CONSCIENCE SHOCKING IN THE AGE OF TRUMP

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The Due Process Clause has both a procedural component, which ensures adequate procedures prior to the deprivation of a right, and a substantive component, which recognizes some rights so fundamental that no amount of procedure is sufficient to justify their deprivation. The substantive Due Process Clause is the source of vital protections for a range of rights and is often especially important for marginalized groups. But recognition of those rights is only part of the battle. For those rights to count, they must be enforceable in court.

One difficulty surrounding judicial review of alleged substantive due process violations is that the Supreme Court has held that the constitutional inquiry differs depending on the type of action involved. In particular, "executive" deprivations of rights do not rise to the level of a constitutional violation unless they can be said to "shock the judicial conscience." The shocks-the-conscience test has generated some problems. Most obviously, there is the issue of deciding how to determine whether any particular violation is sufficiently shocking. But, in addition, there is the threshold problem of deciding what counts as "executive" action and thus triggers the test in the first place.

This Essay examines that latter difficulty in detail. It provides examples of judicial confusion in applying the test in the context of real cases and chronicles a string of recent challenges to Trump Administration actions that seem to have applied the heightened standard unnecessarily, often at the urging of the government itself. In response, this Essay suggests reframing the executive/legislative dichotomy and moving to a remedy-based standard. This Essay argues that such an approach would provide much-needed clarity as to when the shocks-the-conscience test applies while remaining consistent with the conceptual underpinnings of the test and the Court's substantive due process case law.

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INTRODUCTION

It is, even now, seemingly obligatory to begin any discussion related to the substantive Due Process Clause by noting the controversy and confusion that still attends the doctrine. At least since Professor John Hart Ely called substantive due process a "contradiction in terms,"[1] the academic conversation surrounding the doctrine has taken some skepticism as a given.[2] The Supreme Court, as well, has spoken about the confusion surrounding substantive due process even as it applied it in new cases.[3]

Adding to this confusion is the fact that the indeterminacy surrounding substantive due process has multiple dimensions. Most straightforwardly, there is confusion about how to define those rights to which the "substantive" Due Process Clause applies—those rights so basic that no amount of process will suffice to justify their deprivation at the hands of the government.[4] Parsing, for example, what sorts of rights fall within the test announced in *Washington v. Glucksberg*,[5] which requires a "careful description" of the right at issue and a historical inquiry to determine whether any right so described "has any place in our Nation's traditions,"[6] is an extremely delicate process.

But another, perhaps less well-known, source of confusion is the Court's distinction between substantive due process violations involving "executive" and "legislative" actions. For while the *Glucksberg* test is the process by which the Court evaluates whether legislative acts violate the substantive Due Process Clause, a more forgiving test applies to the evaluation of potential violations perpetrated by executive officials. There, utilizing another famous turn of phrase, the Court has required that executive conduct "shock the conscience" in order to rise to the level of a constitutional violation.[7]

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1. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 18 (1980) ("'[S]ubstantive due process' is a contradiction in terms.").

2. *See, e.g.*, Rosalie Berger Levinson, *Reining In Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 521 n.2 (2008) (collecting examples).

3. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 755–56 (1997) (Souter, J., concurring) ("Thus, we are dealing with a claim to one of those rights sometimes described as rights of substantive due process . . . . The [respondents] accordingly arouse the skepticism of those who find the Due Process Clause an unduly vague or oxymoronic warrant for judicial review . . . .").

4. *See id.* at 722 (explaining Fourteenth Amendment substantive due process rights are not "fully clarified . . . and perhaps not capable of being fully clarified").

5. *Id.* at 720–21.

6. *Id.* at 721–23.

7. *See Rochin v. California*, 342 U.S. 165, 172 (1952) (describing police officers forcibly pumping a suspect's stomach to retrieve evidence as "conduct that shocks the conscience").

The confusion surrounding the Court's use of the "shocks the conscience" language in executive-action cases has manifested in inconsistent application of the doctrine among the lower courts.[8] And, perhaps seizing on that inconsistency, the federal government has, in a number of high-profile recent cases, argued that the shocks-the-conscience test insulates even questionably "executive" action from judicial scrutiny.[9] At a time when so many of the most significant and controversial pieces of national policy are being promulgated via executive or agency action rather than through legislation,[10] tracing the precise boundaries of the shocks-the-conscience test takes on a special significance.

This Essay undertakes that project. In particular, it begins with a brief overview of the foundations of substantive due process case law and the origins of the "shocks the conscience" language at the Supreme Court. Next, this Essay chronicles some of the confusion surrounding the shocks-the-conscience test in the lower courts and points out inconsistencies in the way the doctrine has been applied during the Trump presidency. Finally, this Essay proposes a test for application of the shocks-the-conscience standard that focuses on the relief requested. This Essay suggests that such a test is consistent with the conceptual basis of the conscience-shocking requirement but also promotes robust judicial review of governmental action.

I. SUBSTANTIVE DUE PROCESS GENERALLY

The Constitution not only protects those freedoms specifically mentioned in its text but also guarantees citizens certain unenumerated rights.[11] The exact source of that guarantee, however, was initially difficult to pin down. For example, in *Griswold v. Connecticut*[12] alone, the Justices endorsed several possibilities: Justice Douglas explained that specifically enumerated rights have penumbras that encompass additional

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8. At least for a time, the Tenth Circuit, for example, treated the "shocks the conscience" test as an alternative test to uncover a substantive due process violation, such that those asserting a violation of substantive due process could show either violation of a right "implicit in the concept of ordered liberty" under *Glucksberg* or conduct that "shocked the conscience" as in *Rochin*. *Glucksberg*, 521 U.S. at 721 (1997); *Rochin*, 342 U.S. at 172 (1952).

9. *See infra* Part II.B.

10. *See, e.g.*, Morgan Chalfant & Brett Samuels, *Trump Leans into Executive Action, Looking for 2020 Boost*, THE HILL (Aug. 6, 2020, 6:00 AM), https://thehill.com/homenews/administration/510803-trump-leans-into-executive-action-looking-for-2020-boost [https://perma.cc/BH4B-QBJS].

11. *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 488–89 (1965).

12. *See generally id.* (providing several possibilities for the source of guaranteed unenumerated rights).

protections;[13] Justice Goldberg advocated grounding unenumerated rights in the Ninth Amendment;[14] and Justice Harlan located the right at issue in the case in the Fourteenth Amendment's Due Process Clause.[15] Ultimately, the Supreme Court settled on the last of these approaches, grounding many substantive rights in the Due Process Clause of the Fifth and Fourteenth Amendments.[16]

The Fifth and Fourteenth Amendments require that no one be deprived "of life, liberty, or property, without due process of law."[17] While this guarantee uncontroversially entitles individuals to some meaningful procedural protections,[18] it has also been read to imply that some liberty interests are so fundamental that no amount of process will justify their denial.[19] This doctrine of so-called "substantive due process" has been used to protect "certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs."[20]

The doctrine remains vitally relevant today, especially for historically marginalized groups.[21] Rights to contraception and abortion have their roots in substantive due process.[22] Substantive due process analysis also featured heavily in the Court's analysis in *Obergefell v. Hodges*,[23] which secured the right of same-sex couples to marry.[24] And, this area of the law is still evolving,[25] which makes access to meaningful judicial review important. Courts have begun to analyze the claims of transgender people through a due process lens, recognizing transgender

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13. *Id.* at 483 ("[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion.").

14. *Id.* at 488–89 (Goldberg, J., concurring).

15. *Id.* at 500 (Harlan, J., concurring).

16. *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

17. U.S. CONST. amend. V, § 1; *id.* amend. XIV, § 1.

18. *See Mathews v. Eldridge*, 424 U.S. 319, 332–33 (1976).

19. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion) ("The Clause also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997))).

20. *Obergefell v. Hodges*, 576 U.S. 644, 662 (2015).

21. *See, e.g.*, *Karnoski v. Trump*, No. C17-1297, 2017 WL 6311305, at *1, *7–8 (W.D. Wash. Dec. 11, 2017) (considering the substantive due process arguments surrounding a ban on military service by openly transgender people).

22. *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (considering contraception as a substantive due process right); *Roe v. Wade*, 410 U.S. 113, 153 (1973) (considering abortion as a substantive due process right).

23. 576 U.S. 644, 662 (2015).

24. *Id.* at 676.

25. *See Karnoski*, 2017 WL 6311305, at *8 (discussing substantive due process rights for transgenders in the military); *Cancino Castellar v. McAleenan*, 388 F. Supp. 3d 1218, 1230–31 (S.D. Cal. 2019) (discussing substantive due process rights for immigrant detainees).

peoples' fundamental liberty interest in defining and expressing their gender identities.[26] Immigrants, too, have asserted substantive due process interests, for example, in challenges related to immigration detention and release.[27] For this reason, any barrier to adjudication of substantive due process claims has an outsized impact on marginalized people and could stifle the Court's recognition of the due process rights of those groups.

In recent times, the Court's decision in *Washington v. Glucksberg*[28] has become a primary reference point for substantive due process doctrine. The Court's opinion in *Glucksberg* describes the substantive due process inquiry as proceeding in two steps: First, the Court defines the right at issue.[29] Second, the Court inquires as to the place of the right within the Nation's traditions.[30] In *Glucksberg* itself, the Court's framing of the substantive right at issue foreshadowed the case's outcome—it focused specifically on the right to die by suicide rather than a general right to control the manner of one's death.[31] Once the framing issue was decided, the Court had little trouble in concluding that a right protecting suicide was not fundamental.[32]

That framing issue defines many of the debates over substantive due process that persist today—many substantive due process cases revolve around whether a particular alleged right is more properly characterized as partaking generally in some familiar and fundamental interest or as narrowly self-contained.[33] But there is also a threshold question in substantive due process review that has the power to shut down such challenges before they even reach that level of review. Specifically, the Supreme Court has indicated that, for substantive due process violations resulting from "executive action," the conduct at issue will not be constitutionally cognizable at all unless it can be said to "shock the

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26. *See Karnoski*, 2017 WL 6311305, at *8.

27. *See, e.g.*, *Cancino Castellar*, 388 F. Supp. 3d at 1233–35 (substantive due process interest in prompt presentment); *see generally* Anthony O'Rourke, *Substantive Due Process for Noncitizens: Lessons from* Obergefell, 114 MICH. L. REV. FIRST IMPRESSIONS 9 (2015), http://repository.law.umich.edu/mlr_fi/vol114/iss1/11 [https://perma.cc/QGC6-DV84?type=image] (discussing non-citizens and the substantive Due Process Clause).

28. 521 U.S. 702, 720–21 (1997).

29. *Id.* at 720–22.

30. *Id.* at 722–23; *Ssee also* Peter Nicolas, *Fundamental Rights in a Post-*Obergefell *World*, 27 YALE J.L. & FEMINISM 331, 336–38 (2016) (explaining the court's two-step test in further detail).

31. *Glucksberg*, 521 U.S. at 723–24.

32. *Id.* at 723–28.

33. *See generally, e.g.*, Randy E. Barnett, *Scrutiny Land*, 106 MICH. L. REV. 1479, 1479 (2008) ("[T]he ability to define accurately almost any liberty as broad or narrow improperly gives courts complete discretion to protect liberty or not.").

judicial conscience."[34] The problem, simply put, is determining just which actions those are. As a first step toward answering that question, the next Part quickly summarizes the development of the shocks-the-conscience test at the Supreme Court before examining some of the difficulties that lower courts have encountered trying to apply the test.

II. CONSCIENCE SHOCKING AND THE EXECUTIVE/LEGISLATIVE DISTINCTION

The origins of the Court's "shocks the conscience" formulation date to its 1952 decision in *Rochin v. California*.[35] In that case, the Court evaluated a claimed violation of substantive due process involving police officers forcibly inducing vomiting in a suspect who was believed to have swallowed drugs.[36] The case made it to the Supreme Court on a Fourteenth Amendment challenge to the officers' conduct.[37] The Supreme Court held that the officers had violated the Fourteenth Amendment, explaining that the extreme lengths to which the officers had gone to obtain evidence fundamentally failed to "respect certain decencies of civilized conduct."[38]

But, in relying on the Fourteenth Amendment, Justice Frankfurter's majority opinion was clearly sensitive to the potential criticism that the Due Process Clause was serving merely as a vehicle for the Justices to give their own sense of right and wrong the force of constitutional law. Justice Frankfurter defended the Court's ruling by saying:

> The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. . . . Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. This is conduct that shocks the conscience.[39]

Far from announcing a free-standing constitutional test, then, Justice Frankfurter's initial "shocks the conscience" formulation was instead meant to insulate application of the Fourteenth Amendment from

34. *See County of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998).
35. 342 U.S. 165, 175 (1952).
36. *Id.* at 166.
37. *Id.* at 168.
38. *Id.* at 173–74.
39. *Id.* at 170, 172.

allegations of judicial activism. It was not until subsequent application of *Rochin* that conscience shocking became a distinct element of due process analysis.

The Supreme Court recognized that transformation in *County of Sacramento v. Lewis*.[40] There, citing *Rochin*, the Court explained that the actions of the executive branch could go so far as to violate due process, but "the cognizable level of executive abuse of power [is] that which shocks the conscience."[41] The Court made clear that executive conduct must be found "sufficiently shocking"[42] in order to result in liability for executive officials.[43] As Justice Scalia lamented in a concurring opinion, "According to today's opinion, [the shocks-the-conscience test] is the *measure* of arbitrariness when what is at issue is executive, rather than legislative, action."[44] Justice Scalia preferred instead to apply the *Glucksberg* test to any claimed violation of substantive due process,[45] and his dismay at the Court's endorsement of conscience shocking as a separate test underscores that the standard was understood to be doing independent work in substantive due process cases.

A. Confusion in the Circuits

In addition to skepticism at the Supreme Court, the shocks-the-conscience test has caused confusion among the circuits. The Tenth Circuit serves as an instructive example. For instance, *Seegmiller v. LaVerkin City*[46] involved a substantive due process claim brought by a police officer who had been reprimanded based on a false allegation that she had had an affair with the police chief.[47] The officer claimed that the reprimand "infringed on her fundamental liberty interest in sexual privacy" and thus violated the Fourteenth Amendment.[48] Analyzing that claim, the Tenth Circuit described "two strands of the substantive due process doctrine" that might apply in the case: the traditional inquiry into whether government action violates a fundamental liberty interest and a separate strand which "protects against the exercise of governmental power that shocks the conscience."[49]

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40. 523 U.S. 833, 846 (1998).
41. *Id.* at 846.
42. *Id.* at 848.
43. *Id.* at 847 n.8.
44. *Id.* at 861 (Scalia, J., concurring in the judgment).
45. *Id.* at 862 ("[R]ather than ask whether the police conduct here at issue shocks my unelected conscience, I would ask whether our Nation has traditionally protected the right respondents assert.").
46. 528 F.3d 762 (10th Cir. 2008).
47. *Id.* at 764–65.
48. *Id.* at 769.
49. *Id.* at 767.

The Tenth Circuit positioned the two tests in the alternative, holding that "[b]y satisfying either the 'fundamental right' or the 'shocks the conscience' standards, a plaintiff states a valid substantive due process claim under the Fourteenth Amendment."[50] The court justified this approach by explaining that litigants ought not "comparmentaliz[e] the substantive due process cases of this court and the Supreme Court based on whether the governmental conduct complained of was 'executive' or 'legislative'" because that approach would create "an overly rigid demarcation between the two lines of cases."[51] To bolster that view, the Tenth Circuit cited to a plurality decision of the Supreme Court, *Chavez v. Martinez*.[52] That case involved a Fourteenth Amendment challenge to an allegedly coercive police interrogation.[53] Significantly, as the Tenth Circuit pointed out, Justice Thomas's opinion in *Chavez* first determined that the officer's conduct in the case did not "shock the conscience" in *Rochin* and *Lewis*'s sense[54] and then proceeded to also conclude that the interrogation did not violate a fundamental right under *Glucksberg* either.[55] The Tenth Circuit explained that "[d]espite the governmental conduct at issue being 'executive' in nature, both strands were recited and applied" in *Chavez*.[56] This led the Tenth Circuit to conclude that "the 'shocks the conscience' and 'fundamental liberty' tests are but two separate approaches to analyzing governmental action under the Fourteenth Amendment" that are not "mutually exclusive."[57]

But that flexibility applied only to executive action cases. Shortly after its decision in *Seegmiller*, the Tenth Circuit clarified that the either/or approach described above was available only in cases challenging executive action—for challenges to legislative action, the fundamental rights analysis was the only test the court would apply. In *Dias v. City and County of Denver*,[58] citizens brought suit challenging a Denver city ordinance banning residents from owning pit bulls.[59] Because the case involved a challenge to a city ordinance on substantive due process grounds, the Tenth Circuit had no trouble concluding that the

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50. *Id.*
51. *Id.*
52. 538 U.S. 760 (2003).
53. *Id.* at 763–64.
54. *Id.* at 774–75.
55. *Id.* at 775–76.
56. *Seegmiller*, 538 F.3d at 768.
57. *Id.* at 769. Though not discussed by the court, Justice Steven's concurrence in *Chavez* also lends support to this view. *See Chavez*, 538 U.S. at 787 (Stevens, J., concurring) ("The Due Process Clause of the Fourteenth Amendment protects individuals against state action that either shocks the conscience or interferes with rights implicit in the concept of ordered liberty." (internal citations and quotation marks omitted)).
58. 567 F.3d 1169 (10th Cir. 2009).
59. *Id.* at 1172.

challenge was to legislative, not executive conduct.[60] But the court went on to explain that, because legislative conduct was at issue, it would apply *only* the fundamental rights analysis under *Glucksberg* to decide the due process challenge.[61] In other words, while both strands of analysis are available to the court when evaluating executive action, it was improper to assume the reverse and apply both strands to legislative challenges as well.[62]

Eventually, the Tenth Circuit would abandon the either/or understanding altogether. In 2015, then-Judge Gorsuch delivered the opinion for a panel of the Tenth Circuit in *Browder v. City of Albuquerque*.[63] The court in *Browder* was evaluating a substantive due process claim brought against a police officer who had caused a car accident when he ran a red light while speeding with his sirens flashing despite not responding to an emergency.[64] Rather than presenting the shocks-the-conscience standard as an alternative test, Judge Gorsuch instead described it as specific to cases involving executive action.[65] The court described the evaluation of a substantive due process claim against the executive branch as having two parts: The "first job in assessing a substantive due process claim" is to carefully describe the right at issue.[66] Then, courts must "assess whether the government can muster sufficient justification for its actions."[67] Judge Gorsuch described the shocks-the-conscience test as a part of the second step, concerned with the government's justifications.[68] He explained that "[i]f the government infringed the plaintiff's right through legislative activity,"[69] then strict scrutiny applies, but "[i]f the infringement is the result of executive action, the Supreme Court has instructed us to ask whether . . . it might be 'characterized as arbitrary, or conscience shocking.'"[70] Thus, the Tenth Circuit in *Browder* seemed to understand the shocks-the-conscience test as a part of the familiar *Glucksberg* inquiry—while legislative acts that infringe fundamental rights get strict scrutiny, executive acts that infringe fundamental rights must nevertheless be

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60. *Id.* at 1182.

61. *Id.* at 1182–83.

62. *Id.* at 1182 ("[W]hen *legislative* action is at issue, *Glucksberg* continues to govern, and only the traditional two-part substantive due process framework is applicable.").

63. 787 F.3d 1076 (10th Cir. 2015).

64. *Id.* at 1077.

65. *Id.* at 1079.

66. *Id.* at 1078.

67. *Id.*

68. *Id.* at 1078–79.

69. *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

70. *Id.* at 1078–79 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998)).

conscience shocking to constitute a violation of due process. In a footnote acknowledging that "some question lingers about all this," the court describes *Seegmiller*'s suggestion that plaintiffs can prevail under the shocks-the-conscience standard as an independent test "dicta."[71]

The current state of Tenth Circuit law seems to have coalesced around the view that the shocks-the-conscience test is properly applied only in executive action cases and is the exclusive test for determining whether an executive action that violates a fundamental right rises to the level of a constitutional violation.[72] In other words, evaluation of both legislative and executive action requires assessing whether the right at issue counts as fundamental or deeply rooted in the nation's history and tradition. But, while legislative infringements of those rights are subject to strict scrutiny (and thus are exceedingly unlikely to survive judicial review), executive infringements must "shock the conscience" to be actionable under the Constitution.

And, even where a fundamental right is not implicated, some circuit courts have applied the shocks-the-conscience test, rather than rational basis review, to executive action. In a 2017 case, for example, the Fifth Circuit explained that it applies "both tests in substantive due process cases" depending on the type of government action at issue.[73] The court further explained that "many circuits . . . expressly apply rational basis to legislative or quasi-legislative action (government action that applies broadly) and shocks the conscience to executive action (government acts that are more individualized)."[74]

In sum, courts apply the shocks-the-conscience test to due process claims implicating executive action whether or not those claims allege infringement of a fundamental right. As the First Circuit has explained, "an abuse of power practiced by the executive branch of state government sinks to a level cognizable under the Due Process Clause only when it is so extreme and egregious as to shock the contemporary conscience."[75] The "threshold matter" of whether the conduct at issue shocks the conscience applies regardless of whether or not the action at issue violates a fundamental right.[76] But, naturally, the significance of the right at issue in the complaint likely has an important bearing on whether its potential violation is shocking to the contemporary judicial conscience. Thus, while the threshold conscience-shocking inquiry and the later

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71. *Id.* at 1079 n.1.

72. *See Dawson v. Bd. of Cnty. Comm'rs*, 732 Fed. App'x. 624, 633–36 (Tymkovich, C.J., concurring), *cert. denied*, 139 S. Ct. 862 (2019); *Id.* at 636 n.2 (Tymkovich, C.J., concurring) (collecting examples of this approach in other circuits).

73. *Reyes v. N. Tex. Tollway Auth.* (*NNTA*), 861 F.3d 558, 562 (5th Cir. 2017).

74. *Id.* (collecting cases).

75. *DePoutot v. Raffaelly*, 424 F.3d 112, 118 (1st Cir. 2005).

76. *Id.*

fundamentality inquiry are technically distinct, litigants are likely to have an easier time convincing judges that a given action shocks the conscience when that action infringes on a deeply rooted right.

Even though that uneasy status quo is not exactly a model of clarity, the confusion surrounding the shocks-the-conscience test does not end there. The line of Tenth Circuit case law just discussed focuses mainly on how the conscience-shocking inquiry interacts with *Glucksberg*. That discussion tells us how to think about what sorts of violations shock the conscience and how courts should substantively evaluate the egregiousness of the constitutional violation alleged in a given complaint. Logically antecedent to that question, though, is the procedural problem of determining what counts as legislative and executive action in the first place (and thus whether the shocks-the-conscience test should even enter the conversation). As several very recent examples make clear, that task is not as easy as the tidy binary would suggest, especially in a political environment in which many large-scale decisions are made via administrative action and executive order.[77]

Some circuit courts have purported to give relatively straightforward answers to that threshold question. For instance, the Second Circuit described the executive/legislative distinction as "a functional differentiation," explaining that "[s]ome types of executive actions, such as regulations, are more akin to legislative action."[78] The Fifth Circuit, too, has applied a functional standard. In *Reyes v. North Texas Tollway Authority*, for example, the Fifth Circuit applied the legislative rational basis standard to a state agency's imposition of administrative fees on drivers using toll roads.[79] Even though the administrative fees were imposed by a state agency, rather than by legislative enactment, the court reasoned that they were "broadly imposed" and that the private litigants challenging their constitutionality sought "to invalidate the fees across the board, not just a particular application of the fees that had an egregious impact."[80] For that reason, the court declined to apply the shocks-the-conscience test in those circumstances.[81]

This functional, rather than identity-based, inquiry into the character of challenged government action makes sense. But, as the Fifth Circuit acknowledged, "Some due process challenges blur along the executive/legislative line, such as when a broadly applicable rule is challenged only as it applies to a particular situation."[82]

77. *See, e.g.*, Chalfant & Samuels, *supra* note 10.
78. *Hancock v. Cnty. of Rensselaer*, 882 F.3d 58, 65 n.2 (2d Cir. 2018).
79. *NNTA*, 861 F.3d at 563.
80. *Id.*
81. *Id.*
82. *Id.*

B. Blurring the Executive/Legislative Line

Examples of such blurring are not difficult to produce, particularly in light of a string of recent due process-based challenges to Trump Administration policies. One prominent example is a lawsuit begun in the District Court of Maryland, challenging President Trump's decision to disallow enlistment or open service by transgender people in the military.[83] Shortly after President Trump announced that decision on Twitter, several groups brought suit seeking declaratory and injunctive relief based in part on the theory that President Trump's actions were unconstitutionally arbitrary and infringed on transgender servicemembers' liberty in violation of the Due Process Clause.[84] The District Court of Maryland considered the substantive due process claim in the context of both a motion for a preliminary injunction[85] and, later, a motion to dismiss.[86] Each time, the district court assumed that the President's decision to exclude transgender people from military service was executive action and, therefore, triggered the shocks-the-conscience test.[87]

From a functional perspective, however, that result is surprising. While it is true that the identity of the government actor (President Trump) points to the Executive Branch, the policy at issue in the case was broad, affecting an entire class of servicemembers. It was, in the Fifth Circuit's language, an "across the board"[88] challenge to the decision to exclude transgender people, rather than an individual challenge to the way a particular policy was applied to a specific individual. Indeed, one of the plaintiffs in the case was the ACLU of Maryland, which asserted standing based on a broad-based "interest in protecting both its members and other men and women who are transgender from discrimination."[89] The complaint sought declaratory relief that the ban was invalid on its face and injunctive relief preventing the government from enforcing the policy anywhere, not just against the named plaintiffs.[90] The identity of the government actor, then, seems to have been the only aspect of the

83. *Stone v. Trump*, 280 F. Supp. 3d 747, 753–54 (D. Md. 2017).

84. *Id.* at 754, 770–71.

85. *Id.*

86. *Stone v. Trump* (*Stone II*), 400 F. Supp. 3d 317, 356 (D. Md. 2019).

87. *Stone v. Trump*, 280 F. Supp. 3d at 770; *Stone II*, 400 F. Supp. 3d at 355–56 ("Where, as here, the alleged conduct involves executive action, the Court addresses the arbitrariness of the challenged actions as a 'threshold question.'") (quoting *Hawkins v. Freeman*, 195 F.3d 732, 738 (4th Cir. 1999)).

88. *Reyes*, 861 F.3d at 563.

89. Third Amended Complaint for Declaratory and Injunctive Relief ¶ 114, *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017) (No. 17-cv-02459), 2019 WL 7638787.

90. *Id.* ¶ 247.

case that would support classifying the ban on transgender people in military service as an executive deprivation of due process.

Or, consider *J.E.C.M. v. Lloyd*,[91] a challenge to the Office of Refugee Resettlement's (ORR) policies regarding the release of unaccompanied minors from immigration detention.[92] The plaintiffs in the case were unaccompanied minors being held in ORR custody.[93] One of the claims in the putative class action suit challenged ORR's procedures for releasing unaccompanied minors to adult family members or other potential sponsors.[94] Part of the plaintiffs' complaint was that the procedures currently in place made it more difficult for minors to be released from custody, violating the minors' rights to liberty and familial care.[95] Interestingly, in analyzing the substantive due process component of the plaintiffs' claims, the district court set out the shocks-the-conscience test and the fundamental rights analysis as "two independent strands of substantive due process doctrine."[96] Rather than categorize the conduct at issue as executive or legislative and then apply the corresponding test, however, the court independently analyzed plaintiffs' claims under both standards—first finding that the allegations did not rise to the level of conscience-shocking conduct and then rejecting the plaintiffs' fundamental rights argument.[97] Regardless of the merits of the plaintiffs' substantive due process argument, that analysis indicates at least some confusion about which test governed the substantive due process claims in the case. Here again, the government actor implementing the policy at issue was a member of the executive branch, but the complaint sought widespread declaratory and habeas relief on behalf of an entire class of minors in custody.[98] So, on its face, the suit certainly seemed to challenge the reunification policy writ large, which has the flavor of a legislative claim. It is unclear, then, why the elevated shocks-the-conscience test should have factored into the analysis at all.

One reason why the shocks-the-conscience test may be making its way into courts' analysis of policies that appear functionally legislative is that the government itself has argued for application of the test in its briefs. One high-profile example is the challenge to the Trump Administration's decision to rescind the Deferred Action for Childhood

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91. 352 F. Supp. 3d 559 (E.D. Va. 2018).

92. *Id.* at 568.

93. *Id.* at 567–68.

94. *Id.* at 568, 573–74.

95. *Id.* at 586–87.

96. *Id.*

97. *Id.* The approach is reminiscent of the now-abandoned approach of the Tenth Circuit in *Seegmiller*, 528 F.3d at 767; *see supra* note 45 and accompanying text.

98. *J.E.C.M.*, 352 F. Supp. 3d at 575.

Arrivals (DACA) policy.[99] Begun under the Obama Administration, DACA granted deferred action to individuals who had been brought into the country as children without legal status.[100] The Trump Administration's Department of Homeland Security decided to withdraw the deferred action policy, issuing a memorandum explaining that decision in 2017.[101] The threatened withdrawal prompted multiple legal challenges. In the District of Maryland, a group of individual litigants who are current or former DACA recipients, as well as a number of immigration organizations, brought suit seeking to enjoin the rescission.[102] One of the claims in the plaintiffs' suit was that the decision to rescind DACA violated substantive due process because it was fundamentally unfair.[103]

Despite the character of the challenge—a broad constitutional challenge to the Trump Administration's generally applicable and reasoned policy—both the government and district court framed the substantive due process challenge in terms of the shocks-the-conscience test. The government argued that the plaintiffs had failed to state a substantive due process claim, suggesting that "to survive dismissal in a 'challenge to executive action' such as this one, Plaintiffs must allege behavior that is 'so egregious' and 'outrageous' as to 'shock the contemporary conscience.'"[104] Arguing that the decision to rescind could not meet that "extraordinarily high standard," the government urged dismissal of the substantive due process claim.[105] In its opinion addressing the preliminary injunction request, the district court adopted the government's analytical frame.[106] Holding that the rescission policy "does not shock the conscience of this Court," the district court found that the claim "lack[ed] merit" and refused to enjoin the policy on that (or any other) ground.[107] In the ensuing appeal before the Fourth Circuit, the government again framed the substantive due process issue as

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99. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1896 (2020).

100. *Id.* at 1891.

101. *See* Elaine C. Duke, *Memorandum on Recission of Deferred Action for Childhood Arrivals* (*DACA*), DHS (Sept. 5, 2017), https://www.dhs.gov/news/2017/09/05/memorandum-rescission-daca [https://perma.cc/EAE2-RBS5].

102. *Casa De Md. v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758, 762 (D. Md. 2018).

103. *Id.* at 777.

104. Defendants' Memorandum of Law in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment at 66, *Casa De Md. v. U.S. Dep't of Homeland Sec.*, 284 F. Supp. 3d 758 (D. Md. 2018) (No. 17-cv-2942), 2017 WL 11219535.

105. *Id.*

106. *Casa De Md.*, 284 F. Supp. 3d at 777 (suggesting that the conduct at issue "must be 'so egregious' and 'so outrageous' as 'to shock the contemporary conscience'").

107. *Id.* at 777–79.

whether the plaintiffs had adequately "demonstrate[d] conscience-shocking behavior."[108]

The shocks-the-conscience test should not have governed review of DACA under the substantive Due Process Clause. DACA has all the hallmarks of a "functionally" legislative government action. It was a reasoned, deliberative action that affected the legal status of a broad class of people. The lawsuits challenging the DACA rescission sought class-based relief.[109] Virtually nothing about the government action in the DACA case is relevantly similar to, for example, the impulsive decision of individual police officers to pump an individual suspect's stomach pursuant to no formal policy (as in *Rochin*).[110] Indeed, this is arguably not even an instance of the "blurring" of the executive/legislative distinction: the only real aspect of the case that would suggest executive action is the identity of the individual (the Secretary of the Department of Homeland Security) who announced the policy change. To be clear, the point is not that plaintiffs would certainly have succeeded on a substantive due process claim analyzed under the correct standards. Instead, the point is just that the government and the courts seem to have miscast the plaintiffs' constitutional challenge in this case and thereby erected an unnecessary barrier to the plaintiffs' ability to state a cognizable claim under the Due Process Clause.

The government has also invoked the shocks-the-conscience test in response to other similarly broad challenges to official action. For example, in a putative class action challenging the constitutionality of enforcing a sex-segregated selective service requirement, the government argued that a substantive due process challenge to the enforcement of the Military Selective Service Act was best "viewed as a challenge to executive action" and failed to state a claim because "Plaintiff has set for no allegations that would remotely satisfy" the shocks-the conscience test.[111] Or consider the facts of *Ms. L. v. U.S. Immigration and Customs Enforcement*,[112] a prime example of the type of blurring of the executive/legislative distinction the Fifth Circuit warned of in *Reyes* because it involved both a challenge to a broad policy and an objection to how that policy was applied to particular individuals.[113] The plaintiffs in *Ms. L.* were two individuals seeking to represent a class of adult

108. Opening and Response Brief for Appellees at 75–76, *Casa De Md. v. U.S. Dep't of Homeland Sec.*, 924 F.3d 684 (4th Cir. 2019) (No. 18-1521), 2018 WL 3725582, at * 64–65.

109. *Casa De Md.*, 284 F. Supp. 3d at 762–63.

110. *Rochin v. California*, 342 U.S. 165, 166 (1952).

111. Defendants' Memorandum of Law in Support of Motion to Dismiss Plaintiff's Second Amended Complaint at 35–36, *Kyle-Labell v. Selective Serv. Sys.*, 364 F. Supp. 3d 394 (D.N.J. 2019) (No. 15-cv-5193), 2018 WL 3116658.

112. 302 F. Supp. 3d 1149 (S.D. Cal. 2018).

113. *See id.*

parents who had been separated from their children at the hands of the government while in immigration detention.[114] The plaintiffs sought not only reunification with their own children, but also injunctive relief to stop the policy of family separation across the board.[115] Despite the challenge to the policy generally, however, both the government and the district court framed the substantive due process challenge in the case as challenging executive action and therefore applied the shocks-the-conscience test.[116] The same concerns apply to the government's argument that the test should apply to a general challenge to the proposed Presidential Commission on Election Integrity on substantive due process grounds.[117]

Again, the standard-of-review point here is independent of the actual constitutional merits of any of these claims. The concern here is antecedent to consideration of those merits, which have been needlessly obscured by over-application of the shocks-the-conscience test. In all of these circumstances, plaintiffs brought broad challenges to a government policy writ large and yet had to contend with satisfying a test meant to apply to the rogue actions of individual government officials harming individual defendants.[118] Not only does the application of the shocks-the-conscience test run counter to the caselaw from which it derives, but it is also inconsistent with the history of the Due Process Clause and the conceptual underpinnings of the legislative/executive distinction in substantive due process review.

III. PROPOSING A BETTER TEST

The muddled state of case law in this area suggests room for improvement. Rather than advocating for abandoning the shocks-the-conscience test altogether, a position for which there exists scholarly precedent,[119] this Essay suggests that the law could make significant progress by more clearly defining those situations to which the shocks-the-conscience test applies. Specifically, this Essay proposes rejecting the

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114. *Id.* at 1155–56.

115. *See Ms. L. v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 1133, 1137 (S.D. Cal. 2018) (issuing preliminary injunction).

116. *Id.* at 1142–43; Respondent-Defendants' Memorandum of Points and Authorities in Support of Motion to Dismiss at 17, *Ms. L. v. U.S. Immigr. & Customs Enf't*, 302 F. Supp. 3d 1149 (S.D. Cal. 2018) (No. 18-cv-428), 2018 WL 8222952 ("To establish a substantive due process violation, Plaintiffs must establish that the Government has engaged in conduct that is so outrageous that it shocks the conscience.").

117. *See* Defendants' Reply in Further Support of their Motion to Dismiss at 16, 19, *NAACP Legal Def. & Educ. Fund, Inc. v. Trump*, No 17-cv-05427 (S.D.N.Y. 2017), 2017 WL 6533204.

118. *See, e.g.*, *Ms. L. v. U.S. Immigr. & Customs Enf't*, 310 F. Supp. 3d 1133.

119. *See infra* notes 134–35 and accompanying text.

executive/legislative distinction in favor of a distinction between claims for money damages, to be analyzed under the shocks-the-conscience test, and claims for equitable relief, to be analyzed under the more familiar *Glucksberg* test. Ultimately, under this Essay's proposal, that would mean a reduced role for the shocks-the-conscience test, but, importantly, that reduction would be achieved by cabining the test's application rather than rejecting it outright. This Essay argues that a relief-based approach has both practical and conceptual advantages over the status quo. In order to develop those themes, it is important first to explore the justifications for the shocks-the-conscience standard itself in more detail.

A. Justifying the Original Test

Given that conscience-shocking conduct is required to maintain a substantive due process claim against the executive,[120] a natural question is why the Supreme Court saw fit to require this separate inquiry when evaluating executive conduct. That is, why did the Court think it necessary, in the executive-action context, to ask whether the conduct at issue shocks the conscience rather than simply proceeding directly with the *Glucksberg* test and a determination of whether the conduct violated a fundamental right? Woven throughout the Court's reasoning in *Lewis* are at least four possible answers to that question: First, the Court associates conscience-shocking behavior with the sort of arbitrary conduct that is at the heart of the historical understanding of due process.[121] Second, the test helps maintain the proper proportions of constitutional review and mitigates the risk of turning every improper executive action into a constitutional violation.[122] Third, the test gets at a possible difference in mens rea between executive action and legislative enactments.[123] And, finally, the test shows some sensitivity to federalism concerns because it prevents constitutional law from encroaching on state tort systems.[124]

Begin with the history of the Due Process Clause. That history has been extensively chronicled elsewhere,[125] and this Essay does not seek to make an original contribution to that historical scholarship. Instead,

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

121. *See Lewis*, 523 U.S. at 845–47.

122. *Id.* at 848.

123. *Id.* at 854.

124. *Id.* at 855 n.14.

125. *See generally, e.g.*, Edward S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 336 (1911); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408 (2010) (exploring possible differences in historical context between the Fifth and Fourteenth Amendments' Due Process Clauses); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672 (2012) (responding to Williams).

distilling some general themes will be sufficient to place the shocks-the-conscience test in historical context. Broadly, scholars trace due process to the Magna Carta, where the concept operated as a check on the power of the King to unilaterally deprive individuals of rights without legal process.[126] That conception of due process emphasizes that citizens are due a process governed by law—generally applicable standards passed by an independent lawmaking body—rather than process governed by the whims of the sovereign.[127] That historical understanding squares with the Supreme Court's insistence that "[t]he touchstone of due process is protection of the individual against arbitrary action of government."[128]

But, as Professor Rosalie Berger Levinson has pointed out, this very general historical backdrop is difficult to square with the modern shocks-the-conscience requirement.[129] That is because the shocks-the-conscience test creates an additional barrier to courts checking executive conduct on substantive due process grounds "despite the fact that substantive due process was intended, like its forbearer, Magna Carta, to limit the power of the King—the executive branch."[130] If we understand due process as a check on the ability of any particular branch of government to act arbitrarily and independently, it would seem that we ought to be particularly sensitive to potential abuses by the executive branch. The shocks-the-conscience test, however, inverts that sensitivity and gives executive action additional insulation against judicial review.

A second theme readily discernible from brief engagement with the history of the Due Process Clause involves the conceptual distinction between law and judgment. As Professors Nathan Chapman and Michael McConnell argue, the Due Process Clause can be understood to constitutionalize separation of powers concepts.[131] Central to the separation of powers is the distinction between laws, which "said how subjects will be bound" and judgments or sentences, which "applied the existing law by which a subject had been bound."[132] Used this way, "law" can be distinguished by two characteristics: "prospectivity" and "generality."[133] That is, laws were understood to provide general rules

126. *See* Chapman & McConnell, *supra* note 125, at 1683 (explaining the origins of due process as requiring that "the Crown could deprive subjects of rights only through institutional coordination").

127. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 24–25 (1981) (discussing that due process is the intersection between the power of the law and individual rights).

128. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

129. *See* Rosalie Berger Levinson, Kingsley *Breathes New Life into Substantive Due Process as a Check on Abuse of Government Power*, 93 NOTRE DAME L. REV. 357, 358 (2017).

130. *Id.*

131. Chapman & McConnell, *supra* note 125, at 1727–30.

132. *Id.* at 1731.

133. *Id.* at 1731–34.

for future cases and to operate similarly on all citizens in relevantly similar circumstances.[134]

Viewed with those concepts in mind, the muddled application of the shocks-the-conscience test detailed above should be troubling. After all, if the character of "law" or "legislative act" is defined primarily by prospectivity and generality, then executive policies that, for example, withdraw all future assurances of non-enforcement of immigration laws for a general class of individuals brought to this country as children would seem to be quintessentially "legal." Indeed, any of the substantive due process challenges to broad executive policies like that described above would seem to fit comfortably within the core of what "due process of law" was historically understood to protect. Those policies are general in the relevant sense—they apply broadly to an identifiable group.[135] They are also clearly prospective in that they announce what the policy of the administration is and will be with regard to military service by transgender people, or deferred action, or family separation, or gendered draft requirements, or detention of unaccompanied minors. Given that the policies at the heart of the suits described above fit so comfortably within these conceptual parameters, it makes little sense to interpose the shocks-the-conscience requirement between such policies and meaningful due process review.

Courts explaining the shocks-the-conscience requirement have also justified the test as serving a different separation-of-powers function: it prevents courts from usurping legislative authority by turning every tort committed by a government official into a constitutional violation.[136] In this way, the test can be understood as preserving the proper dimensions of constitutional review: preventing egregiously arbitrary abuses by the executive while leaving to the legislature the job of crafting a tort system to adequately protect citizens against more mundane types of government action.

The Supreme Court has explained that the Due Process Clause "is not a 'font of tort law to be superimposed upon whatever systems may already be administered by the States.'"[137] Instead, the Constitution is meant to address "the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together

134. *Id.*

135. As Chapman and McConnell explain, generality does not require that a law "apply universally to all persons." To take their example, a law prohibiting minors from drinking alcohol is still general because it applies equally to a general class of citizens. *Id.* at 1733–34.

136. *See County of Sacramento v. Lewis*, 523 U.S. 833, 848 (1998).

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

in society."[138] But "injuries that attend living together in society"[139] evokes the core of traditional tort law: the sorts of accidental injuries that are inevitable as people interact. Those sorts of accidents, while statistically certain to occur, are difficult to predict, so legislatures construct rules to ensure that the costs associated with any particular accident are not debilitating and so as to incentivize actors to take precautions to avoid some accidents as well.[140] But that sort of tort system has little to say about legal claims in response to deliberate government action. The potential costs of revoking a decision of non-enforcement for Dreamers or of separating families in immigration detention are not the sort of random costs that result from accidents among citizens. There is little reason to think, therefore, that traditional tort law has much of anything to say about those cases.

What's more, as described above, many of the challenges to which the shocks-the-conscience test has been applied do not seek tort-like remedies. In several instances, plaintiffs sought declaratory or injunctive relief on behalf of a purported class rather than individual money damages to compensate for some accidental loss.[141] There would seem to be little risk, therefore, of such suits infringing upon territory that would be typically associated with tort law.

Relatedly, the shocks-the-conscience test's legislative/executive distinction can be understood to track important differences in the mens rea associated with different kinds of government conduct. The *Lewis* Court explained that "the Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process."[142] The Court explained that the shocks-the-conscience test was intended to guide courts considering liability in a "middle range" between mere negligence but less than intentional conduct.[143] As then-Judge Gorsuch explained in *Browder*, "in cases where forethought is feasible some form of recklessness to the plaintiff's right may be enough: our tradition suggests that we can and should usually expect more from the sovereign than deliberate indifference to fundamental rights."[144] The heightened mens rea requirement makes sense in light of the circumstances in which we might expect to see executive violations of fundamental rights most often—if an executive official is "responding to an emergency," for example, or making some other type of in-the-moment decision that does

138. *Daniels v. Williams*, 474 U.S. 327, 332 (1986).

139. *Id.*

140. *See, e.g.*, *Connor B. ex rel. Vigurs v. Patrick*, 774 F.3d 45 (1st Cir. 2014).

141. *Id.* at 45.

142. *County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998).

143. *Id.*

144. *Browder v. City of Albuquerque*, 787 F.3d 1076, 1080 (10th Cir. 2015).

not allow for deliberation.[145] In those circumstances, the shocks-the-conscience test perhaps provides executive officials with latitude to respond to exigent circumstances without the potential for liability causing them to second-guess their decisions.

Whatever one thinks of that sort of justification for a heightened mens rea requirement in cases where the facts did not allow time for deliberation, it plainly does not apply to challenges to generally applicable executive policy. Agency and executive action is rarely the sort of snap decision that would justify this kind of latitude—the actions at issue in, for example, the DACA litigation, were the subject of extensive government analysis and two distinct memoranda produced by the Department of Homeland Security.[146] When an administration has taken the time to justify its policy and has claimed to have deliberated about the benefits and drawbacks associated with a particular course of action,[147] the administration presumably also has time to consider whether its policy is unconstitutional. And, while such policies undoubtedly govern areas of domestic life that are important, that importance does not mean that the issues are "emergencies" in the sense relevant to the mens rea justification. If there is time to outline the reasons for a policy in an official memorandum or order, there is time for the sort of constitutional scrutiny ex ante that obviates the need for a shield from judicial review ex post.

A final possible justification for the shocks-the-conscience test is that it preserves state power over tort systems and thereby promotes important federalism interests.[148] But for one thing, that explanation applies to the review of action by state officials—federal actors would be immune from state tort liability unless Congress creates an exception.[149] And again, while this sort of justification might hold in situations where plaintiffs sue state officials in their individual capacities seeking money damages, the sorts of government policies that are the focus of this Essay are so far removed from the domain of state tort systems as to make this rationale a non-starter. It hardly intrudes on the sovereignty of the states

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145. *Id.*

146. *See Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, 908 F.3d 476, 491–92, 510 n.24 (9th Cir. 2018).

147. *See generally, e.g.*, Memorandum from Sec'y Kirstjen M. Nielsen, Sec'y, U.S. Dep't of Homeland Sec. (June 22, 2018) (on file with the U.S. Department of Homeland Security).

148. *See, e.g.*, *Lewis*, 523 U.S. at 864 (Scalia, J., concurring) ("If the people of the State of California would prefer a system that renders policer officers liable for reckless driving during high-speed pursuits, '[t]hey may create such a system . . . by changing the tort law of the State in accordance with the regular lawmaking process.'").

149. *See, e.g.*, *Robinson v. Egnor*, 699 F. Supp. 1207, 1214 (E.D. Va. 1988) (citing 28 U.S.C. § 2679(b)(1) (1948) (amended 1988)) ("Congress chose to provide federal officials with absolute immunity for all acts within the scope of their employment.").

to subject the policies of federal executive officials to meaningful constitutional scrutiny. Indeed, insofar as the Due Process Clause serves as a check on the federal government's power, robust application of the Clause to executive policy actually enhances state sovereignty by reigning in federal overreach.[150] And besides, a challenge to a ban on military service by transgender people or an objection to some aspect of immigration policy or detention focuses on substantive legal domains that are uniquely the province of the federal government.[151] Federalism principles would seem to have relatively little salience in situations, like those mentioned above, where the federal government takes action that affects individuals throughout the country in areas (such as immigration and the military) that are exclusively committed to federal control.[152] The option to, as Justice Scalia explained in *Lewis*, "chang[e] the tort law of the State in accordance with the regular lawmaking process,"[153] simply does not exist in these kinds of cases. No state legislature could conceivably create liability for federal officials implementing policy in substantive domains of federal control. Because of that, robust judicial review would seem to be all the more important in such circumstances, and a shocks-the-conscience standard which makes access to that review more difficult would seem to be out of place.

B. A Simpler Alternative

While the confusion surrounding the legislative/executive distinction is not universal,[154] it appears common enough that some change to the test is warranted. Some scholars have previously called for abandoning the test entirely,[155] but this Essay has focused less on the substance of the test itself and more on procedural questions surrounding its application. Therefore, rather than advocating for complete abandonment of the shocks-the-conscience test, this Essay instead suggests a more straightforward approach to determining when courts should undertake

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150. *Lewis*, 523 U.S. at 855 n.14.

151. *See generally* U.S. CONST. art. II, § 2; *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citations omitted) ("Our cases 'have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'").

152. *See generally* U.S. CONST. art. II, § 2; *Fiallo*, 430 U.S. at 792.

153. *Lewis*, 523 U.S. at 864 (citation omitted).

154. *See, e.g.*, *Abdi v. Wray*, 942 F.3d 1019, 1027–28 (10th Cir. 2019) (explaining that where litigant challenges "broad government policies" the challenged conduct is sufficiently "legislative" that the Glucksberg test governs the substantive due process inquiry).

155. *See* Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307, 308 (2010); *see also* Robert Chesney, *Old Wine or New? The Shocks-the-Conscience Standard and the Distinction Between Legislative and Executive Action*, 50 SYRACUSE L. REV. 981, 1018 (2000).

the conscience-shocking inquiry. Rather than using the legislative/executive dichotomy, we could make progress by relying on a more bright-line rule. To that end, this Essay proposes that courts look to the type of relief requested in a complaint rather than attempting to characterize the challenged conduct as legislative or executive. Complaints seeking individualized damages would continue to trigger the shocks-the-conscience standard, while complaints seeking equitable relief in the form of an injunction or declaratory relief should be analyzed under the *Glucksberg* test.

This proposed division has several advantages over the muddled status quo. First of all, a rule applying the test based on the type of relief sought, rather than based on whether the action at issue is legislative or executive, is much easier to administer. Rather than having cases "blur" along the executive/legislative divide (for example, in situations in which a group of litigants challenges a broad policy as it is being applied to them), courts would need only look to the face of the complaint to determine which test to use. And, in situations where plaintiffs sought both equitable relief and money damages, courts could simply apply both a *Glucksberg*-style fundamental rights analysis and the shocks-the-conscience test for appropriate claims. It would not be unusual for courts to apply, for example, the *Glucksberg* test for purposes of preliminary injunctive relief and the shocks-the-conscience test to determine whether damages were appropriate. Courts would still be free to find that a particular government action violated the Constitution when considered as a broad policy under the fundamental rights analysis, but that money damages were inappropriate because the particular behavior at issue did not rise to the level of conscience-shocking, and tort remedies were more appropriate. A similar sort of bifurcated inquiry already happens under the status quo, for example, in qualified immunity cases where courts sometimes first determine whether a constitutional violation has occurred and then whether the violation was of "clearly established law."[156]

Second, a remedy-based distinction comports with the history and purpose of the shocks-the-conscience test. Again, the test originated in tort-like circumstances where the actions of individual executive branch officials infringed the rights of individual citizens.[157] Part of the conceptual appeal of the shocks-the-conscience test was that it prevented over-constitutionalizing torts committed by government officers.[158] A

156. *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

157. *See generally Lewis*, 523 U.S. at 845, 848. A more detailed discussion of qualified immunity follows below. *See infra* Notes 163–76 and accompanying text. And, even if there are some increased decision costs associated with requiring judges to parse a complaint and apply different substantive due process standards to different claims for relief, it seems probable that any such decision costs are outweighed by the error costs that result from applying the shocks-the-conscience test in a blanket fashion.

158. *Id.* at 847–48.

revised test that applied only to claims for money damages would still track that concern—litigants seeking to right individual wrongs would still have to show conscience-shocking behavior or else rely on more commonplace tort law to vindicate their injuries. But broader claims seeking to enjoin some generally applicable practice would not face the added impediment of having to demonstrate conscience-shocking conduct.

Third, the proposed remedy-based approach is more consistent with the realities of modern governance. Especially considering how much of the substance of modern government happens through agency action or executive order,[159] the distinction between broad legislative acts and narrow executive conduct is outdated. What the test ought to track is whether the challenged conduct applies broadly or narrowly, and a remedy-based approach is a better proxy for that question. The recent suits against the Trump Administration discussed above underscore the confusion that arises when agency and executive action determine so much crucial national policy. And this concern is especially salient in circumstances such as those alleged in many of the complaints discussed above, where litigants challenge executive policy that is allegedly hostile toward the rights of groups like the LGBT community, women, and immigrants. Because so many important constitutional protections for those groups trace back to the substantive Due Process Clause, a test that serves to reinstate meaningful judicial review of violations of those rights is especially important.

Finally, a remedy-based approach promotes substantive due process protections in those circumstances where enforcing substantive due process is most justified. Removing the shocks-the-conscience test as a barrier to judicial scrutiny in cases seeking equitable relief would allow meaningful judicial review under the substantive Due Process Clause in cases seeking to remedy systemic violations. That availability coheres with the notion that "substantive due process analysis is on its firmest footing when applied to systematic governmental action."[160] As Professor Christina Brooks Whitman has put it, "what is special about constitutional law, and distinguishes it from tort, is its concern with institutional power, and therefore with systemic injustice."[161] A remedy-based test for application of the shocks-the-conscience test would serve

159. *See, e.g.*, Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1750 (2019) ("[I]n the second half of the twentieth century, the nation's legal system shifted from one governed primarily by congressional statutes to one governed largely by regulatory law created by administrative agencies within the executive branch.").

160. *Leading Cases*, *The Supreme Court, 1997 Term*, 112 HARV. L. REV. 122, 199 (1998).

161. Christina Brooks Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 CHI. KENT L. REV. 661, 690 (1997).

to elevate claims of systemic injustice by allowing them to proceed without requiring conscience-shocking conduct. And, it is worth pointing out that litigants could not easily game a remedy-based system by simply requesting equitable relief in their complaints if the underlying facts of the case focus on an isolated event—litigants who were really complaining of tort-like injuries resulting from government conduct would lack standing to seek equitable relief.[162]

A natural question in response to this proposal is how the shocks-the-conscience test would interact with various immunity doctrines and with qualified immunity in particular. After all, suits seeking damages against government officials in their individual capacities are already the sorts of claims that trigger defenses of qualified immunity and the attendant inquiry concerning whether the violation of law was "clearly established" at the time of the violation.[163] How would the shocks-the-conscience test interact with the qualified immunity standard in such cases?

To answer that question, it is important to understand two points about the status quo. First, qualified immunity and the shocks-the-conscience test already coexist somewhat uneasily. For example, in *Lewis* itself, Justice Stevens wrote a concurring opinion saying that, because the constitutional question in the case was unclear, he would have avoided answering a "difficult and unresolved" question of constitutional law and ruled instead on qualified immunity grounds.[164] Addressing Justice Stevens's suggestion, the majority disapproved of avoiding the constitutional question altogether, explaining that "in any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated."[165] Citing *Siegert v. Gilley*,[166] the majority explains that "the better approach to resolving cases in which the defense of qualified immunity is raised is to determine first whether the plaintiff has alleged a deprivation of a constitutional right at all."[167] That is especially true, the majority suggested, when the constitutional questions are "difficult and unresolved."[168] If courts avoided answering the constitutional question, then the uncertainty in the law would persist "to the detriment both of officials and individuals."[169] Of course, after

162. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 103–05 (1983) (explaining that plaintiff lacked standing to seek equitable relief because he could not establish sufficient likelihood of similar injury in the future).

163. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

164. *County of Sacramento v. Lewis*, 523 U.S. 833, 859 (1998) (Stevens, J., concurring).

165. *Id.* at 841 n.5.

166. 500 U.S. 226, 232 (1991).

167. *Lewis*, 523 U.S. at 841 n.5.

168. *Id.* at 859.

169. *Id.* at 841 n.5.

Pearson v. Callahan,[170] that procedure is now regarded as only "often beneficial" rather than "mandatory."[171]

Even so, the majority's suggestion in *Lewis* provides a clear role for the shocks-the-conscience standard in cases where plaintiffs seek money damages. If courts treat determination of a constitutional violation as logically prior to a decision about whether the law was clearly established at the time of the violation, then the shocks-the-conscience standard serves to frame the constitutional analysis independent of the "clearly established" prong of the qualified immunity inquiry.[172] In those circumstances, if anything, it would be the qualified immunity test that feels redundant. Having found that an executive official engaged in conscience-shocking behavior, courts might have less trouble concluding that such behavior constituted a clear violation of the law. That is especially true where circuits use a "sliding scale" approach to qualified immunity according to which more egregious constitutional violations receive less protection.[173] As the Tenth Circuit explained in *Browder*, "it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt."[174] Far from being duplicative, then, the shocks-the-conscience test would help to frame the constitutional inquiry and foreshadow the qualified immunity determination to come. But, in contrast to its operation now, with a remedy-based standard, the shocks-the-conscience test would only serve this role in cases where a subsequent qualified immunity decision was likely. And, if the Supreme Court were to ever reconsider the law of qualified immunity,[175] then the shocks-the-conscience standard would remain to "point the way" in deciding substantive due process claims for money damages.[176]

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170. 555 U.S. 223, 236 (2009).

171. *Id.*

172. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

173. *See Fogarty v. Gallegos*, 523 F.3d 1147, 1161 (10th Cir. 2008) ("[O]ur circuit uses a sliding scale to determine when a law is clearly established. Under this approach, '[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.'" (quoting *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) (citation omitted))).

174. *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082–83 (10th Cir. 2015) ("[T]he police cannot obtain immunity for liability for false arrests by arresting people on preposterous charges and then pointing to the absence of any judicial decision that declares the statutory interpretation underlying the charges to be preposterous." (quoting *Northen v. City of Chicago*, 126 F.3d 1024, 1028 (7th Cir. 1997))).

175. *See, e.g.*, Brief of Legal Scholars as *Amici Curiae* in Support of Petitioner, *Baxter v. Bracey*, 751 F. App'x 869 at 5 (6th Cir. 2018) (No. 18-1287); *Baxter v. Bracey*, 751 F. App'x 869 (6th Cir. 2018), *cert. denied*, 140 S. Ct. 1862 (2020).

176. *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998) (alteration to original) (citation omitted).

Second, a remedy-based approach to the application of the shocks-the-conscience test would bring substantive due process jurisprudence more in line with the law of governmental immunity. As Professor Levinson has pointed out, "The Court's unwillingness to hold executive officials liable for substantive due process violations . . . stands in sharp contrast to the law of immunity . . . . [G]overnment officials who engage in legislative conduct enjoy *absolute* immunity from liability, whereas members of the executive branch have only *qualified* immunity."[177] In other words, the law of immunity encourages judicial review of executive conduct relative to the review of legislative acts.[178] It is strange, then, that the shocks-the-conscience test seems to strike the opposite balance for substantive due process review, requiring a higher threshold for review of executive action. A remedy-based application of the test would soften that effect and help to correct the inverted attitude toward judicial review that currently results in substantive due process challenges.

And, whatever its faults, it bears emphasis that a remedy-based application of the shocks-the-conscience test would at least produce a test without the threshold confusion that currently attends the doctrine. Courts have had little trouble deciding that qualified immunity does not exist in suits seeking injunctive relief.[179] While some confusion exists surrounding the substance of the qualified immunity test, just as some confusion exists surrounding what conduct "shocks the conscience," qualified immunity has at least avoided the sort of initial procedural confusion that continues to plague substantive due process review. There is good reason to think that a remedy-based approach for substantive due process cases would produce similar results.

CONCLUSION

The shocks-the-conscience test creates additional burdens for litigants alleging deprivations of their substantive due process rights by executive officials. It has caused confusion among lower courts and provided the government with a convenient argument to attempt to insulate administrative and executive action from close constitutional scrutiny. That lack of scrutiny is particularly harmful to the historically marginalized groups who rely on substantive due process the most. One

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177. Levinson, *supra* note 155, at 338.

178. This is true given Congress's waiver of sovereign immunity in suits seeking injunctive relief against the federal government. *See Cabrera v. Martin*, 973 F.2d 735, 741 (9th Cir. 1992) (finding that 5 U.S.C. § "702 now provides a broad waiver of immunity for injunctive actions filed against the federal government.").

179. *See, e.g.*, *Yang Jing Gan v. City of New York*, 996 F.2d 522 (2d Cir. 1993); *Chrissy F. by Medley v. Miss. Dep't of Pub. Welfare*, 925 F.2d 844, 849 (5th Cir. 1991) ("Neither absolute nor qualified personal immunity extends to suits for injunctive or declaratory relief under § 1983.").

way to avoid over-application of the shocks-the-conscience test, and so to promote the constitutional rights of those groups, is to adopt a clearer threshold test for when the shocks-the-conscience standard applies. A remedy-based approach provides a clean and administrable approach that remains consistent with the conceptual underpinnings of the shocks-the-conscience test and substantive due process law generally.