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## Outrageous and Irrational

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## Article

# Outrageous and Irrational

Jane R. Bambauer<sup>†</sup> & Toni M. Massaro<sup>††</sup>

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## INTRODUCTION

The government does many things that are abominable.

Some are violations of specifically enumerated constitutional provisions, such as the First Amendment right to free speech or the Fourth Amendment right to be free from unreasonable searches and seizures.<sup>1</sup> The courts have developed elaborate doctrinal criteria to guide elevated scrutiny for rights that are explicitly accounted for in the Constitution.

Others are violations of fundamental rights that are *not* enumerated in the Constitution, but have nevertheless been protected through the Due Process clauses.<sup>2</sup> These “penumbral” rights, such as the right to marital privacy,<sup>3</sup> reproductive autonomy,<sup>4</sup> and child-rearing decisions,<sup>5</sup> have been deemed so fundamental to an American sense of liberty that the courts scrutinize government interferences with them. The vagueness of these fundamental substantive due process rights attracts criticism, but their existence and function are broadly accepted.

That leaves the *other* cases. These cases correct government conduct that implicates no recognized fundamental or specifically enumerated right, and deploys no judicially recognized suspect classification. They are the misfits of constitutional law. The cases come in two forms. One set challenges executive actions that are alleged to be outrageous. Successful claimants must prove that the government’s conduct “shocks the conscience” even of those with the most “hardened sensibilities.”<sup>6</sup> The second set challenges legislative and regulatory actions that are alleged to be irrational. These claimants must prove that a law or rule fails rational basis scrutiny and is devoid of any possible legitimate purpose.<sup>7</sup>

Together, the outrageous and irrational cases establish

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1. U.S. CONST. amends. I, IV.

2. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2604 (2015) (placing marriage autonomy rights under the umbrella of the due process concept of personal liberty). There are two Due Process Clauses: the Fifth Amendment Due Process Clause constrains the federal government, and the Fourteenth Amendment constrains the states and local governments. Both now protect both substantive and procedural due process.

3. *Griswold*, 381 U.S. at 485.

4. *Roe v. Wade*, 410 U.S. 113, 153–54 (1973).

5. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Carey v. Population Servs., Int’l*, 431 U.S. 678, 684–85 (1977).

6. *County of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998); *Rochin v. California*, 342 U.S. 165, 172 (1952).

7. *See Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955).

constitutional floors to provide a minimum of decency and order the government must maintain in all of its varied activities. Both tests trigger non-elevated, highly deferential judicial review. They provide the lightest of checks on government power; indeed, both of the floor tests are hard for the government to flunk.<sup>8</sup> Nevertheless, their mere existence makes legal observers queasy.

The outrageous and irrational tests raise the specter of judicial overreach. For scholars who fear a revival of *Lochnerism*<sup>9</sup> (which is to say, for most scholars<sup>10</sup>), the floor tests look dangerous. The tests can provide a vehicle for courts to create new constitutional rights that are unmoored from text and history and are insulated by the Constitution from political counter-moves short of constitutional amendment.<sup>11</sup> Moreover, in addition to the separation of powers problem, the floor tests raise doubts about the institutional competence of the courts to understand the vast range of decisions made by every type of government actor, be it a school teacher, a police officer, or a congressperson.<sup>12</sup> And then there are the usual problems of amorphous standards—namely, the risk of arbitrary, idiosyncratic, or partisan application.

Yet despite the seeming soundness of these objections, the floor tests have not been abused by the courts. To the contrary, it is the widespread *reluctance* to use the floor tests that has led

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8. The burden of proving this violation has been described as “a virtually insurmountable uphill struggle.” See *Rimmer-Bey v. Brown*, 62 F.3d 789, 791 n.4 (6th Cir. 1995).

9. *Lochner v. New York*, 198 U.S. 45, 64 (1905) (recognizing a constitutional right to freely contract in the labor market). See *infra* Part V.A for an in-depth discussion.

10. See, e.g., John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 496 (1997); Daniel R. Mandelker, *Entitlement to Substantive Due Process: Old Versus New Property in Land Use Regulation*, 3 WASH. U. J.L. & POL’Y 61, 67–72 (2000); Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 877 (1987). But see DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* (2011).

11. See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (explaining that one danger of nonoriginalism is that judges may “mistake their own predilections for the law”).

12. See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (1st ed. 2004) (arguing that history indicates judicial review is not intended to be the primary means of interpreting the Constitution); ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 155 (2006) (“[R]eal-world decisionmakers, including judges, have limited capacity to understand and use even the information they do have. The problem of bounded information is amplified by bounded decision making capacity.”).

courts to use other parts of the Constitution to make bold inroads into areas of traditional executive and legislative control. Thus, by avoiding the use of these constitutional release valves, the courts have, ironically, expanded judicial power.

This Article explains and vindicates the non-fundamental rights cases. Its first goal is descriptive. This is the first account (so far as we know) to clarify the connection between the outrageousness test used to challenge executive action and the rational basis test used to challenge legislative action under due process or equal protection. Both tests root out blatant exploitations of power that needlessly abuse the disfavored constituents or pointlessly reward the favored. Notwithstanding their shared goals and textual bases, the floor tests have not been recognized as analytical analogs before.

Once the outrageousness and irrationality tests are properly seen as close cousins, a striking inconsistency is revealed. The tests have diverging trajectories. The rational basis test is enjoying a bit of a comeback. Progressives value the rational basis test because of its heroic role in the gay marriage cases.<sup>13</sup> Conservatives and libertarians have growing respect for the rational basis test because it has been used in the last few years to strike down questionable economic regulations.<sup>14</sup> At times, the test has reinforced the values of libertarians and progressives simultaneously, as when a Texas federal court found that a state statute requiring African hair braiding schools to comply with an onerous set of building codes lacked a rational basis for doing so.<sup>15</sup> Thus, the rational basis test is tolerated across the ideological spectrum and is well poised for a modest resurgence.

The outrageousness test, by contrast, still lives in disre-

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13. See WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999) (describing the history of court challenges); Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45, 47 (1996) (arguing for a rational basis approach to gay rights); *infra* text accompanying notes 99–123; cf. Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 5 (1994) (expressing concern that a rational basis approach may be too adventurous).

14. *St. Joseph Abbey v. Castille*, 712 F.3d 215, 217, 227 (5th Cir. 2013) (finding that a Louisiana statute restricting the sale of caskets to licensed funeral homes lacked a rational basis under the Due Process and Equal Protection Clauses); *Craigsmiles v. Giles*, 312 F.3d 220, 222 (6th Cir. 2002) (finding the same for a Tennessee restriction on casket sales). Both cases were litigated by the Institute for Justice, an organization dedicated to promoting economic liberty rights.

15. *Brantley v. Kuntz*, No. A-13-CA-872-SS, 2015 WL 75244, at \*8 (W.D. Tex. Jan. 5, 2015).

pute. Its occasional use sends critics clamoring for more judicial restraint.<sup>16</sup> The Supreme Court has commanded lower courts to use the outrageousness test only as a last resort—if the claimed injustice has no plausible connection to any other enumerated or fundamental constitutional right.<sup>17</sup> These constraints were intended to limit the drawbacks of an amorphous outrageousness standard, but in the process they wiped out many of the benefits. Unlike the rational basis test, which has enough slack in the rope to allow lower courts to experiment and respond adequately to new problems, the outrageousness test is kept under strict limits. Its waning scope forces lower courts to choose between two bad options when a government agent has abused his power. They can either expand their interpretation of fundamental and enumerated constitutional rights, or they can let the abuse slip between the doctrinal cracks.<sup>18</sup>

This brings us to the second goal, the prescriptive objective, of the Article. The floor tests deserve a formal exoneration. While the courts could misuse the tests, the primary problems anticipated by critics are more theoretical than actual. Both now have long track records without serious compromises to the separation of powers. Moreover, in practice, the floor tests have a counterintuitive beauty. If one accepts, as we think one must, that outrageous and irrational state actions are destined

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16. *County of Sacramento v. Lewis*, 523 U.S. 833, 861 (1998) (Scalia, J., concurring); *Radecki v. Barela*, 945 F. Supp. 226, 230 (D.N.M. 1996) (“[I]ts application will change as one federal judge after another struggles to apply it.”), *rev’d*, 146 F.3d 1227 (10th Cir. 1998); Rosalie Berger Levinson, *Time To Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307, 346–47 (2010) (discussing the test in detail); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363, 437–41 (1999) (describing problems with administering the test); Matthew D. Umhofer, *Confusing Pursuits: Sacramento v. Lewis and the Future of Substantive Due Process in the Executive Setting*, 41 SANTA CLARA L. REV. 437, 438–40 (2001) (highlighting the doctrinal ambiguities). *But see* Paul Gewirtz, *On “I Know It When I See It,”* 105 YALE L.J. 1023, 1031–32 (defending the test from criticism of its abdication of reason in favor of emotion). See *infra* Part V.B for a discussion of the criticism directed at the outrageousness test.

17. See *Graham v. Connor*, 490 U.S. 386, 397–98 (1989).

18. Others have worried about doctrine-distorting effects of compelling courts to give rights all-or-nothing scrutiny, though their concern is that expanding rights results in less protection for rights that lie at the core of the applicable amendment. See, e.g., Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823 (2009) (discussing equal protection rights); Philip Hamburger, *More Is Less*, 90 VA. L. REV. 835 (2004) (discussing religious freedom); Philip Hamburger, *The New Censorship: Institutional Review Boards*, 2004 SUP. CT. REV. 271 (2004) (discussing speech and press rights). *But see* John D. Inazu, *More Is More: Strengthening Free Exercise, Speech, and Association*, 99 MINN. L. REV. 485 (2014) (critiquing Hamburger’s thesis on the expansion of rights).

to occasionally persuade the courts to respond, then the outrageousness and rational basis tests actually provide a *conservative* option for judicial intervention.

The tests give courts a viable alternative to expanding enumerated or fundamental rights or suspect classifications to cover the offensive government conduct. Were the current floors jettisoned, the basic principles they reflect almost certainly would reappear under different constitutional cover, in a reinterpretation of some other right. Yet there is little reason to think these other constitutional cubby-holes would be better homes—or should be the exclusive homes—for addressing the range of contexts and liberty concerns reflected in the floor cases.<sup>19</sup> Many would be worse, requiring new epicycles in the already-complex rules that have accumulated around the enumerated rights.

Indeed, this dynamic between the constraints on substantive due process and the subsequent bloating of other rights already has occurred in the context of criminal procedural rights. As the outrageousness test has been reined in, courts have compensated by correcting bad police behavior through more expansive interpretations of the Fourth and Fifth Amendments. In some instances, bad facts have driven courts to create new rules that unnecessarily complicate and confuse existing doctrine.<sup>20</sup> For example, the courts have introduced contradictions into Fourth Amendment precedent in order to redress scandalous disciplinary measures and searches per-

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19. Constitutional cubby-holing is a relatively recent phenomenon. Owen Fiss has noted that in earlier eras “constitutional interpretation was not an exercise in clause-parsing.” OWEN M. FISS, *TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910* 85 (1993). Victoria Nourse “would go further and suggest it was not interpretative at all in the modern sense. Interpretation assumes a textualist view of the Constitution; but the police power—the most ubiquitous concept in constitutional analysis during [the late nineteenth and the early twentieth centuries]—had no textual basis.” Victoria F. Nourse, *A Tale of Two Lochners: The Untold History of Substantive Due Process and the Idea of Fundamental Rights*, 97 CAL. L. REV. 751, 763 (2009). In fact, she adds, for some “enumeration was considered a positive evil or at the least irrelevant, rather than the self-evident good it is portrayed as today.” *Id.* at 764; cf. Norman Redlich, *Are There “Certain Rights . . . Retained by the People?”*, 37 N.Y.U. L. REV. 787, 787 (1962) (“[W]e may be approaching an era where human dignity and liberty will require protection of rights other than those contained in the first eight amendments.”). We argue further that the constitutional floors, not just new fundamental rights, can contribute to the ability of courts to address human dignity and liberty concerns that may not immediately warrant the development of a full fundamental right or suspect class treatment.

20. AKHIL AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* 1 (1997) (“The Fourth Amendment today is an embarrassment.”).

formed at public schools.<sup>21</sup> And they have had to make exceptions to the exceptions to the Fifth Amendment privilege against self-incrimination in order to redress unusually bad police practices.<sup>22</sup> The outrageousness test could have provided a stopgap before these other rights were expanded. By resisting thoughtful use of substantive due process, courts are counter-intuitively expanding the reach of their constitutional review by couching their decisions in other, untouchable, constitutional rights.

In short, we argue that the very flexibility that critics abhor allows the floor tests to promote justice in modest steps while maintaining the analytical coherence of the rest of the Constitution. The vagueness of the doctrines requires courts to limit their holdings and reasoning to the facts before them and to leave other rights to expand slowly and deliberately, if at all.

We exhort courts and commentators to think anew about the outrageous and irrational tests. The profound skepticism about them served a vital purpose at one time to ensure that they remained modest. But that work is done. Judges will continue to confront many scenarios in which they simply hold their noses and uphold government conduct that they find distasteful, stupid, clunky, corrupt, invasive, or worse.<sup>23</sup> Today, the greater risk stems from courts overreacting to the floor tests. Too much skepticism deprives us of a valuable judicial resource. We therefore advocate for (carefully) increased use of outrageousness and irrationality scrutiny to allow liberty claims to develop organically, cautiously, and contextually.

The Article proceeds as follows: Part I defines the outrageousness test and explains its origins. Part II does the same for the irrationality test. Part III identifies the shared purposes of the outrageousness and irrationality tests and differentiates them from other constitutional rights (including other substantive due process rights). Part IV describes some confusion in

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21. See *infra* text accompanying notes 295–99.

22. See discussion of *Oregon v. Elstad* and *Missouri v. Siebert* *infra* notes 303–11.

23. See *infra* text accompanying notes 48–62. Yet the courts also respond—albeit rarely—to the most egregious abuses of government power. As Herbert Packer said over fifty years ago, “No one, Supreme Court Justices included, is immune to the force of the horrible example. And therein lies the Due Process Model’s peculiar strength. . . . It would take a conspiracy of silence to check the mobilization of energies that perpetuates the Due Process revolution.” Herbert L. Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1, 64 (1964). The outrageousness and irrationality tests can play a crucial role in monitoring these worst-case scenarios.



the precedent and legal scholarship that has led to doctrinal distortion. Part V explores the theoretical and doctrinal attacks that each floor test has faced and challenges their implicit assumptions. Part VI vindicates both tests by exploring their potential to manage irrational and outrageous government conduct.

### I. OUTRAGEOUS

One July morning in 1949, three Los Angeles County sheriff deputies entered the house of Antonio Rochin.<sup>24</sup> The sheriffs entered without a warrant, but that deficiency, which seems so glaring now, would not have mattered much at the time.<sup>25</sup> The Fourth Amendment's protection against warrantless and unreasonable searches and seizures was incorporated into the Fourteenth Amendment and made applicable to the states less than one month earlier, and the case, *Wolf v. Colorado*,<sup>26</sup> declined to adopt the exclusionary rule against state governments out of deference to federalism and a commitment to judicial restraint.<sup>27</sup>

But the investigation got worse. After breaking through Rochin's bedroom door, the deputies observed two capsules that contained morphine.<sup>28</sup> The deputies were investigating Rochin for the sale of narcotics and suspected the capsules contained illicit drugs.<sup>29</sup> One of the deputies asked, "Whose stuff is this?"<sup>30</sup> In response, Rochin grabbed the capsules, put them in his mouth, and, after a struggle with the deputies, swallowed.<sup>31</sup> For the deputies, the matter was not over. Either out of a fierce desire to preserve evidence or out of sheer retribution, the deputies took Rochin to the nearest hospital and forcibly pumped Rochin's stomach until he vomited the capsules.<sup>32</sup>

This conduct was a bridge too far. Even Justice Frankfurter, the author of the *Wolf* opinion who had strongly cautioned the Court against overextending its authority, believed that the Court had a responsibility to correct what happened to

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24. *Rochin v. California*, 342 U.S. 165, 169 (1952).

25. *Id.* at 166-67.

26. 338 U.S. 25 (1949).

27. *Id.* at 32.

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

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

Rochin.<sup>33</sup> This case was not one that put the Court at risk of substituting the sheriff's idiosyncratic judgment with its own.<sup>34</sup> No, the deputies' conduct did more "than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience."<sup>35</sup> Thus, in *Rochin v. California*, under Frankfurter's direction, the Court concluded that judges may intervene in the conduct of state (and other) authorities that is so outrageous that it offends more than judges' logic and traditions; it offends the "traditions and conscience of our people."<sup>36</sup>

Justice Frankfurter recognized the elasticity of the terms "decency" and "shocking," but stated that "[i]n dealing not with the machinery of government but with human rights, the absence of formal exactitude, or want of fixity of meaning, is not an unused or even regrettable attribute of constitutional provisions."<sup>37</sup> On the contrary, this is a matter of judicial judgment based on "considerations deeply rooted in reason and in the compelling traditions of the legal profession."<sup>38</sup> As he put it, a "shocks the conscience" due process boundary on executive conduct is "historic and generative."<sup>39</sup>

The *Rochin* test has taken a beating ever since.

The origins of the outrageousness test (also known as the "shocks the conscience" test)<sup>40</sup> may seem like a historical anomaly. After all, today the facts of *Rochin* would easily qualify for a Fourth Amendment challenge, and the evidence used against Rochin would be excluded on that basis. Indeed, the Fourth Amendment now protects individuals from blood draws and other much less invasive procedures than a stomach pump,<sup>41</sup> and the Fourth Amendment has a "surgical search" doctrine that renders some invasive surgical processes to extract bullets or other evidence a constitutional violation even if the police

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33. *Id.* at 169, 172; *Wolf v. Colorado*, 338 U.S. 25, 31–33 (1949).

34. *Rochin*, 342 U.S. at 170–71 ("We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function.")

35. *Id.* at 172.

36. *Id.* at 175.

37. *Id.* at 169 (emphasis added).

38. *Id.* at 175.

39. *Id.* at 173 (emphasis added).

40. Kenneth Miller, *Outrageous Government Conduct that Shocks the Conscience*, 25 FED. PRAC. 81, 81 (1998).

41. *Schmerber v. California*, 384 U.S. 757, 761 (1966) ("We hold that the privilege protects an accused only from being compelled to testify against himself.")

have probable cause and a warrant.<sup>42</sup> At first blush, it may seem that the outrageous conduct analyzed in *Rochin* eventually would have come under the Fourth Amendment umbrella, and the Court could have ended up with the right result without relying on dubious substantive due process review.<sup>43</sup> But as a purely historical matter, this gets the order reversed. All of the blood draw and surgical search cases used *Rochin* to support the recognition of a Fourth Amendment problem,<sup>44</sup> and there's little reason to assume that the Fourth Amendment development would have been inevitable.

This is not unique. Other rights that were once analyzed as substantive due process rights have been overtaken by other amendments. For example, prior to the incorporation of the Fifth Amendment's right against self-incrimination, criminal defendants who were investigated by state (as opposed to federal) police were protected from coerced and involuntary confessions through the Due Process Clause of the Fourteenth Amendment.<sup>45</sup> Today, these rights are so strongly and automatically associated with justice that their emergence as fundamental rights seems almost inevitable, but it isn't so. The first stage of development was the tentative judicial testing afforded by the vague promises of due process.

The outrageousness test screens for abuses of official power of any variety, and because the scope is so wide, the courts also ensure that the protection is weak. It is used sparingly, only for misconduct that nearly everyone would agree is wrong. As one court has put it, "before a constitutional infringement occurs, state action must *in and of itself* be egregiously unacceptable, outrageous, or conscience-shocking."<sup>46</sup> Arbitrary and irrational conduct is not necessarily outrageous under this test; it must *also* shock the conscience.<sup>47</sup> But even with the tables tilted dramatically in the government's favor, litigants use the outrageousness test and win, albeit rarely, when they cannot find a

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42. *Winston v. Lee*, 470 U.S. 753, 760 (1985).

43. Indeed, this reversed logic seems to be at the center of the Court's later precedent instructing lower courts to preferentially use enumerated rights rather than substantive due process. *See Graham v. Connor*, 490 U.S. 386, 393–95 (1989).

44. *See, e.g., Winston*, 470 U.S. at 760–63; *Schmerber*, 384 U.S. at 759–60.

45. *See Lisenba v. California*, 314 U.S. 219, 236–37 (1941) (reviewing cases where confessions were extracted by improper means); *Brown v. Mississippi*, 297 U.S. 278, 287 (1936).

46. *Amsden v. Moran*, 904 F.2d 748, 754 (1st Cir. 1990).

47. *See, e.g., Pyles v. Village of Manteno*, No. 13-CV-2114, 2013 WL 6459484, at \*5 (C.D. Ill. Dec. 9, 2013) (finding that the failure to disclose evidence in order to indict plaintiff satisfied this test).

suitable constitutional route out of a jam. Lower courts invoke this minimum decency baseline in cases challenging government misconduct, even as they consistently reassure the other branches that the baseline is low and reserved for cases of exceptionally bad—that is, outrageous—behavior.

The test is also invoked, and taken seriously, in some of the losing cases. In the 1992 case of *Collins v. Harker Heights*,<sup>48</sup> the Court concluded the shocks-the-conscience standard was not violated when a city failed to train or warn city workers about asphyxiation dangers, and a sewer worker perished while attempting to clear an underground sewer line.<sup>49</sup> In *County of Sacramento v. Lewis*, it likewise held that the standard was not violated when a deputy sheriff pursued a motorcyclist at 100 miles per hour through a residential neighborhood, at a distance of 100 feet.<sup>50</sup> And in *NASA v. Nelson*, the Court was willing to “assume” that Americans have a constitutional interest in privacy that springs from the Due Process Clause (though the constitutional minimum threshold for privacy was not violated by extensive background checks on government employees).<sup>51</sup>

Objections to confinement or parole conditions also are sometimes couched as substantive due process violations, though few succeed. In *Catanzaro v. Harry*, the federal district court reviewed but rejected the prisoner’s claim that his due process rights were violated by a decision to transfer him to the Residential Sex Offender Program at the Kalamazoo Probation Enhancement Program facility because a physician did not make the decision.<sup>52</sup> Nor did the prisoner’s required participation in the Sex Offender Program as a condition of parole shock the conscience.<sup>53</sup>

In a particularly chilling case, on contested facts, a district court ruled that a Border Patrol agent did not shock the conscience when he shone his headlights on an undocumented person attempting to cross the Rio Grande illegally, began driving the vehicle toward her, and then drove over her with his back tires.<sup>54</sup> He then lifted her up, pulled her into the back seat of his vehicle torso first, stepped to the other side and pulled her into

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48. 503 U.S. 115 (1992).

49. *Id.* at 117–18, 129.

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

51. *NASA v. Nelson*, 562 U.S. 746 (2011).

52. *Catanzaro v. Harry*, 848 F. Supp. 2d 780, 798–99 (W.D. Mich. 2012).

53. *Id.* at 799.

54. *Carcamo-Lopez v. Doe*, 865 F. Supp. 2d 736, 742–43 (W.D. Tex. 2011).

the vehicle, and then drove her to meet EMT technicians, who then took her to the hospital.<sup>55</sup>

Also bracing is a recent Ninth Circuit Court of Appeals decision, in which the government indisputably sent a paid confidential informant to a poor, minority community in Phoenix, Arizona, “with instructions to recruit random persons to help rob a non-existent cocaine stash house.”<sup>56</sup> Worth emphasizing here is the dissent from the denial of rehearing en banc.<sup>57</sup> Judge Reinhardt—joined by Chief Judge Kozinski—noted as follows:

As we have long recognized, the Due Process Clause requires us to dismiss the indictment in “extreme cases in which the government’s conduct violates fundamental fairness.” In other words, a conviction must fall where “the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction.”<sup>58</sup>

Among other things, the dissenting judges worried about the overwhelming temptation that sting operations like this may pose for the most economically vulnerable in hard economic times.<sup>59</sup> But the judges thought the liberty concerns went beyond the risk of a disparate impact and warned that “[t]he government verges too close to tyranny when it sends its agents trolling through bars, tempts people to engage in criminal conduct, and locks them up for unconscionable periods of time when they fall for the scheme.”<sup>60</sup> Moreover, such acts cannot be justified on the bare claim that the outrageous conduct “will advance law enforcement goals.”<sup>61</sup> Of course they will advance law enforcement goals, if one construes those goals with no regard for calibration or equity. The dissent objected to how readily the majority opinion nodded to government law enforcement justifications and lamented that “the outrageous government conduct doctrine has little or no continued vitality in this Circuit.”<sup>62</sup>

The case underscores how weak that doctrine is, even in the allegedly pro-defendant Ninth Circuit. But the doctrine is not dead, and should not be—for the very reasons given by the

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55. *Id.* at 743.

56. *United States v. Black*, 750 F.3d 1053, 1054 (9th Cir. 2014) (en banc) (Reinhardt, J., dissenting).

57. *Id.* at 1054.

58. *Id.* at 1055 (quoting *United States v. Stinson*, 647 F.3d 1196, 1209 (9th Cir. 2011); *United States v. Russell*, 411 U.S. 423, 431–32 (1973)).

59. *Id.* at 1056.

60. *Id.* at 1057.

61. *Id.* at 1060.

62. *Id.*

dissent. The case shows how wrong-headed uncritical deference to government is if one shares the dissent's concerns about "Orwellian" abuse of government power.<sup>63</sup> As the dissent put it: "Do we really need to add to the extraordinary number of our youth whom we now imprison those our government can induce to commit fictitious crimes?"<sup>64</sup>

These fake crime sting operations, the dissent continued, "are one of the most extreme and chilling manifestations of an overzealous criminal system that often fails to respect the boundaries of law, good public policy, and simple decency."<sup>65</sup> Upholding such conduct thus poses serious, modern, real-world liberty risks that may otherwise evade meaningful constitutional review. Phoenix is, after all, located in Maricopa County, Arizona—the stomping ground of "Sheriff Joe" Arpaio, known for a variety of particularly stunning and abusive law enforcement tactics.<sup>66</sup> Yet concern about physically abusive or otherwise outrageous law enforcement tactics is hardly confined to Maricopa County, as national outrage over perceived abuses of law enforcement authority proves.

Verbal abuse and psychological threats may be sufficiently outrageous to breach the "brutal and inhumane abuse of official power"<sup>67</sup> formidable wall.<sup>68</sup> Calling a student a prostitute in front of the class, and continuing to refer to the student in such

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63. *Id.* at 1057 (describing the police tactics as those that call to mind George Orwell's 1984, or Phillip K. Dick's *The Minority Report*).

64. *Id.* at 1058.

65. *Id.*

66. For a description of the pattern and practice of discriminatory law enforcement conduct by Sheriff Arpaio, see Complaint at 1–3, *United States v. Maricopa County*, No. 2:12-cv-00981:LOA (D. Ariz. May 10, 2012); see also Complaint at 1–8, *United States v. Maricopa County*, No. 2:10-cv-01878-GMS (D. Ariz. Sept. 2, 2010). See generally *Melendres v. Arpaio*, 989 F. Supp. 2d 822 (D. Ariz. 2013).

67. Emily F. Suski, *Dark Sarcasm in the Classroom: The Failure of the Courts To Recognize Students' Severe Emotional Harm as Unconstitutional*, 62 CLEV. ST. L. REV. 125, 132 (2014) (quoting *Hall v. Tawney*, 621 F.2d 607, 613 (4th Cir. 1980)) (arguing that courts should be more willing to find substantive due process violations when government officials in schools inflict serious emotional harm on students); see also *Alberici v. County of Los Angeles*, No. CV 12-10511-JFW (VBKx), 2013 WL 5573045, at \*16–19 (C.D. Cal. Oct. 9, 2013); *Turner v. Unknown Parties # 1*, No. 1:11-cv-1128, 2012 U.S. Dist. LEXIS 16674, at \*26–28 (W.D. Mich. Feb. 9, 2012) (noting that verbal harassment by a prison official, calling plaintiff a "bitch" and telling him not to "turn a stick up into a murder," did not shock the conscience).

68. See, e.g., *Wilson v. Moreau*, 440 F. Supp. 2d 81, 101 (D.R.I. 2006) (sympathizing with plaintiff's "apparently-undeserved disrespectful and unpleasant treatment" but certain that "no reasonable jury would conclude that [the] conduct violated universal standards of societal decency").

a fashion for several weeks will not violate the standard,<sup>69</sup> but the courts have said they “can imagine a case where psychological harassment might be so severe that it would amount to torture. . . .”<sup>70</sup> In general, hostile threats or intimidation are seldom sufficient, even in the criminal process; courts instead look for evidence that rises to the level of “sophisticated psychological torture.”<sup>71</sup>

Courts also look for patterns of severe abuse, rather than isolated police misconduct that intentionally singles out an individual short of the “conscience-shocking” mark. One government administrative official’s rude, arbitrary, or even hostile behavior typically will not suffice. Minor burdens, even if cumulative, also are insufficient. For example, a plaintiff who received 24 bogus parking tickets and alleged a pattern of police harassment did not satisfy the shocks-the-conscience test.<sup>72</sup> Nor did the plaintiff who was issued a single erroneous parking ticket, although he had no actual or constructive notice that he had to pay for parking.<sup>73</sup>

Even serious privacy invasions may not suffice. A wiretap that resulted in the interception of a confidential phone conversation among a defendant, his mother, and a defense investigator did not violate the standard, absent evidence of intent to in-

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69. *See* *Abeyta v. Chama Valley Indep. Sch. Dist.*, 77 F.3d 1253, 1255 (10th Cir. 1996).

70. *Id.* at 1258.

71. *Cooper v. Dupnik*, 963 F.2d 1220, 1248–49 (9th Cir. 1992) (finding that hours of mistreatment, coupled with “sophisticated psychological torture” that was “a twentieth-century inquisitorial version of the Star Chamber” shocked the conscience); *see, e.g.*, *Brittain v. Hansen*, 451 F.3d 982, 994–95 (9th Cir. 2006) (holding that police officers’ hostile, aggressive and condescending threats of arrest during dispute did not shock the conscience); *Pettit v. City of Orting*, No. C12-5744 BHS, 2013 WL 414231, at \*5 (W.D. Wash. Feb. 1, 2013). Nevertheless, coercive interrogation arguably can, in some circumstances, violate substantive due process. *See Chavez v. Martinez*, 538 U.S. 760, 780 (2003) (remanding case for court to determine if party could pursue a claim of liability for substantive due process); *Miller v. Fenton*, 474 U.S. 104, 109 (1985).

72. *See, e.g.*, *Geinosky v. City of Chicago*, 675 F.3d 743, 750–51 (7th Cir. 2012); *see also Brittain*, 451 F.3d at 995 (holding that police officer’s interference with mother’s exercise of court-ordered visitation rights did not violate substantive due process and was not conscience-shocking); *Shelton v. Astrue*, No. 5:12CV00009, 2013 WL 278617, at \*3, 9 (W.D. Va. Jan 24, 2013) (finding that the alleged frustration by administrative employees of a plaintiff’s effort to secure Social Security benefits did not shock the conscience).

73. *Peruta v. City of Hartford*, No. 3:09-CV-1946 VLB, 2012 WL 3656366, at \*10 (D. Conn. Aug. 24, 2012); *cf. Sheng v. City of New York*, No. CV-05-1118-RRM VVP, 2009 WL 6871132, at \*11–12 (E.D.N.Y. June 26, 2009) (holding that the issuance of multiple parking violation summonses, which led to seizure of car, did not violate substantive due process).

vade the defendant's attorney-client privilege.<sup>74</sup> Moreover, a social worker's decision to allow a child to be removed from his parents and remain with his maternal grandmother, as approved by the Juvenile Court, did not shock the conscience.<sup>75</sup>

Finally, *Herrera v. Collins* may constitute the low water mark for substantive due process.<sup>76</sup> A capital defendant facing the death penalty urged in a federal habeas petition that he had newly discovered evidence of his actual innocence. The Court held that this "freestanding claim" of actual innocence did not support the miscarriage of justice exception, even in a capital case.<sup>77</sup> Nor could a due process-based demand for a new trial prevail absent history to support such a claim.<sup>78</sup> Yet in a dissent joined by Justices Stevens and Souter, Justice Blackmun observed that "[n]othing could be more contrary to contemporary standards of decency or more shocking to the conscience than to execute a person who is actually innocent."<sup>79</sup> Here again, the due process argument failed, along with the fundamental rights arguments that any capital case entails, but only after vetting all the way to the Supreme Court.<sup>80</sup>

Although these cases illustrate the myriad ways that a shocks-the-conscience argument can fail, careful readers will also see frequent reassurance from the courts that the outrageousness test continues to constrain government acts. For example, "an officer's use of false evidence to secure a conviction is capable of shocking the conscience."<sup>81</sup> When a coach deliberately struck a high school student in the eye with a heavy object, with sufficient force to blind her in one eye, this shocked the conscience.<sup>82</sup> The asserted disciplinary justification was not enough to insulate the behavior from substantive due process

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74. See *People v. Alexander*, 235 P.3d 873, 878 (Cal. 2010).

75. See *Alberici v. County of Los Angeles*, No. CV 12-10511 JFW VBKX, 2013 WL 5573045, at \*16 (C.D. Cal. Oct. 9, 2013) (stating that to prevail on a due process claim based on unwarranted interference with familial rights a plaintiff must show "that the government's action at issue was so egregious or ill-conceived that it shocks the conscience").

76. *Herrera v. Collins*, 506 U.S. 390 (1993).

77. *Id.* at 401.

78. *Id.* at 411.

79. *Id.* at 430 (Blackmun, J., dissenting). *Herrera* was executed. For a recent analysis of erroneous conviction of innocent defendants in capital cases, see Samuel R. Gross et al., *Rate of False Conviction of Criminal Defendants Who Are Sentenced to Death*, 111 PROC. NAT'L ACAD. SCI. 7230 (2014).

80. *Herrera*, 506 U.S. at 411, 417.

81. *White v. Smith*, 808 F. Supp. 2d 1174, 1242 (D. Neb. 2011).

82. See *Neal ex rel. Neal v. Fulton Cty. Bd. of Educ.*, 229 F.3d 1069, 1076 (11th Cir. 2000).



review. Likewise, “when a police officer not faced with an emergency drives his vehicle through a red light at sixty-four miles per hour on a dark and snowy winter night and kills an innocent seventeen year-old girl, such actions rise to the level of conscience-shocking.”<sup>83</sup>

Unjustified physical harm and control provide obvious grounds for a shocks-the-conscience challenge, but emotional harms and affronts to dignity can give rise to successful claims as well. Some courts have stated that “there is no meaningful distinction between physical and psychological harm.”<sup>84</sup> For example, one court held that law enforcement conduct shocked the conscience where an arrestee extracted drugs from her own vagina after police threatened her that they would be extracted involuntarily, and claimed falsely that they had a search warrant to transport her to a local hospital for that purpose.<sup>85</sup>

These examples demonstrate two things that matter to our arguments here. First, the outrageousness test is not completely impotent. In some cases the argument prevails, though these are quite rare occurrences. In others courts recite a commitment to protect the public from government abuses. Second, the outrageousness test is a weak constraint at best. It is a brake on government conduct beyond the pale.

## II. IRRATIONAL

Closely related to the shocks-the-conscience hand brake on outrageous executive action is the more generally applicable rational basis test. Whether employed through the Due Process Clause or the Equal Protection Clause, the rational basis test mandates that government action cannot be wholly arbitrary or malicious.<sup>86</sup> As Richard Fallon has observed, the constitutional

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83. *Terrell v. Larson*, 396 F.3d 975, 985 (8th Cir. 2005) (emphasis omitted).

84. *See, e.g., United States v. Cuervelo*, 949 F.2d 559, 565 (2d Cir. 1991) (citing *United States v. Chin*, 934 F.2d 393, 399 n.4 (2d Cir. 1991)).

85. *See United States v. Anderson*, No. 5:13-CR-24, 2013 WL 5769976, at \*9–12 (D. Vt. Oct. 24, 2013), *rev'd*, 772 F.3d 969 (2d Cir. 2014). In reversing the order of the district court to suppress the unlawfully obtained evidence, the Second Circuit did not address whether there was a due process violation, but instead held that the defendant, who did not have the actual conduct performed on his own person, did not have standing to bring the claim. *United States v. Anderson*, 772 F.3d 969, 970 (2d Cir. 2014).

86. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 486–87 (1955). As Fallon has observed, “[T]he intuitive idea is not mysterious: government officials must act on public spirited rather than self-interested or invidious motivations, and there must be a ‘rational’ or reasonable relationship between government’s ends and its means.” Richard H. Fallon, Jr., *Some Confusions*

duty of care that due process imposes on state actors is a “general duty on government officials to behave ‘rationally’ in their selection of both ends and means.”<sup>87</sup> Much like the outrageousness cases, the irrationality cases are a gnarl, and the doctrinal and practical obstacles to a successful challenge abound. But the rational basis test still is invoked, and occasionally is successful.

The rational basis test has developed with profound deference to the government imbedded into its core. Courts employ elevated scrutiny only for fundamental rights or suspect classifications.<sup>88</sup> The rest of the time courts demand only the faintest evidence of rationality to survive constitutional review. The test is so deferential that it has confused some courts into wrongly assuming that *only* fundamental rights trigger substantive due process.<sup>89</sup> In fact, all lawmaking must have a rational basis,<sup>90</sup> though its exceedingly low bar is often *the most rigorous* constitutional scrutiny that federal or state law making will receive.<sup>91</sup>

The most commonly invoked version of the rational basis test is tracked back to *Williamson v. Lee Optical of Oklahoma, Inc.* in which the Supreme Court upheld a state law requiring a prescription by a licensed eye professional before glasses may be fitted with lenses.<sup>92</sup> First, there must be a plausible rationale

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*About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 310 (1993).

87. *Id.* at 362; cf. Packer, *supra* note 23, at 65 (“[A]n important dimension of the Due Process ideology is in its insistence upon equality in the operation of the criminal process.”).

88. And even in these cases, the substantive due process precedent often subjects state government rule-making to what Richard Fallon has called a form of abstention doctrine that relegates claims against state officials to state courts and state remedies. Fallon, *supra* note 86, at 310–11.

89. See *infra* text accompanying notes 168–77.

90. Rational basis scrutiny also applies to federal law-making, not merely state and local law-making, even though the federalism concerns that contribute to greater judicial unwillingness to second-guess state law-making and enforcement are absent.

91. Moreover, many other rules—e.g. standing, official immunity, sovereign immunity, stricter pleading requirements—likewise impose barriers to judicial relief for outrageous or irrational government conduct. And as applied to federal lawmaking, there is a preliminary step that confines legislative power—it must be supported by one of Congress’s enumerated sources of law-making authority. See Erwin Chemerinsky, *How the Supreme Court Protects Bad Cops*, N.Y. TIMES, Aug. 27, 2014, at A23 (discussing many obstacles to suits against governmental entities). With states, this first step is arguably easier to surmount, given the expansive modern view of state police powers.

92. *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487–89 (1955).

for the legislation.<sup>93</sup> This need not be the actual reason legislators had in mind when adopting the measure; it can be stated (or invented) *post hoc*.<sup>94</sup> Second, the means chosen to advance the end may be extremely over-inclusive or under-inclusive; it need only tend to advance the alleged legitimate end feebly.<sup>95</sup> The same excessively forgiving test applies whether one challenges the end of the government action under substantive due process or the ways in which it allocates burdens and benefits under equal protection. The heavy burden of showing that the measure is irrational rests with the party challenging it, not with the government.<sup>96</sup>

The rational basis test is usually applied to legislation.<sup>97</sup> Such cases arguably are better vehicles for substantive due process than are the challenges to executive misconduct insofar as “due process law [increasingly] aims less to correct individual injustices than to structure and maintain a regime in which courts ensure that governmental law-breaking does not reach intolerable levels; this latter ambition is more clearly implicated in challenges to rules and legislation than in individual tort actions.”<sup>98</sup> In other words, due process is better deployed to root out systemic government arbitrary conduct than to function as a roving, constitutional tort system to correct for more isolated misdeeds.

This may be one reason for the rational basis test’s resurgence. Unlike the outrageousness test, it may have garnered more understanding from jurists and the legal community at inception, which helped the current generation of lawyers to appreciate its virtues, if used sparingly. Whatever the reason for its greater acceptance, the rational basis test has played a starring role in the modern development of so-called “gay” constitutional rights—a story told briefly here as part of a broader tale about constitutional floors.

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93. *Id.* at 488.

94. *Id.* at 487 (detailing all the possible reasons the legislature may have passed the law).

95. *Id.* at 486.

96. *Id.* at 488; *see also* *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013).

97. *See, e.g.*, *Bonner v. City of Brighton*, 848 N.W.2d 380, 388, 391 n.43 (Mich. 2014), *cert. denied*, 135 S. Ct. 230 (2014) (challenging municipal ordinance on substantive and procedural due process grounds). For a discussion of property claims under due process, *see* E. THOMAS SULLIVAN & TONI M. MASSARO, *THE ARC OF DUE PROCESS IN AMERICAN CONSTITUTIONAL LAW* 42–44, 56–68 (2013); *see also* Stephen J. Massey, *Justice Rehnquist’s Theory of Property*, 93 *YALE L.J.* 541, 542–44 (1984).

98. Fallon, *supra* note 86, at 339–52.

In the 1990's, the legal community began to build the infrastructure for a gay rights revolution. Challenges to laws that criminalized sexual conduct, discriminated against gay and lesbian people in employment, and prohibited same-sex marriage were brought with increasing frequency.<sup>99</sup> But the optimal legal strategy for attacking these laws was intensely debated.<sup>100</sup>

One approach that seemed well-suited for that constitutional moment was to seek “thin” constitutional rights—that is, to use the rational basis tests from the Equal Protection Clause or Due Process Clauses—rather than pursuing only the thicker protection that comes from fundamental rights or suspect classification under the Equal Protection Clause.<sup>101</sup> Despite the many problems with a rational basis approach—especially the ease with which the rational basis standard can be overcome—the thin approach proved to be a shrewd tool for challenging laws that discriminated on the basis of sexual orientation.<sup>102</sup> It avoided the “reverse discrimination” doctrine that has ensnared race- and gender-based equal protection law;<sup>103</sup> it avoided re-

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99. See generally BARRY D. ADAM, *THE RISE OF A GAY AND LESBIAN MOVEMENT* (1995) (detailing gay and lesbian movements worldwide); ELLEN ANN ANDERSON, *OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS LITIGATION* (2004) (developing a perspective that analyzes how and why litigation was used as a tool in the gay rights movement); PATRICIA CAIN, *RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT* (2000) (examining rights based arguments in the gay rights movement); ESKRIDGE, *supra* note 13; NAN D. HUNTER ET AL., *THE RIGHTS OF LESBIANS AND GAY MEN* (3d ed. 1992); Mary Anne Case, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643 (1993) (discussing the concept of coupling and its absence in gay and lesbian litigation); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989) (discussing the levels of equal protection scrutiny that should be applied to legislation targeting gay, lesbian, and bisexuals); Rhonda R. Rivera, *Queer Law: Sexual Orientation in the Mid-Eighties: Part I*, 10 U. DAYTON L. REV. 459 (1985) (surveying legal sources affecting homosexual individuals); William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997) (examining group decision making in litigation).

100. See Massaro, *supra* note 13 (discussing debate about legal strategies); Rubenstein, *supra* note 99; Sunstein, *supra* note 13.

101. See Massaro, *supra* note 13.

102. *Id.*

103. Elevated scrutiny, of course, has resulted in the reversal of some race-conscious affirmative action by the government where the measures were held not to satisfy strict scrutiny. See, e.g., *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 748 (2007) (“The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 510–11 (1989).

solving thorny issues of immutability or political powerlessness that plagued some arguments for suspect classification,<sup>104</sup> and it allowed courts to proceed incrementally and contextually.<sup>105</sup> Most importantly, it put pressure on government to explain *why* sexual orientation distinctions make sense, on a case-by-case basis.<sup>106</sup>

This strategy turned the rational basis test's weakness into its strength. The same-sex marriage cases, for example, put on public display the states' inability to assert a single objectively reasonable, secular and constitutionally adequate basis for discriminating against same-sex couples. Even the litigation successes for state governments became Pyrrhic victories, as the injustice of the laws gained more and more attention and pushed to the light concerns that the laws, too, were products of irrational bias.<sup>107</sup> To be sure, litigants typically coupled the thin rational basis arguments with thicker arguments for elevated scrutiny, but they pushed hard on the irrationality point and demanded open and transparent reasons for the laws.

The strategy worked.<sup>108</sup>

Context by context, courts confronted laws that discriminated on the basis of sexual orientation. They began with criminal prohibitions on private adult sexual conduct,<sup>109</sup> worked slowly to marriage laws,<sup>110</sup> and struck down some laws using a blend of substantive due process and equal protection rational basis—not elevated scrutiny—analysis.<sup>111</sup> In each context, the question put to the fore was whether the particular law was rational in a constitutional sense, versus as an abstract or perfec-

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104. See *infra* text accompanying notes 234–36.

105. See Massaro, *supra* note 13.

106. *Id.*

107. Once the courts detected animus they became unwilling “to tolerate wildly over- or underinclusive laws.” See Dale Carpenter, *Windsor Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 248 (discussing the animus factor and how cases that involve it defy standard equal protection review).

108. See *United States v. Windsor*, 133 S. Ct. 2675, 2695–96 (2013) (striking down Section 3 of the Defense of Marriage Act on the grounds that it was irrational and displayed animus against gay and lesbian couples, as well as on federalism grounds).

109. See *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) (involving criminal anti-sodomy statutes).

110. See *Baehr v. Lewin*, 852 P.2d 44, 65 (Haw. 1993), *abrogated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941, 968 (Mass. 2003).

111. See, e.g., *Windsor*, 133 S. Ct. at 2675; *Romer v. Evans*, 517 U.S. 620 (1996).

tionist form of rationality.<sup>112</sup> In each context, asking that question raised concerns that animus or selective indifference was the real explanation for the measure, rather than a legitimate public end.<sup>113</sup> In each context, the feeble government justifications were weighed against the substantial burdens imposed by the laws.<sup>114</sup> In each context, the courtroom airing advanced public debate about how the government balanced the asserted legal rights, individual burdens, and evolving cultural norms.

Perhaps the most poignant tipping point occurred when the lawyer defending Proposition 8, the California ban on same-sex marriage, was asked what harm to opposite-sex marriages would occur if same-sex marriages were allowed. His limp answer, “I don’t know. I don’t know,”<sup>115</sup> reverberated throughout the courtroom.

The decisions overturning laws that discriminate on the basis of sexual orientation are analytically fuzzy. In them courts applied a mixture of liberty and equality themes, invoked vague nouns like “dignity,”<sup>116</sup> emphasized liberalism-based objections to animus or caste,<sup>117</sup> and focused on the

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112. See Carpenter, *supra* note 107 (discussing the development of the animus strand in LGBTQ cases).

113. See *id.*

114. See *Windsor*, 133 S. Ct. at 2689–90 (discussing the impact on families).

115. Edmund White, *I Do, I Do*, N.Y. REV. BOOKS, Aug. 14, 2014, at 26, 27 (discussing the battle for gay marriage, and characterizing the courtroom statement by lawyer Chuck Cooper as “an admission of defeat”). Similarly feeble responses to questions about why prohibitions on same-sex marriage are justified led to an opinion by Judge Posner that is the most powerful to date in terms of its vigorous condemnation of the irrationality of the government’s arguments. See *Baskin v. Bogan*, 766 F.3d 648, 656 (7th Cir. 2014) (noting that the laws discriminated against a minority defined by an immutable characteristic, “and the only rationale that the states put forth with any conviction—that same-sex couples and their children don’t need marriage because same-sex couples can’t produce children—intended or unintended—is so full of holes that it cannot be taken seriously”); see also Mark Joseph Stern, *Listen to a Conservative Judge Brutally Destroy Arguments Against Gay Marriage*, SLATE: OUTWARD (Aug. 27, 2014), [http://www.slate.com/blogs/outward/2014/08/27/listen\\_to\\_judge\\_richard\\_posner\\_destroy\\_arguments\\_against\\_gay\\_marriage.html](http://www.slate.com/blogs/outward/2014/08/27/listen_to_judge_richard_posner_destroy_arguments_against_gay_marriage.html) (excerpting some of the more memorable oral arguments from the case). But see *DeBoer v. Snyder*, 772 F.3d 388, 420–21 (6th Cir. 2014) (upholding a same-sex marriage ban on grounds of judicial restraint, separation of powers, federalism, and tradition), *rev’d sub nom.* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Robicheaux v. Caldwell*, 2 F. Supp. 3d 910, 919 (E.D. La. 2014) (holding that a ban on same-sex marriage is rational because marriage is a legitimate concern of state law, and the value of state decisions reached by a “democratic process” is sufficient to satisfy the rational basis test).

116. *Obergefell*, 135 S. Ct. at 2584; *Windsor*, 133 S. Ct. at 2689.

117. *Windsor*, 133 S. Ct. at 2695 (saying that the government cannot “de-

harms endured by the affected individuals with powerful narratives about their relationships and families.<sup>118</sup> The courts did not follow the usual formalistic rules about tiers of review, but neither did they follow an “all bets against it” form of rational basis.<sup>119</sup> They did not treat equal protection irrationality—which asks whether the law discriminates on a rational basis—distinctly from substantive due process irrationality—which asks whether the law as designed serves legitimate public ends.<sup>120</sup> The tests and the irrationality they police intersected.<sup>121</sup>

Justice Anthony Kennedy has been at the forefront of this hybrid, fluid approach to due process,<sup>122</sup> and has been met with stinging criticism from fellow justices.<sup>123</sup> Yet the very ambiguity

grade or demean” under Fifth Amendment due process); *see also* Carpenter, *supra* note 107 (discussing the role of animus); Daniel Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 258 (1996) (saying that the government cannot designate any societal group as “untouchable”).

118. *Obergefell*, 135 S. Ct. at 2584; *Windsor*, 133 S. Ct. at 2689–90; *see also* Baskin, 766 F.3d at 658–59.

119. *Obergefell*, 135 S. Ct. 2584; *Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting).

120. *Obergefell*, 135 S. Ct. at 2604; *Windsor*, 133 S. Ct. at 2706 (Scalia, J., dissenting).

121. In the case of challenges to irrationality of federal laws, the intersection of equal protection and substantive due process rationality is textually inescapable: the cases are based on the Fifth Amendment, which lacks an Equal Protection Clause. Equal protection irrationality can *only* be due process irrationality. In our view, however, whenever government—federal or state—draws lines in utterly arbitrary and irrational ways, it violates baseline substantive due process under the Fifth and Fourteenth Amendments, respectively. *See infra* Part IV.C.

122. *Obergefell*, 135 S. Ct. at 2584 (applying equal protection and due process as intersecting rights, without expressly naming any specific tier of review); *Windsor*, 133 S. Ct. at 2693 (declining to specify a level of scrutiny).

123. The dissents in *Obergefell* were exceptionally harsh. *See, e.g.*, *Obergefell*, 135 S. Ct. at 2612 (Roberts, C.J., dissenting) (describing the majority opinion, authored by Justice Kennedy, as “an act of will, not of legal judgment”); *id.* at 2630, 2630 n.22 (Scalia, J., dissenting) (describing Kennedy’s opinion as “couched in a style that is as pretentious as its content is egotistic,” and “profoundly incoherent,” complaining further, “[i]f, even as the price to be paid for a fifth vote, I ever joined an opinion for the Court that began [as the majority did], I would hide my head in a bag”); *see also infra* text accompanying notes 223–24 (discussing the cases that were critical of *Roe v. Wade*). For insightful analyses of the Kennedy approach and its doctrinal implications, *see* Carpenter, *supra* note 107; Cary Franklin, *Marrying Liberty and Equality: The New Jurisprudence of Gay Rights*, 100 VA. L. REV. 817 (2014) (describing the “jurisprudential implications of [the] intertwining of due process and equal protection in the context of same-sex marriage”); Heather K. Gerken, *Windsor’s Mad Genius: The Interlocking Gears of Rights and Structure*, 95 B.U. L. REV. 587 (2015) (describing the “mad genius” of *Windsor*); Russell K. Robinson, *Unequal Protection*, 67 STAN. L. REV. (forthcoming 2015) (analyzing how Kennedy’s opinion in *Windsor* added to the growing changes in the equal pro-

and fluidity of the test used in these cases allowed step-by-step progress that now has precipitated a cascade of liberty for same-sex couples. Regardless of whether one favors that cascade one must acknowledge that due process and equal protection floors were essential to this decades-long legal evolution and expansion of liberty.

The gay rights victories may be the most obvious modern examples of use of the rational basis test to root out irrationality, but they are not alone. In *Schware v. Board of Bar Examiners of New Mexico*, the Court found that the State of New Mexico could not deprive a law school graduate of the opportunity to sit for the bar exam based on neither the bar applicant's past arrests (without convictions) or his affiliation with the Communist Party.<sup>124</sup> In other words, the popular morality of the state at the time was not sufficient justification to deny Schware a privilege that he objectively deserved as much as any other applicant. And, years later, the Supreme Court used something akin to rational basis review to invalidate a Texas law that denied public education to undocumented immigrant school children.<sup>125</sup>

Some recent cases have even used the irrationality test to successfully challenge classic economic regulation—the zone in which judges are most loathe to deploy substantive due process as a meaningful check on government power.<sup>126</sup> This shift to

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tection analysis).

124. *Schware v. Bd. of Bar Exam'rs of N.M.*, 353 U.S. 232, 246–47 (1957).

125. *Plyler v. Doe*, 457 U.S. 202, 226–30 (1982). For a rich discussion of *Plyler* and its seeming conflict with other education cases, see Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357, 382–87 (1999).

126. See, e.g., *St. Joseph Abbey v. Castille*, 712 F.3d 215, 218, 226–27 (5th Cir. 2013) (striking down a portion of a Louisiana regulatory scheme granting funeral homes the exclusive rights to sell caskets on substantive due process grounds), *cert. denied*, 135 S. Ct. 423 (2013) (mem.); *Merrifield v. Lockyer*, 547 F.3d 978, 992 (9th Cir. 2008) (striking down an economically advantageous licensing scheme for pest controllers based on equal protection rational basis scrutiny); *Craigsmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (“[P]rotecting a discrete interest group from economic competition is not a legitimate government purpose.”); *Brantley v. Kuntz*, No. A-13-CA-872-SS, 2015 WL 75244, at \*8 (W.D. Tex. Jan. 5, 2015) (striking down state regulations applied to African hair braiders as irrational under substantive due process); see also Timothy Sandefur, *Equality of Opportunity in the Regulatory Age: Why Yesterday's Rationality Review Isn't Enough*, 24 N. ILL. U. L. REV. 457 (2004) (arguing for more meaningful review of economic regulation). But see *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004) (upholding an economically advantageous licensing scheme), *cert. denied*, 544 U.S. 920 (2005).

These cases are slowly accumulating evidence of the successful arguments by scholars who have long favored greater protection of socioeconomic rights.



ward treating liberty of property and contract as equivalent to other, more personal liberties has not escaped attention from academics,<sup>127</sup> and may offer significant future grist for the rational basis mill as well as powerful reasons to favor the test's modesty versus its stricter scrutiny cousins.

For example, plaintiffs recently challenged a rule issued by the Louisiana Board of Funeral Directors that granted funeral homes an exclusive right to sell caskets.<sup>128</sup> An abbey of the Benedictine Order of the Catholic Church argued that the rule was irrational and thus an unconstitutional denial of due process and equal protection.<sup>129</sup> *Mirabile dictu*, they won.

Writing for the panel, Judge Higginbotham noted that Louisiana “does not regulate the use of a casket, container, or other enclosure for the burial remains; has no requirements for the construction or design of caskets; and does not require that caskets be sealed.”<sup>130</sup> In fact, Louisiana law does not even require that a person be buried in a casket.<sup>131</sup> Yet the state imposed significant regulatory restrictions on the sale of caskets, which prevented an abbey in the state from selling caskets at prices much lower than those sold by funeral homes.<sup>132</sup>

The court recognized the broad deference owed to the government, post-*Williamson v. Lee Optical of Oklahoma, Inc.*<sup>133</sup> States may justify laws based on a desire to protect a discrete industry, provided that “protection of the industry can be linked to advancement of the public interest or general welfare.”<sup>134</sup> By itself, however, economic protection of a particular

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*See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); BERNSTEIN, *supra* note 10; RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT (2014); MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION (2012). For a review of this work and its implications see Suzanna Sherry, *Property Is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452, 1475 (2015) [hereinafter Sherry, *Privacy*] (describing the momentum of the movement that treats much governmental regulation as a massive wealth transfer and warning, “If liberal legal academics continue to assume the legitimacy of the New Deal and dismiss contrary conservative theory as out of the mainstream, they will be marginalized while Epstein, Barnett, and the others march unopposed all the way to the Supreme Court.”).

127. Sherry, *Privacy*, *supra* note 126 (noting this shift and joining those who have warned of its potential power, if unopposed).

128. LA. REV. STAT. §§ 37:831(37)–(39), 37:848 (2007).

129. *Castille*, 712 F.3d. at 220.

130. *Id.* at 217.

131. *Id.* at 218.

132. *Id.*

133. 348 U.S. 483 (1955).

134. *Castille*, 712 F.3d at 222.

industry may not suffice. It may be legitimate if it can be “supported by a post hoc perceived rationale as in *Williamson*,”<sup>135</sup> but it cannot be a “naked transfer of wealth.”<sup>136</sup>

The Court further stated that “although rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality.”<sup>137</sup> This rationale may be post hoc, but it may not be “fantasy,” and the link between the means and the plausible public end must be plausible as well.<sup>138</sup> Applying this “fantasy” test the Court concluded that no sufficient link existed between the post hoc hypothesis of a consumer protection rationale for the law and the exclusive right of sale to funeral homes.<sup>139</sup> Nor was there a rational relationship between the asserted public health and safety justification and the Louisiana law.<sup>140</sup> It was nothing more than a brazen rent extraction carried out with the legislature’s help.

Anticipating objections that the court’s decision could usher in another era of *Lochnerism*,<sup>141</sup> Judge Higginbotham noted that “[w]e deploy no economic theory of social statics or draw upon a judicial vision of free enterprise . . . . We insist only that Louisiana’s regulation not be irrational—the outer-most limits of due process and equal protection . . . .”<sup>142</sup>

The few economic rights cases that succeed under the irra-

135. *Id.* at 223 (citing Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984)).

136. *Id.*

137. *Id.* at 223.

138. *Id.*

139. *Id.* at 226–27.

140. *Id.*

141. See *infra* Part V.A (discussing critiques of the irrationality and outrageousness tests).

142. *Castille*, 712 F.3d at 227; see also *Craigiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (“[P]rotecting a discrete interest group from economic competition is not a legitimate government purpose.”); Brianne J. Gorod, *Does Lochner Live?: The Disturbing Implications of Craigiles v. Giles*, 21 YALE L. & POL’Y REV. 537, 538 (2003) (critiquing the case); cf. *Heffner v. Murphy*, 745 F.3d 56 (3d Cir. 2014) (upholding a law regulating funeral homes challenged on various constitutional grounds, including substantive due process, and arguing that out of date facts may render a law irrational), *cert. denied*, 135 S. Ct. 220 (2014) (mem.). But see *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004) (viewing economic protectionism as rational under equal protection); cf. *Bonner v. City of Brighton*, 848 N.W.2d 380 (Mich. 2014) (noting that substantive due process requires that a zoning ordinance advance a reasonable government interest, and may not make exclusions that are purely arbitrary and capricious).

tionality test do so for the same reason that many of the more personal rights cases succeed. They reinforce the notion, articulated by Richard S. Kay, that “legislation based only on favoritism or on spite is outside the scope of proper governmental activity.”<sup>143</sup> Thus, when lawmakers have used their authority for purposes that have no objective relationship to public welfare the rational basis challenge remains one option in the litigant toolbox. Still, like the outrageousness test, the irrationality test is a constitutional argument of last resort. It rarely produces victories. For those who fear erosion of New Deal era principles, this is its most attractive feature, especially if the shift toward expanding socioeconomic liberties continues. We favor preserving this modesty, while also favoring the preservation of a last resort check on government craziness, capture, and cruelty.

### III. OUTRAGEOUS AND IRRATIONAL

The irrationality and outrageousness tests both mark constitutional floors—bare minimum standards to which the government must hold itself. The two tests have enough differences in the language and analysis typically used by courts to merit independent treatment of them throughout this Article. But they are close relatives. The two groups of cases overlap in large, overlooked respects worth underscoring. In particular, the outrageousness test sometimes applies something that looks more like a check for irrational decision-making to executive acts when those acts incorporate some form of government deliberation. Also, the tests share a textual root and core concern about government acting arbitrarily and without reason.

At bottom, both tests function as checks against abuses of power. Because the nature of each institution’s power differs, so, too, do the floor tests. Federal and local executive power is usually asserted through the myriad actions of their individual agents, and thus the alleged abuses are better suited to the shocks-the-conscience test. When legislatures abuse their power, in contrast, they lack a single conscience that can be measured against a minimum threshold of decency. Instead, legislators abuse their power by permitting the democratic process to be corrupted by political favoritism.

But the outrageousness and irrationality tests are better conceived as two instantiations of a single quest to ferret out abuses of power. The particulars of the government actor and

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143. Richard S. Kay, *The Equal Protection Clause in the Supreme Court 1873–1903*, 29 *BUFF. L. REV.* 667, 696 (1980).

the power abused should determine which test applies or whether the separation is even necessary.<sup>144</sup> Indeed, Supreme Court precedent has shown sensitivity to context and has avoided creating rigid divisions between the two floor tests.

In *County of Sacramento v. Lewis*,<sup>145</sup> for example, the Court held that the standard of police officer culpability in a high-speed pursuit scenario was whether the officer's behavior was "arbitrary in the constitutional sense," emphasizing that police must make extremely rapid decisions in life-threatening situations.<sup>146</sup> But the Court also insisted that a less deferential test of executive misconduct might apply "when actual deliberation is practical."<sup>147</sup> In these other, less dynamic contexts, courts may have the freedom to scrutinize and sanction irrational behavior and not merely shocking conduct. For example, the rational basis test has been used in land use cases to review municipal executive conduct that is "arbitrary, irrational, or tainted by improper motive."<sup>148</sup> This standard, and *not* the stricter conscience-shocking standard, governed these land use determinations despite the fact that the conduct at issue was executive rather than legislative.<sup>149</sup>

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144. In some respects, the floor tests explored here are quite unremarkable. Other relatively weak constitutional constraints on government abound: the rationality test within Commerce Clause doctrine (*see, e.g.*, *United States v. Lopez*, 514 U.S. 549, 556–57, 559 (1995) (reaffirming the judicial power to assure a rational basis exists for congressional decision that regulatory activity substantially affects interstate commerce); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 281 (1981) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942))); the deferential test applied to judicial challenges of non-discriminatory state regulation that burdens interstate commerce (*see, e.g.*, *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662 (1981) (holding that a deferential test was not satisfied and that the state law at issue impermissibly burdened interstate commerce)); and the judicial deference to administrative agencies' reading of a statute that the agency is charged with administering (*see, e.g.*, *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984); Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 *YALE L.J.* 969 (1992); Cass R. Sunstein, *Chevron Step Zero*, 92 *VA. L. REV.* 187 (2006)).

145. 523 U.S. 833 (1998).

146. *Id.* at 846 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 129 (1992)).

147. *Id.* at 851; *see, e.g.*, *Davis v. Rennie*, 264 F.3d 86, 99–100 (1st Cir. 2001) (holding that the court did not err in declining to give a "shocks the conscience" jury instruction when mental patient was involuntarily committed and alleged officials failed to intervene when he was subjected to repeated punching; mental health worker here was subject to a more exacting standard than a prison guard reacting to a riot or a police in high speed pursuit of a suspect).

148. *E.g.*, *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988).

149. For this reason, the panel in *United Artists Theatre Circuit, Inc. v.*

In *BMW of North America, Inc. v. Gore*, the Court invalidated an excessive punitive damage award using a blend of the outrageousness and irrationality tests.<sup>150</sup> The Court struck the Alabama court's award for entering "a zone of arbitrariness" that could not be justified by the harm that the defendant caused.<sup>151</sup> This has the veneer of a rational basis test since the punitive damage award offended a shared sense of proportionality and rational decision-making. On the other hand, the opinion accused the Alabama courts of inflicting a "grossly excessive" penalty, and of "imposing its regulatory policies on an entire Nation."<sup>152</sup> These passages, plus the Court's references to specific facts related to the case, are more analogous to the outrageousness test because they focus on the Alabama courts' actions in a particular, rather than systemic, way. Perhaps this makes a good deal of sense in the context of a challenge to a state court award. Judicial decisions are simultaneously specific and general because they resolve individual cases *and* create precedent. Thus, the outcomes of cases are analogous to the actions of an agent in a particular moment *and* to the actions of a legislature setting system-wide rules. Both due process floor tests should apply.

Again, the floor tests are not wholly distinct or mutually exclusive creatures. But to crystallize the issues, we will often treat the two tests separately. What we lose in nuance by analyzing the tests as more distinct than they truly are we gain by clarifying their different trajectories and critiques. Still, we encourage readers not to lose track of the insight that the tests spring from a common constitutional well. In the following sections we describe the confusion over these tests, the scorn they elicit, and the many virtues of them that these criticisms ignore.

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*Township of Warrington*, 316 F.3d 392, 401 (3d Cir. 2003), *erred*. The panel, which included Samuel Alito, held that the "shocks the conscience" test applied to executive conduct in a municipal land use dispute. For a persuasive critique of the case, see Clifford B. Levine & L. Jason Blake, *United Artists: Reviewing the Conscience Shocking Test under Section 1983*, 1 SETON HALL CIR. REV. 101 (2005) (critiquing *United Artists* and arguing that the conscience shocking test should apply only in cases of non-deliberative government contexts, not in land use settings in which executive officials have greater decision making time and deliberative structures).

150. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

151. *Id.* at 568; *see also id.* at 580–81 (applying a ratio between actual harm and assessed punitive damages).

152. *Id.* at 585.

## IV. CONFUSION

The outrageousness and irrationality tests easily confuse courts not only because their respective standards are amorphous, but also because the division between them and cases that involve due process fundamental rights and elevated equal protection scrutiny is muddled. Misconceptions about the floor tests come in three forms.

First, courts occasionally inject confusion into the precedent by maintaining that the Due Process Clauses provide only *procedural* protections rather than substantive promises. As a normative matter, this debate is still live, but as a descriptive matter this is plainly incorrect.

Second, and more commonly, some courts have suggested that substantive due process only protects *fundamental* rights. These courts insist inappropriately on an initial showing that the claimant's fundamental rights were violated before applying one of the floor tests.

Third, the Supreme Court itself has introduced impenetrable confusion into the doctrine by ruling in *Graham v. Connor*<sup>153</sup> that courts should avoid considering substantive due process outrageousness claims if the action is plausibly covered by any other enumerated or fundamental constitutional right. The spirit of this case was meant to reinforce judicial restraint by ensuring that substantive due process protections are kept thin. But the actual mandate established by the case is so flawed that courts (including at times the Supreme Court itself) have refused to follow it faithfully.

We consider each of these sources of confusion in order.

## A. DUE PROCESS IS NOT EXCLUSIVELY PROCEDURAL

The phrase “due process” could suggest that the constitutional protection affords only procedural rights—rights to have a meaningful opportunity to challenge a government action without any guarantees as to one's success. Many distinguished commentators and jurists believe this is the better textual and historical view.<sup>154</sup>

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153. 490 U.S. 386, 395–96 (1989).

154. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 31 (1990) (calling it a “momentous sham”); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980) (describing it as a “contradiction in terms”); Nelson Lund, *Federalism and Civil Liberties*, 45 U. KAN. L. REV. 1045, 1059 (1997) (stating that neither the text nor the intentions of the Framers supports substantive due process); see also *Ellis v. Hamilton*, 669 F.2d 510, 512 (7th Cir. 1982) (Posner, J.) (de-

This, of course, is not the law. The modern Due Process Clauses plainly protect substantive rights any time they are used to enforce enumerated or fundamental rights.<sup>155</sup> They also protect against substantively arbitrary and irrational and outrageous government conduct,<sup>156</sup> not merely deprivations that violate process rights.<sup>157</sup> Finally, due process has been construed to also embrace a right to equal protection under the Fifth Amendment.<sup>158</sup>

#### B. SUBSTANTIVE DUE PROCESS PROTECTS MORE THAN FUNDAMENTAL RIGHTS

Substantive due process protects fundamental and non-fundamental liberties.<sup>159</sup> Fundamental rights often receive the most attention because they trigger elevated scrutiny, and therefore vest more power in the courts.<sup>160</sup> Within the category of fundamental rights are two sub-types of rights: those derived from enumerated rights set forth in the Bill of Rights and selectively “incorporated” into the Fourteenth Amendment and

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scribing substantive due process as an “oxymoron”). The current Court has two substantive due process deniers in Justice Scalia and Justice Thomas, who have insisted that due process should only protect procedural and not substantive rights. *McDonald v. City of Chicago*, 561 U.S. 742, 806 (2010) (Thomas, J., concurring in part) (arguing that the Second Amendment applies to the States through the Fourteenth Amendment’s Privilege and Immunities Clause, not its Due Process Clause); *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring) (“I reject the proposition that the Due Process Clause guarantees certain (unspecified) liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty.”).

155. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 481–86 (1965) (explaining that a law affecting a married couple’s ability to use birth control implicates the Due Process Clause).

156. See *County of Sacramento v. Lewis*, 523 U.S. 833, 834 (1998) (“[O]nly the most egregious official conduct can be said to be ‘arbitrary’ in the constitutional sense.” (quoting *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992))).

157. Indeed, these two concepts are interdependent, in ways that often make any effort to draw bright-line borders between them futile. See SULLIVAN & MASSARO, *supra* note 97, at 168.

158. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954); see SULLIVAN & MASSARO, *supra* note 97, at 159–66; David E. Bernstein, *Bolling, Equal Protection, Due Process, and Lochnerphobia*, 93 GEO. L.J. 1253, 1261 (2005); Richard A. Primus, *Bolling Alone*, 104 COLUM. L. REV. 975, 975 (2004); cf. *Truax v. Corrigan*, 257 U.S. 312, 332 (1921) (noting that due process “tends to secure equality of law in the sense that it makes a required minimum of protection for every one’s right of life, liberty and property”).

159. SULLIVAN & MASSARO, *supra* note 97, at 158.

160. See *City of Cleburne v. Cleburne Living Ctr., Inc.* 473 U.S. 432, 440 (1985) (describing fundamental rights that initiate elevated scrutiny).

“unenumerated” rights deemed to be fundamental to ordered liberty.<sup>161</sup> Of these, unenumerated fundamental rights have sparked the most heated criticism, especially reproductive rights and sexual autonomy-related rights.

Nearly all of the first eight amendments have been deemed to be incorporated into the Fourteenth Amendment.<sup>162</sup> Only the Third and Seventh Amendments have escaped incorporation.<sup>163</sup> Thus, most of the specific constitutional rights that can be asserted against the states—such as freedom of speech or protection against unreasonable searches and seizures—are due process-based rights.<sup>164</sup> The Court also has stated that when rights from the Bill of Rights are incorporated into the Fourteenth Amendment, they usually must be given the same meaning as they have in the Bill of Rights.<sup>165</sup> An asymmetrical reading must be justified.<sup>166</sup> Therefore, the case law that defines freedom of speech under the First Amendment applies equally to freedom of speech under the Fourteenth Amendment Due Process Clause, and it is not uncommon for courts to describe such a claim against the state as a First Amendment claim even though it is technically a due process claim.<sup>167</sup>

Some courts believe that the only other rights that the Due Process Clauses protect are fundamental rights that receive heightened scrutiny.<sup>168</sup> However, the fact that an asserted liberty interest lacks fundamental right status does not mean it is nonexistent. Instead, it means it triggers only rational basis review, with a strong presumption in favor of government.<sup>169</sup> Some discussions of substantive due process miss this point and treat all substantive due process cases as requiring at the

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161. SULLIVAN & MASSARO, *supra* note 97, at 159.

162. *See* McDonald v. City of Chicago, 561 U.S. 742, 764 n.12 (2010).

163. *Id.* at 744 n.13.

164. *See id.* at 744.

165. *Id.*

166. *See id.* at 744.

167. *Gitlow v. New York*, 268 U.S. 652, 664–66 (1925).

168. *Ill. Psychological Ass’n v. Falk*, 818 F.2d 1337, 1342 (7th Cir. 1987) (calling substantive due process a “durable oxymoron” and suggesting that it offers protection limited only to fundamental rights).

169. *See, e.g., Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 491 (1955) (holding that a regulation forbidding opticians from fitting and duplicating eyeglasses had some rational relation to a legitimate government objective and therefore was constitutional); *United States v. Carolene Prods.*, 304 U.S. 144, 153 (1938) (“Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry . . .”).



outset the identification of a fundamental or enumerated right.<sup>170</sup>

Courts, too, have confused the liberty right of freedom from outrageous or irrational conduct with the due process principle that government behavior must burden a right that is “deeply rooted in this Nation’s history and tradition,” which is the standard to gain fundamental right status and trigger elevated scrutiny.<sup>171</sup> This is a high standard to meet, for good reason—courts are reluctant to identify too many fundamental-but-unexpressed constitutional rights within the court’s control.

Courts that require litigants to first prove that a fundamental right was violated in order to make use of the outrageousness or irrationality test, however, are confused. Fundamental rights do not exhaust substantive due process protections. The weak outrageousness and rational basis brakes apply to fundamental and *non*-fundamental rights.<sup>172</sup> They are interstitial due process protections. The floor tests are best seen as a constitutional protection from the very worst forms of executive abuse of authority, and they can be used independently or in combination with other constitutional rights. The outrageousness test, for example, applies only when the

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170. See, e.g., *Lofton v. Sec’y of the Dep’t of Children & Family Servs.*, 358 F.3d 804, 816–17 (11th Cir. 2004) (construing *Lawrence v. Texas*, 539 U.S. 558 (2003), as failing to establish a fundamental right relevant to adoption and suggesting that fundamental rights provide the only route to a substantive due process victory); *MFS, Inc. v. Dilazaro*, 771 F. Supp. 2d 382, 439–45 (E.D. Pa. 2011) (describing steps and concluding that government conduct did not shock the conscience in land use approval case); Steven G. Calabresi, *Substantive Due Process After Gonzales v. Carhart*, 106 MICH. L. REV. 1517, 1539 (2008) (criticizing *Lawrence* for protecting rights through substantive due process that are not deeply rooted in history and tradition).

171. *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997) (noting that a party alleging a violation of substantive due process must include a “careful description” of the asserted fundamental liberty interest, and must establish that “neither liberty nor justice would exist if [it] were sacrificed” (citing *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937))).

172. See SULLIVAN & MASSARO, *supra* note 97, at 130–34, 154 (providing background on the development of the rational basis test and its application to non-fundamental rights and explaining that “substantive due process also constrains executive power, and arguably imposes a rationality limitation on the exercise of that power”). This does not mean, however, that the relative importance of the liberty interest at stake is irrelevant. A court’s assessment of what is constitutionally outrageous or irrational is inevitably dependent upon the significance or weight of the liberty interest affected. But if only fundamental liberty interests—so identified by the courts—triggered even rational basis scrutiny, then the rational basis test would be superfluous: fundamental liberty interests trigger elevated scrutiny, by definition.

executive misconduct is intentional, deliberate,<sup>173</sup> and conscience shocking. It applies even if no other recognized right has been violated. Thus, there is no reason that a litigant should have to claim that the infringed liberty interest is “fundamental” before tapping into one of the floor tests. A denial of rational or non-outrageous treatment is itself a deprivation of a due process liberty. Stripped to its essentials, due process’s “animating commitment . . . is captured by perhaps the most persistently recurring theme in due process cases: government must not be arbitrary.”<sup>174</sup>

Seeing this distinction, and recognizing that fundamental rights and their so-called “strict scrutiny” define only one parcel of the substantive due process territory, becomes crucial here. There also are rationality floors, and not just fundamental rights silos with their strict scrutiny fortification.<sup>175</sup>

These two types of substantive rights—baseline rationality expectations and higher, fundamental rights and suspect classification expectations—provide a useful framework for understanding the due process and equal protection case law as a whole. In truth, however, the fundamental/non-fundamental rights dichotomy is not perfectly descriptively accurate. Substantive due process cases exist on a continuum, just like procedural due process cases.<sup>176</sup> Sliding scales of review often tend to overtake clean categorical divisions in areas where the law

173. See, e.g., *Russo v. City of Bridgeport*, 479 F.3d 196, 210 (2d Cir. 2007) (noting that “[t]he state of mind of a government defendant is an integral aspect of any ‘shock the conscience’ standard” and requires more than negligence); *People v. Uribe*, 199 Cal. App. 4th 836, 862 (2011) (finding that traditionally substantive due process is applied to deliberate action in order to prevent oppressive and arbitrary government action).

174. Fallon, *supra* note 86, at 322–23. For this reason, among others, we treat equal protection arbitrariness as a sub-species of due process irrationality.

175. See *SULLIVAN & MASSARO*, *supra* note 97, at 166 (“Due process today is part of an astounding mosaic of reconceived constitutional rights, rights that are best read as reconstitutive and interdependent rather than as silos of protection, narrowly understood.”).

176. See *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); see also Justice Frankfurter’s express view to this effect about substantive due process, *infra* note 282. Equal protection cases also lie on a continuum, for reasons articulated by Justice Stevens, among others. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring). See generally Andrew M. Siegel, *Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation*, 74 *FORDHAM L. REV.* 2339 (2006) (providing background on applications of the Equal Protection Clause and arguing that the Supreme Court should apply the Equal Protection Clause without any mediating doctrines, pursuant to Justice Stevens’ concurrence in *Craig v. Boren*, 492 U.S. 190, 211–14 (1976)).

must cover a broad landscape, and this is no less true of substantive due process.<sup>177</sup>

The sexual orientation cases are good examples of cases that now inhabit a space between the traditional bare minimum promised by the rational basis test and the heightened protections offered to fundamental rights and suspect classes.<sup>178</sup> Adding to the doctrinal muddiness is that the gay rights cases drew heavily on both equal protection-styled arguments about arbitrariness and animus *and* connections to previously recognized fundamental interests in sexual privacy and marriage. But even the successful gay rights challenges were treated with the same rhetorical skepticism that characterizes all rational basis challenges.

The legacy of *Lawrence v. Texas*<sup>179</sup> is instructive. When the Fifth Circuit was asked to consider whether a Texas ban on the provision (even for free) of sex toys violated its residents' substantive due process rights, the court avoided having to answer the question of whether private sexual activities in the home were protected fundamental rights.<sup>180</sup> Because of *Lawrence*, the court didn't feel it needed to decide whether the plaintiffs challenging the sex toy ban concerned a fundamental right because the only defense the government could muster was that the ban furthered a state interest in general "public morality."<sup>181</sup> Although the court didn't say so, it was able to avoid the fundamental rights question because it could, and did, apply the deferential rational basis test from *Lawrence* and rule against the government.

More generally, the floor cases are good vehicles for seeing the complexities in constitutional law more clearly and accurately, precisely because at times they evade a simple, broad-brush formula. Efforts to impose some order on this vast due

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177. For an enduringly insightful analysis of the many reasons why substantive due process "defies reduction to any elegant set of controlling substantive principles," see Fallon, *supra* note 86, at 322.

178. They also resemble other equal protection cases that are suspect class and fundamental rights "near misses" and thus receive a form of intermediate scrutiny. See, e.g., *City of Cleburne*, 473 U.S. at 442, 448 (holding that mentally disabled is not a quasi-suspect class calling for a heightened standard of review, but also holding that a zoning ordinance requiring a group home for mentally disabled patients to obtain a special use permit bears no rational basis to a legitimate government interest and therefore violates the Equal Protection Clause).

179. 539 U.S. 558 (2003).

180. *Reliable Consultants, Inc. v. Earle*, 517 F.3d 738, 743–44 (5th Cir. 2008).

181. *Id.* at 745.

process terrain will always be difficult. We recognize that the complex system of due process review is flattened to some extent by our rough classifications of due process floor cases<sup>182</sup> and we will explicitly address the need for higher standards of review in appropriate cases.<sup>183</sup> But to make some sense of existing doctrine and to explore its potential, we will treat substantive due process as consisting of both fundamental rights cases and—of particular importance to us—the floor cases.

### C. DUE PROCESS IRRATIONALITY AND EQUAL PROTECTION IRRATIONALITY ARE CLOSE COUSINS

Challenges to irrational laws have used both the Due Process and Equal Protection Clauses for their constitutional source. A distinction can be drawn between them: Equal Protection looks for differences in treatment to different groups of people while substantive due process tests the substance of the law.<sup>184</sup> But this distinction is mostly illusory. Just about every

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182. We are mindful of the powerful body of scholarship that debates the pros and cons of abandoning tiers and allowing unmediated application of constitutional provisions. *See, e.g.*, Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54, 88–90 (1997) (analyzing the suspect and non-suspect classification tests for the Equal Protection and Due Process Clauses); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 482–84 (2004) (contending that a single standard should replace the tiered approach to applying the Equal Protection Clause); Calvin Massey, *The New Formalism: Requiem for Tiered Scrutiny?*, 6 U. PA. J. CONST. L. 945, 993 (2004) (supporting tiered scrutiny for Equal Protection application); Jeffrey M. Shamann, *Cracks in the Structure: The Coming Breakdown of the Levels of Scrutiny*, 45 OHIO ST. L.J. 161, 163 (1984) (arguing that tiered scrutiny will collapse); Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 7–10 (1996) (supporting a minimalist approach to applying the Equal Protection Clause); *cf.* Peter Brandon Bayer, *Rationality—and the Irrational Underinclusiveness of the Civil Rights Laws*, 45 WASH. & LEE L. REV. 1 (1988) (discussing the interrelationship between choosing a tier of review and balancing the relevant normative concerns).

183. *See, e.g.*, Lawrence G. Sager, *Of Tiers of Scrutiny and Time Travel: A Reply to Dean Sullivan*, 90 CAL. L. REV. 819, 821 (2002) (noting that nomenclature matters, and calling something that is “evil” a “mere inconvenience” may result).

184. The classic statement explaining this comes from Justice Jackson, in *Railway Express Agency, Inc. v. New York*:

Invalidation of a statute or an ordinance on due process grounds leaves ungoverned and ungovernable conduct which many people find objectionable.

Invocation of the equal protection clause, on the other hand, does not disable any government body from dealing with the subject at hand. It merely means that the prohibition or regulation must have a broader impact. . . . [T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that

legislative action involves line drawing, and those lines create boundaries between subsets of people who will be differentially affected by the law. Those group distinctions often affect the law's fairness and rationality as much as the substance. Indeed, challenges to the substance of a law are usually inseparable from considerations of who bears its effects, so courts and scholars alike have treated them as functionally identical.<sup>185</sup> As the Court recently emphasized, equal protection and due process are "connected in a profound way, though they set forth different principles. . . . [I]n some instances each may be instructive as to the meaning and reach of each other."<sup>186</sup>

More fundamentally, liberty and equality are doctrinally entwined because there is no separate Equal Protection Clause to constrain the federal government as there is to bind the states.<sup>187</sup> Equality *only* binds the federal government through judicial interpretations of the Fifth Amendment Due Process Clause and its dynamic relationship to the Fourteenth Amendment.<sup>188</sup> That is, the type of arbitrariness that offends

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the principles of law which officials would impose upon a minority be imposed generally.

336 U.S. 106, 112 (1949) (Jackson, J., concurring).

185. See, e.g., *Bannum, Inc. v. City of Fort Lauderdale*, 157 F.3d 819, 822 n.2 (11th Cir. 1998) ("[T]he rational basis inquiry is the same for equal protection and substantive due process challenges to zoning." (quoting *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1214 n.6 (11th Cir. 1995))); *Georgia Manufactured Hous. Ass'n v. Spalding County*, 148 F.3d 1304, 1307 (11th Cir. 1998); *Idris v. City of Chicago*, No. 06 C 6085, 2008 WL 182248, at \*7 (N.D. Ill. Jan. 16, 2008) ("[T]he rational basis test under substantive due process is identical to the rational basis test under equal protection."); Anthony B. Sanders, *Exhumation Through Burial: How Challenging Casket Regulations Helped Unearth Economic Substantive Due Process in Craigsmiles v. Giles*, 88 MINN. L. REV. 668, 674 (2004); cf. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20–24 (1972) (examining Justice Jackson's concurrence in *Railway Express Agency* but explaining that "due process, like equal protection, also purports to impose a requirement of minimally rational means-ends relationship").

186. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2603 (2015). The Court continued, "[i]n any particular case one [c]lause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two clauses converge in the identification and definition of that right." *Id.*

187. *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013) ("The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person equal protection of the laws."). Compare U.S. CONST. amend. V ("[N]or [shall any person] be deprived life, liberty, or property without due process of law."), with U.S. CONST. amend. XIV § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

188. See *Bolling v. Sharpe*, 347 U.S. 497, 498 (1954); see also *Windsor*, 133

our sense of equal treatment is judicially traced back to the due process artery in cases that involve federal authority, in a form of reverse incorporation.<sup>189</sup> Inequality thus is a *due process* liberty problem, as a matter of current constitutional grammar.

To take just one example, the Supreme Court recently reiterated that tax measures that make distinctions among taxpayers trigger rational basis review under equal protection.<sup>190</sup> The Court recognized that this is an extremely easy test for the government to satisfy,<sup>191</sup> but in dissent, Chief Justice Roberts and Justices Scalia and Alito thought that the rational basis floor had been breached.<sup>192</sup> The case happened to involve a municipal tax code.<sup>193</sup> Had a similar tax distinction been drawn by the Internal Revenue Service instead of a municipality, the Court would have had to analyze the distinction under the Fifth Amendment Due Process Clause, not the Equal Protection Clause of the Fourteenth Amendment. Yet the rational basis analysis would have proceeded in precisely the same way.<sup>194</sup>

Thus, we lose little by treating due process and equal protection irrationality as two star pieces in a single constitutional floor protection.

#### D. OUTRAGEOUSNESS AS A LAST RESORT

The most significant doctrinal obstacle to outrageousness claims is an obscure principle derived from *Graham v. Con-*

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S. Ct. at 2695 (“While the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does, the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.”).

189. For an extended discussion of the “reverse incorporation” history, see SULLIVAN & MASSARO, *supra* note 97, at 159–66.

190. *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2077 (2012); *cf.* *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 883 (1985) (noting that in-state preference to home state insurance companies would violate equal protection rationality).

191. *Armour*, 132 S. Ct. at 2080–81; *see also* *Fitzgerald v. Racing Ass’n of Cent. Iowa*, 539 U.S. 103, 107–08 (2003) (describing the low threshold that a tax law must meet to satisfy the rational-basis test); *Heller v. Doe*, 509 U.S. 312, 319–20 (1993) (noting the increased deference given to governments under rational-basis review); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*) (“States are accorded wide latitude in the regulation of their local economies.”).

192. *Armour*, 132 S. Ct. at 2087 (Roberts, C.J., dissenting).

193. *Id.* at 2078 (majority opinion).

194. *See* *McDonald v. City of Chicago*, 561 U.S. 742, 789–90 (2010) (discussing the presumption in favor of symmetrical readings of constitutional limits on federal and state authorities).

*nor*.<sup>195</sup> To the extent that the cases are tied to substantive due process rather than to a more explicit, textual source of protection, they violate an unevenly enforced constitutional principle that specific text should trump more general sources of constitutional rights.<sup>196</sup> Substantive due process, according to this view, should not be used as judicial filler to supplement places where the more specific text protections run out.<sup>197</sup> Rather, “that [specific] Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.”<sup>198</sup>

But one need only consider the case of *Graham* to understand that the process of looking for a fundamental or enumerated right first and applying the outrageousness test second *has* to be wrong. In *Graham*, the Supreme Court decided that the outrageousness test articulated in *Rochin* cannot be invoked when a “more specific” constitutional right against the alleged improper behavior is available.<sup>199</sup> Where one can “carefully describe” a specific constitutional right that may cover the alleged government misconduct, this more specific right in effect “preempts” a more diffuse substantive due process argument.<sup>200</sup> So, at least in instances when the fundamental liberty interest is recognized in another part of the Constitution, the

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195. 490 U.S. 386 (1989).

196. *Id.* at 395–96.

197. *Id.*

198. *Id.* at 395.

199. *County of Sacramento v. Lewis*, 523 U.S. 833, 842 (1998); *Albright v. Oliver*, 510 U.S. 266, 273 (1994); *Graham*, 490 U.S. at 395; see Michael J.Z. Mannheim, *Coerced Confessions and the Fourth Amendment*, 30 HASTINGS CONST. L.Q. 57, 76–86 (2002); Toni M. Massaro, *Reviving Hugo Black? The Court’s “Jot for Jot” Account of Substantive Due Process*, 73 N.Y.U. L. REV. 1086, 1086–87 (1998) (examining *Graham*’s holding and its effects).

200. The test has also been invoked as a limit on official culpability in cases involving familial association liberty. See generally *Alberici v. City of Los Angeles*, No. 12-10511-JFW (VBKx), 2013 WL 5573045 (C.D. Cal. Oct. 9, 2013). In other words, the test not only may form the basis of a substantive due process right against shocking government conduct, but also may operate as a limit on official culpability for *other* substantive due process rights. In the latter cases, the analysis would have three steps: first, to determine if another substantive due process right exists; second, to determine if the right has been violated; and third, to determine if the official conduct that interfered with the right was conscience shocking. Such cases, however, only use the “shocks the conscience” benchmark to determine the applicable standard of care and scope of official immunity, not to define the underlying due process right itself. They also seem to regard conscience-shocking as an across-the-board test for executive misconduct such that even less egregious forms of executive arbitrariness, even in the realm of *fundamental* due process rights, cannot violate due process. We regard this as a mistake.

lower courts in theory *cannot* combine that fundamental right with the outrageousness test.

However, the rule expressed in *Graham* has only exacerbated the confusion in this area. Its rule is lamentable;<sup>201</sup> its reasoning is unsound. It cannot be squared with the common practice of allowing multiple constitutional rights to be asserted when the facts suggest they may be violated. Moreover, the *Graham* rule is heeded inconsistently, even by the Supreme Court. After all, *Graham* was decided in 1989, and many of the cases we have already described (including *Lewis*) were decided later and potentially could have been analyzed under a different, more specific right.<sup>202</sup>

Meanwhile, *Graham* has spawned some badly disoriented case law. In some cases, courts have added the outrageousness test to their analysis of other constitutional rights. That is, if a more specific constitutional right—say the First<sup>203</sup> or the Fourth Amendment—covers the government misconduct, then executive officials (e.g. police) cannot be held accountable for the violation unless their conduct is conscience shocking. In these cas-

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201. See Massaro, *supra* note 199; see also Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights*, 103 COLUM. L. REV. 833, 833 (2003) (offering a more sympathetic view of *Graham*, and construing the holding more narrowly to better fit it into substantive due process doctrine more generally). The good news is that the Court has not applied this “specific trumps general” account of substantive due process as pervasively as it might have given the open-ended nature of the opinion. The bad news is that the Court has not retreated altogether from this rule, with troubling implications. For a recent, compelling analysis of such worrisome implications in the abortion rights context, see Caitlin E. Borgmann, *Abortion Exceptionalism and Undue Preemption*, 71 WASH. & LEE L. REV. 1047, 1047 (2014) (examining courts’ interpretation of the undue burden standard).

202. See *County of Sacramento*, 523 U.S. at 845–46; *Graham*, 490 U.S. at 386.

203. Say, for example, state officials detailed to protect the Governor engaged in unconstitutional viewpoint-based discrimination in policing political expression. Citing safety concerns, state officials might place protestors in places far removed from sight or hearing whenever the Governor speaks in public, while allowing pro-Governor speakers to ring the public podium. It is one thing to say the officials might be sheltered from suit under qualified immunity. See, e.g., *Wood v. Moss*, 134 S. Ct. 2056, 2066 (2014) (upholding qualified immunity for Secret Service agents who moved protestors farther away from President Bush than Bush supporters). It is quite another thing to say that such conduct, if engaged in by state officials, is insulated unless it is conscience shocking. Moreover, freedom of speech limits on states flow from substantive due process, not from the First Amendment directly. *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (discussing liberties protected by the Fourteenth Amendment, including freedom of speech).



es, the *Rochin* test can strangle the constitutional rights that are supposed to be robust.<sup>204</sup>

These cases ought to be ignored. Courts taking this approach are confused about what substantive due process covers: it includes all of the fundamental rights that apply to state executive officials through the incorporation doctrine, as well as the equal protection limits on federal executive officials that flow from the Fifth Amendment Due Process Clause, and the non-fundamental liberties that receive only rational basis review. These are *all* “substantive due process” rights.<sup>205</sup> Surely it cannot be that executive officials are incapable of violating these rights absent conscience-shocking conduct.

Even if all of these doctrinal errors were corrected, however, the outrageousness test would still have an exceedingly narrow scope and modest effect. A recent illustration of how difficult the test is to satisfy, even when properly invoked, is *Zotos v. Town of Hingham*, in which the federal district court noted that “in order to demonstrate conduct that shocks the conscience, a plaintiff must present ‘stunning evidence’ of ‘arbitrariness and caprice’ that extends beyond ‘[m]ere violations of state law, even violations resulting from bad faith’ to ‘something more egregious and more extreme.’”<sup>206</sup> This is because the test is designed to be an option of last resort. A more liberal interpretation of the test would conflict with its purpose.<sup>207</sup>

Despite the caution that courts have taken before applying one of the substantive due process floor rules, they have both attracted outsized reactions from the judiciary. For reasons we explain next, the contempt is unwarranted.

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204. For an insightful overview of these cases, see Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 519 (2008) (arguing substantive due process should be a limitation on abuses of executive power); *cf.* Levinson, *supra* note 16, at 308 (outlining perceived problems with applying only low level, shocks the conscience review of executive action).

205. For an exceptional analysis of the history of substantive due process see Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 411 (2010) (arguing that due process under the Fourteenth Amendment had a widely accepted substantive component).

206. *Zotos v. Town of Hingham*, No. 12-11126-JGD, 2013 WL 5328478, at \*12 (D. Mass. Sept. 19, 2013) (quoting *DePoutot v. Raffaely*, 424 F.3d 112, 119 (1st Cir. 2005)); *see also* *Rimmer-Bey v. Brown*, 62 F.3d 789, 791 n.4 (6th Cir. 1995) (describing the test as a “virtually insurmountable uphill struggle”).

207. *S.M. v. Lakeland Sch. Dist.*, 148 F. Supp. 2d 542, 547–49 (M.D. Pa. 2001) (holding that verbal abuse and humiliation of a public school student did not satisfy the shocks the conscience test and did not implicate a liberty interest).

## V. SCORN

Substantive due process law has sprawled since the ratification of the Fourteenth Amendment. At every moment, including the moment of its rebirth in 1868, the doctrine has inspired controversy and scorn.

The outrageousness and irrationality tests attract criticism related to the discretionary and unpredictable nature of the standards they apply. Each test also inspires criticism unique to its particular history and usage. We consider each in turn.

## A. CRITICISM OF THE OUTRAGEOUSNESS AND IRRATIONALITY TESTS

The root of some objections to the outrageousness and irrationality tests is profound skepticism about the substantive due process enterprise as a whole.<sup>208</sup> The floor tests are even less understood and less legitimated by courts than are the forms of substantive due process that protect enumerated or fundamental rights, or the strands of equal protection that name suspect classifications. Thus, all the criticism that applies to substantive due process generally applies to these floor tests as well, but with special vehemence. For example, scholars and jurists who regard due process as properly about only procedural due process are, naturally, dubious about *all* of the case law that imposes substantive due process limits on the states—fundamental and non-fundamental rights, enumerated and unenumerated.<sup>209</sup>

The concerns that motivate criticism for substantive due process writ large are applicable to some degree to the constitutional floor tests.<sup>210</sup> The criticisms center on the menaces of judicial discretion and power. Substantive due process suffers from a lack of interpretative guideposts, particularly with the floor tests.<sup>211</sup> And the doctrine permits an arrogation of power to

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208. See *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988).

209. *Id.*

210. Although David Bernstein has criticized the fundamental rights line of substantive due process cases for selecting certain types of individual rights for protection while giving economic liberties short shrift. BERNSTEIN, *supra* note 10.

211. Some scholars dislike judicial balancing tests generally. There is vast literature on the pros and cons of rules versus standards, and their judicial deployment. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1991) (arguing that following rules may lead to suboptimal outcomes because of under or over inclusion); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (examining how various factors influ-

the judiciary that arguably belongs to other branches, and especially to the states.<sup>212</sup> The outrageousness and irrationality tests can spawn new rights that impede the democratic will of legislatures, with the shared defects of atextualism, judicial activism, and subjectivity. In a word, the fear is *Lochner*.

In *Lochner v. New York*,<sup>213</sup> the Supreme Court found that a New York labor statute prohibiting employees from working more than sixty hours per week violated employers' and employees' substantive due process rights to freely contract.<sup>214</sup> The Court recognized that the state has broad police powers to restrict the freedom to contract for the safety and welfare of its citizens without any interference by the federal constitution.<sup>215</sup> So, the case can be characterized as a rational basis floor test,<sup>216</sup> although it is conceived by some as a precedent that established, for a time, a fundamental right to make contracts.<sup>217</sup> Re-

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ence the creation and application of rules verses standards); Kathleen M. Sullivan, *The Supreme Court 1991 Term: Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 26 (1992) (looking at the Justices' differing views on rules and standards).

212. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 520–22 (1965) (Black, J., dissenting) (“[T]here is no provision of the Constitution which either expressly or impliedly vests power in this Court to sit as a supervisory agency over acts of duly constituted legislative bodies and set aside their laws because of the Court’s belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational. The adoption of such a loose, flexible, uncontrolled standard for holding laws unconstitutional . . . will amount to a great unconstitutional shift of power to the courts which . . . will be bad for the courts and worse for the country. Subjecting federal and state laws to such an unrestrained and unrestrainable judicial control as to the wisdom of legislative enactments would . . . jeopardize the separation of governmental powers that the Framers set up and at the same time, threaten to take away much of the power of States to govern themselves which the Constitution plainly intended them to have.”); see also *Obergefell v. Hodges*, 135 S. Ct. 2584, 2615–16 (2015) (Roberts, C.J., dissenting) (condemning the majority opinion for recreating the mistake of *Lochner* by acting as a legislature rather than a court).

213. 198 U.S. 45 (1905).

214. *Id.* at 53.

215. *Id.* at 53–54.

216. Indeed, the opinion takes great pains to describe a range of cases in which the Court held that the State’s interests in the safety and welfare of workers and third parties were sufficient to withstand the constitutional challenge to labor laws. *Id.* at 54–56.

217. The key reasoning language uses a mix of concepts we would find in both rational basis and heightened scrutiny. *Id.* at 57–58 (“There is no reasonable ground for interfering with the liberty of [a] person or the right of free contract . . . we think that a law like the one before us involves neither the safety, the morals, nor the welfare of the public . . . . The mere assertion that the subject relates, though but in a remote degree, to the public health, does not necessarily render the enactment valid. The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and le-

ardless of the Court's intent, the opinion came to be understood as a low point in the history of judicial restraint because it enticed judges to question the value of labor and economic regulations and to substitute their own policy judgments for that of the legislatures.

*Lochner* has cast a long and menacing shadow over substantive due process ever since.<sup>218</sup> Judicial scrutiny of government action that affects socio-economic, non-fundamental rights still triggers Progressive anxieties about judicial thwarting of worthy policy reform.<sup>219</sup> Arguments against such scrutiny still cite the 1905 decision, despite its formal renunciation 60 years ago, in 1955.<sup>220</sup> Yet courts were not as aggressive during the *Lochner* era as they sometimes are described.<sup>221</sup> Moreover,

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gitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in his person and in his power to contract in relation to his own labor.”).

218. See, e.g., BERNSTEIN, *supra* note 10; see also Harrison, *supra* note 10 (discussing in great detail the possible textual and historical justifications for substantive due process and concluding that there is no satisfactory link); Mandelker, *supra* note 10 (discussing *Lochner*'s “shadow” over substantive due process); Sunstein, *supra* note 10 (noting the effects of *Lochner* as “[ruling out] most forms of redistribution and paternalism”); cf. FISS, *supra* note 19, at 109 (arguing that the Court in *Lochner* reinforced the wrong right); David A. Strauss, *Why Was Lochner Wrong?* 70 U. CHI. L. REV. 373, 375 (2003) (arguing that the *Lochner* flaw was not its finding a right to contract, but its aggressive interpretation of that right).

219. This is even true when arguments proceed within the zone of fundamental, enumerated rights. For example, First Amendment scholars are currently debating the “*Lochnerization*” of freedom of expression. See Tim Wu, *The Right To Evade Regulation*, NEW REPUBLIC, June 3, 2013. This critique, however, is hardly new. See, e.g., Thomas H. Jackson & John C. Jeffries, Jr., *Commercial Speech: Economic Due Process and the First Amendment*, 65 VA. L. REV. 1, 8, 40 (1979) (arguing that the extension of free speech protection to commercial speech was a lamentable resurrection of *Lochner*-style economic due process); see also Mark Tushnet, *Introduction: Reflections on the First Amendment and the Information Economy*, 127 HARV. L. REV. 2234, 2248–50 (2014) (discussing ways in which First Amendment doctrine is “business friendly” and how that may change in an information economy).

220. See *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955).

221. See Nourse, *supra* note 19, at 754 (claiming the standard *Lochner* narrative ignores what Nourse has described as *Lochner*'s “double history” and defies the facts); *id.* at 757 (“[T]he claim that *Lochner* is politics does not rest upon the 1905 law of substantive due process, but on Teddy Roosevelt's political opposition to *Lochner*'s result. Today's standard *Lochner* story is Roosevelt's story; it is not Justice Peckham's majority story or Justice Harlan's dissenting story.”); see also HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 4 (1993) (discussing harms created when “activist judges turn away from important institutional norms and become more interested in making law than interpreting it”); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 421 (1995) (describing the story of *Lochner*'s

those who fear modern use of the rational basis test to strike down economic regulations may have lost sight of America's complicated history with dubious economic regulations; the enforcement of importation rules and duties that filled the British coffers without offering any benefit to the colonies were regarded as the sort of bald economic favoritism that tarnished the legitimacy of British rule and inspired the Bill of Rights.<sup>222</sup>

Whatever one may think of *Lochner's* history, however, court seizure of vast power to second-guess economic regulation simply is not a realistic threat today. A generation of law scholars and judges has been primed to see the perils of constitutional review whenever it is not moored to a particular constitutional right, with few taking notice of the caution and modesty that the courts have exhibited, or of the wide range of normatively appealing uses of such an "emergencies only" test.

Use of the *Lochner* trope thus is a misleading way to describe substantive due process doctrine and its potential risks today, just as the *Roe v. Wade*<sup>223</sup> trimester strict scrutiny trope is a misleading way to describe modern abortion rights and their potential downsides. Rightly or wrongly, the doctrinal impact of both cases was checked almost immediately by subsequent opinions, though the restraining cases enjoy less popular name recognition and did little to curb the fears of those wary of judicial over-reaching.<sup>224</sup>

Nevertheless, accusations of judicial indiscretion are a hearty perennial, and *Lochner*-inflected winds—both actual and rhetorical—often blow through them.<sup>225</sup> The gay rights opinions described above triggered consternation from dissenting judges, who demanded more formalism, less legal "argle-

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constitutionalization of laissez-faire economic rights as "exaggerated at best" (citing Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970, 978-81 (1975)).

222. Stuntz, *supra* note 221, at 404-06.

223. 410 U.S. 113 (1973).

224. For *Lochner*, the relevant case is *Williamson*, 348 U.S. at 483. For *Roe*, it is *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). But one rarely hears in legal scholarship "Viva *Williamson v. Lee Optical!*" Or, sees signs in front of the United States Supreme Court: "Overrule *Planned Parenthood v. Casey* Now!"

225. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2616 (Roberts, C.J., dissenting). It is not just *Lochner* that sends a chill down some spines. The most notorious case in Supreme Court history—*Dred Scott*—also makes an appearance in debates as the ultimate example of grotesque judicial over-reaching under the substantive due process banner. See *id.*; see also *infra* note 246.

bargle”<sup>226</sup> and “nonspecific hand-waving,”<sup>227</sup> more careful articulation of the precise due process and equal protection rights at stake, sharper analysis of the weirdness of using “animus” as a way of denouncing results of majoritarian processes (versus individual action),<sup>228</sup> and greater emphasis on historical legal traditions that allowed government to regulate—even criminalize—core aspects of sexuality and same-sex relations.<sup>229</sup> They also were furious that the courts were “mistak[ing] a *Kulturkampf* for a fit of spite”<sup>230</sup> and imposing the predilections of an elite, law-trained legal culture on the lay public.<sup>231</sup> Some accused the courts of constitutionalizing outcomes in fundamental disputes about the nature of social institutions—especially marriage—in ways that might precipitate long-term, adverse consequences for society as well as the judiciary.<sup>232</sup>

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226. *United States v. Windsor*, 133 S. Ct. 2674, 2709 (Scalia, J., dissenting).

227. *Id.* at 2707; *see also supra* note 123 (describing the exceptionally harsh criticisms of the majority opinion written by Chief Justice Roberts and Justice Scalia in *Obergefell*).

228. For articles that analyze the “animus” thread, see Carpenter, *supra* note 107; Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 29 (2014) (examining the Court’s reasoning in various cases to show a Fourteenth Amendment right to same-sex marriage); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2064 (2002) (arguing that identity-based social movements influenced interpretations of rights in the twentieth century); Barbara J. Flagg, “Animus” and Moral Disapproval: A Comment on *Romer v. Evans*, 82 MINN. L. REV. 833, 833–35 (1998) (exploring the distinction between moral disapproval and animus); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 887 (2012) (looking at Court precedence for a standard that can be used to identify animus).

229. *Lawrence v. Texas*, 539 U.S. 558, 593 (2013) (Scalia, J., dissenting).

230. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (emphasis added).

231. *Id.*

232. *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2612 (Roberts, C.J., dissenting) (asking “[j]ust who do we think we are?” of the majority for disrupting traditional notions of marriage, and accusing it of violating democratic principles by doing so); *id.* at 2642 (Alito, J., dissenting) (warning that the opinion may be used to vilify those who “are unwilling to assent to the new orthodoxy” and imposed its own view of marriage on the American people in ways that might cause “bitter and lasting wounds”); *Windsor*, 133 S. Ct. at 2715–16 (Alito, J., dissenting) (expressing his concern that the Court was substituting a companionate theory of marriage over traditional, procreative views of marriage, which was a policy decision for legislatures to make instead of courts). The emerging academic commentary on the case is mixed, but Justices Alito and Scalia are not alone in their concern that the gay rights cases defy conventional doctrinal logic and proper judicial respect for state laws. *See, e.g.*, Carpenter, *supra* note 107 (defending *Windsor* on anti-animus principles); Gerken, *supra* note 123 (describing an inner logic of the opinion as arising

Many argued that the test used in these cases could not accurately be described as “rational basis” as conventionally understood,<sup>233</sup> and described the analysis as a hybrid form of “rational basis with bite” or even “intermediate scrutiny” as courts tried to synthesize these results and locate them along the due process/equal protection spectrum.<sup>234</sup> Many also said—accurately, in our view—that a cascade upward had occurred, such that all sexual orientation classifications had become pre-

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from the interplay of constitutional rights and structure in a way that clears space for change); Richard S. Myers, *The Implications of Justice Kennedy's Opinion in United States v. Windsor*, 6 ELON L. REV. 323, 323 (2014) (critiquing the opinion on judicial craftsmanship grounds); Sandy Levinson, *A Brief Comment on Justice Kennedy's Opinion in Windsor*, BALKINIZATION (June 26, 2013), <http://balkin.blogspot.com/2013/06/a-brief-comment-on-justice-kennedys.html> (describing the opinion as “blather”).

233. See *Witt v. Dep't of the Air Force*, 527 F.3d 806, 816–18 (9th Cir. 2008) (holding that *Lawrence* requires elevated scrutiny under due process). But consider other cases that rely on marriage as a fundamental right, which therefore requires strict scrutiny. See, e.g., *Kitchen v. Herbert*, 755 F.3d 1193, 1209, 1217 (10th Cir. 2014) (relying on marriage as a fundamental right, requiring strict scrutiny); *Bostic v. Rainey*, 970 F. Supp. 2d 456, 473 (E.D. Va. 2014) (relying on marriage as a fundamental right); cf. *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252, 1295 (N.D. Okla. 2014) (invalidating prohibitions on same-sex marriage on grounds it failed to satisfy the rational basis test under equal protection).

234. See, e.g., *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014) (striking down same-sex marriage ban in Idaho on heightened scrutiny under equal protection); *Witt*, 527 F.3d at 813 (holding that *Lawrence* requires elevated scrutiny under due process); see also Ian Bartrum, *The Ninth Circuit's Treatment of Sexual Orientation: Defining “Rational Basis Review with Bite,”* 112 MICH. L. REV. FIRST IMPRESSIONS 142 (2014) (examining the Ninth Circuit's attempt to establish a standard); cf. *Cook v. Gates*, 528 F.3d 42, 61 (1st Cir. 2008) (holding that *Lawrence* does not mandate elevated scrutiny); *Lofton v. Sec'y of the Dep't of Children & Family Servs.*, 358 F.3d 804, 817 (11th Cir. 2004) (stating elevated scrutiny is not mandated by *Lawrence*). Russell Robinson recently expressed concern that the Court's departure from conventional tiers of scrutiny in the LGBT cases has not been followed in other domains. See Robinson, *supra* note 123 (stating that the Court has “turned its back on groups who once benefited from ‘animus’ review, including people with disabilities and poor people”). One reason—though likely not the complete explanation—may be that the LGBT cases entailed the removal of sexual orientation distinctions only after the challengers demonstrated that no possible rational justification for the distinction existed. The irrationality may have been inspired by animus, but not necessarily. It was the challenged laws, rather than the group of litigants, that were exceptional in these cases. The litigants also sought only “sameness equality.” This simple version of equality has always been easiest for the Court to embrace and implement. With disability and wealth distinctions, in contrast, removal of distinctions will usually cause dramatic costs or consequences that may demonstrate a rational basis for the law in the first place. Nevertheless, where the laws make distinctions on the basis of poverty or disability for no rational reason, they should tumble. The LGBT cases may help in bringing their demise.

sumptively irrational rather than presumptively rational.

But this does not mean that the rational basis test is immodest or was distorted in the process of reaching these outcomes. An alternative understanding of this legal history is that the judicial conclusions that look aggressive today (i.e., that the regulation of sexual orientation for its own sake now comes with a strong presumption of irrationality) occurred only over the course of many decades of legal challenges, during which courts grew comfortable with a change in default. More to our point here, the judicial work of striking down sexual orientation-specific laws was principally done *without* relying exclusively on the usual “strict scrutiny” formalities. The judiciary worked slowly<sup>235</sup> up from the rational basis floor to a higher scrutiny perch.<sup>236</sup> Loss after loss preceded small victories that only slowly eroded the edifice of resistance and finally resulted in doctrinal openings. The pace of this was glacial, not galloping. And the basic legal question was throughout the one rational basis scrutiny was meant to advance: is the law here based on rational premises and permissible public ends? If not, what residual explanation for the law remains, and can this be squared with constitutional liberty or equality precepts?

When, for example, the government argued that allowing same-sex marriage would discourage opposite-sex marriage, the courts demanded evidence to justify that conclusion. In *Obergefell v. Hodges*, the Court responded by saying “it is unrealistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so.”<sup>237</sup> The Court also identified four principles and traditions that support

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235. Much has been said about the rapid pace of change in this corner of constitutional law. It only feels rapid to those who have just tuned in to sexual orientation law post-1990, or even post-2000, not to those who have toiled a lifetime in these liberty-free vineyards. The law actually moved glacially, even though the cumulative effect of the piecemeal progress is now having cascade-type effects. See ESKRIDGE, *supra* note 13 (providing a legal history of the movement); Case, *supra* note 99; Rivera, *supra* note 99; Rubenstein, *supra* note 99.

236. The evolutionary process in sexual orientation cases is very similar to the evolution in gender cases from rational basis to elevated, “intermediate” level scrutiny. For a recent discussion of this history, see Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527 (2014). Roots of rational basis review used in *Windsor* also may lie in cases like *Bell’s Gap Railroad Co. v. Pennsylvania*, which point to the “unusual” nature of a prohibition as a hat tip that something irrational may be afoot. *Bell’s Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890) (dictum); see also *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37–38 (1928) (examining principles included in the Due Process Clause).

237. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607 (2015).



marriage as a fundamental right under the Constitution and concluded they “apply with equal force to same-sex couples.”<sup>238</sup> These passages reflected the prior work of exploring in detail whether the government’s justifications for prohibiting same-sex marriage rested on constitutionally sound reasons. By constitutionally sound, of course, this meant secular reasons that could survive judicial inspection.

To be sure, the Court’s ultimate conclusion in *Obergefell* did not rest on reasonableness alone. The majority also relied on marriage as a fundamental interest,<sup>239</sup> the “immutable nature” of homosexuality,<sup>240</sup> and on how exclusion from marriage demeaned and stigmatized those whose liberty was denied,<sup>241</sup> including their children.<sup>242</sup> This combination of constitutionally relevant issues carried the day. But it now will be difficult indeed—even in a *non*-fundamental rights case—for government to justify using sexual orientation as a basis for denying liberty interests. Government use of sexual orientation distinctions in most, if not all contexts, likely will be deemed irrational.

The doctrinal journey to the Court’s holding that prohibitions on same-sex marriage violate the Fourteenth Amendment thus is usefully instructive. It illustrates vividly that the rational basis floor can be the start of a continuum, not a wholly discrete point in the liberty landscape.<sup>243</sup> The cases also illustrate that early litigation losses can serve a worthy liberty purpose, and may eventually culminate in new due process rights or the expansion of old ones. When the rational basis test offers a remote chance of success, courts have the opportunity to learn from losing litigants who continue to beg for the sanctuary and mercy of the Due Process Clause. These are the problems and grievances that will not go away, and will be instructive in the slow evolution of justice.

The sexual orientation cases also moved some constitu-

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238. *Id.* at 2599. As to one of these principles—that marriage “is a keystone of the Nation’s social order”—the Court stated “[t]here is no difference between same- and opposite-sex couples with respect to this principle.” *Id.* at 2590.

239. *Id.* at 2598.

240. *Id.* at 2594.

241. *Id.* at 2602.

242. *Id.* at 2590.

243. As Justice Harlan noted in *Poe v. Ullman*, “This ‘liberty’ [guaranteed by the Due Process Clause] is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints.” 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

tional law talk away from the arid formalities of “tiers of review” and strict enumeration, in favor of a more openly factored balance of liberty-related concerns. Rational basis—even with “bite”—was more accurately and sympathetically seen as one bloom in the common constitutional garden, not as a hothouse orchid. Equal protection rationality was seen—accurately—as one petal on the substantive due process bloom, not as a wholly separate shoot.

One thing is clear: *Lochner* no longer controls all of the doctrine, and it should be read in its proper historical context.<sup>244</sup> As Chief Justice Hughes observed, “[l]iberty in each of its phases has its history and its connotations.”<sup>245</sup> The proper use of our *Lochner* experience now is to ask the following question: when does *modest* judicial oversight of government regulation best serve the overall constitutional value in preventing arbitrary incursions into liberty, without undermining unduly other worthy government ends? The wrong use of *Lochner* history is to claim this 1905 case and its aftermath answers the question with an absolute, uncompromising “Never!”<sup>246</sup>

As we explain below, the substantive due process floor tests offer useful and cabined responses to abuses of government power. Moreover, precisely because of their humble status, they offer a conservative alternative to the current practice of force-fitting remedies into the doctrines of enumerated constitutional rights.

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244. Historians know that the best use of history is not as a book of *answers* to modern dilemmas, but as guidelines to what *questions* to ask. See MARGARET MACMILLAN, DANGEROUS GAMES: THE USES AND ABUSES OF HISTORY 44 (2008); see also Toni M. Massaro, *Substantive Due Process, Black Swans, and Innovation*, 2011 UTAH L. REV. 987, 1013–15 (2011).

245. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937).

246. Justice Scalia has made a similar overcorrection with his analogy between reproductive rights and Chief Justice Taney’s logic in the *Dred Scott* opinion. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 1001–02 (1992) (Scalia, J., concurring in part, dissenting in part). In fairness to Justice Scalia, *Dred Scott* did invoke substantive due process to strike down congressional power to “deprive[] a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular territory of the United States . . . [such an Act of Congress] could hardly be dignified with the name of due process of law.” *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 450 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV. But the extrapolation from that constitutional law low point to tarnish all other applications of substantive due process is far from convincing. See also Christopher L. Eisgruber, *The Story of Dred Scott: Originalism’s Forgotten Past*, in CONSTITUTIONAL LAW STORIES 155, 155 (Michael C. Dorf ed., 2009) (critiquing originalist defenses of *Dred Scott*).

## B. CRITICISM OF THE OUTRAGEOUSNESS TEST

The outrageousness test has been criticized on two grounds. First, it addresses problems that are better left to state tort remedies. Second, it uses a standard that is too vague and subjective to be a legitimate source of rights.

To promote analytical clarity, some scholars have argued that the outrageousness test applies only when the state actor has violated a fundamental or specifically enumerated constitutional right, and courts should otherwise abstain and allow state tort law to define the scope of remedies.<sup>247</sup> Richard Fallon points to *Parratt v. Taylor*<sup>248</sup> for support of the doctrinal clean-up—though he has made clear that he does not think *Parratt* was decided correctly as a normative matter.<sup>249</sup> In *Parratt*, the Court found no due process violation when a prison inmate's hobbyist materials were taken from the prison mailroom.<sup>250</sup> Because the prisoner could bring a negligence claim or some other tort action, the Court determined that the prisoner received all the process that was due to him.<sup>251</sup> Fallon infers from the Court's lack of substantive analysis that it was backing away from the outrageousness test any time the government actor's misconduct could be covered by traditional tort law.<sup>252</sup> This abstention norm could apply in every case brought under the outrageousness test since the tort of Intentional Infliction of Emotional Distress is designed to root out similarly undefined out-outrageous conduct; so if Fallon is correct, the constitutional outrageousness test would be wiped out.<sup>253</sup>

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247. Fallon, *supra* note 86, at 346–47; Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, and the Fourteenth Amendment*, 86 COLUM. L. REV. 979, 991 (1986). The Court has said that substantive due process is not a “font of tort law to be superimposed upon whatever systems may already be administered by the states.” *Paul v. Davis*, 424 U.S. 693, 701 (1976).

248. 451 U.S. 527 (1981).

249. Fallon, *supra* note 86, at 344–45.

250. *Parratt*, 451 U.S. at 527, 543.

251. Fallon, *supra* note 86, at 340–41.

252. *Id.*

253. The rule would make the outrageousness test largely moot since the tort of Intentional Infliction of Emotional Distress (IIED) is a close analog to the constitutional protections offered by the shocks-the-conscience test. IIED provides relief for malicious and outrageous conduct of any variety, and abuses of authority are a common form of sanctionable behavior. *See* *Brandon v. County of Richardson*, 624 N.W.2d 604 (Neb. 2001) (abusive questioning of rape victim); *Drejza v. Vaccaro*, 650 A.2d 1308 (D.C. 1994) (valid IIED claim where police made harassing jokes to a rape victim). *But see* *Costello v. Mitchell Pub. Sch. Dist.* 79, 266 F.3d 916 (8th Cir. 2001) (teacher at a public middle school was not sufficiently “outrageous” by calling a student “stupid” and “retarded” in front of her classmates). *See generally* DAN B. DOBBS ET AL., THE

While we agree that garden-variety minor abuses of power are better redressed, if at all, through state tort law, we do not think that *Parratt* did or should mark a shift in the substantive due process outrageousness test. A case based on the misplacement of \$27 worth of hobbyist materials is unrecognizable as the sort of malicious deprivation and degradation that the outrageousness test had previously addressed, and Justice Powell distinguished *Parratt* from *Rochin* and other outrageousness cases on that basis.<sup>254</sup> Moreover, when government actors abuse their authority in conscience-shocking ways, their cruelty puts the victim at the mercy of not merely another individual, but of the government itself. While the same facts are likely to make a good tort claim if they have any chance of success under the due process outrageousness test, the overlap in remedies is no more consequential than the overlap in equal protection and employment discrimination law, or in free speech and Anti-SLAPP law.

But this leaves the vagueness criticism. There is no denying that the outrageousness test flirts with subjectivity. As one court put it, “the measure of what is conscience shocking is no calibrated yard stick.”<sup>255</sup> Case-specific facts matter greatly, and thus no decision under the test provides more than loose guidance for the next set of facts.

In *County of Sacramento v. Lewis*, the outrageousness test evoked a mocking concurring opinion by Justice Scalia, in which he described the test as the “*ne plus ultra*, the Napoleon Brandy, the Mahatma Gandhi, the Cellophane of subjectivity.”<sup>256</sup> His Cole Porter-inspired contempt for the open-ended due process test has been echoed by other federal judges.<sup>257</sup> (Scalia

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LAW OF TORTS §§ 385–89 (2d. ed. 2011).

254. *Parratt*, 451 U.S. at 553.

255. *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998).

256. *Id.* at 861 (Scalia, J., concurring).

257. See, e.g., *Mays v. City of East St. Louis*, 123 F.3d 999, 1001 (7th Cir. 1997) (“[S]ubstantive due process’ is an oxymoron.”); *United States v. Miller*, 891 F.2d 1265, 1271, 1273 (7th Cir. 1989) (Easterbrook, J., concurring) (describing the *Rochin* shocks-the-conscience test as “not a rule of any kind, let alone a command of the Due Process Clause”); see also RICHARD A. POSNER, REFLECTIONS ON JUDGING 118–19 (2013) (noting that standards for determining whether government may be held liable for due process violations are “[v]erbosity masquerading as precision” and add confusion when they demand that the defendant “not only have acted recklessly, but have shocked the conscience—whatever that means . . . . I don’t know what the expression means, or what it adds to indifference to a known risk of injury”); cf. *Slade v. Bd. of Sch. Dirs. of Milwaukee*, 702 F.3d 1027, 1033 (7th Cir. 2012) (stating that “shocks the conscience” is “not a very illuminating expression, and we don’t know what it adds to recklessness. Reckless indifference to a child’s safety

is also dubious of substantive due process challenges that use the irrationality test for the same reason—that it permits free-wheeling by the judiciary<sup>258</sup>—but he has been less consistent in his criticisms and voting behavior in those cases, as we discuss below.)

The subjectivity critique of outrageousness fails to account for three important features. First, the very flexibility that makes the test seem subjective is also its virtue. The test is interstitial. By design, it catches government offenses that would otherwise slip through the doctrinal cracks. Second, although the “shocks-the-conscious” rule *seems* subjective, in practice the standard has been extremely demanding on litigants who seek its help. To the extent there is error in the system, it goes only one way—in the government’s favor. Thus, while the test is flexible, it is inaccurate to call it subjective. Subjectivity suggests that it operates at the whim of the particular preferences and attitudes of the judge. In fact, the outrageousness test intervenes only in instances where reasonable minds would agree that the government has engaged in misconduct (and it doesn’t even intervene in all of them). Third, precisely because it offers the last hope for recourse when something has gone wrong, judges who take seriously their responsibility to curb abuses of government power will undoubtedly find an abstract constitutional value to do it. If the outrageousness test isn’t available, they will reach the same result some other way.

First, the designed flexibility. The very idea of an outrageousness floor is that neither the framers nor the judges interpreting the Constitution can anticipate in advance all the myriad ways that government actors will harass or torment their subjects. Thus, if left only to existing definitions of constitutional rights, courts would be forced to leave some abuses of power unacknowledged and undeterred. Cases like *Rochin* show that the Supreme Court, at least at one time, could not live with the consequences of that setup without feeling that they abdicated their responsibilities to check abusive government.

An analogous problem confronts state courts when they are tasked with the responsibility to protect the state’s residents

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would doubtless shock the conscience, but . . . negligence doesn’t”).

258. He has objected when the Due Process Clause has been invoked to strike down gay marriage bans (*United States v. Windsor*, 133 S. Ct. 2675, 2706 (2013) (Scalia, J., dissenting)), to create privacy rights (*NASA v. Nelson*, 562 U.S. 134, 160–61 (2011) (Scalia, J., concurring)), and to protect corporations from excessive punitive damage awards (*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 598 (1996) (Scalia, J., dissenting)).

from each other through tort law. When we pester and torment each other, our conduct may fall within one of the longstanding torts like battery, assault, or trespass. But often, too often to be ignored, whether by chance or human ingenuity, a tormentor will manage to intentionally inflict seriously harm on another person without using conduct that falls into the traditional categories of relief.<sup>259</sup> When they do, their victims can pray for relief under the tort of Intentional Infliction of Emotional Distress (IIED). Much like the substantive due process floor test, IIED requires the plaintiff to prove that the defendant's conduct was outrageous in order to ensure that the behavior is vile enough so as not to require the notice and judicial guidance that other tort doctrines offer.<sup>260</sup>

Likewise, the substantive due process "outrageousness" floor provides a gap-filler that provides justice and relief in unprecedented and unanticipated circumstances. This gap-filler is both necessary and desirable.

One may worry that the benefits of creating a constitutional stop-gap will be outweighed by the havoc that can result from an ambiguous and subjective test (a test that is, ironically, arbitrary). But the last sixty years of outrageousness precedent contradicts this theory. Perhaps because the test developed with the most self-conscious attention to the potential for actual and perceived abuses of judicial discretion, claims of outrageousness encounter stiff headwinds.

In short, conscience-shocking behavior happens, but courts only rarely call it unconstitutional. It would be foolish to claim that the rulings do not suffer from some amount of subjectivity, but the subjectivity appears to cause vastly more of one type of error (non-relief for deserving claims) than the other.

Nevertheless, even in cases where courts defer to executive officials, they do address the conscience-shocking due process argument on the merits; they do not dismiss it on Rule 11 grounds or as otherwise wholly beyond the judicial pale.<sup>261</sup> These rulings also are sometimes written over passionate, eloquent dissents. Finally, a world in which the due process arguments are aired, and the most egregious wrongs occasionally are ad-

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259. *Muratore v. M/S Scotia Prince*, 845 F.2d 347 (1st Cir. 1988); *Figueiredo-Torres v. Nickel*, 584 A.2d 69 (Md. 1991).

260. *Brandon v. County of Richardson*, 264 N.W.2d 604, 620–21 (Neb. 2001).

261. Cf. Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity,"* 25 GEO. MASON CIV. RTS. L.J. 43 (2014) (discussing use of 12(b)(6) motions in rational basis cases).

dressed, is better than one in which all such claims are categorically denied.

This leads to the third argument rebutting charges of subjectivity: because courts are the final enforcer of the Constitution's abstract commitments to a restrained government, judges will have an irresistible urge to shut down abuses that they find undeniably shocking.

For example, when a suspended police officer was required to undergo a penile plethysmograph as a condition of reinstatement, this shocked the judicial conscience.<sup>262</sup> In another case, the forced paralysis, intubation, and a digital rectal examination of a suspect in custody also violated the outrageousness test even though the police reasonably believed the suspect had contraband in his rectum.<sup>263</sup> The court added that, by definition, this also violated the Fourth Amendment prohibition against unreasonable searches and seizures.<sup>264</sup> But it treated the two constitutional inquiries as reinforcing, rather than mutually exclusive.

Both cases involved bodily restraints, which have been described as a core liberty concern.<sup>265</sup> Both involved especially invasive police procedures. Other forms of misconduct, though, have also passed the test. Intentional framing of innocent per-

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262. *Harrington v. Almy*, 977 F.2d 37, 43–44 (1st Cir. 1992). A penile plethysmograph is a machine for measuring the circumference of the penis, sometimes used to determine male sexual arousal or blood flow to the penis. *Cf.* *United States v. McLaurin*, 731 F.3d 258 (2d Cir. 2013) (striking down use of penile plethysmography testing as a condition of supervised release, on grounds that it was extraordinarily invasive and violated substantive due process); *United States v. Weber*, 451 F.3d 552, 571 (9th Cir. 2006) (Noonan, J., concurring) (“There is a line at which the government must stop. Penile plethysmography testing crosses it.”).

263. *United States v. Booker*, 728 F.3d 535 (6th Cir. 2013).

264. *Id.* at 546 (“[I]nvestigative conduct that would shock the conscience for purposes of the Due Process Clause is ‘unreasonable’ for purposes of the Fourth Amendment.”).

265. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *see also Martinez v. City of Oxnard*, 337 F.3d 1091, 1092 (9th Cir. 2003) (allowing a due process claim where it was alleged that an officer interfered with medical treatment of the plaintiff while screaming in pain); *Bounds v. Hanneman*, No. 13-266 (JRT/FLN), 2014 WL 1303711 (D. Minn. Feb. 4, 2014) (holding that plaintiff properly stated a claim of substantive due process where DRE officer trainees recruited citizens to smoke large amounts of marijuana for purposes of observational training of officers, where there were allegations that police threatened citizens with arrest if they did not participate, on grounds that this was invasion of bodily integrity that shocked the conscience); *Callaway v. N.J. State Police Troop A*, No. 12-5477 (RBK), 2013 WL 1431668, at \*16 (D.N.J. Apr. 9, 2013) (noting that “conscience shocking” typically provides relief in cases of physical abuse).

sons for crimes has been held to shock the conscience.<sup>266</sup> Where a prosecutor allegedly failed to disclose a forensic report in order to secure a grand jury indictment against a defendant, and withheld the information to cover up for others, this supported a substantive due process shock-the-conscience claim.<sup>267</sup>

If forced, courts and advocates could be creative in their labeling and framing of claims so that these uncategorizable offenses could be fit into existing categories. But it is not credible to think that the judiciary would let all or even most of these types of claims die, and finding alternate sources of relief would require intellectual dishonesty and doctrinal incoherence. We will return to this idea in Subpart D.

### C. CRITICISM OF THE IRRATIONALITY TEST

Because the rational basis test is typically invoked to challenge legislation, it tends to get a different sort of critique—one based in realism. The “laws as sausages” joke has a good deal of truth to it. What it takes to get laws passed often may have more to do with political logrolling and other compromises than any overarching logic.<sup>268</sup> And the lines drawn by the laws often are easily critiqued for their under- and overinclusion. Expecting more from legislators would be an act of naiveté.

Political processes do, of course, involve compromises and deals brokered between legislators with disharmonious mindsets. And often, a legislator’s political philosophy is indistin-

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266. See, e.g., *Limone v. Condon*, 372 F.3d 39, 44–45 (1st Cir. 2004). Note, however, that perjury, where it occurred in a peripheral hearing and was not shown to have prejudiced the defendant’s right to a fair trial, was not found to be outrageous. See, e.g., *People v. Uribe*, 199 Cal. App. 4th 836 (Cal. Ct. App. 2011).

267. See *Pyles v. Village of Manteno*, No. 13-CV-2114, 2013 WL 6459484 (C.D. Ill. Dec. 6, 2013).

268. See John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2395 (2003) (discussing how statutes often take odd shapes in response to behind-the-scenes maneuvers). A related concern might be the lack of judicial capacity for the Supreme Court to be called on to double-check the work of the lower courts using their authority in this way. See Andrew B. Coan, *Judicial Capacity and the Substance of Constitutional Law*, 122 YALE L.J. 422, 437 (2012) (discussing why high volume legal domains often result in courts either applying “clear-cut categorical rules, which reduce uncertainty for potential litigants and thus reduce the volume of litigation, or . . . abandon[ing] anything resembling the full potential enforcement of [the constitutional provision]” and concluding that “possibly it will feel compelled to do both”). We think that both substantive due process floor tests have ample room embedded in the doctrines to avoid judicial capacity problems because the tests are slanted toward government success and are so context-dependent that their use does not typically demand Supreme Court review.



guishable from a set of positions he would take when guided solely by political and financial self-interest. But this does not unravel the need for a rational basis test.

The rational basis test accommodates the garden-variety political negotiations and their inherent political nonsense. Properly used, rational basis review is not a vehicle for voicing mere grumblings about the chaos, the slights, the inanities, and the unevenness of lawmaking, with its pocket vetoes and pork politics. It focuses instead on the fallout of the messy political process and allows individuals who bear the brunt of that fallout to seek judicial relief if political negotiations have been exploited to serve ends that add no value to society. Rational basis is a way (often the only way) to illuminate the worst and the most novel forms of government chicanery. These are cases in which animus, political capture, and gross violations of public trust depart from the barest expectations that the government will engage in public-minded pursuits. They challenge regulations that go too far, with too little justification, and cause especially grave consequences that are distributed with callous indifference toward the burdened.

This is why due process irrationality so often travels with equal protection irrationality: government officials are far less likely to impose egregious consequences on themselves or their most influential constituents. One need not consult Rawls's "veil of ignorance"<sup>269</sup> to see how this works: laws that bind the lawmakers *themselves* are less likely to suffer from the localized deafness-to-justice defect that often infects laws that apply to others. Thus, most of the worst cases of lawmaking typically apply to subsets of the population, and present issues of both liberty and equality. While close judicial scrutiny of all legislative action is neither practical nor desirable for a representative democracy, judicial oversight at the outer limits of legislative mischief can be quite consistent with the American form of constrained democratic government.

#### D. THE NEGLECTED VIRTUES OF THE FLOOR TESTS

The force of these well-rehearsed arguments against the floor tests is plain. Utterly missing from the scornful critiques, however, is how the floor tests can make valuable and con-

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269. JOHN RAWLS, A THEORY OF JUSTICE 118–23 (rev. ed. 1999) (developing a theory of fairness in which a parties should consider justice principles from behind a veil of ignorance that masks the position they themselves would occupy within the system, to prevent them from developing rules biased in their favor).

servative contributions to the larger project of defining constitutional rights and protecting baseline liberties.

First, the floor tests allow for public airing of government misconduct, even when courts uphold that behavior. The chance to make one's case in a court of law in and of itself expresses important due process and other values.<sup>270</sup> Like voting, litigating may often be an exercise in futility and even "irrational."<sup>271</sup> But it still has expressive, political, and social meaning that matters to the litigants and to fellow citizens. This airing, of course, may itself have worthwhile deterrent effects, particularly if the lawsuit attracts media attention. The economic and political costs of defending claims of arguably outrageous and irrational uses of power may play a role in curtailing misconduct even without a successful legal resolution. Thus, even a weak and embattled substantive due process floor test can make valuable contributions.

Second, the floor tests can help *constrain* judicial power, counterintuitive as this sounds. There are only two, extreme, alternatives to the flexible floor tests: no review or elevated scrutiny review through a different constitutional channel. Because judges, purely as a descriptive matter, will not be able to stomach the former in extreme cases, substantive due process floors provide a cautious, conservative alternative to the latter.

For example, in *Wood v. Ryan*, an Arizona death row inmate requested a preliminary injunction to stay his execution until the state provided him with information about the chemical cocktail that the department of corrections would use in their lethal injection.<sup>272</sup> He brought his claim as a First Amendment challenge, claiming that the state's *nondisclosure* violated his right to access information.<sup>273</sup> A Ninth Circuit panel agreed and was prepared to expand a narrow First Amendment right for the public to access the courts to cover Wood's claim, despite the fact that it was a misfit for the public access doctrine.<sup>274</sup> Two Ninth Circuit judges wrote dissents to the Circuit's

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270. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 110 (2006).

271. See, e.g., GORDON TULLOCK, TOWARDS A MATHEMATICS OF POLITICS 37–49 (1967) (arguing that voting appears irrational given costs versus vote value); cf. Richard L. Hasen, *Voting Without Law?*, 144 U. PA. L. REV. 2135 (1996) (arguing that social norms solve the paradox of voting).

272. *Wood v. Ryan*, 759 F.3d 1076, 1078 (9th Cir. 2014), *rev'd*, 135 S. Ct. 21 (2014).

273. *Id.* at 1079.

274. *Wood*, 759 F.3d at 1088. *Contra* *Owens v. Hill*, 758 S.E.2d 794 (Ga. 2014) (holding it is not unconstitutional to maintain the confidentiality of names and other identifying information of persons and entities involved in

decision to deny a rehearing en banc outlining the problems with the panel's novel approach to the First Amendment,<sup>275</sup> and the panel's decision was promptly vacated by the Supreme Court.<sup>276</sup> In light of the subsequent botched execution of Ryan,<sup>277</sup> which tends to confirm fears that lethal injection executions cannot be done humanely without more research and transparency, the issue, and the Ninth Circuit's First Amendment theory, may come back around.

Substantive due process would provide a better route to secure death row inmates access to information related to their planned executions. If courts analyze this problem as a shocking or irrational deprivation of information, they could avoid adding new, ambiguous First Amendment rights that might swell the amendment's scope and further laden the inquiry into when executions are constitutional.

The third value that the floor tests contribute is that they work slowly, contextually, and tentatively. They provide a means of experimentation that relieves courts from the anxiety of forming permanent constitutional rules. In this zone, presumptions favor government and weigh against rights. Parties urging that government action is irrational must come with their litigation bags overflowing with arguments against actual and even hypothetical justifications for that action. They must break a huge sweat to overcome that strong presumption—and even then will encounter official immunities and other rules that give every advantage to the government.<sup>278</sup>

The floor tests defy constitutional cubby-holing and resist over-theorizing. “Arbitrariness” and “irrationality” do a lot of work here, but with minimal consequences. The tests are inherently open-ended and vague, which allows the successful cases to dull in consequence over time if they turn out to be poorly reasoned.

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executions, including those who manufacture the drug or drugs to be used).

275. *Wood*, 759 F.3d at 1102, 1103–05 (Kozinski, C.J., and Callahan, J., dissenting).

276. *Ryan v. Wood*, 135 S. Ct. 21 (2014).

277. Ben Brumfield et al., *No Evidence Arizona Execution Botched, Corrections Chief Says*, CNN (Sept. 8, 2014, 7:15 AM), <http://www.cnn.com/2014/07/24/justice/arizona-execution-controversy/>.

278. One increasingly large barrier is elevated pleading standards. See *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); see also Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 *Duke L.J.* 1 (2010); Jacob A. Zuniga, *Supervisory Liability Under 42 U.S.C. § 1983 in the Wake of Iqbal and Connick: It May Be Misconceived but It's Not a Misnomer*, 56 *ARIZ. L. REV.* 601 (2014).

Conversely, when floor cases *are* decided well, and their reasoning does withstand the test of time, the cases can lead to thicker rights (as was the case with *Rochin*). This approach to constitutional experimentation recognizes that past is not always prologue, and that new problems may fit poorly into customary ways of sorting and weighing liberty and equality.<sup>279</sup>

Substantive floors offer judges some space to make doctrinal corrections, to experiment, and to allow half-baked ideas to rise (or not) in due time, all while checking the worst abuses that would otherwise evade constitutional redress.

In short, if anything, judicial power skeptics should favor *bolder* use of the highly contextual rational basis/conscience-shocking floors; both tend to block categorical movements of individual rights to fundamental right status and groups to suspect classes—where elevated scrutiny applies, judicial power expands, and a strong presumption arises against government regulatory power. The rational basis floors preserve more space for experimentation and freedom for government actors than the alternative, clause-bound constitutional approaches. Healthy judicial power skepticism thus is compatible with rational basis floors, even if the floors are used very modestly, as intended. This latter approach is the course we endorse here.

This approach—using the floor tests as testing grounds for rights that may develop more robustly over time—is precisely the reverse of the instruction given in *Graham*, discussed above. To have the sort of fluidity and tentativeness that we think these cases should have, courts will have to be encouraged to use due process instead of expanding existing doctrines related to enumerated or fundamental rights.

We recognize, as we must, that there is no way to assure that a “just so” judicial balance will be struck in every case between the poles of deference and intervention. No judicial test can promise this. Also, this Article is not properly understood as a *paean* to judges and courts. We nevertheless conclude that modern judges can and should play a modest role in achieving due process equilibrium, and that the due process floors offer them vehicles for doing this thoughtfully and humbly.<sup>280</sup>

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279. We favor a dynamic approach to due process. See SULLIVAN & MASSARO, *supra* note 97. We also concur with the legal realist view that the judicial construction of liberty is best seen as an evolving doctrine that is ever “headed for parts unknown.” Walton H. Hamilton, *The Path of Due Process of Law*, 48 ETHICS 269, 270 (1938).

280. See Scott H. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 30–31 (1980) (arguing that a search for rationality should pursue a realistic search for reasons that make a test a viable one); Fallon, *su-*

Next we outline specific ways in which the floors have untapped potential to bring coherence and intellectual honesty to the task of constitutional lawmaking. If regarded with less scorn and skepticism, substantive due process floors could help save the courts from introducing paradoxes and problems in other constitutional doctrines.

## VI. POTENTIAL

Once the confusion about the floor tests is removed, the sound reasons for their continued use become apparent. They allow the courts to secure a “background of liberty,” as Randy Barnett has called it, which has a modest and localized effect on the other branches.<sup>281</sup>

As we have articulated above, the two floor tests, outrageousness and irrationality, are of a piece; they serve the common goal of preventing extreme abuses of power. But the stories of the two floor tests diverge when we consider the present and future.

The irrationality test has its detractors, but between the cases protecting gay rights (favored by the left) and the cases protecting economic liberties (favored by the right), the rational basis test has become an accepted, if not welcome, guest to the constitutional party. Thus, irrationality is enjoying a period of relative respect and occasional employment.

Outrageousness, on the other hand, still lurks Boo Radley-like in the shadows, very rarely called into service. It has not

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*pra* note 86, at 316 n.38 (“For rationality review to be real rather than a sham, the court must be willing to make some independent assessment of legislative purpose.”).

281. See BARNETT, *supra* note 126. Although we like this phrase, our argument is based on a much more limited promise of protection than Barnett’s sweeping historical analysis of the natural rights backdrop of the Ninth and Fourteenth Amendments. We simply note that the case law itself does not rule out substantive due process floors, and argue that late twentieth, and early twenty-first century unfolding developments suggest good reasons for the maintenance and occasional deployment of these floors. We echo David Strauss’s assumptions that judicial review of due process claims are important, and that judges are capable of furthering sensible substantive due process protections. David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996). And we join other commentators who have urged the modest use of rational basis scrutiny to assure that government actions that result in disparate treatment are not merely “an exercise of political power by those benefitted.” Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 69 (1985); *cf.* Sandefur, *supra* note 261, at 83 (arguing that the rational basis test is best understood as an evidentiary presumption of constitutionality that can be overcome, rather than as a rigid formalistic test).

had a comparable moment of vindication. We think it could. The limited nature of the test, and its tolerance for experimentation and slow growth, could come in very handy during times of great technological change. In particular, the test could be very useful for addressing the critical but baffling problems that involve privacy.<sup>282</sup>

This Part explores how each of the floor tests (particularly outrageousness) can be put into more effective service without losing the modesty and restraint that help legitimate them in the first place.

#### A. POTENTIAL FOR THE OUTRAGEOUSNESS TEST

The outrageousness test could bring coherence to the Fourth Amendment if courts were unshackled from the *Graham* mandate to preferentially use enumerated rights over substantive due process. Judges confronted with the balance between individual privacy and government policy have few good options. If they grant Fourth Amendment or fundamental right status to a form of informational privacy, this requires more searching and pervasive judicial scrutiny of a breathtaking range of government policies and conduct.<sup>283</sup> Yet, if judges grant government *carte blanche* regulatory authority over new sources of detailed information, serious abuses of privacy and law enforcement discretion will be insulated from judicial review.

This bind is on magnificent display in the context of the Fourth Amendment's third party doctrine. That rule permits the government to access records and transaction data held by third parties without constituting a Fourth Amendment search.<sup>284</sup> The rationale for the third party doctrine was never terribly convincing,<sup>285</sup> and the criticism has become all the more

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282. An important point is that Justice Frankfurter saw the relationship between outrageous-type disgust and due process restraints on legislative conduct that unduly invades personal liberty. In his dissenting opinion in *Poe v. Ullman*, he cited *Rochin* in support of his conclusion that application to a married couple of a Connecticut statute that made use of contraceptives a crime violated substantive due process. 367 U.S. 497, 539, 548 (1961) (Harlan, J., dissenting).

283. See *NASA v. Nelson*, 562 U.S. 134, 159 (2011) (holding that NASA background checks of contract employees did not violate any constitutional right of informational privacy that might exist, but declining to decide directly whether such a constitutional right does exist).

284. *Smith v. Maryland*, 442 U.S. 735, 745–46 (1979); *United States v. Miller*, 425 U.S. 435, 440–43 (1976).

285. See Jed Rubenfeld, *The End of Privacy*, 61 STAN. L. REV. 101, 113–15 (2008) (arguing the logic behind the Stranger Principle is untenable); see also

ferent in the wake of the revelation that the NSA collected and stored telephonic metadata about every last American.<sup>286</sup> The collection itself is potentially troubling, and when combined with some evidence that the government may target journalists and whistleblowers for criminal enforcement of minor crimes,<sup>287</sup> the demand for doctrinal reform is understandably powerful. Thus, in *United States v. Jones*, a case considering the Fourth Amendment treatment of GPS devices, Justice Sotomayor took the opportunity to explicitly call out the third party doctrine as a rule in need of reconsideration.<sup>288</sup>

The superficially satisfying solution is to recognize a Fourth Amendment interest in third party records that describe us, and to require a warrant (or at least reasonable suspicion) before law enforcement can collect them. This is precisely the approach taken by the Eleventh Circuit.<sup>289</sup> But it is destined for failure.

As flawed as the third party doctrine is, creating Fourth Amendment rights in third party data will cause a range of problems and constitutional conflicts. When third party records document evidence of innocence (rather than guilt), a warrant requirement could have unintended consequences for wrongly accused criminal suspects.<sup>290</sup> A warrant requirement could also come into conflict with the First Amendment speech rights of companies in instances where the consumer relationship has broken down and the company positively and voluntarily wishes to disclose its data to law enforcement.

More fundamentally, the new rule could interfere with law enforcement to a degree that is simply untenable. Many crimes like fraud and insider trading are only detected through rec-

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Sherry Colb, *What Is a Search?: Two Conceptual Flaws in Fourth Amendment Doctrine and Some Hints of a Remedy*, 55 STAN. L. REV. 119, 123 (2003) (contending that the Court improperly “equat[es] risk-taking with inviting exposure and equat[es] limited-audience with whole-world self-exposure”).

286. See *infra* notes 313–15 and accompanying text.

287. Emily Bazelon, *Obama’s War on Journalists*, SLATE (May 14, 2013), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/05/obama\\_s\\_justice\\_department\\_holder\\_s\\_leak\\_investigations\\_are\\_outrageous\\_and.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/05/obama_s_justice_department_holder_s_leak_investigations_are_outrageous_and.html).

288. *United States v. Jones*, 132 S. Ct. 945, 956 (2012) (Sotomayor, J., concurring).

289. See *United States v. Davis*, 754 F.3d 1205, 1215–17 (11th Cir. 2014), *vacated*, 573 F. App’x 925 (mem.) (11th Cir. 2014) (holding there is a Fourth Amendment interest in protecting third party records and requiring law enforcement obtain search warrants prior to executing a search).

290. See generally Joshua A.T. Fairfield & Erik Luna, *Digital Innocence*, 99 CORNELL L. REV. 981 (2014) (discussing obstacles defendants face in obtaining third party data that could prove their innocence).

ords. A warrant requirement would give the government no avenue to build cases where reasonable suspicion does not already exist. Indeed, more than a century ago, the Supreme Court had to learn this lesson the hard way with first party records (the records maintained by the criminal suspects themselves). In *Boyd v. United States*, the Supreme Court recognized a Fourth Amendment right to protect documents from compelled disclosure through subpoena processes.<sup>291</sup> The protections devastated the government's ability to investigate certain crimes—tax evasion and antitrust violations—and after several decades of problems, the Court gutted the rule in the 1976 case *Fisher v. United States*.<sup>292</sup>

Although the information revolution will require the Fourth Amendment to adapt to new technological realities, a simple and comprehensive new rule is not likely to work.<sup>293</sup> A rational basis or outrageousness approach to emerging privacy problems would allow courts to check the most egregious invasions of individual privacy, with greater freedom to consider competing interests. This would permit courts to amble, not dash, up the rapidly evolving “constitutional privacy” path, and to consider the issues context by context.

Two activities permitted under the current third party doctrine seem especially amenable to these tests. First, when the government specifically selects a target and collects long and detailed data histories without any individualized suspicion, and without limiting the collection to information potentially relevant to an already-committed crime, that collection reeks of discretion run amok. This type of information stalking may satisfy the outrageousness floor test. Second, dragnet collection practices in which the government hovers *all* the data for the vague and unlimited purpose of law enforcement or national security may also shock the conscience. Or, if the government cannot offer satisfactory evidence (under seal) that the collec-

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291. *Boyd v. United States*, 116 U.S. 616, 638 (1886).

292. 425 U.S. 391, 414 (1976); *see also* William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1025 (1995) (citing *Fisher* as an example of the Court moving away from Fifth Amendment protections).

293. At some level the Supreme Court seems to know this, which is why the adaptations in Fourth Amendment law have been incremental and fact-specific. *United States v. Jones*, 132 S. Ct. 945, 953 (2012), was decided on a narrow trespass theory of search, and *Riley v. California*, 134 S. Ct. 2473, 2484–86 (2014), altered the search incident to arrest doctrine without making sweeping conclusions about the treatment of smart phones in criminal law enforcement.



tion program is effective, it may fail the rational basis test.<sup>294</sup>

As the privacy rights evolution continues, courts should retain this due process emergency cord. It can serve as a constitutional gap filler for unanticipated horrors. The versatile due process floors also can be proving grounds for more protected constitutional privacy rights that can enable courts to amass evidence before mounting the graduated steps to higher levels of protection in specific privacy scenarios.

As government-deployed devices for extracting information, monitoring peoples' lives, coercing individual conduct, and otherwise infringing on individual autonomy grow more sophisticated, more pervasive, more inventive, and harder to anticipate or detect, the "conscience shocking" floor may become an ever more important constitutional tool for curbing official enthusiasm.

Its use may have made much more sense as the first or final home for some Fourth Amendment cases that have caused confusion and incoherence. For example, in *Safford Unified School District Number 1 v. Redding*, the Supreme Court decided that a strip search of a middle school student who may have been hiding four ibuprofen pills was an unreasonable search under the Fourth Amendment.<sup>295</sup> This is clearly the right result. But the search was not precisely "unreasonable" in the sense that the term is used in other Fourth Amendment search cases involving schools and employers. Viewed strictly in terms of the evidence that the school principal had that the student was likely to be carrying over-the-counter drugs, that those drugs were a violation of school policy, and that the administration had evidence that students not infrequently hid contraband in their underwear, the strip search arguably met

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294. Christopher Slobogin has proposed treating these types of "panvasive" surveillance practices using political process theory, arguing that such surveillance can only be reasonable if the public has demonstrated a sufficient amount of buy-in. Christopher Slobogin, *Panvasive Surveillance, Political Process Theory, and the Nondelegation Doctrine*, 102 GEO. L.J. 1721, 1724 (2014). Slobogin's proposals run into ours in the sense that legislation authorizing "panvasive" surveillance would still have to survive rational basis scrutiny, which would "prevent[] completely foolish panvasive actions." *Id.* at 1745 n.119; see also Richard C. Worf, *The Case for Rational Basis Review of General Suspicionless Searches and Seizures*, 23 TOURO L. REV. 93, 159 (2007) (explaining that when a court uses rational basis review to invalidate a legislative decision, the court is determining whether a "rational legislature would have approved the policy").

295. *Safford Unified Sch. Dist. No. 1 v. Redding*, 577 U.S. 364, 374–77 (2009).

the standards previously required for school searches.<sup>296</sup> That is, the school principal may have maintained the requisite amount of suspicion to be “justified at its inception”<sup>297</sup> and enough reason to believe that searching the inside of her underwear was within the scope of a search likely to uncover evidence.

But just like the stomach pumping in *Rochin*, this search was unreasonable *despite* its likelihood to uncover evidence because it was, in a word, outrageous. The offense was too small to justify so great an intrusion. The principal’s decision to search inside the student’s bra and underwear was shocking in light of its lack of proportionality to the student’s offense. The risk of deciding *Redding* under the Fourth Amendment rather than the substantive due process clause is that the reasoning—this mismatch between the offense and the style of search—is not consistent with other Fourth Amendment cases that have insisted that the severity of an offense *does not* alter the analysis.<sup>298</sup> The outrageousness test would have spared courts this Fourth Amendment mess.<sup>299</sup>

Or consider the doctrinal epicycles that the Court has crafted in the law of self-incrimination. As every culturally conscious American knows, the police must provide *Miranda* warnings to the subject of an interrogation in order for his confession to be admissible.<sup>300</sup> However, in order to accommodate deep skepticism for the *Miranda* rule within and outside the judiciary, the Supreme Court has weakened the effect of the *Miranda* rule by limiting the remedy available when *Miranda* warn-

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296. See *New Jersey v. T.L.O.*, 469 U.S. 325, 325–26 (1985) (holding that the search of a public school student by a school administrator was reasonable for Fourth Amendment purposes because the administrator possessed reasonable suspicion that the student had cigarettes in her purse).

297. *Id.* at 326.

298. See *Whren v. United States*, 517 U.S. 806, 812 (1996) (declining to adopt a new Fourth Amendment test which would measure the constitutionality of a traffic test by “whether a police officer, acting reasonably, would have made the stop for the reason given”); see also *United States v. Jones*, 132 S. Ct. 945, 953 (2012) (“There is no precedent for the proposition that whether a search has occurred depends on the nature of the crime being investigated.”).

299. For similar reasons, substantive due process is a better source of rights for public school students who are subject to excessive or inhumane discipline. See Lewis M. Wasserman, *Students’ Freedom from Excessive Force by Public School Officials: A Fourth or Fourteenth Amendment Right?*, 21 KAN. J. L. & PUB. POL’Y 35, 35 (2011) (documenting the confusion among courts about which constitutional amendment to use, and endorsing the use of the Fourth Amendment in light of *Graham’s* rule, which requires litigants to use only enumerated rights if one is applicable).

300. *Miranda v. State of Arizona*, 384 U.S. 466, 467 (1966).

ings are not provided. An unwarned but voluntary confession can be used to impeach a criminal defendant who takes the stand and states something that contradicts the earlier confession,<sup>301</sup> and witnesses or physical evidence discovered because of unwarned statements could also be introduced.<sup>302</sup> The greatest retraction of *Miranda*'s force came from *Oregon v. Elstad*.<sup>303</sup> There the Court decided that because the *Miranda* warning is a constitutionally mandated prophylaxis but not a constitutional violation itself, prosecutors can introduce evidence of a defendant's confession even if the defendant had first confessed without *Miranda* warnings, and was subsequently *Mirandized* and led back through the narrative he had just provided.<sup>304</sup> The product of this back-and-forth between pro- and anti-*Miranda* positions was a clear (if not entirely principled) scheme that permitted the police to take full advantage of unwarned confessions short of introducing the un-*Mirandized* confession itself.

This scheme was well established when an enterprising police force in Rolla, Missouri decided to exploit the holding in *Elstad*. The police developed a protocol for custodial interrogation such that officers would routinely extract a confession without *Miranda* warnings and would then *Mirandize* the suspect, seek a waiver, and retrace the same ground to produce an admissible confession.<sup>305</sup> Rolla's was not the only police department to implement this interrogation technique, proving that, contrary to expectations, policemen are perfectly capable "legal technicians."<sup>306</sup> The Court could not stand by and watch the police department "disfigure" the *Elstad* holding and intentionally undermine the effects of the *Miranda* warnings.<sup>307</sup>

However, the facts of *Missouri v. Seibert* presented a challenge to the justices. On many previous occasions the Court had insisted that the subjective mental state of a police officer is not relevant to Fourth and Fifth Amendment criminal procedural rules.<sup>308</sup> Yet here they were clearly disturbed most by the police

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301. *Harris v. New York*, 401 U.S. 222, 225–26 (1971).

302. *Michigan v. Tucker*, 417 U.S. 433, 450–52 (1974).

303. 470 U.S. 298, 308–09 (1985).

304. *Id.*

305. *Missouri v. Seibert*, 542 U.S. 600, 604 (2004).

306. *Illinois v. Gates*, 462 U.S. 213, 231 (1983) (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)).

307. *Seibert*, 542 U.S. at 614.

308. *See Kentucky v. King*, 131 S. Ct. 1849, 1859 (2011) (explaining that a bad faith analysis is "fundamentally inconsistent with our Fourth Amendment jurisprudence").

department's *intentional* exploitation of the rules.<sup>309</sup> Committed to working within the *Miranda* doctrine, the Court decided that the effects of Seibert's unwarned interrogation had not worn off by the time the police *Mirandized* her and asked for a waiver.<sup>310</sup> This sub-rule—this exception to the exception to the suppression remedy—introduces a murky analysis to *Miranda* cases that has little to do with the problem that actually miffed the judges: government conniving. If the Court had chosen instead to work within the outrageousness doctrine of substantive due process, it could have crafted its holding and reasoning to the intentional exploitation of the rules that actually shocked the justices.<sup>311</sup>

More generally, manipulation, venality, and viciousness are not new human vices; but there now are manifold new ways in which they may express themselves that may make official stomach pumping look quaint. Even well-intentioned government actors, though, may be tempted to abuse their authority when offered tools with unprecedented power to detect and possibly prevent crime, terrorism, health and safety threats, fraud, economic disasters, and other social harms more effectively.<sup>312</sup> As ever, the constitutional question will be whether the liberty costs are outweighed by the social benefits. The *Rochin* baseline should be a starting point for that slow and deliberate exploration.

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309. *Seibert*, 542 U.S. at 617 (describing the police as “[s]trategists dedicated to draining the substance out of *Miranda*”).

310. *Id.* at 616–17.

311. Another example comes from *Wilson v. Layne*, 526 U.S. 603, 611–12 (1999), in which the Supreme Court decided that law enforcement officers who bring members of the press with them during the execution of a warrant commit a Fourth Amendment violation. Because police are permitted to bring some civilians with them during a warranted search, the Court had to create a sub-rule within the Fourth Amendment that evaluated the “legitimacy” of the third party observer even though the law enforcement officers complied with the limits of the warrant. *Id.* Since the impropriety had less to do with the validity of the warrant and its execution and more to do with the filming and disclosure of sensitive information from inside the home to the general public, the Court could have (and should have) categorized this abuse of authority as a due process violation.

312. The Court in *Riley v. California* recognized the power of new technology to invade privacy, when it unanimously held that police generally may not, without a warrant, search digital information seized from an individual who has been arrested. 134 S. Ct. 2473 (2014). The government argued strenuously, but unsuccessfully, that the cell phone data was vulnerable to remote wiping that could seriously compromise law enforcement ends. *Id.*

## B. POTENTIAL FOR THE IRRATIONALITY TEST

The rational basis test, too, has untapped potential for courts to tentatively explore constitutional protections against an overbearing government.

Again, the due process floor tests can come to the aid of a sprawling mess of Fourth Amendment rules by offering relief from general police policies that cause foreseeable and unjustified harm to the jurisdiction's residents. Two examples can illustrate the prospects.

First, the section of the Foreign Intelligence Surveillance Act that authorized the bulk collection of cell phone metadata without any accompanying restrictions on use<sup>313</sup> was arguably irrational, especially if the data is as useless as Senator Leahy has claimed it is at detecting and thwarting terrorist plots.<sup>314</sup> Using the rational basis test could save Courts from creating precedents in reaction to the NSA surveillance programs that badly conflict with longstanding Fourth Amendment law until a consistent principle has been identified and articulated.<sup>315</sup>

Second, a police department's *failure* to account for the likely and invidious effects of its practices on the community could be conceived as a failure of substantive due process, even if the individual members of the community would have difficulty proving that the department violated established individual rights.<sup>316</sup> For example, if allegations that U.S. Border Patrol

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313. 50 U.S.C. § 1861 (2001) (amended by Pub. L. No. 107-156, § 215 (2001)) (expired June 1, 2015). The constitutionality of the bulk metadata collection is a bit of a puzzle; federal courts split over whether the program was or was not a violation of the Fourth Amendment, and the Supreme Court did not have the opportunity to clear up the irreconcilable differences in the precedents. See generally Orin Kerr, *What Will Happen to the Section 215 Cases?*, WASH. POST (June 9, 2015), <https://www.washingtonpost.com/news/voikh-conspiracy/wp/2015/06/09/what-will-happen-to-the-section-215-cases>.

314. See Charlie Savage & David E. Sanger, *Senate Panel Presses N.S.A. on Phone Logs*, N.Y. TIMES (July 31, 2013), <http://www.nytimes.com/2013/08/01/us/nsa-surveillance.html> (quoting Senator Patrick J. Leahy).

315. The U.S. District Court for the District of Columbia invalidated the bulk metadata collection program using the Fourth Amendment. *Klayman v. Obama*, 957 F. Supp. 2d 1, 37–42 (D.D.C. 2013). However, the court's decision has irreconcilable conflicts with Fourth Amendment precedent establishing the third party doctrine and the national security exceptions. See, e.g., *United States v. Miller*, 425 U.S. 435, 444 (1976) (establishing the third party doctrine); see also *United States v. U.S. District Court for E. Dist. of Mich.*, S. Div., 407 U.S. 297, 321 (1972) (establishing a qualified exception to Fourth Amendment protections when the government is investigating a national security risk).

316. Gillian Metzger has identified and praised a range of efforts among federal agencies to engage in their own form of "constitutionalism"—that is, their own attempts to provide guidance and responsibly administer their func-

has systematically ignored complaints of unjustified seizures or uses of force, that history could create a basis for a challenge.<sup>317</sup> Likewise, the City of New York Civilian Complaint Review Board's report finding that the New York Police Department failed to enforce its own policy against the use of chokeholds for a sustained period of time should create a basis for a due process challenge.<sup>318</sup> More generally, a department's consistent failure to monitor and penalize its agents when they abuse their powers irrationally promotes poor behavior and could be a basis for a substantive due process challenge. Charles Sabel and William Simon have nicely described the course of justice in the criminal law enforcement context by noting that while first-generation problems typically involve single bad actor abuses of power (intentionally harmful conduct), the next generation of problems involves bureaucratic abuses of power and willful neglect.<sup>319</sup>

As the Fifth Circuit's rational basis case on the restriction of coffin sales shows, the irrationality test also has the potential to affect economic regulations not because they interfere with an individual right to laissez-faire economic freedoms, but because they fail to promote public welfare on *any* political or economic philosophical account. This type of due process argu-

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tions with an eye toward constitutional values. *See generally* Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897 (2013). Metzger may oversell the value and independence of administrative efforts to interpret the Constitution, but to the extent such exercises are useful, the Due Process Clause can supply a source of recourse if a federal or local agency *fails* to make some minimal efforts at designing systems that are consistent with constitutional values.

317. Brian Bennett, *Border Patrol Agents Rarely Disciplined in Abuse Cases, Records Show*, L.A. TIMES (May 9, 2014), <http://www.latimes.com/nation/la-na-border-force-20140510-story.html> (finding that only 13 out of 809 abuse complaints sent to the agency's internal affairs unit resulted in discipline).

318. CITY OF N.Y. CIVILIAN COMPLAINT REVIEW BD., *A MUTATED RULE: LACK OF ENFORCEMENT IN THE FACE OF PERSISTENT CHOKEHOLD COMPLAINTS IN NEW YORK CITY: AN EVALUATION OF CHOKEHOLD ALLEGATIONS AGAINST MEMBERS OF THE N.Y.P.D. FROM JANUARY 2009 THROUGH JUNE 2014* (2014), [http://www.nyc.gov/html/ccrb/downloads/pdf/Chokehold%20Study\\_20141007.pdf](http://www.nyc.gov/html/ccrb/downloads/pdf/Chokehold%20Study_20141007.pdf).

319. Charles F. Sabel & William H. Simon, *Due Process of Administration: The Problem of Police Accountability*, 33 YALE J. REG. (forthcoming 2016). The authors embrace the Due Process Clause as a potential source of remedies. *Id.* at \*3 ("The duty of responsible administration might have been derived through judicial interpretation of the constitutional due process clauses . . ."). *But see* *Withrow v. Larkin*, 421 U.S. 35, 52 (1975) (upholding agency procedure that combined prosecutorial and adjudicative functions in a due process and separation of powers challenge, on grounds that "[t]he incredible variety of administrative [systems] in this country will not yield to any organizing principle").

ment could be useful in current legal controversies related to the (arguably) needless licensing required to provide teeth whitening services<sup>320</sup> or to bans of direct sales of Tesla automobiles.<sup>321</sup>

These applications may never grow to be as robust as the due process and equal protection rights developed in the gay rights cases. Those cases model the most formidable buildup of protections stemming from the rational basis test. Norms and tolerance shifted slowly. During that shift, the fluidity and government-deferential posture of a rational basis test made intellectual, normative, and pragmatic sense.

In other areas courts likewise may begin with caution and reserve that comes automatically with the rational basis test and move organically to identify specific examples where a more solidified, “fundamental rights” approach may be warranted. However, this refinement and solidification of more robust rights may never be appropriate in some contexts. Indeed, unlike sexual orientation classifications—which now fit comfortably into a “presumptively irrational” silo—due process challenges to systems of law enforcement or to economic regulations will cover too much regulatory territory, with too many contextual variations, to make a monolithic declaration of presumptively protected rights or groups. Thus, retaining the versatile due process floor is likely to prove particularly useful in dealing with what is arguably the single most important modern constitutional problem: balancing individual liberties with legitimate government regulatory power.

We do not here support any shift or expansion in due process methodology, or endorse any particular due process rights outcomes that might flow more easily from such a shift than from the current doctrine. Rather, our purpose is to underscore that these rational basis cases already are part of the due process doctrine<sup>322</sup> and lend recent support to our argument that

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320. North Carolina Bd. of Dental Exam'rs. v. F.T.C., No. 13-534, slip op. at 2 (U.S. Feb. 25, 2015) (holding that a state dental board did not qualify for *Parker* doctrine immunity from antitrust laws because the state did not actively regulate the board, which was composed of market participants).

321. H.B. 5606, 97th Leg., Reg. Sess. (Mich. 2014); see John Voelcker, *Tesla Direct Sales Ban in Michigan Called “Corrupt Politics at Its Worst,”* CHRISTIAN SCI. MONITOR (Oct. 22, 2014), <http://www.csmonitor.com/Business/In-Gear/2014/1022/Tesla-direct-sales-ban-in-Michigan-called-corrupt-politics-at-its-worst> (reporting criticism of Michigan’s ban on the direct sale of Tesla automobiles).

322. See *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 433 (1985) (striking down a restrictive special use permit requirement as irrational under equal protection); see also *Armour v. Indianapolis*, 132 S. Ct. 2073, 2084–85

the rare use of the rational basis floor to overturn laws on the ground that they violate baseline principles of liberty and respect is sensible, even inevitable.<sup>323</sup>

### CONCLUSION

In *Sister Mary Ignatius Explains It All For You*, the lead character is a nun who stands in front of the audience and answers hard questions about Catholic dogma and faith in general.<sup>325</sup> She holds a stack of note cards with queries, and primly and confidently responds to them.<sup>326</sup> One card asks, “Are all our prayers answered?”<sup>327</sup> Sister Mary Ignatius responds, “Yes, they are! What people who ask that question often don’t realize is that sometimes the answer to our prayers is ‘no.’”<sup>328</sup>

Legal challenges to outrageous or irrational state conduct are a lot like our heavenly appeals: the answer is usually “no.” Perhaps this is why legal claims often are framed as *prayers* for relief—they betray a faith that the worst injustices might be redressed by a higher power.<sup>329</sup> The outrageousness and ration-

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(2012) (Roberts, J., dissenting) (arguing that the Board of Public Works assessment scheme was irrational under equal protection); *Plyler v. Doe*, 457 U.S. 202, 203 (1987) (plurality opinion) (striking down the denial of funding for public education for children of non-documented persons for being irrational under equal protection); *Dep’t of Agric. v. Moreno*, 413 U.S. 528 (1973) (holding that the “unrelated” person provision was irrelevant to the stated purpose of the Food Stamp Act and violated the Fifth Amendment Due Process Clause); *cf. Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1067 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 889 (holding that even under rational basis review of equal protection, there was no legitimate interest rationally related to state decision to treat Deferred Action for Childhood Arrivals immigrants differently from other citizens who were allowed to use Employment Authorization Documents as proof of authorized presence in United States when applying for a driver’s license).

323. As Victoria Nourse correctly observes, the need for “balance between the needs of individuals and the needs of the common welfare . . . has not disappeared: one can see its resurgence in a number of areas of current substantive due process law.” Nourse, *supra* note 19, at 798.

325. CHRISTOPHER DURANG, *SISTER MARY IGNATIUS EXPLAINS IT ALL FOR YOU, AND THE ACTOR’S NIGHTMARE* (Dramatists Play Serv., Inc., rev. ed. 1995) (1980).

326. Well, all but one. The one unanswered card asks: “If God is all powerful, why does He allow evil in the world?” The nun reads the question aloud, and then wordlessly places the note card back at the bottom of the stack. This moment in the play, which recurs, is hilarious—in a dark way, of course. *Id.* at 32, 35.

327. *Id.* at 37.

328. *Id.*

329. Put more eloquently, as only Cardozo could:

By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in re-



al basis tests are built on that faith and serve important expressive, remedial, and occasionally generative ends.

Both tests have suffered from the effects of popular misunderstanding and undeserved mistrust. The judicial practice of the last half-century disproves the dire predictions of judicial overuse that currently blight their reputations.

In fact, the outrageous and irrational tests share three enduring features: they police the worst-case scenarios of government abuse; they are highly context-specific standards that defy formalistic summary; and, occasionally, their claimants succeed.

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serve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith.

BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 93 (1921).