

ARTICLES

REVIVING HUGO BLACK? THE COURT'S "JOT FOR JOT" ACCOUNT OF SUBSTANTIVE DUE PROCESS

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In Graham v. Connor, the United States Supreme Court held that the Fourth Amendment effectively preempts any substantive due process claims that law enforcement officers used excessive force in the course of an arrest. Graham's disarmingly simple rationale was that an explicit textual provision trumps a more general constitutional provision. Professor Massaro argues that this rationale, as subsequently invoked by the Supreme Court and expansively applied by the lower courts in First, Fourth, Fifth, and Eighth Amendment cases, may ultimately have a pervasive impact on substantive due process. At the very least, the logic of Graham requires that substantive due process be confined to its current doctrinal limits. Carried to its furthest extreme, Graham requires overruling the Court's substantive due process "unenumerated rights" caselaw altogether. The author argues that Graham is an analytical and doctrinal oddity, inconsistent with well-accepted and regularly enforced principles of constitutional interpretation, that should be overruled rather than used to revive Hugo Black's "jot for jot" account of substantive due process.

Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.

—Graham v. Connor, 490 U.S. 386, 395 (1989)

[H]istory conclusively demonstrates that the language of the first section of the Fourteenth Amendment . . . guarantee[s] that . . . no state [can] deprive its citizens of the privileges and protections of the Bill of Rights. . . . And I further contend that the "natural law" formula which the Court uses . . . subtly conveys to courts, at the expense of legislatures, ultimate power over public policies in fields

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where *no specific provision* of the Constitution limits legislative power.

—*Adamson v. California*, 332 U.S. 46, 74-75 (1947) (Black, J., dissenting) (emphasis added)

In *Graham v. Connor*,¹ the United States Supreme Court held that the Fourth Amendment effectively preempts any substantive due process claim that law enforcement officers used excessive force in the course of an arrest. The rationale was a disarmingly simple principle of statutory interpretation: an explicit textual provision “on point”—here, the Fourth Amendment—trumps any more general provisions of the Constitution.² This trumping move displaces only one general provision: substantive due process.

The 1989 case excited very little law review commentary,³ received glancing or no attention in the leading constitutional law treatises,⁴ and at first seemed to have no effect beyond the factual scenario of excessive force cases. In 1994, however, the Court, in *Albright v. Oliver*,⁵ invoked *Graham* in a malicious prosecution scenario to preclude the plaintiff from raising a substantive due process claim where the Fourth Amendment arguably covered the terrain. In 1997, the Court applied *Graham* in an Eighth Amendment case,

¹ 490 U.S. 386 (1989).

² See *id.* at 395.

³ See Michael J. Phillips, The Nonprivacy Applications of Substantive Due Process, 21 Rutgers L.J. 537, 554-55 (1990) (noting *Graham*, but reading it narrowly to preserve use of substantive due process in some excessive force cases). A handful of commentators noticed *Graham* only after it was applied by the Court in *Albright v. Oliver*, 510 U.S. 266, 273-74 (1994) (plurality opinion). See, e.g., James Lank, The *Graham* Doctrine as a Weapon Against Substantive Due Process: *Albright v. Oliver*, 114 S. Ct. 807 (1994), 17 Harv. J.L. & Pub. Pol’y 918, 918 (1994) (noting potential of *Graham*, as interpreted, to be “a powerful tool in disposing of future substantive due process claims”); Martin A. Schwartz, Section 1983 Litigation, 11 Touro L. Rev. 299, 304 (1995) (discussing *Graham* after *Albright*); Michael T. Carton, Note, 25 Seton Hall L. Rev. 1560, 1573-75, 1589 (1995) (same); John T. Ryan, Jr., Note, Malicious Prosecution Claims Under Section 1983: Do Citizens Have Federal Recourse?, 64 Geo. Wash. L. Rev. 776, 797 (1996) (same); Eric J. Wunsch, Note, Fourth Amendment and Fourteenth Amendment—Malicious Prosecution and § 1983: Is There a Constitutional Violation Remediable Under Section 1983?, 85 J. Crim. L. & Criminology 878, 902 (1995) (same).

⁴ Laurence Tribe’s Second Edition of American Constitutional Law was published in 1988, the year before *Graham*. See Laurence H. Tribe, American Constitutional Law (2d ed. 1988). John E. Nowak & Ronald D. Rotunda, Constitutional Law (5th ed. 1995), does not cite *Graham*. Erwin Chemerinsky’s 1997 constitutional law treatise alone cites *Graham*, stating simply that “claims against the police for excessive force or impermissible use of deadly force cannot be brought under the due process clause.” Erwin Chemerinsky, Constitutional Law: Principles and Policies § 7.3.4, at 448 (1st ed. 1997).

⁵ 510 U.S. 266 (1994) (plurality opinion). At least one constitutional law casebook briefly took note of *Albright*, see Daniel Farber et al., Supplement to Cases and Materials on Constitutional Law 142 (1997), but omitted the case in the second edition of the text. See David Farber et al., Cases and Materials on Constitutional Law (2d ed. 1998).

United States v. Lanier.⁶ *Graham* thus has crept beyond the excessive force context⁷ and may ultimately have a pervasive impact on substantive due process in ways belied by the scant attention paid it by commentators.

There is reason to believe that this impact will occur if one consults emerging lower court caselaw invoking *Graham*. Unlike constitutional law scholars, the lower courts definitely have discovered *Graham* and have applied its logic in First, Fourth, Fifth, and Eighth Amendment cases.⁸ Indeed, it was one of these decisions that first drew my attention to this little-noticed corner of due process law. A former student who was researching a case pending before the Court of Appeals for the Ninth Circuit asked whether *Graham* applied in a takings scenario. Much to my surprise, and to the student's, the appellate court ultimately held that *Graham* *did* apply to takings cases.⁹ After reading *Graham*, I had to concede that this interpretation of *Graham* was entirely plausible, if not the best reading of the decision.¹⁰ Nothing in *Graham* suggests that the Court's preemptive approach to substantive due process should apply only to Fourth

⁶ 117 S. Ct. 1219, 1228 n.7 (1997) ("*Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.>").

⁷ Last term, the Court decided *County of Sacramento v. Lewis*, 118 S. Ct. 1708 (1998), which determined that substantive due process analysis was not foreclosed by the Fourth Amendment in the context of reckless high-speed police pursuits of criminal suspects. The Court held that the Fourth Amendment was inapplicable, thus precluding a *Graham* analysis, because no "search" or "seizure" occurs when police unintentionally injure a bystander during a high-speed pursuit of a criminal suspect. See *id.* at 1713.

⁸ See, e.g., *Ivey v. Yeager*, No. 97-1627, 1998 WL 153413, at *1 (4th Cir. Apr. 3, 1998) (First Amendment and procedural due process); *Mays v. City of East St. Louis*, 123 F.3d 999 (7th Cir. 1997) (Fourth Amendment); *Riley v. Dorton*, 115 F.3d 1159 (4th Cir. 1997) (Fourth, Fifth, and Eighth Amendments); *Yassini v. City of Sunnyvale, C.A.* No. 95-16942, 1996 U.S. App. LEXIS 32929, at *3 (9th Cir. Nov. 6, 1996) (First Amendment); *Tinney v. Shores*, 77 F.3d 378 (11th Cir. 1996) (Fourth Amendment); *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996) (en banc) (Fifth Amendment); *Holman v. Page*, 95 F.3d 481 (7th Cir. 1996) (Eighth Amendment); *Gehl Group v. Koby*, 63 F.3d 1528 (10th Cir. 1995) (First Amendment); *Magill v. Lee County*, No. CIV.A. 96-A-1140-E, CIV.A. 97-A-25-E, 1998 WL 24257, at *4, (M.D. Ala. Jan. 20, 1998) (Fourth Amendment); see also *infra* text accompanying notes 64-68.

⁹ See *Armendariz*, 75 F.3d at 1311; see also *infra* text accompanying notes 69-72.

¹⁰ See *infra* text accompanying notes 78-119 for a discussion of how *Graham* might have been distinguished in the takings case; see also *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131, 2146-53 (1998), the Court's most recent regulatory takings case, which discusses both the Takings Clause and substantive due process, with no mention whatsoever of *Graham*.

Amendment cases. Rather, *Graham* seems to apply to *all* substantive due process inquiries.¹¹

The appeal of *Graham*'s preemptive approach is obvious: The Court has never articulated a fully persuasive or coherent rationale for its substantive due process doctrine, especially in its unenumerated rights cases, and stands in the long shadow of *Lochner*¹² whenever it extends substantive due process principles to new scenarios. Hewing to the express, incorporated Bill of Rights provisions and their caselaw elaborations gives the Court sturdier (though hardly unassailable) authority to act under the Fourteenth Amendment, as well as fairly established guideposts for exercising that authority. Such a cause also fastens the hatch on at least some "new" substantive due

¹¹ Thus, four primary categories of substantive due process claims may now exist: (1) claims that invoke enumerated rights incorporated into the Fourteenth Amendment; (2) claims that assert the addition of unenumerated, fundamental rights already deemed protected by the Fourteenth Amendment; (3) claims of an arbitrary exercise of government power that do not implicate a fundamental right (enumerated or unenumerated); and (4) claims that assert a "right" in factual circumstances that also implicate an enumerated right, in which case the incorporated, specific provision "occupies the field" and preempts any overlapping, inconsistent, or supplemental protection under substantive due process. So, for example, if an arrest is unlawful under the Fourth Amendment, it cannot also be unlawful under substantive due process, though it may violate other constitutional provisions, including equal protection. More importantly, for practical purposes, if the arrest is lawful under the Fourth Amendment, it cannot be unlawful under substantive due process, though it may violate other constitutional provisions.

For more nuanced subcategories of substantive due process, see Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 Colum. L. Rev. 309, 309 (1993) (sorting through due process law to promote analytical clarity and doctrinal coherence by exposing confusions).

Not clear is whether a new, unenumerated substantive due process claim that bears a resemblance to an already recognized, unenumerated fundamental right is also logically precluded under *Graham*. For example, would a new claim that purports to expand on existing privacy doctrine be read as an undue expansion of the vague contours of substantive due process? The same "vagueness" concerns that animated *Graham* would be present in such a case, but the case would not entail the "explicit textual" provision alternative that *Graham* says preempts the due process analysis. Yet it seems odd to allow a proliferation of due process claims when no specific text exists that addresses the same concern, but to disallow any due process claims when a specific text seems to address the circumstances. The *Graham* limitation may not apply to a case involving the expansion of an already identified unenumerated right, but the matter is unclear. This complexity has come to the attention of the lower courts. See, e.g., *Heidorf v. Town of Northumberland*, 985 F. Supp. 250, 256-57 (N.D.N.Y. 1997) (concluding that procedural due process component of due process clause is not type of specific, separate source of constitutional protection that should trigger *Graham*'s foreclosure of substantive due process).

¹² *Lochner v. New York*, 198 U.S. 45, 45 (1905) (striking labor law and holding that Fourteenth Amendment substantive due process protects general right to contract). The *Lochner* era has been looked upon by the Court as a dark period in its history. See *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965) ("Overtones of some arguments suggest that *Lochner* . . . should be our guide. But we decline that invitation . . . We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions.").

process claims—those that fall into the factual zone, if not the clear doctrinal embrace, of an enumerated right—and thereby appeals to those justices and judges who likely would, if not for *stare decisis*, happily pitch substantive due process caselaw altogether.¹³

Despite these attractions to advocates of a constrained Due Process Clause, however, *Graham* is an analytical and doctrinal oddity. As I will explain, the opinion suffers from several flaws, some minor and some potentially quite major. The minor flaws are that the case conflicts with the Court's consistently enforced general practice of allowing a plaintiff to seek relief under multiple constitutional theories,¹⁴ asserts an unconvincing justification for crafting this isolated exception,¹⁵ and may create unanticipated interpretation complexities as courts and litigants struggle to determine whether *Graham* applies whenever a factual scenario is "covered" by a specific amendment—versus "covered" by the law under that amendment—and what that means.

These objections, however, are of mere aesthetic interest (in an area of law hardly distinguished by its aesthetics) if the case causes no real mischief. Why should anyone care if *Graham* departs from constitutional interpretation etiquette, or seems inconsistent with other caselaw, if it causes no harm? Wouldn't the specific amendment in question do an adequate, if sometimes incomplete, job of responding to the relevant constitutional concerns?

I argue here that *Graham* may cause harm, despite its superficially benign and contained appearance, in at least two ways. First,

¹³ Justice Scalia falls into this category. See, e.g., *Albright v. Oliver*, 510 U.S. 266, 275 (1994) (Scalia, J., concurring) (rejecting "the proposition that the Due Process Clause guarantees certain (unspecified) liberties, rather than merely guarantees certain procedures as a prerequisite to deprivation of liberty"); see also Raoul Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* 221-22 (2d ed. 1997) (noting that whatever due process means "'precisely', . . . it did not comprehend judicial power to override legislation on substantive or policy grounds"); Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 32 (1990) (arguing for similarly constrained view of due process); John Hart Ely, *Democracy and Distrust* 18 (1980) (arguing that substantive due process is "contradiction in terms").

¹⁴ See *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993) ("We have rejected the view that the applicability of one constitutional amendment pre-empt[s] the guarantees of another."); see also *infra* text accompanying notes 128-134.

¹⁵ See *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) ("Appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful 'respect for the teachings of history [and] solid recognition of the basic values that underlie our society.'" (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J., concurring))). That other, specific constitutional provisions likewise may apply in a case that triggers substantive due process may support a conclusion that similar constitutional standards should apply to all such provisions; but it in no way justifies a holding that substantive due process analysis is foreclosed by other amendments that may address overlapping concerns.

and most obviously, cases that invoke *Graham* do so to disallow a substantive due process inquiry, usually where the preferred specific textual provision yields little or no protection for the party invoking it.¹⁶ This is inconsistent with the Court's long-standing prudential inclination to reserve, but rarely exercise, judicial review authority.¹⁷ *Graham* departs from this judicial strategy by incautiously asserting that specific text categorically trumps any vague substantive due process claim. If one favors cabinining constitutional rights then this result is of course undisturbing, even welcome. But if one worries about government excesses that might elude specific Bill of Rights protections, and if one favors preservation of the substantive due process option for monitoring such excesses, then the result is cause for concern.

There is a second, far more troubling impact of *Graham*: The logic of *Graham* requires that substantive due process be confined to its current doctrinal limits, at the very least, and, carried to its furthest extreme, requires overruling the Court's substantive due process "unenumerated rights" caselaw altogether. As I will explain, *Graham* was actually an unenumerated rights case in which the Court subtly elided, rather than confronted, the substantive due process inquiry. It treated the Bill of Rights as the outer constraint on substantive due process possibilities, holding that whenever the Bill of Rights arguably covers the factual terrain in question, and even if the Bill of Rights offers no relief, then substantive due process yields.

Thus, *Graham* underscores a major tension within substantive due process doctrine that has gone undetected. The logic of *Graham* strains against the competing logic of the Court's unenumerated rights caselaw—a logic that continues to be intoned by the current Court—and produces a fissure that may ultimately compromise the stability of unenumerated rights jurisprudence altogether. *Graham* adds another layer to the Court's resistance to *any* new substantive due process claims, and is being given expansive effect by the lower courts.¹⁸ As

¹⁶ For example, lower courts that applied *Graham* to high-speed chase scenarios used the specific text of the Fourth Amendment to foreclose any claim that a reckless pursuit that causes severe injury is unconstitutional. See, e.g., *Mays v. City of East St. Louis*, 123 F.3d 999, 1002-03 (7th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3577 (U.S. Feb. 20, 1998) (No. 97-1388) (invoking *Graham* to block substantive due process claim where court determined Fourth Amendment offered no protection against harm from "reckless pursuit" of criminal suspects).

¹⁷ In a tradition dating back to Justice John Marshall, the Court has tended to husband, but exercise infrequently, pockets of judicial power for future scenarios. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), is the best known, and most striking, example of this practice.

¹⁸ See *supra* note 8.

lower court caselaw increases, precedential and practical momentum builds for rejecting unenumerated rights caselaw as a matter of doctrinal logic. The Court, heretofore unwilling to overturn settled expectations created by past caselaw, may rethink its approach if it can recite significant and fairly uniform lower court precedent that expressly rejects an expansive account of substantive due process and implicitly renounces the concept altogether. The shift would then appear less a matter of Supreme Court fiat than a matter of organic, lower court practice. Given this potential impact, *Graham* and its applications deserve closer scrutiny than they have received to date.

I

INROADS INTO SUBSTANTIVE DUE PROCESS

A. *Graham v. Connor*¹⁹

The *Graham* preemption rule first appeared in a criminal case, an area in which the Rehnquist Court seems particularly unwilling to expand constitutional rights. Thus, it initially made sense for commentators to assume that *Graham* was not an expression of hostility to substantive due process per se, but to Warren Court expansions of constitutional criminal procedure rights in particular, and, more broadly, to the proliferation of tort-based causes of action arising under section 1983.²⁰

The facts of *Graham* also may have made the preclusion of a substantive due process layer of protection seem unremarkable, even desirable, to some observers. The police conduct in *Graham* involved an investigatory stop of a suspect in a robbery which resulted in physical violence to the suspect.²¹ The injured suspect filed a section 1983 suit

¹⁹ 490 U.S. 386 (1989).

²⁰ Another explanation for the lack of attention paid to the case by standard constitutional law texts may be that, since the sixties, constitutional criminal procedure has been treated as a subject separate from basic constitutional law materials and courses. Thus, many constitutional law scholars who do not also study criminal procedure simply may have missed the case. See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963, 1012-13 (1998) (describing effects on new generation of criminal procedure cases from constitutional law casebooks of constitutional scholars).

²¹ See *Graham*, 490 U.S. at 389-90. A police officer stopped Graham on the suspicion that Graham had robbed a nearby convenience store. Graham, a diabetic, had entered and left the store rapidly because he sensed the onset of an insulin reaction. He claimed that he intended to purchase orange juice to forestall the reaction but hurried out of the store when he saw the long line at the counter. The officer who detained Graham instructed Graham to wait while he ascertained whether the store had been robbed. Back-up officers arrived at the scene and held Graham while the original officer returned to the convenience store. While waiting, Graham passed out briefly, then regained consciousness. He attempted to explain his medical condition to the back-up officers and asked them to look at a diabetic decal that he carried in his wallet. Instead, one officer ordered Graham to

against the officers, alleging that their use of excessive force in the course of the arrest violated both his Fourth Amendment and substantive due process rights.²² The Court held that the Fourth Amendment's objective "reasonableness" standard governed the section 1983 excessive force claim, so no additional or different standard under substantive due process could be invoked to challenge the police conduct.²³ The specific textual provisions of the Fourth Amendment alone governed the arrest, and hence, all allegations of excessive force in the context of the arrest or the investigatory stop.²⁴

*B. Application of Graham in Albright v. Oliver*²⁵

The Court revisited *Graham* five years later in *Albright v. Oliver*, a malicious prosecution case. The plaintiff in *Albright* filed a section 1983 suit against detective Roger Oliver, who testified at a preliminary hearing that Albright sold a "look-alike" substance to undercover informant Veda Moore.²⁶ Moore, Albright later discovered, had made accusations against fifty other people, none of whom had been successfully prosecuted for any crime. The detective agreed to provide Moore, a cocaine addict, with protection from a dealer in exchange for her assistance as an informant.²⁷ Albright sued on the ground that the government's reliance on such an untrustworthy informant violated his liberty interest in freedom from prosecution except upon probable cause.²⁸ The Court concluded that Albright's substantive due process claim was foreclosed by the Fourth Amendment even though Albright had not raised a Fourth Amendment argument. The Court found that the Fourth Amendment is the sole measure of the constitutionality of a pretrial deprivation of liberty.²⁹ That is, the logic of *Graham* applied to *all* Fourth Amendment scenarios, not merely excessive force cases.³⁰ In Chief Justice Rehnquist's words, "[T]he Court has always been reluctant to expand the concept

shut up and slammed his head against a car. Other officers then shoved Graham head-first into a police car. Graham suffered a broken foot, head and shoulder injuries, and lacerations on his head. See *id.* at 388-90.

²² See *id.* at 390.

²³ See *id.* at 395.

²⁴ See *id.*

²⁵ 510 U.S. 266 (1994) (plurality opinion).

²⁶ See *id.* at 268 n.1.

²⁷ See *id.* at 292 n.3 (Stevens, J., dissenting).

²⁸ See *id.* at 269.

²⁹ See *id.* at 268-71. The plurality did not decide the Fourth Amendment claim on the merits because the question was not presented to the Court.

³⁰ See *id.* at 273-74.

of substantive due process because the guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.”³¹

The justices in *Albright* split on the analysis of the case, but not on the result. Justice Ginsburg concurred in the result, but went on to address the merits of Albright’s unasserted Fourth Amendment claim.³² She argued that use of false or misleading testimony as a basis for an arrest warrant may violate the Fourth Amendment in certain cases and suggested that the reason Albright failed to assert a Fourth Amendment claim was that he mistakenly assumed none would apply in his case.³³ She did not object, however, to the argument that when the Fourth Amendment applies, substantive due process cannot also apply.³⁴

Justice Souter concurred on the narrower ground that the specific facts of Albright’s case raised no substantive due process claim.³⁵ Souter believed that any injuries to Albright flowed solely from his wrongful arrest and were not compounded by the use of false or misleading testimony at any other stage in his prosecution.³⁶ Although Souter rejected the argument that a specific constitutional provision necessarily preempts another, more general one,³⁷ he agreed that the Fourth Amendment was the appropriate measure of the constitutionality of Albright’s arrest as a matter of judicial restraint.³⁸ He cautioned, however, that in other cases where the assertion of baseless charges against an arrestee causes damage that would not necessarily have flowed from the arrest alone, substantive due process might apply.³⁹ Essentially, Souter preserved a substantive due process envelope of protection around the pretrial stages of prosecution that are *not* covered by the Fourth Amendment, to ensure that any abuse of

³¹ Id. at 271-72 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

³² See id. at 276-81 (Ginsburg, J., concurring).

³³ See id. at 276-79. She essentially proposed a “continuing seizure” account of the Fourth Amendment, under which Fourth Amendment protections extend to the end of trial. See id. at 278-81.

³⁴ See id. at 281.

³⁵ See id. at 286, 291 (Souter, J., concurring).

³⁶ See id. at 289.

³⁷ See id. at 286:

The Court has previously rejected the proposition that the Constitution’s application to a general subject (like prosecution) is necessarily exhausted by protection under particular textual guarantees addressing specific events within that subject (like search and seizure), on a theory that one specific constitutional provision can pre-empt a broad field as against another more general one.

³⁸ See id. at 287 (“We are . . . required by ‘[t]he doctrine of judicial self-restraint . . . to exercise the utmost care whenever we are asked to break new ground in [the] field’ of substantive due process.” (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992))).

³⁹ See id. at 291.

official authority in these stages would trigger judicial review. According to Souter, where the Fourth Amendment applies to a factual situation, it alone determines the applicable constitutional standard, but only as a matter of judicial restraint, not one of textual command.⁴⁰

Justice Kennedy, joined by Justice Thomas, likewise agreed that the Fourth Amendment is the measure of the constitutionality of an arrest without probable cause.⁴¹ But Kennedy argued that Albright was not challenging his arrest *per se*; rather, he was challenging the decision to charge and prosecute him. As to that decision, a substantive due process challenge was appropriate, unless the state provided an adequate state law remedy, which Kennedy concluded was available in Albright's case.⁴² In other words, the availability of the state law remedy, not the Fourth Amendment, "foreclosed" Albright's specific substantive due process claims.⁴³

Justice Scalia likewise concurred in the result based on *Graham's* preclusion principle.⁴⁴ But he also noted his oft-expressed opposition to substantive due process *per se* as an additional reason to reject any expansions of the doctrine.⁴⁵

C. *The Doctrinal Split*

The Court recently distinguished *Graham* in *County of Sacramento v. Lewis*,⁴⁶ where the Court held that the Fourth Amendment did not apply to high-speed pursuit of suspects by law enforcement officers and thus did not foreclose a substantive due process claim.⁴⁷ The Ninth Circuit Court of Appeals had decided that the Fourth Amendment governs only the intentional pursuit of a suspect, not unintentional harm that may be inflicted on a bystander while pursuing a suspect.⁴⁸

⁴⁰ See *id.* at 287.

⁴¹ See *id.* at 281 (Kennedy, J., concurring).

⁴² See *id.* at 283-86 (noting that availability of Illinois tort remedy for malicious prosecution makes it unnecessary to undertake due process inquiry).

⁴³ This latter approach is derived from the infamous inmate hobby kit case, *Parratt v. Taylor*, 451 U.S. 527 (1981), overruled on alternate grounds by *Daniels v. Williams*, 474 U.S. 327 (1986). *Parratt* echoed the sentiment expressed in *Paul v. Davis*, 424 U.S. 693 (1976), that due process is not a "font of tort law" that enables every citizen with a grievance against a state official to literally make a federal case out of it. *Id.* at 701.

⁴⁴ See Albright, 510 U.S. at 275 (Scalia, J., concurring).

⁴⁵ See *id.*

⁴⁶ 118 S. Ct. 1708 (1998).

⁴⁷ See *id.* at 1713.

⁴⁸ See *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996), *aff'd*, 118 S. Ct. 1708 (1998). As the court stated, it is often "undisputed that [the officer] did not intend to hit [the victim] with his patrol car." See *id.* at 438 n.3. The substantive due process issue

The Ninth Circuit's approach departed sharply from that of the Seventh Circuit, which concluded in *Mays v. City of East St. Louis*⁴⁹ that the Fourth Amendment does preclude the due process inquiry in high-speed chase cases.⁵⁰ The most provocative aspect of the Seventh Circuit opinion, however, was not the application of *Graham* to high-speed chases, but Judge Easterbrook's sweeping rationale for concluding that a substantive due process claim was unavailable.

Judge Easterbrook first observed that "'substantive due process' is an oxymoron,"⁵¹ joining Justice Scalia and others who have expressed a similar view,⁵² and concluding that "due process" should have no force beyond procedural due process cases.⁵³ He then asserted a narrower objection to the substantive due process claim—specifically, that substantive due process protects only rights that are both "fundamental" and that our nation's legal traditions and practices recognize as a "*specific* limitation on governmental action with respect to a *specific* right."⁵⁴ *Graham* enforces the latter restriction, he argued, because it insists that the specific limitations found in the Bill of Rights trump any more general due process inquiry.⁵⁵ In closing his opinion, he returned to his far more fundamental objection to substantive due process, offering an extended explanation of why our "social and legal traditions" do not give citizens injured in a high-

before the Supreme Court was whether the applicable standard of conduct under the Fourteenth Amendment is "reckless indifference," "shocks the conscience," "gross negligence," or some other standard. See *id.* at 439. The appellate court ultimately seized upon "deliberate indifference to, or reckless disregard for, a person's right to life and personal security" as the applicable standard. *Id.* at 441; see *Mays v. City of East St. Louis*, 123 F.3d 999, 1002 (7th Cir. 1997) (holding substantive due process inapplicable given Fourth Amendment's applicability). But see *Evans v. Avery*, 100 F.3d 1033, 1036, 1038 (1st Cir. 1996) (allowing substantive due process inquiry and applying "shocks the conscience" standard of review); *Williams v. Denver*, 99 F.3d 1009, 1015 (10th Cir. 1996) (applying "shocks the conscience" standard of review); *Foy v. City of Berea*, 58 F.3d 227, 232 (6th Cir. 1995) (modifying 6th Circuit's standard and applying "deliberate indifference" standard of review); *Fagan v. City of Vineland*, 22 F.3d 1296, 1308 (3d Cir. 1994) (en banc) (applying "shocks the conscience" standard of review); *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 720 (4th Cir. 1991) (same); *Jones v. Sherrill*, 827 F.2d 1102, 1106 (6th Cir. 1987) (applying "reckless indifference" standard of review); *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986) (applying "shocks the conscience" standard of review).

⁴⁹ 123 F.3d 999, 1002 (7th Cir. 1997).

⁵⁰ See *id.* at 1002.

⁵¹ *Id.* at 1001.

⁵² See *supra* note 13.

⁵³ See *Mays*, 123 F.3d at 1002-03.

⁵⁴ *Id.* at 1002 (emphasis added).

⁵⁵ See *id.* The Fourth Amendment applies to high-speed chase scenarios, according to Judge Easterbrook, because the scope of a "search and seizure" under the Fourth Amendment includes the chase as part of an attempt to make an arrest. Because the Fourth Amendment covers this spatial and temporal territory, substantive due process does not. See *id.* at 1003-04.

speed chase “a legal right—as opposed to a moral claim” to protection from harm that may flow from the reckless pursuit of escaping criminals.⁵⁶ If the Fourth Amendment preempted the due process inquiry, as he had already stated, then this disposition on the merits of the due process issue was plainly unnecessary.

Although the Supreme Court ultimately sided with the Ninth Circuit on the issue of whether *Graham* foreclosed a substantive due process analysis of a high-speed pursuit, Judge Easterbrook’s opinion in *Mays* is actually far more consistent with the logic of *Graham* than is *Lewis*. As I will show, objections to substantive due process per se, not *expressio unius* textual construction, or a clause-specific concern about judicial competence to interpret vague constitutional provisions, best explain both *Mays* and *Graham*. Consequently, insofar as the Court in *Lewis* imposed a “shocks the conscience” substantive due process restraint on high-speed chases,⁵⁷ it is very difficult to square with *Graham*’s implicit renunciation of unenumerated rights.

The growing body of lower court caselaw that applies *Graham* expansively⁵⁸ eventually may force the Court to confront the doctrinal inconsistency that it chose to ignore in *Lewis*. If it wishes to resolve, rather than perpetuate, this tension, then the Court will face several options. It could heed the chidings of Judge Easterbrook and attempt (explicitly or implicitly) to foreclose *any* substantive due process claim on the theory that the substantive due process caselaw is “oxymoronic.” Although such a precedent-shattering ruling is unlikely, it is hardly inconceivable given Justice Scalia’s presence on the Court. A midground option, though still dramatic, would be to freeze substantive due process caselaw at its stare decisis limits,⁵⁹ though not overrule it altogether: No additional “unenumerated” fundamental rights would be carved out under substantive due process, on the theory that the specific provisions of the Bill of Rights control, rather than the more general and open-ended provision of “substantive” due process. Alternatively, the Court could foreclose any substantive due process claim except where government action implicates a fundamental right—enumerated *or* unenumerated—provided that the unenumerated right has already been recognized by the courts. This,

⁵⁶ Id. at 1003.

⁵⁷ See *County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1717-21 (1998).

⁵⁸ See *supra* note 8.

⁵⁹ For a similar approach in the dormant Commerce Clause arena, articulated despite Justice Scalia’s belief that the doctrine is illegitimate judicial lawmaking, see *General Motors Corp. v. Tracy*, 117 S. Ct. 811, 830-31 (1997) (Scalia, J., concurring) (noting that he will not expand dormant Commerce Clause beyond its existing domain because it is “unjustified judicial invention,” though he would enforce it on stare decisis grounds in limited circumstances).

of course, is not the current doctrine, which facially, at least, concedes the continued existence of unenumerated, yet-to-be determined fundamental rights and includes a fall-back, though typically toothless, "rational basis" or "shocks the conscience" form of substantive due process review, even absent a specific textual right incorporated into the Fourteenth Amendment or an unenumerated fundamental right.⁶⁰ That is, the substantive due process inquiry into the substance of government action is never foreclosed, under prevailing doctrine, except in *Graham*'s odd corner of substantive due process; it is simply fruitless in most cases that do not involve an already-established fundamental right.⁶¹

Graham thus hints at a much narrower account of substantive due process than does current doctrine. At the very least, *Graham* could be read to support a "selective-incorporation-plus-existing-unenumerated-rights-only" construction of substantive due process, under which only those already-identified fundamental rights would trigger elevated substantive due process analysis. At the most, rational basis review and unenumerated fundamental rights could disappear completely.

Weighing against a *Graham*-driven renunciation of substantive due process is the Court's caselaw that respects and anticipates the continued existence of both unenumerated rights⁶² and rational basis scrutiny of government action which does not burden a fundamental right.⁶³ The Court could choose to resolve the tension between *Graham* and this other, considerable caselaw by simply overruling *Graham*. Before turning to the doctrinal and policy objections to *Graham*'s implicit formulation of substantive due process, however, I will first describe the lower courts' expansions of *Graham*-type preemption, as these expansions support the claim that *Graham* may cause mischief in ways commentators thus far have failed to detect.

⁶⁰ See *Lewis*, 118 S. Ct. at 1710 (1998) (holding that executive action that "shocks the conscience" may violate substantive due process in some circumstances); *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997) (noting that caselaw establishes "a threshold requirement—that a challenged state action implicate a fundamental right—before requiring more than a reasonable relation to a legitimate state interest to justify the action," implying that this "reasonable relation" must exist even absent a fundamental right); see also *Phillips*, *supra* note 3, at 545 (noting that even in disfavored realm of economic rights Supreme Court has "never made substantive review impossible"; it merely sticks to lenient rational basis test).

⁶¹ See *Fallon*, *supra* note 11, at 322-23 (discussing due process prohibition of arbitrary government action).

⁶² See, e.g., *Glucksberg*, 117 S. Ct. at 2267 ("The Due Process Clause guarantees more than fair process . . . It also provides heightened protection against government interference with certain fundamental rights and liberty interests.").

⁶³ See *supra* text accompanying note 59.

II

THE LOWER COURTS' EXPANSION OF *GRAHAM*

Several lower courts have read *Graham* as authority for a general proscription against invoking substantive due process whenever a specific textual provision, including a non-Fourth Amendment textual provision, may apply. In Takings Clause,⁶⁴ First Amendment,⁶⁵ Eighth Amendment,⁶⁶ and equal protection contexts,⁶⁷ courts have declared that whenever the challenged governmental conduct is covered by "explicit" constitutional provisions, this "precludes [the plaintiff] from obtaining relief under the notion of substantive due process."⁶⁸

A. *Doctrinal Problems of Graham Exposed*

Even in the allegedly liberal Ninth Circuit, *Graham* has been given an expansive effect, significantly restricting the applicability of substantive due process in takings scenarios. A particularly instruc-

⁶⁴ See, e.g., *Armendariz v. Penman*, 75 F.3d 1311, 1322 (9th Cir. 1996) (en banc) (holding that "constitutional bar on 'private takings' preempts [more generalized] substantive due process claim[s]"). But see *Tri County Indus., Inc. v. District of Columbia*, 104 F.3d 455, 459 (D.C. Cir. 1997) (noting that "in this circuit . . . the requirements of the takings clause cannot be said to exhaust the Fifth Amendment's substantive protection of property rights from government imposition"); *Guimont v. Clarke*, 854 P.2d 1, 5 (Wash. 1993) (en banc) (noting that land use regulation "may be challenged either as an unconstitutional taking or as a violation of substantive due process").

⁶⁵ See, e.g., *Yassini v. City of Sunnyvale*, C.A. No. 95-16942, 1996 U.S. App. LEXIS 32929, at *3 (9th Cir. Nov. 6, 1996) (rejecting challenge to prohibition on live music after 2:00 AM as substantive due process claim); *Gehl Group v. Koby*, 63 F.3d 1528, 1539 (10th Cir. 1995) (holding that substantive due process claim was improper in light of *Albright*, and that "[p]laintiffs' claims [were] properly analyzed under the more specific guarantees of the First Amendment").

⁶⁶ See *Holman v. Page*, 95 F.3d 481, 485-86 (7th Cir. 1996) (holding principle that disfavors substantive due process review for claims more appropriately analyzed under specific constitutional provisions also applies to challenge of life sentence, which is more appropriately addressed by Eighth Amendment). This approach to the Eighth Amendment has Supreme Court approval. See *United States v. Lanier*, 117 S. Ct. 1219, 1228 n.7 (1997) ("*Graham* . . . requires that if a . . . claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.").

⁶⁷ See *Gehl Group*, 63 F.3d at 1539 (10th Cir. 1995) (holding that plaintiffs' claims were more appropriately analyzed under First Amendment, Equal Protection Clause, and procedural due process than under substantive due process).

⁶⁸ *Yassini*, 1996 U.S. App. LEXIS 32929, at *3; see also *Hoeck v. City of Portland*, 57 F.3d 781, 786 (9th Cir. 1995) (rejecting substantive due process challenge on ground that claim was not based on fundamental right and therefore government action need only have cognizable legitimate interest in order to satisfy review), cert. denied, 516 U.S. 1112 (1996); *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1408 n.10 (9th Cir. 1989) (noting that substantive due process cases not barred by *Graham* altogether, but merely limited).

tive illustration is *Armendariz v. Penman*,⁶⁹ in which the Ninth Circuit Court of Appeals held that "private takings" are controlled by the more explicit textual source of the Takings Clause, not by substantive due process.⁷⁰ In *Armendariz*, owners and former owners of low-income housing units challenged the City of San Bernardino's vigorous enforcement of its housing code, which resulted in the eviction of many tenants, including suspected gang members and drug dealers, the boarding up of housing units, and the revocation of property owners' business licenses and certificates of occupancy.⁷¹ The court, rejecting property owners' substantive due process claims, noted that "*Graham* does not stand for the proposition that a plaintiff may bring a substantive due process claim whenever his potential claims under more specific provisions of the Bill of Rights fail; rather . . . substantive due process . . . does not extend to *circumstances already addressed by other constitutional provisions*."⁷²

The court's analysis in *Armendariz* raises several concerns,⁷³ some of which are peculiar to the Takings Clause scenario, others of which are illustrative of the deep, doctrine-pervasive implications of *Graham*. The first problem is a doctrine-pervasive one. The court in *Armendariz* argued that its extension of *Graham* promoted *Graham*'s cited goal: Courts should be extremely reluctant to enlarge the scope of substantive due process, given the lesson of *Lochner* and the concern that open-ended substantive due process doctrine could enable judges to substitute their policy preferences for those of the state.⁷⁴ This reasoning did not, however, prevent the court from invoking other open-ended constitutional provisions, like equal protection, though the "more specific" Takings Clause text was available. Indeed, the court in *Armendariz* concluded that because the housing code in question drew a distinction that "lack[ed] any rational basis,"⁷⁵ it may

⁶⁹ 75 F.3d 1311 (9th Cir. 1996) (en banc).

⁷⁰ See *id.* at 1324. The case thus rejects a trend, noted by Professor Michael Phillips in 1990, of invoking substantive due process in striking down decisions of land use planning bodies. See Phillips, *supra* note 3, at 549.

⁷¹ See *Armendariz*, 75 F.3d at 1313.

⁷² *Id.* at 1325 (emphasis added).

⁷³ The Ninth Circuit first read *Graham* and *Albright* to mean that a substantive due process claim is not precluded by a more specific claim based on the Takings Clause where the plaintiff alleges that the government has used its power in an abusive, irrational, or malicious way, see *Sinaloa Lake Owners Ass'n*, 882 F.2d at 1409, but it has now retreated completely from this position, see *Armendariz*, 75 F.3d at 1324-26.

⁷⁴ See *Armendariz*, 75 F.3d at 1326; see also *Macri v. King County*, 126 F.3d 1125, 1128 (9th Cir. 1997) (noting court's concern in *Armendariz* with expansion of substantive due process), cert. denied 118 S. Ct. 1178 (1998); *supra* note 12.

⁷⁵ *Armendariz*, 75 F.3d at 1326.

have violated equal protection, even if it was not a taking.⁷⁶ Determining when a regulatory distinction lacks a "rational basis" is not an obviously less open-ended inquiry than is determining whether the regulation itself lacks a rational basis.⁷⁷ Nor is inequality under the housing code any less obviously "covered" by the Takings Clause than by equal protection.

A second doctrine-pervasive problem raised by *Graham* as applied in *Armendariz* is that the relationship between a "specific" provision of the Bill of Rights and substantive due process is not easy to chart, given the Court's past and—more crucially—continued practice of applying both in appropriate cases. For example, the Ninth Circuit's construction of the relationship between takings and substantive due process claims is difficult to square with early Supreme Court precedent in the area of property regulation. The Ninth Circuit suggested that the Takings Clause is the sole measure of the constitutionality of land use regulation.⁷⁸ Yet the Supreme Court has suggested quite the opposite in situations that hold tremendous intuitive appeal and that highlight the potential perils of expansive applications of *Graham*.

For example, assume that a municipal zoning ordinance is drafted to prohibit certain relatives from cohabitating on a permanent basis. Application of the ordinance to a particular homeowner—for example, a sixty-three-year-old grandmother—would require her either to move or to expel her ten year-old grandson, who has lived with and been raised by her for nine years. Assume further that the zoning ordinance would not be a regulatory taking under the Takings Clause and, in any event, that a successful takings claim would merely entitle the homeowner to just compensation for the taking, not the right to continue to live in the home with her grandson. The logic of *Graham*,

⁷⁶ See *id.*

⁷⁷ I am aware of the argument that the judiciary is better equipped to handle equal protection questions, which analyze the means government selects to promote its ends, than it is to handle substantive due process questions, which analyze the ends themselves. See *Railway Express Agency, Inc. v. City of New York*, 336 U.S. 106, 111-12 (1949) (Jackson, J., concurring) (arguing that Supreme Court should invalidate ordinances on equal protection grounds more readily than on due process grounds). This may be so, but I doubt that the differences between the "open-endedness" of the equal protection and substantive due process inquiries lie in the constitutional text, and for that reason justify categorically different interpretative principles for the latter. "Open-endedness" is perhaps the most striking common feature of nearly all provisions of the Constitution, as, ironically, the Court's own interpretation of the Due Process Clause to include "substantive" due process proves. As Raoul Berger has noted, "the 'ambiguity' of substantive due process was not 'inherent' but judicially contrived." See Berger, *supra* note 13, at 300. Once the Court began to flesh out terms like "due process" and "equal protection" without rigid adherence to text and history—themselves highly unstable anchors—it became "ambiguity" and "open-endedness" all the way through.

⁷⁸ See *Armendariz*, 75 F.3d at 1324.

as applied by the Ninth Circuit in *Armendariz*, suggests that this homeowner would not also be able to raise a claim that the zoning ordinance violates "substantive due process" because the factual situation entails the occupation and use of one's property as one wishes, short of creating a nuisance or other interference with important public interests, and the specific provision of the Takings Clause "occupies the field" of constitutional challenges to regulatory interferences with property rights. That is, the court could simply dismiss the substantive due process claim as unavailable to the homeowner, under *Graham* "preemption" analysis, and analyze only the takings claim.

Of course, in *Moore v. City of East Cleveland*,⁷⁹ a plurality of the Court held that such an ordinance *did* violate the substantive due process rights of the grandmother who wished to continue living with her grandson. The plurality in *Moore* extended its fuzzy family privacy caselaw to protect her right to choose to live permanently with her immediate relatives.⁸⁰ Under a *Graham* approach to *Moore*-type facts, however, the Court might have dodged the question of whether a zoning ordinance can interfere unduly with a homeowner's substantive due process rights under the Fourteenth Amendment. Because the Takings Clause—a specific textual provision—arguably addressed the circumstances, any "open-ended due process inquiry" into whether the ordinance was rights-invasive in other respects might have been foreclosed.

One could respond that *Moore*-type facts would not trigger *Graham* preemption because the zoning ordinance in *Moore* impaired a "specific," though unenumerated, fundamental right under substantive due process—the right to family privacy. This feature arguably distinguishes *Moore* from *Armendariz*, which involved only a vague claim that due process prevents any arbitrary government interference with property, not the more specific claim that due process prevents interferences with property interests that also implicate a fundamental right. In other words, only where the *only* substantive due process right being asserted is both unenumerated and non-fundamental is it foreclosed by *Graham*. Yet, again, the pre-*Graham* Court took quite a different view. In *Village of Belle Terre v. Boraas*,⁸¹ the Court sustained a zoning ordinance similar to that in *Moore*, which applied a restricted definition of "family" allowed to cohabitate in a single-family residential zone, on the ground that it bore a rational relationship to permissible state objectives.⁸² The Court in *Belle Terre* invoked the

⁷⁹ 431 U.S. 494 (1977).

⁸⁰ See *id.* at 499-502.

⁸¹ 416 U.S. 1 (1974).

⁸² See *id.* at 8.

1926 holding of *Euclid v. Ambler Realty Co.*,⁸³ which states that land use regulations may violate substantive due process if they are "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."⁸⁴ That is, the Court has long insisted that substantive due process applies to cases that involve government interference with property even where the interference falls short of a regulatory taking under the Takings Clause, and even where the interference implicates a fundamental, unenumerated right. The Court has consistently maintained this view after *West Coast Hotel Co. v. Parrish*,⁸⁵ despite its extreme wariness about expanding substantive due process rights in the realm of economic liberties. To be sure, the occasions on which government action in the economic realm will be deemed to flunk this lenient rational relationship test will be rare.⁸⁶ Nevertheless, this due process "money in the bank" for later withdrawals in exigent circumstances seemed well-established until *Graham*.

Cases like *Armendariz* thus foreshadow a potentially significant change in substantive due process caselaw: *Graham* may logically be read to foreclose any substantive due process inquiry, rather than merely imposing a weak "rational basis" requirement on government actors, whenever one can point to a specific textual provision that arguably covers the territory. So understood, *Graham* bars even the possibility of a closer look at the implicated interests or the means adopted to pursue the stated ends, as well as the application of any rational basis analysis (with or without bite) to the regulations. This result may be appealing to justices who dislike judicial scrutiny of economic legislation and substantive due process generally, but it is hardly inconsequential or easy to square with constitutional caselaw that still recognizes both.

⁸³ 272 U.S. 365 (1926); see also *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928) (holding restrictive zoning ordinance invalid because it lacked substantial relationship to public health, morale, or welfare).

⁸⁴ *Euclid*, 272 U.S. at 395; see also *Eastern Enterprises v. Apfel*, 118 S. Ct. 1114 (1998) (discussing both Takings Clause and substantive due process in regulatory takings scenario, with no mention of *Graham*).

⁸⁵ 300 U.S. 379 (1937) (upholding minimum wage law for women and ending *Lochner* era of substantive due process review of government interference with economic liberties).

⁸⁶ See, e.g., *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause . . . to strike down state laws, regulatory of business and industrial conditions, because they might be unwise, improvident, or out of harmony with a particular school of thought.").

B. When Does an Explicit Textual Provision "Control"?

The *Armendariz* approach also creates nasty interpretative snarls that other extensions of *Graham* are bound to encounter. Specifically, courts must determine when a claim falls under the explicit textual provisions of a particular amendment.⁸⁷ In *Macri v. King County*,⁸⁸ the Ninth Circuit faced this complication in its attempt to apply the *Armendariz* ruling that the Takings Clause, not substantive due process, provided the sole constitutional remedy for a claim it characterized as a private taking.⁸⁹ Appellants contended at oral argument that they were arguing only that government denial of their plat application failed to substantially advance a legitimate government purpose, not that it constituted a taking. According to the court, however, appellants could not "sidestep *Armendariz* by re-characterizing their claim as lying solely in substantive due process."⁹⁰ Rather, Supreme Court decisions recognize that "a land use restriction that does not 'substantially advance legitimate state interests' or 'denies an owner economically viable use of his land' effects a taking."⁹¹ Consequently, the court held that the Takings Clause "covers" these allegations and precludes a substantive due process argument.⁹²

But the parameters of "takings territory" are hardly so evident. For example, if a claim is not yet "ripe" under the Takings Clause, one could argue that takings law does not cover this *temporal* territory and thus does not preempt a substantive due process claim.⁹³ Alternatively, of course, one could argue that takings law is the Constitution's sole, specific word on limits to government regulation of property, so it forecloses even rational basis scrutiny of this regulation under substantive due process. Such a broad reading of the takings terrain, though, would produce ironic results: While the current Court has been inclined to approve more, not less, protection of property rights, mapping the Takings Clause broadly here could constrict potential

⁸⁷ See *Armendariz v. Penman*, 75 F.3d 1311, 1324 n.8 (9th Cir. 1996) (en banc) (concluding "that the Takings Clause, as a more explicit textual source [than substantive due process], should be read as the home of the right against 'private takings'"); see also *id.* at 1324-25 (making similar argument).

⁸⁸ 110 F.3d 1496 (9th Cir. 1997).

⁸⁹ See *id.* at 1499-1500.

⁹⁰ *Id.* at 1500.

⁹¹ *Id.* (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 383-85 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

⁹² See *id.*

⁹³ See *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 195 (1985) (setting forth two procedural conditions before claimant can bring action for taking: having sought final determination as to permitted use of property, and having unsuccessfully sought just compensation if procedure is available to obtain it).

property rights by foreclosing substantive due process analysis. Moreover, the Court's rationale for preclusion in *Graham* was not Fourth Amendment specific, making it difficult to justify granting a generous construction to substantive due process in property cases but applying a narrow construction in Fourth Amendment scenarios. Consequently, the Court likely will not restrict *Graham* to criminal procedure cases when this point is pressed, despite any preference it might have for economic rights. Once *Graham* officially and visibly extends beyond criminal cases, the Court may be forced to reexamine quite a bit of caselaw decided under the rubric of substantive due process to assess whether a specific textual provision should have been invoked instead. For example, the abortion cases might be reviewed to determine whether the Fourth Amendment should have preempted any substantive due process analysis in these scenarios.⁹⁴ Indeed, one wonders how long it will be before other canny lawyers notice, as did the lawyers in *Armendariz*, *Graham*'s great potential as a means of undermining substantive due process claims in *all* cases, even those in which the Court has long deemed them applicable.

Still another complication that *Armendariz* creates is the difficulty that courts may encounter in determining what specific legal theory a party intends to raise. Plaintiffs mindful of the caselaw likely will word their claims as broadly and opaquely as possible, lest they be deemed to have foreclosed invocation of all constitutional theories that might pertain to the matter. For example, the Ninth Circuit in *Macri* held that because the appellants invoked the standard "does not 'substantially advance legitimate state interests,'" their claim would *only* be read as a claim of a private taking.⁹⁵ This wording, however, might have been offered to suggest a number of other constitutional arguments that likewise require the court to balance the relevant state interests against the asserted individual interests. That the appellants in *Macri* invoked this wording, standing alone, in no way proves that they meant to restrict, or should be deemed to have restricted themselves, to one particular amendment, if several plausibly could have applied to the same situation.

⁹⁴ But see *Kansas v. Hendricks*, 117 S. Ct. 2072 (1997) (upholding Kansas's Sexually Violent Predator Act against substantive due process, double jeopardy, and ex post facto challenges with no hint whatsoever that more specific claims might preempt any due process inquiry in case).

⁹⁵ *Macri v. King County*, 110 F.3d 1496, 1500 (9th Cir. 1997) (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 383-85 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

The court in *Macri* nevertheless insisted that the Supreme Court's opinions in *Agins v. City of Tiburon*,⁹⁶ *Nollan v. California Coastal Commission*,⁹⁷ and *Dolan v. City of Tigard*⁹⁸ justified a characterization of the wording as exclusive to a takings claim and not also suggestive of a substantive due process claim. None of these decisions, however, so indicates.

In *Agins*, decided nine years before *Graham*, the Court reviewed a facial challenge to a municipal zoning ordinance alleging that the ordinance constituted a taking of appellants' unimproved land.⁹⁹ As the Court noted at the beginning of the opinion, "the only question properly before us is whether the mere enactment of the zoning ordinances constitutes a taking."¹⁰⁰ The complaint, according to the Court, "framed the question as whether a zoning ordinance that prohibits all development of their land effects a taking under the Fifth and Fourteenth Amendments."¹⁰¹ As to that issue, the Court stated that the standard is whether the zoning law "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."¹⁰² The Court thus never addressed the term "substantive due process" in *Agins* because this issue was not before the Court. Consequently, the *Agins* Court's invocation of the phrase "substantially advances legitimate state interests" sheds no particular light on whether the furtherance of legitimate state interests might not also be relevant to a substantive due process inquiry, where that issue is properly raised. More relevant to whether a takings claim alone is being asserted, it would seem, is the comparatively distinctive phrase, "denies an owner economically viable use of his land."¹⁰³ But even this phrase might conceivably appear in the pleadings or other allegations of a substantive due process challenge to property regulation, either as evidence of the damages suffered by the property owner or of the egregiousness and irrationality of the government action.

Nollan,¹⁰⁴ decided two years before *Graham*, lends slightly more support to the claim that invocation of this phrase can *only* mean that

⁹⁶ 447 U.S. 255, 261 (1980) (finding municipal zoning ordinance "substantially advance[d] legitimate governmental goals" and thus was not taking).

⁹⁷ 483 U.S. 825 (1987) (holding permit to rebuild, made conditional on owner's grant of public easement, failed to substantially advance state interests and thus was taking).

⁹⁸ 512 U.S. 374 (1994) (invalidating redevelopment permit conditioned on owner's dedication of land to public purposes on ground that condition lacked reasonable relationship to proposed development).

⁹⁹ See *Agins*, 447 U.S. at 258-59.

¹⁰⁰ *Id.* at 260.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

the lawyers are pursuing a takings claim, though *Nollan* too fails to justify fully the Ninth Circuit's ultimate conclusions. Justice Scalia's primary focus in *Nollan* was not on substantive due process, but on setting forth his expanded, controversial account of the Takings Clause.¹⁰⁵ To the extent that the opinion does address substantive due process analysis, it both undermines and supports the Ninth Circuit's claim that the "substantial government purpose" phrase applies exclusively to Takings Clause claims. In his discussion of this standard, Justice Scalia noted that a "broad range of governmental purposes and regulations satisfies these requirements,"¹⁰⁶ and cited—among other cases—*Euclid v. Ambler Realty Co.*¹⁰⁷ The *Euclid* decision, however, referred only to substantive due process, not the Takings Clause, when it stated that land use regulations must not be arbitrary or unreasonable and must bear a "substantial relation to the public health, safety, morals, or general welfare."¹⁰⁸ To be sure, *Euclid* predates both the alleged death of substantive due process and the Takings Clause "revival," but the modern Court has continued to cite the case in its analyses of property regulations that allegedly go too far and cause too much harm, with too little in the way of a public purpose justification.¹⁰⁹ Whether the ends of property regulation constitute a legitimate state interest is thus relevant if the litigant's claim is that of a taking, of an arbitrary exercise of government power under substantive due process, or both.

The strongest support in *Nollan* for the Ninth Circuit's interpretation of *Graham* lies in a footnote, where Justice Scalia observed that the verbal formulations in the takings field use the phrase "substan-

¹⁰⁵ Justice Scalia's Takings Clause opinions have been the subject of considerable scholarship. See, e.g., David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375, 1442-46 (1996) (using *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), written by Justice Scalia, to examine role of customary law on contemporary property law jurisprudence); Richard G. Wilkins, *The Takings Clause: A Modern Plot for an Old Constitutional Tale*, 64 Notre Dame L. Rev. 1, 4-14 (1989) (critiquing the Court's Takings Clause analyses, and questioning the rigorous "means/ends" analysis applied in *Nollan*); George Wyeth, *Regulatory Competition and the Takings Clause*, 91 Nw. U. L. Rev. 87, 108-09, 127-32 (1996) (using *Lucas* and *Nollan* to demonstrate application of market-based takings theory); Donald H. Zeigler, *The New Activist Court*, 45 Am. U. L. Rev. 1367, 1370-82 (1996) (analyzing and using *Lucas* to support contention that Rehnquist Court is "very activist").

¹⁰⁶ *Nollan*, 483 U.S. at 835.

¹⁰⁷ 272 U.S. 365 (1926).

¹⁰⁸ *Id.* at 395; see *supra* note 84 and accompanying text.

¹⁰⁹ See, e.g., *Concrete Pipe of California v. Laborers' Pension Trust*, 508 U.S. 602, 645 (1993) (citing *Euclid* in discussion of whether mere diminution of value of property can constitute taking under modern doctrine); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 3-5 (1974) (referring to *Euclid* as part of discussion of reasonableness/nonarbitrary constitutional standard for zoning regulation, but finding standard not met in this case).

tially advance," while due process and equal protection formulations use the phrase "could rationally have decided."¹¹⁰ His point here, however, was to contrast the Takings Clause's different and stricter restrictions on government with more lenient due process restrictions; he never hinted, let alone stated, that the applicability of the former foreclosed the latter. Rather, Justice Scalia seemed to assume, as did the dissenting justices, that both claims could be asserted to challenge a land use regulation. *Nollan* thus hardly establishes that the two types of claims are so interdependent that the specific (Takings Clause) is meant to trump the general (substantive due process). Rather, the stress is on their independence and on Justice Scalia's argument that interpretations of due process restrictions on land use regulation—the work product of the chastened post-*Lochner* Court—should not necessarily bind the modern Court to a symmetrically hands-off takings test.

In fact, had the Court in 1987 viewed the question as a simple matter of "specific text trumps more general substantive due process," Justice Scalia could have made much shorter and cleaner work of the dissent's insistence that the standard for reviewing all land use regulations, including the development exactions at issue in *Nollan*, should be the rational basis approach developed in the due process and equal protection cases. Given Justice Scalia's well-known disdain for substantive due process claims in general,¹¹¹ why *wouldn't* he have seized upon this excellent opportunity to achieve two cherished goals: to expand property rights through an aggressive account of the Takings Clause and to concomitantly contract "fuzzy" substantive due process by insisting that the specific claim trumps the more general one in all cases? That he did not do so suggests, at the least, that he felt bound to respect the substantive due process precedent, even as he distinguished it from the takings precedent.

The final decision, *Dolan v. City of Tigard*,¹¹² likewise fails to support the Ninth Circuit's approach to takings and substantive due process. The Court in *Dolan* noted that the phrase "reasonable relationship," deployed by a majority of state courts reviewing challenges to zoning regulations, was "confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment."¹¹³

Significantly, however, the Court did not declare substantive due process analysis to be inapplicable, even though *Dolan* post-dated

¹¹⁰ *Nollan*, 483 U.S. at 834 n.3 (emphasis omitted).

¹¹¹ See *supra* note 13.

¹¹² 512 U.S. 374 (1994).

¹¹³ *Id.* at 391.

Graham by five years.¹¹⁴ Instead, the Court took great pains to distinguish the two standards for reviewing property regulation in its effort to give greater force to the Takings Clause than it had given to either substantive due process or equal protection challenges.¹¹⁵ Yet the majority could hardly have missed the point about the applicability and independence of both the Takings Clause and substantive due process, given Justice Stevens's sharp dissent chiding the majority for applying with bite here "what is essentially the doctrine of substantive due process,"¹¹⁶ a doctrine that in other contexts, he argued, these justices would give no bite whatsoever.¹¹⁷ If the majority believed that *Graham*-type preemption pertained to Takings Clause cases, it certainly should have—and likely would have—invoked it here to blunt Stevens's accusation of unprincipled self-contradiction. This seems especially true, given that Chief Justice Rehnquist authored both *Graham* and *Dolan*.

Finally, as Ronald Krotoszynski has noted, many Takings Clause cases address concededly rational assertions of government power—where government has a legitimate public purpose for taking private property.¹¹⁸ Substantive due process, on the other hand, polices irrational government action and therefore should cover different, much rarer, assertions of government power over property.

One might respond to these *Armendariz*-inspired arguments against *Graham* by stating that the Ninth Circuit simply misapplied *Graham* in extending it to takings cases;¹¹⁹ that is, the Ninth Circuit misapprehended the many ways in which takings law and substantive due process do not cover the same territory. Properly and narrowly read, *Graham* remains a logical, defensible, but highly contained in-

¹¹⁴ See also *Yee v. City of Escondido*, 503 U.S. 519 (1992), which also post-dates *Graham* but does not rule out the application of substantive due process in a takings scenario. In *Yee*, the Court avoided the due process inquiry because it was not raised or addressed below. See id. at 533.

¹¹⁵ See *Dolan*, 512 U.S. at 388-91.

¹¹⁶ Id. at 410 (Stevens, J., dissenting).

¹¹⁷ See id. at 409-10 (Stevens, J., dissenting); see also *Eastern Enterprises v. Apfel*, 118 S. Ct. 1114 (1998) (plurality op.) (discussing both Takings Clause and substantive due process, but not reaching due process claim, given plurality's conclusion that Takings Clause was violated).

¹¹⁸ See Ronald J. Krotoszynski, Jr., *Fundamental Property Rights*, 85 Geo. L.J. 555, 572 (1997) (observing that Takings Clause "speaks directly to occasions of presumptively rational government behavior"); see also Ross A. Macfarlane, *Comment, Testing the Constitutional Validity of Land Use Regulations: Substantive Due Process as a Superior Alternative to Takings Analysis*, 57 Wash. L. Rev. 715, 744 (1982) (discussing differences between substantive due process and takings analysis of land use regulations).

¹¹⁹ See *Macri v. King County*, 110 F.3d 1496, 1500 (9th Cir. 1997) (noting that denial of application without advancing legitimate state interest "would constitute a taking" and that "substantive due process has no place in this context").

road into substantive due process doctrine. It could be argued that *Graham* properly applies only rarely outside the context of constitutional criminal procedure, where the Bill of Rights offers an especially detailed account of justice, and so needs little supplementation from the vague doctrine of substantive due process.

Litigants in other circuits seeking to avoid the impact of cases like *Macri* and *Armendariz* certainly should make this argument, and should stress the distinction between the holding of *Graham* and its dicta. But they may make little headway, given that the logic of *Graham* does seem to apply equally to non-Fourth Amendment scenarios.¹²⁰ Moreover, reading *Graham* to limit all due process arguments—ones that would cabin the property rights that conservatives tend to admire, as well as ones that would cabin the criminal procedure rights that liberals tend to admire—has an appealing symmetry that preserves the appearance of judicial neutrality, as well as judicial restraint.

III

OVERRULING *GRAHAM*: A COMPELLING CASE

The question thus is whether *Graham* should be overruled, rather than narrowly construed in a clarifying opinion that rejects applications of *Graham* to noncriminal procedure circumstances. The argument for overruling *Graham*, I conclude, is more compelling than is the argument for its preservation for at least four reasons. First, *Graham* runs afoul of important prudential practices of the Court, even if construed narrowly. Second, *Graham* violates the Court's own interpretive rules and practices. Third, *Graham* invokes "vagueness" as the reason for this unique interpretive approach, despite the vagueness that pervades the Constitution. Fourth, as I have shown, *Graham* is fundamentally inconsistent with the Court's caselaw on substantive due process, especially its unenumerated rights and "rational basis" caselaw. Because I favor the preservation of this caselaw, I favor overruling *Graham*. If one rejects this caselaw, of course, then it is *Graham* that should stand, and the substantial body of substantive due process caselaw that should go.

A. *Squandering Judicial Capital*

The primary prudential flaw of *Graham* should have been especially clear to the current Court. By foreclosing substantive due process analysis, rather than preserving it as a weak, potential check on

¹²⁰ See *supra* text accompanying notes 30-31.

state power, the Court needlessly squandered judicial capital in a way that it has not in other areas. For example, the Court in *United States v. Lopez*¹²¹ recently stunned observers when it held for the first time in sixty years that Congress had overstepped its Commerce Clause power. Yet the Court in *Lopez* was able to, and did, invoke a consistently-expressed caveat that congressional power, while vast, was not limitless.¹²² The day had come, in the Court's mind, to cash in on its dormant judicial power.

Likewise, in *Printz v. United States*¹²³ and *New York v. United States*,¹²⁴ the Court drew on well-preserved, though seldom invoked, judicial authority to impose federalism restraints on congressional power, again surprising some observers who had come to believe that states' rights objections to congressional power would fail, even when Congress "commandeered" state officials.¹²⁵ In both areas, the Court consistently and prudently had preserved (but rarely invoked) the power to declare that Congress had overstepped its concededly expansive authority to determine what the national interest requires.

Just as the Court's approach to the Commerce Clause cases of the *Lochner* era informed its approach to the substantive due process cases of the same era, the Commerce Clause cases of the current

¹²¹ 514 U.S. 549 (1995) (holding that Gun-Free School Zones Act of 1990 exceeded Congress's Commerce Clause authority).

¹²² See *id.* at 553.

¹²³ 117 S. Ct. 2365 (1997) (holding Brady Handgun Violence Prevention Act imposed unconstitutional obligation on state officers).

¹²⁴ 505 U.S. 144 (1992) (holding congressionally-imposed incentive for states to provide waste disposal exceeded congressional power and thus invaded state sovereign authority insofar as it required states to either "take title" to waste or submit to federal regulation).

¹²⁵ This sentiment likely found support in Herbert Wechsler's influential argument that the political process, not the courts, should determine such federalism restraints. See generally Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954). For more recent discussions of the point, see Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. Cal. L. Rev. 1447, 1450 (1995) (urging that Court act as monitor of congressional power rather than attempting to remove restraints on that power); Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485, 1500-03 (1994) (arguing against judicial enforcement of federalism principles); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903, 903-08 (1994) (arguing that Court has worked to disfavor federalism despite avowed support for federalist positions). Even congressional spending power, thought to be the most impervious to judicial challenge, retains at least some potentially enforceable boundaries, according to the caselaw. See *South Dakota v. Dole*, 483 U.S. 203 (1987) (holding that indirect encouragement of State action to obtain uniformity in State drinking ages is valid use of congressional spending power); see also Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 Colum. L. Rev. 1911 (1995) (discussing potential limits on conditional spending, drawn from Justice O'Connor's dissent in *Dole* and federalism restraints on commerce power set forth in *Lopez*).

Lopez era should inform contemporary substantive due process analysis: Viewed broadly, both arenas involve potential abusive exercises of legislative power. Although one could read these modern cases as concerned only with congressional excesses that harm states *qua* states, a far more plausible and complete view of the concerns that animate the cases would recognize that centralization of federal power is worrisome for many reasons, including the loss of experimentation opportunities and of individual liberty—both of which are triggered by engorged and unchecked state authority as well as by limitless federal authority. Thus it is quite odd (even counterintuitive, post-Reconstruction) for the current justices to ignore the possibility that the states, like Congress, may “go too far,” and for them to forfeit the judicial means of responding to such *rara avis* cases, even if they seldom exercise this power.¹²⁶ The mystery is compounded when one notes that these same justices *have* recognized the dangers of state-inflicted, “nontextual” abuses in at least some recent cases, and invoked substantive due process to police them. For example, in 1996 the Court departed from its excessively deferential approach to state laws that involve deprivations of nonfundamental property or liberty interests, and overturned a “grossly excessive” punitive damage award on substantive due process grounds.¹²⁷

¹²⁶ Indeed, the Court has been quite willing in other areas—such as the dormant Commerce Clause cases—to police state regulatory power despite the absence of express textual support for the doctrine or the Court’s role in enforcing it. See, e.g., *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981) (affirming judgment that state law against double-trailer trucks impermissibly burdened interstate commerce); *Pike v. Bruce Church Inc.*, 397 U.S. 137 (1970) (holding Arizona regulation imposing in-state packing requirements constituted unlawful burden on interstate commerce); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) (holding Interstate Commerce Act did not impose burden on state power to protect health and safety of public); cf. *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590, 1615 (1997) (Thomas, J., dissenting) (arguing that dormant Commerce Clause doctrine “has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application”); *Tyler Pipe Indus. v. Washington State Dep’t of Revenue*, 483 U.S. 232, 254-65 (1987) (Scalia, J., concurring in part and dissenting in part) (noting dormant Commerce Clause doctrine lacks textual support and should be pursued narrowly, if at all).

¹²⁷ See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574 (1996) (holding \$2 million punitive damages award for fraudulently selling repainted car was grossly excessive in relation to legitimate state interests). Again, the decision does not signal the advance of rigorous, case-by-case checks on all punitive damage awards, but preservation of a worst-case scenario bubble of due process protection. For an incisive critique of *BMW*, see Susan R. Klein, *The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles*, 1997 U. Ill. L. Rev. 453, 453-54 (1997) (contending that *BMW* represents inability to develop precise test for evaluating due process implications of punitive, remedial, and criminal sanctions).

B. *The Foreclosure of Multiple Constitutional Claims*

The second major flaw of *Graham* is that it violates the Court's well-established interpretative principle that multiple constitutional claims may apply to a given scenario.¹²⁸ For example, some discriminatory state laws may trigger privileges and immunities, dormant Commerce Clause, and equal protection arguments.¹²⁹ Other state laws may implicate freedom of religion, freedom of speech, and equal protection.¹³⁰ Yet in cases other than *Graham*, and its few Supreme Court applications, the Court has never declared that one constitutional provision "occupies the field"; rather, each is analyzed independently. *Graham* places a limitation that has no apparent constitutional, doctrinal, or historical basis on substantive due process analysis alone. This limitation does not apply even to its Fourteenth Amendment companion clause—the Equal Protection Clause.¹³¹ Indeed, the limitation is one the Court itself has ignored in some criminal procedure contexts.¹³²

¹²⁸ See, e.g., *United States v. James Daniel Good Real Property*, 510 U.S. 43, 49 (1993) (rejecting view that one applicable constitutional amendment "pre-empts the guarantees of another").

¹²⁹ See, e.g., *Doe v. Bolton*, 410 U.S. 179, 186, 200 (1973) (addressing both equal protection and privileges and immunities claims).

¹³⁰ See, e.g., *Rosenberger v. Rector of Univ. of Virginia*, 515 U.S. 819 (1995) (holding University guidelines prohibiting disbursement of funds from student activity fees account to religious student organization violated Free Speech Clause and were not justified by Establishment Clause concerns); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding state-sanctioned prohibition on use of school facilities by church violated Free Speech Clause); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding Act prohibiting discrimination against school clubs on basis of religious content did not violate Establishment Clause); *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding "equal access" policy for religious groups not incompatible with Establishment Clause).

¹³¹ The interpretative principle allowing multiple constitutional claims likewise applies to power-conferring versus power-limiting provisions of the Constitution. The Court has never held, for example, that a treaty is invalid because it governs an area that Congress could have regulated under one of its enumerated powers. See *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir. 1978) (holding self-executing treaty transferring property to Panama valid, even though Article IV, § 3 expressly gives Congress power to dispose of property belonging to United States).

Of course, an argument can be made that some functions allotted to Congress by the Constitution cannot be performed by treaty, absent congressional authorization. For example, Article I, § 9, clause 7 states that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." A treaty that sought to appropriate funds without congressional approval likely would violate this specific textual provision. In this case, however, there are separation of powers issues and a direct conflict produced by the invocation of both provisions. No similar conflicts arise when a plaintiff presents both substantive due process and other constitutional objections to the exercise of state power.

¹³² See, e.g., *Kansas v. Hendricks*, 117 S. Ct. 2072, 2076, 2086 (1997) (addressing substantive due process, ex post facto, and double jeopardy claims with no discussion of whether latter claims precluded substantive due process).

To impose this unique obstacle on substantive due process claims, and to only some of them, is not only strange but also violates the sense of each provision's integrity insisted upon elsewhere. For example, in *Dolan v. City of Tigard*, Chief Justice Rehnquist cautioned, "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."¹³³ In the *Graham* context, this same point could be made even more sharply, as follows: "We see no reason why substantive due process, as much a part of the Fourteenth Amendment as the Equal Protection Clause, should be relegated to the status of a poor relation in these comparable circumstances." Even the Privileges and Immunities Clause of the Fourteenth Amendment, gutted as it was by *The Slaughterhouse Cases*,¹³⁴ nevertheless retains independent constitutional status such that where it does overlap with another, more specific constitutional provision, it is not deemed inapplicable, though it has been read to provide very scant protection.

C. Preferring Foreclosure to Ambiguity

The third source of *Graham*'s fallibility is the disingenuous nature of seizing on the ambiguity of a clause as reason to foreclose its application. In *Printz v. United States*,¹³⁵ the most striking recent example of this, the Court relied on no specific constitutional text to overturn the Brady Act provisions requiring state law enforcement officers to conduct background checks on prospective gun purchasers. Rather, it resorted to the "structure" of the Constitution to impose a check on federal power,¹³⁶ an interpretative guidepost Justice Stevens aptly described as he read his dissent from the bench as no less vague and ethereal than the "penumbras" and "emanations" thought to give rise to many substantive due process rights.¹³⁷ Curbing substantive due

¹³³ *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994); cf. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 n.14 (1992) (rejecting approach of Justice Stevens on ground that it would "render[] the Takings Clause little more than a particularized restatement of the Equal Protection Clause").

¹³⁴ 83 U.S. (16 Wall.) 36, 76-80 (1873) (holding that "Privileges and Immunities" referred to in Fourteenth Amendment protect only limited set of national rights, such as right to free access to federal agencies or right to use navigable waters).

¹³⁵ 117 S. Ct. 2365 (1997).

¹³⁶ See *id.* at 2376.

¹³⁷ See Linda Greenhouse, Justices Limit Brady Gun Law as Intrusion on States' Rights, *N.Y. Times*, June 28, 1997, at A1 (reporting on Stevens's oral remarks); see also *Printz*, 117 S. Ct. at 2386-2401 (Stevens, J., dissenting); *National Paint and Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1129 (7th Cir. 1995) (noting that substantive due process is "a doc-

process claims on the ground that the clause is shapeless is thus a very weak reed, given the Court's willingness to grapple with comparably flaccid constitutional text in other areas. One might respond, probably correctly, that the current justices fear congressional overreaching on vertical federalism grounds more than they fear state government overreaching. But a preference for state government power over federal power did not openly drive the Court in *Graham*: The Court has since cited only judicial authority concerns of vagueness, open-ended provisions, and the absence of meaningful judicial standards in explaining *Graham*.¹³⁸

D. *Moving Toward Justice Black's View of Substantive Due Process*

Graham's final flaw is its fundamental inconsistency with the Court's overall substantive due process caselaw, both before and after *Graham*. As the Court stated only one year after *Graham*, in *Cruzan v. Director, Missouri Department of Health*,¹³⁹ "[d]ecisions prior to the incorporation of the Fourth Amendment into the Fourteenth Amendment analyzed searches and seizures involving the body under the Due Process Clause and were thought to implicate substantial liberty interests."¹⁴⁰ Justice O'Connor elaborated on this point in her concurring opinion, noting that "[b]ecause our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination, the Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause. Our Fourth Amendment jurisprudence has echoed this same concern."¹⁴¹ One might well think that where the Fourth Amendment "echoes," it covers the territory a la *Graham*, and thus would crowd out any amorphous "right to refuse medical treatment," unless it were granted specifically by the Fourth Amendment. Yet the Court in *Cruzan* did not view this imbrication of the two amendments as a reason to foreclose substantive due process analysis.

The only logical reading of *Graham* is that it implicitly embraces the view that the "liberty" protected by substantive due process—assuming that there is a substantive component to due process at all—is limited to the rights enumerated in the Bill of Rights. A "specific-

trine owing its existence to constitutional structure rather than a clear grant of power to the judiciary").

¹³⁸ See *supra* text accompanying note 31 (discussing the Court's explanation of *Graham* in *Albright*).

¹³⁹ 497 U.S. 261, 279 (1990) (assuming there is constitutional right for competent person to refuse lifesaving hydration and nutrition).

¹⁴⁰ *Id.* at 278.

¹⁴¹ *Id.* at 287-88 (O'Connor, J., concurring) (citation omitted).

text-crowds-out-general-text" approach simply cannot be squared with a willingness to protect unenumerated rights under due process.¹⁴² *Graham* thus is a subtle revival of Hugo Black's "jot for jot" view of the Fourteenth Amendment, under which the Bill of Rights is the exclusive word on what rights are "fundamental" and thus protected under the Fourteenth Amendment.¹⁴³ This is a surprising turn, given that a majority of the Court has never adopted Justice Black's approach. Instead, the Court has effectively (and controversially) adopted Justice Harlan's interpretation, found in *Poe v. Ullman*,¹⁴⁴ that "the fact that an identical provision limiting federal action is found among the first eight Amendments . . . suggests that due process is a discrete concept . . . more general and inclusive than the specific prohibitions."¹⁴⁵

Of course, the current justices may regret that earlier justices ever started down the path of unenumerated rights but they have not yet abandoned that path.¹⁴⁶ Rather, current doctrine clearly allows the

¹⁴² Cases that evince such willingness include the following: *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992) (reaffirming constitutional protection, derived from Fourteenth Amendment, of woman's right to terminate pregnancy); *Roe v. Wade*, 410 U.S. 113 (1973) (finding right of privacy in Fourteenth or Ninth Amendments broad enough to encompass woman's decision to terminate pregnancy); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding Connecticut statute forbidding use of contraceptives violated right of marital privacy within penumbra of specific guarantees of Bill of Rights); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding state law forbidding teaching in language other than English invasive of liberty guaranteed by Fourteenth Amendment). Even *Bowers v. Hardwick*, 478 U.S. 186 (1986), which rejected a constitutional right to engage in consensual acts of sodomy given the long tradition of prohibiting such acts, nevertheless acknowledged the continued viability of these unenumerated rights cases, see *id.* at 190-91.

¹⁴³ Justice Harlan first used the "jot for jot" description of Black's position in his dissent in *Duncan v. Louisiana*, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting). Justice Black set forth this position in *Adamson v. California*, 332 U.S. 46, 74-75 (1947) (Black, J., dissenting) (describing his view that entire Bill of Rights, but only Bill of Rights, should be deemed to be incorporated into Fourteenth Amendment, and rejecting any judicial power to craft other substantive rights by reference to "natural law"); see also *Duncan*, 391 U.S. at 162-71 (1968) (Black, J., concurring); *Betts v. Brady*, 316 U.S. 455, 474-75 & 475 n.1 (1942) (Black, J., dissenting).

¹⁴⁴ 367 U.S. 497 (1961).

¹⁴⁵ *Id.* at 542 (Harlan, J., dissenting); see also *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (Goldberg, J., concurring) ("[T]he concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights."). See generally Suzanna Sherry, *The Founders' Unwritten Constitution*, 54 U. Chi. L. Rev. 1127 (1987) (suggesting that framers intended courts to look beyond Constitution in determining validity of governmental actions, especially those affecting individuals' fundamental rights).

¹⁴⁶ The "death of substantive due process," is often foretold, see, e.g., Daniel O. Conkle, *The Second Death of Substantive Due Process*, 62 Ind. L.J. 215, 215-16 (1987) (suggesting that *Bowers* "killed" whatever substantive due process had been resurrected from earlier death by *Griswold* line of cases), but is not yet at hand. See *County of Sacramento v.*

Court to look beyond the enumerated Bill of Rights, even to sources beyond the text, to fashion substantive due process. The modern Court has tried to confine this concededly extratextual search to particular sources, especially to the nation's firmly established "history, legal traditions, and practices."¹⁴⁷ Consequently, the interests that receive Fourteenth Amendment protection, though thought to have been informed by the specific interests named in the Bill of Rights, have never been deemed to be exhausted by them.

Even if the Court were to change its mind about these unenumerated rights and suddenly embrace an alternative reading of the Due Process Clause—say, the view that it polices only procedural defects¹⁴⁸—this still would not justify the specific-trumps-general explanation of *Graham*. The Court presumably would be obliged to analyze a Due Process Clause claim independently to decide whether the clause spoke to the issue, in addition to, or in a different way than, any other constitutional issues that might arise in the case. Again, only if the Court were to adopt Justice Black's view of substantive due process—that the Fourteenth Amendment protects solely those rights enumerated in the Bill of Rights and not a jot more¹⁴⁹—would *Graham* make doctrinal sense. *Graham* thus is inconsistent with the Court's own due process logic.

To reiterate, *Graham's* analytical peculiarities are fourfold: it departs from the Court's more general, prudential practice of reserving pockets of judicial authority for worst case scenarios of government misconduct that may unfold in the future, though it may very rarely exercise that authority;¹⁵⁰ it creates a unique exception to the Court's

Lewis, 118 S. Ct. 1708, 1714 (1998) (stating that "due process protection in the substantive sense limits what the government may do in both its legislative and its executive capacities"); *Washington v. Glucksberg*, 117 S. Ct. 2258, 2267-68 (1997) (listing fundamental rights and liberty interests protected by Due Process Clause and explaining established method of substantive due process analysis in addition to specific freedoms protected by Bill of Rights); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (holding \$2 million punitive damage award for fraud grossly excessive in relation to legitimate state interests and thus in violation of due process).

¹⁴⁷ *Glucksberg*, 117 S. Ct. at 2262; see also *id.* at 2268 ("[W]e have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' . . ." (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977))).

¹⁴⁸ See *supra* note 13 for examples of this position.

¹⁴⁹ See *supra* note 143 (discussing Justice Black's viewpoint). Black's approach has earlier roots. Justice Stone, in footnote four of *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938), stated that only "when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments," would more rigorous judicial scrutiny apply. *Id.* at 152 n.4.

¹⁵⁰ Another example of this practice is found in the Court's Article III caselaw, where it construes the potential constitutional reach of federal court authority very broadly, see,

general rule of allowing multiple constitutional claims to apply in a given situation; it invokes the vagueness of one clause as a reason not to enforce or apply it in certain cases, while ignoring the comparable ambiguity of other provisions; and it is fundamentally inconsistent with the Court's general approach to unenumerated rights under the Fourteenth Amendment.

Perhaps the Court in *Graham* simply believed that its approach furthered efficiency ends by avoiding the need to develop new standards for substantive due process review in excessive force or malicious prosecution actions. Yet this same efficiency likely would apply in many other scenarios where *Graham*-type preclusion does not: For example, it would be "efficient" to state that where the First Amendment applies, no other amendment may apply or to state that where no specific amendment grants constitutional protection, there is no "penumbral" protection either. But this has not been the Court's approach, even though the specific amendment, as incorporated into the Fourteenth Amendment, often will govern the analysis in ways that obscure the fact that the Due Process Clause is the underlying text supporting the specific restraint on state power.¹⁵¹ In any event, efficiency could have been achieved in *Graham* simply by borrowing principles of rationality from the Fourth Amendment context so as to avoid imposing contradictory (rather than supplemental) obligations on officials without taking the more radical and categorical step of deeming substantive due process inapplicable. This was, as we have

e.g., *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 824 (1824) (holding that federal question need only form an "original ingredient" in matter to justify Article III power), but construes identical statutory language that grants federal court subject matter jurisdiction much more narrowly, see, e.g., *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 817 (1986) (holding that federal statute may provide basis for "arising under" jurisdiction under 28 U.S.C. § 1331 only if statute is one that provides for express or implied private right of action); *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983) (stating that federal jurisdiction is appropriate where "federal law creates the cause of action or [where] the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law"). In these cases, the Court leaves considerable subject matter jurisdiction "money in the bank" for Congress to draw on in the future, should expansion of federal court authority seem necessary or desirable, while it refuses to broadly construe the current jurisdiction statutes, thus curbing its own judicial authority.

¹⁵¹ For example, in resolving a First Amendment freedom of expression challenge to state or local government action, the Court may refer to both the First and Fourteenth Amendments in its opening description of the constitutional claim, but thereafter refer solely to the First Amendment in resolving the issue. See, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563, 565 (1968). It may even refer solely to the First Amendment, without mentioning the Fourteenth Amendment platform for the First Amendment claim. See, e.g., *International Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 674 (1992) (holding Port Authority's ban on solicitation of public funds at airport terminal not violative of First Amendment rights).

seen, the prudent position urged by Justice Souter in his concurring opinion in *Albright*.¹⁵² The only "inefficiency" produced by this alternative would be that a lawsuit based on substantive due process might be pursued when none would be available or likely to be pursued under the Fourth Amendment, because of some procedural bar or other remedial limitation. Such cases, however, are likely to be rare; in any event, "efficiency" in this sense is not a sufficient reason to excise a subcategory of constitutional claims, however small that category may be.¹⁵³ As Justice Powell said in *Moore v. City of East Cleveland*,¹⁵⁴ "There are risks when the judicial branch gives enhanced protection to certain substantive liberties without the guidance of the more specific provisions of the Bill of Rights. . . . [The] history [of the *Lochner* era] counsels caution and restraint. But it does not counsel abandonment" ¹⁵⁵

IV

POLICY OBJECTIONS TO THE INDIRECT ERADICATION OF SUBSTANTIVE DUE PROCESS

Graham's inconsistency with well-accepted and regularly enforced principles of constitutional interpretation and its departure from caselaw in other respects hint at a different motive than those cited by the Court. When the *Graham* analysis is pressed against the Court's other work, what emerges is the very strong sense that the best explanation for the case is some justices' skepticism about the merits of substantive due process per se, and their sharp aversion to unenumerated, "non-fundamental" substantive due process claims in particular. The Court appears to concede the need for some judicial policing of legislative acts, but rejects the use of substantive due process as a vehicle for creating constitutional torts. Thus, the justices may not care about the illogic of *Graham*, if logic is measured by coherence with past unenumerated rights caselaw, because some of them reject the "logic" of these prior decisions altogether, and none has a strong desire to expand their reach. For example, Chief Justice

¹⁵² See *supra* text accompanying notes 35-40.

¹⁵³ Even *Parratt v. Taylor*, 451 U.S. 527 (1981), restricted federal court power to review certain allegedly arbitrary state official decisions only when state law provided for an alternative and adequate remedy. See Fallon, *supra* note 11, at 345 (describing *Parratt* as essentially a form of abstention). The *Graham* caveat to substantive due process claims, in contrast, does not hinge on the availability of any such adequate alternative to the plaintiff. Recall that *Graham*-type preemption has only become relevant where the specific textual provision likely would not protect against the alleged arbitrary or irrational official act, for various reasons. See *supra* note 16 and accompanying text.

¹⁵⁴ 431 U.S. 494 (1977).

¹⁵⁵ *Id.* at 502.

Rehnquist, Justice Scalia, and Justice Thomas almost certainly would not be moved by an argument against *Graham* that seems to presuppose that substantive due process imposes any judicially-enforceable baseline of nonarbitrary, rational government conduct.¹⁵⁶ Although Justices Souter, Ginsburg, Stevens, and Breyer—and perhaps Justices Kennedy and O'Connor—agree that some such baseline exists, they would draw the “goes too far” line in quite different places, and thus might resist overruling *Graham* out of a sense that substantive due process protection *should* be very weak in the limited scenarios in which *Graham* has said it no longer applies. The crucial issue is still whether *Graham* causes any real mischief, apart from its technical flaws, because without evidence of such mischief, one may not secure the votes to overcome stare decisis impulses.

Such pragmatic resistance to overruling *Graham* is well-grounded. Overruling *Graham* clearly would *not* mean that substantive due process would be construed to offer additional, significant protection of property rights, freedom from excessive force in the course of an arrest, or any other specific individual right in most situations. Rather, the current justices likely would continue to give very little bite to substantive due process review of criminal law enforcement practices, local zoning board decisions, or other government practices. Like rational basis review under the Equal Protection Clause, rational basis review under substantive due process likely would be effective against only the most egregious, and thus rarest, abuses of government power.

Nevertheless, if a majority of the current Court still believes that legislative and executive rationality under the Fourteenth Amendment continues to have two components¹⁵⁷—rationality in the substantive due process sense that the law must promote some intelligible and plausible end and be executed in a non-shocking, rational manner, *and* rationality in the equal protection sense that the law's distinctions must be drawn in a reasonably fair, nonbiased manner—then *Graham* should be overruled, insofar as it may be read to withdraw the former check on assertions of state power.

¹⁵⁶ In this respect, they likely would agree with Justice Black, who expressed similar skepticism in *Griswold v. Connecticut*, 381 U.S. 479, 511-13 (1965) (Black, J., dissenting) (“I do not believe that we are granted power by the Due Process Clause or any other constitutional provision . . . to measure constitutionality by our belief that legislation is arbitrary, capricious or unreasonable, or accomplishes no justifiable purpose, or is offensive to our own notions of ‘civilized standards of conduct.’” (citations omitted)); see also *supra* note 143.

¹⁵⁷ See Fallon, *supra* note 11, at 322-23 (arguing that substantive due process law's “animating commitment . . . is captured by perhaps the most persistently recurring theme in due process cases: government must not be arbitrary”).

Of course, this begs the very question raised in cases like *Palko v. Connecticut*,¹⁵⁸ *Adamson v. California*,¹⁵⁹ *Poe v. Ullman*,¹⁶⁰ and *Griswold v. Connecticut*:¹⁶¹ should courts participate in policing "arbitrary" government conduct, absent a clearly, or even arguably, applicable specific textual provision? The contours of this debate are well-mapped, and are not my focus here. My argument is simply that to foreclose the inquiry, as *Graham* effectively does if extended to its logical conclusion, is to depart from the Court's practices. The significance of this departure has led to the development of a lower court doctrine that is deeply inconsistent with the unenumerated rights caselaw in ways that have gone unrecognized by commentators. Whatever one may ultimately conclude on this crucial question, it is best resolved directly and with an awareness of the potential implications, not slipped past the eyes of commentators and the public.

CONCLUSION

Graham is a tiny tail, but it may wag a very big dog, insofar as it is best read as a renunciation of judicial authority to define or craft any uncharted rights under substantive due process. *Graham* implicitly revives Hugo Black's jot for jot, and "not a jot more" account of substantive due process, even as the Court elsewhere continues to embrace (however fitfully) Harlan's account of the independence of the Fourteenth Amendment. Two wholly incompatible logics thus now struggle within this doctrine, a tension that is becoming increasingly insistent and that the Court eventually may confront. When it does, I propose that *Graham*, rather than the substantive due process edifice, should topple.

¹⁵⁸ 302 U.S. 319 (1937).

¹⁵⁹ 332 U.S. 46 (1947).

¹⁶⁰ 367 U.S. 497 (1961).

¹⁶¹ 381 U.S. 479 (1965).