145]

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reasoned, the Court has held that the Due Process Clause supplements the Bill of Rights, but has never held that the Bill of Rights takes anything away from the Due Process Clause. *Id.* at 830 (Stevens, J., dissenting).

139 *Id.* at 830-31 (Stevens, J., dissenting).

140 *Id.* at 831 (Stevens, J., dissenting). Justice Stevens posited that the accusation itself "causes a harm that is analytically, and often temporally, distinct from the arrest." *Id.* Therefore, the Justice concluded, either an unconstitutional seizure or a prosecution without probable cause "can independently support an action under 42 U.S.C. § 1983." *Id.* at 831 n.26 (Stevens, J., dissenting).

141 *Id.* at 831 (Stevens, J., dissenting).

142 *Id.* at 832 (Stevens, J., dissenting).

143 *Id.* Justice Stevens quoted an early Massachusetts opinion stating:

> "The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury . . . is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty."

Id. (quoting Jones v. Robbins, 74 Mass. 329, 344 (1857)). Justice Stevens also cited to a great number of cases in the lower courts that had concluded that "claims of prosecution without probable cause" were actionable under § 1983. *Id.* (citations omitted).

144 *See id.* (asserting that "it is quite wrong to characterize petitioner's claim as an invitation to enter unchartered territory").

145 *Id.* at 833 (Stevens, J., dissenting) (footnotes omitted). Justice Stevens considered Justice Souter's rationale for limiting the use of substantive due process to those claims not fully covered under other amendments rather "dubious," but insisted that, even if it were so, Justice Souter's reasoning was "relevant only to damages, not to the existence of constitutional protection." *Id.* (footnote omitted).

Finally, Justice Stevens found Justice Kennedy's reliance on *Parratt* unfounded in the petitioner's case.[146] Justice Stevens asserted that *Parratt* involved a common law tort that could have been committed by anyone.[147] Distinguishing the petitioner's case, Justice Stevens noted that the criminal charges brought against the petitioner were the result of the respondent's deliberate act carried out under state law procedures.[148] Justice Stevens suggested that under *Monroe*, which held that § 1983 made federal remedies supplemental to any state remedies, the existence of a state remedy was irrelevant.[149]

Justice Stevens concluded by noting the great diversity in the opinions of the Court, the fact that none of the opinions commanded a majority, and that none embraced the reasoning of the appellate court.[150] The Justice submitted that a majority of the Court did not reject the proposition that the Fourteenth Amendment's Due Process Clause proscribes the state's power to accuse an individual of a crime.[151]

While it is difficult to extract much consensus from the plurality, concurring, and dissenting opinions, *Albright* does afford a glimpse of the Justices' views toward § 1983 and substantive due process. Most evident, on the whole, is that the Court continued its mission to actively curtail the scope of constitutional torts and substantive due process.[152] As a corollary, *Albright* manifested a determined resistance to novel § 1983 claims that rely on substantive due process. Assuming that *Parratt* does stand for the proposition that some torts are best left to the state judiciaries,[153] this reluc-

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146 *Id.* (citing Parratt v. Taylor, 451 U.S. 527 (1981)).

147 *Id.* (citing *Parratt*, 451 U.S. at 543-44) (other citation omitted).

148 *Id.* at 833-34 (Stevens, J., dissenting) (footnotes omitted). Justice Stevens argued that state procedures authorized the respondent to act. *Id.* at 834 (Stevens, J., dissenting) (footnote omitted). Likewise, the Justice asserted, the respondent knew precisely what the consequences of his actions would be and what liberties the petitioner would lose. *Id.* (footnote omitted).

149 *Id.* (quoting Monroe v. Pape, 365 U.S. 167, 183 (1961) ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked."), *overruled on other grounds*, Monell v. Department of Social Servs., 436 U.S. 658, 663 (1978)).

150 *Id.* at 835 (Stevens, J., dissenting).

151 *Id.*

152 The plurality emphasized that § 1983 does not generate any substantive rights and that *Albright* should make clear that substantive due process may not be used as a foundation for traditional common law torts like malicious prosecution. *Albright*, 114 S. Ct. at 811 n.4, 812. For commentary on the Court's motivation in limiting § 1983 torts and substantive due process, see *supra* notes 2, 7-8 and accompanying text.

153 *See Albright*, 114 S. Ct. at 818 (Kennedy, J. concurring) (citing Parratt v. Taylor, 451 U.S. 527, 544 (1981)) (stating that *Parratt* stands for the proposition that some

tance to recognize new torts based on substantive due process will considerably narrow the field of constitutional torts in the lower courts by filtering out most claims that do not rest upon violations of explicit textual constitutional guarantees.

Perhaps most important, the plurality's holding considerably expands upon both *Graham* and *Collins* by arming the latter's mandate of judicial restraint with a powerful weapon for disposing of potential substantive due process claims.[154] While it is doubtful that *Albright* stands for the second death of substantive due process, it seems clear that a majority of the Court would like its expanded interpretation of *Graham* to ensure that the substantive due process doctrine is reserved for relatively rare and more egregious violations.[155]

Ultimately, though, *Albright* raises more questions than it answers. Foremost among the issues yet to be resolved are: (1) to what extent the Court intended *Graham* to supplant substantive due process with the specific provisions of the Bill of Rights;[156] (2) how the Court will reconcile its holding in *Albright* to precedent

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questions of tort law are "best resolved by state legal systems without resort to the federal courts").

154 *See* James Lank, Recent Development, *The* Graham *Doctrine as a Weapon Against Substantive Due Process*: Albright v. Oliver, 17 HARV. J.L. & PUB. POL'Y 918, 928 (1994). Lank posited that:

> If the scenario in *Albright* repeats itself in the future, *Graham* may emerge as a powerful tool for use in avoiding the expansion of substantive due process. . . . Under this reading of *Graham*, claims that assert a novel due process right need only be recast in terms of an incorporated amendment in order to dispose of them. This recasting could be done either by focusing on the relevant state actions, as the Chief Justice did in *Albright*, or by focusing on the specific liberty deprivations incurred, as Justice Souter did.

Id. at 928-29.

155 The plurality noted that substantive due process has been reserved to protect rights "relating to marriage, family, procreation, and the right to bodily integrity" and emphasized that Albright's alleged right was "markedly different" from those in the former category. *Albright*, 114 S. Ct. at 812. Likewise, Justice Souter asserted that substantive due process should be reserved for "otherwise homeless substantial claims" presenting a substantial burden on liberty "beyond what [a more specific constitutional provision] is generally thought to redress already." *Id.* at 820-21 (Souter, J., concurring).

156 Justice Scalia, one of the most conservative members of the Court, applied the *Graham* standard only to criminal proceedings. *See Albright*, 114 S. Ct. at 814 (Scalia, J., concurring). According to Justice Scalia, the Court's jurisprudence "rejects 'the more generalized notion of "substantive due process"' at least to this extent: it cannot be used to impose additional requirements upon such of the states' criminal processes as are already addressed (and left without such requirements) by the Bill of Rights." *Id.* (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

such as *U.S. v. James Daniel Good Real Property*;[157] and (3) how much latitude the Court will give itself to mold substantive due process claims into violations of already existing amendments and their applicable standards.

Until the Court provides definitive answers to these questions, future litigants would do well to avoid framing § 1983 claims as infringements upon substantive due process rights, especially in the area of criminal proceedings. To prevent dismissal, a more cautious approach advocates grounding § 1983 claims upon a relevant, explicit constitutional guarantee and its applicable standard. Failing that, the litigant should consider the suitability of an adequate state remedy, thereby joining the Court in its effort to circumvent this convoluted area of the law.

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157 *See id.* at 820 (Souter, J., concurring) (quoting United States v. James Daniel Good Real Property, 114 S. Ct. 492, 499 (1993) (rejecting the argument that the applicability of a more specific constitutional amendment preempts the protections of another, more general, amendment)).