LIBERTY ON HOLD: THE CONSTITUTIONAL TEST AND SOURCE FOR OVERDETENTION CLAIMS

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The persistence of overdetention—meaning continued detention after officers knew or should have known that the arrested person was entitled to release—poses major concerns about both the fundamental right against arbitrary detention and other unenumerated constitutional rights. The U.S. Supreme Court's 1979 decision in Baker v. McCollan *established a vague constitutional protection against overdetention, but it left lower courts to answer many open questions about its parameters.*

Although courts agree that the Constitution prohibits law enforcement from arbitrarily detaining indefinitely an arrested person who protests their legitimate release, the application of this protection has been inconsistent across federal courts of appeals. This Note examines the present circuit split over both (1) the test for unconstitutional overdetention and (2) the constitutional source of the protection against overdetention. This Note then advocates for courts, moving forward, to (1) adopt a totality of the circumstances test which would evaluate all the factors that contributed to the overdetention, and (2) continue to ground the right against overdetention in substantive due process rather than shifting to a Fourth Amendment framework. This Note also analyzes the overlap between procedural and substantive due process and criticizes the shift toward the Fourth Amendment for the sake of avoiding controversies around substantive due process for overdetention claims.

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INTRODUCTION

"'It could've been me.' That's what each of us thought when we learned that an innocent man was arrested twice, simply because he had the same name as someone with an outstanding warrant: David Sosa."[1] In both an opinion article published in *The Hill*[2] and an amicus brief before the U.S. Supreme Court,[3] Americans named David Sosa lamented the injustice that had befallen their fellow David Sosa.[4] These David Sosas—of which there may be up to 924 in the United States—now fear that they could spend days detained without constitutional recourse when police run a warrant check in Alabama, Florida, or Georgia, because of their common name.[5]

The Martin County, Florida Sheriff's Department arrested plaintiff David Sosa based on a warrant for a different man with the same name issued twenty-two years prior in Harris County, Texas.[6] In 2018, officers wrongfully detained Sosa for three days due to delays in fingerprinting despite the fact that Sosa noted the differences in identifiers, brought up a similar incident in 2014, and repeatedly protested his innocence.[7] Sosa subsequently filed a civil rights action alleging constitutional violations against the county, the sheriff, and the deputies who arrested and interacted with him during his detention.[8] He found no justice in the courts: the district court dismissed his complaint,[9] and the U.S. Court of Appeals for the Eleventh Circuit, rehearing his case en banc, held that there was no constitutional recourse for an overdetention of three days.[10] Sosa appealed, but the Supreme Court denied his writ of certiorari.[11]

Courts have faced questions addressing the constitutionality of overdetention—meaning continued detention after officers knew or should have known that the arrested person was entitled to release—for decades.[12]

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1. David Sosa & David Sosa, *Police Arrested the Wrong David Sosa Twice; We David Sosas Want SCOTUS to Hear His Case*, THE HILL (July 11, 2023, 9:00 AM), https://thehill.com/opinion/criminal-justice/4088761-police-arrested-the-wrong-david-sosa-twice-we-david-sosas-want-scotus-to-hear-his-case/ [https://perma.cc/2LDW-5J2H].

2. *See id.*

3. *See generally* Brief of David Sosa, David Sosa, David Sosa, David Sosa & The Institute for Justice as Amici Curiae Supporting Petitioner, Sosa v. Martin County, 144 S. Ct. 88 (2023) (No. 22-1145).

4. *See id.* at 2–3.

5. *See id.*

6. *See* Sosa v. Martin County, 57 F.4th 1297, 1299 (11th Cir. 2023) (en banc).

7. *See id.*

8. *See id.*

9. *See* Sosa v. Snyder, No. 19-CV-14455, 2020 WL 6385696, at *5 (S.D. Fla. June 25, 2020).

10. *See Sosa*, 57 F.4th at 1303.

11. *See* Sosa v. Martin County, 144 S. Ct. 88 (2023), *denying cert. to* Sosa v. Martin County, 57 F.4th 1297 (11th Cir. 2023).

12. *See, e.g.*, Cannon v. Macon County, 1 F.3d 1558, 1562–63 (11th Cir. 1993); Gray v. Cuyahoga Cnty. Sheriff's Dept., 150 F.3d 579, 582–83 (6th Cir. 1998); Armstrong v. Squadrito, 152 F.3d 564, 571–73, 576 (7th Cir. 1998); Berg v. County of Allegheny, 219 F.3d

In *Baker v. McCollan*,[13] the Court established a vague constitutional right against overdetention based on substantive due process.[14] In the over forty years since that decision, lower courts adjudicating overdetention claims have differed on (1) the test for unconstitutional overdetention and (2) the constitutional source of the protection against overdetention.[15]

Overdetention issues arise in varying circumstances, but, as was the case in *Sosa*, they are often based on cases of mistaken identity[16] due to warrants with insufficient, outdated, or erroneous information.[17] These warrants number in the millions and are accessible to thousands of independently-run police departments through the Federal Bureau of Investigation's (FBI) National Crime Information Center.[18] As a result, cities across the United States have experienced systematic issues with wrongful arrests based on incomplete or unreliable records.[19]

Overdetention issues are of grave concern to all but are unequally borne by the citizenry. Sudden prolonged incarceration can have particularly devastating effects for low- or no-income Americans, such as the loss of

261, 269–71 (3d Cir. 2000); Kennell v. Gates, 215 F.3d 825, 826–30 (8th Cir. 2000); Lee v. City of Los Angeles, 250 F.3d 668, 683–85 (9th Cir. 2001); Russo v. City of Bridgeport, 479 F.3d 196, 206–10 (2d Cir. 2007); Harris v. Payne, 254 F. App'x 410, 422 (5th Cir. 2007); Schneyder v. Smith, 653 F.3d 313, 328–31 (3d Cir. 2011); Porter v. Epps, 659 F.3d 440, 448–49 (5th Cir. 2011); Rivera v. County of Los Angeles, 745 F.3d 384, 390–93 (9th Cir. 2014); Garcia v. County of Riverside, 817 F.3d 635, 641–43 (9th Cir. 2016); Safar v. Tingle, 859 F.3d 241, 247–48 (4th Cir. 2017); Seales v. City of Detroit, 724 F. App'x 356, 362–65 (6th Cir. 2018); Crittindon v. LeBlanc, 37 F.4th 177, 186–92 (5th Cir. 2022); *Sosa*, 57 F.4th at 1300–03; Parker v. LeBlanc, 73 F.4th 400, 405–06 (5th Cir. 2023); Hicks v. LeBlanc, 81 F.4th 497, 505–10 (5th Cir. 2023); McNeal v. LeBlanc, 90 F.4th 425, 430–33 (5th Cir. 2024).

13. 443 U.S. 137 (1979).

14. *Id.* at 144–45.

15. *See supra* note 12.

16. *See, e.g.*, *Kennell*, 215 F.3d at 826–27; *Lee*, 250 F.3d at 678; *Russo*, 479 F.3d at 199–200; *Harris*, 254 F. App'x at 412–13; *Rivera*, 745 F.3d at 386; *Garcia*, 817 F.3d at 638; *Seales*, 724 F. App'x at 357; *Sosa*, 57 F.4th at 1299.

17. *See* PRINCIPLES OF THE LAW: POLICING § 2.08, cmt. b (AM. L. INST. 2023); *see also* Brandon V. Stracener, *It Wasn't Me—Unintended Targets of Arrest Warrants*, 105 CALIF. L. REV. 229, 232 (2017); Ryan Webb, Note, *What's in a Name?: A Case for Including Biometric Identifiers on Arrest Warrants*, 47 LOY. L.A. L. REV. 319, 319 (2014).

18. *See NCIC Turns 50: Centralized Database Continues to Prove Its Value in Fighting Crime*, FBI NEWS (Jan. 17, 2017), https://www.fbi.gov/news/stories/ncic-turns-50 [https://perma.cc/729H-LWTS] ("[As of January 2017], the database is organized into a total of 21 files and contains 12 million active records entered by local, state, and federal law enforcement agencies—and it handles an average of 14 million transactions a day.").

19. *See* Jack Leonard, *ID Errors Put Hundreds in County Jail*, L.A. TIMES (Dec. 25, 2011, 12:00 AM), https://www.latimes.com/archives/la-xpm-2011-dec-25-la-me-wrong-id-20111225-story.html [https://perma.cc/W9C3-W3XL] (identifying "more than 1,480" wrongful arrests in Los Angeles in the past five years, "with some [arrested persons] spending weeks behind bars before authorities realized those arrested were mistaken for wanted criminals" due to "a variety of factors, including officials' overlooking fingerprint evidence and working off incomplete records," and that "some years people were jailed because of mistaken identity an average of once a day"); *see also* Dan Frosch, *Mistaken Identity Cases at Heart of Denver Lawsuit over Wrongful Arrests*, N.Y. TIMES (Feb. 16, 2012), https://www.nytimes.com/2012/02/16/us/lawsuit-in-denver-over-hundreds-of-mistaken-arrests.html [https://perma.cc/4RA9-SGTZ] (identifying 500 wrongful arrests in Denver from 2002 to 2009).

income, employment, housing, or parental rights.[20] Additionally, Black Americans—who constitute only 13 percent of the population—make up a majority of innocent defendants who are later exonerated and spend more time in prison before they are released.[21] This disparity can be attributed to, among other factors, the risk of eyewitness misidentification in cross-racial crimes, the higher likelihood of law enforcement interaction, police or prosecutorial misconduct against Black Americans, and the systemic framing of groups of defendants by police for fictitious crimes.[22] Black Americans have been increasingly targeted in recent years due to the use of artificial intelligence in the criminal legal system, which often fails to correctly identify people with darker complexions.[23]

The urgency of overdetention is twofold. First, the constitutionality of overdetention touches on key topics of constitutional law, particularly around substantive due process and protections against arbitrary actions by government actors.[24] This issue not only determines whether the people can hold the government accountable for overdetention claims,[25] but also informs the existence of other constitutional rights—particularly those that have traditionally fallen under substantive due process—and how those rights are to be evaluated.[26] Second, and perhaps more importantly, this issue poses concerns to both American civilians, who must understand what liberties

20. *See* Nicole Zayas Manzano, *The High Price of Cash Bail*, AM. BAR ASS'N (Apr. 12, 2023), https://www.americanbar.org/groups/crsj/publications/human_rightr_magazine_home/economic-issues-in-criminal-justice/the-high-price-of-cash-bail/ [https://perma.cc/7YSX-MWZB].

21. *See* SAMUEL R. GROSS, MAURICE POSSLEY & KLARA STEPHENS, NAT'L REGISTRY OF EXONERATIONS, RACE AND WRONGFUL CONVICTIONS IN THE UNITED STATES, at ii, 3, 26–28 (2017), https://www.law.umich.edu/special/exoneration/Documents/Race_and_Wrongful_Convictions.pdf [https://perma.cc/FG6B-A6LA].

22. *See id.* at 27–28; *see also* Brad Heath, *Racial Gap in U.S. Arrest Rates: 'Staggering Disparity'*, USA TODAY (Nov. 18, 2014, 5:13 PM), https://www.usatoday.com/story/news/nation/2014/11/18/ferguson-black-arrest-rates/19043207/ [https://perma.cc/3NXP-XNUT] ("At least 70 departments scattered from Connecticut to California arrested black people at a rate 10 times higher than people who are not black, USA TODAY found.").

23. *See* PATRICK GROTHER, MEI NGAN & KAYEE HANAOKA, NATL. INST. OF STANDARDS & TECH. INTERAGENCY INTERNAL REP., NISTIR 8280, FACE RECOGNITION VENDOR TEST (FRVT)–PART 3: DEMOGRAPHIC EFFECTS 2–3 (2019), https://doi.org/10.6028/NIST.IR.8280 [https://perma.cc/JPA2-H725] (finding a higher rate of false positives in face recognition software for Black Americans, Asian Americans, and Native Americans); *see also* Thaddeus L. Johnson & Natasha N. Johnson, *Police Facial Recognition Technology Can't Tell Black People Apart*, SCI. AM. (May 18, 2023), https://www.scientificamerican.com/article/police-facial-recognition-technology-cant-tell-black-people-apart/ [https://perma.cc/UA8B-QYAU]; Katie Hawkinson, *In Every Reported Case Where Police Mistakenly Arrested Someone Using Facial Recognition, That Person Has Been Black*, BUS. INSIDER (Aug. 6, 2023, 3:41 PM), https://www.businessinsider.com/in-every-reported-false-arrests-based-on-facial-recognition-that-person-has-been-black-2023-8 [https://perma.cc/W8HL-BQP2].

24. *See infra* Parts I.C.1–2.

25. Plaintiffs in overdetention claims can also sue government officers through tort law theories, but a constitutional protection against overdetention bolsters avenues of relief. *See* Michael L. Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 CHI.-KENT L. REV. 617, 617 (1997).

26. *See infra* Part I.C.1.

they have and where those liberties lie,[27] and to law enforcement officers, who must know the constitutional rights of those involved in the criminal legal system.[28] The more barriers that plaintiffs face in challenging overdetention claims in court, the more indifferent the state will become to violations of constitutional rights, including the right against overdetention.[29] Altogether, this open constitutional question around overdetention has serious implications for protecting civil rights and holding government officials accountable.

This Note examines the present circuit split over the scope of a constitutional right against overdetention and its source in the Constitution. Part I provides background on § 1983 lawsuits, *Baker*, and the Court's evolving jurisprudence on the Fourth and Fourteenth Amendments. Part II examines the present circuit split over (1) the test for unconstitutional overdetention and (2) the constitutional source of the protection against overdetention. Finally, Part III advocates for a totality of the circumstances test for overdetention claims and calls on courts to continue using a substantive due process analysis rather than shifting to a Fourth Amendment framework. Part III also lays out similarities between procedural due process and *Baker*'s version of substantive due process and criticizes shifts toward other constitutional amendments for the sake of avoiding controversies around substantive due process.

I. THE LEGAL BACKGROUND OF OVERDETENTION LAWSUITS

This part details the legal background of overdetention lawsuits. Part I.A discusses the history behind § 1983 and how the Court evaluates civil action claims based on constitutional violations. Part I.B examines the Court's holding in *Baker* and the guidance it issued to lower courts. Part I.C explains how the Court's jurisprudence on the Fourth and Fourteenth Amendments has evolved in the past decades, with a particular focus on the retraction of substantive due process and the expansion of Fourth Amendment seizures.

A. History of Civil Rights Actions

42 U.S.C. § 1983 allows private lawsuits against state and local government officials who deprive individuals of "any rights, privileges, or immunities secured by the Constitution."[30] Congress introduced § 1983 through the Ku Klux Klan Act of 1871[31] to protect recently freed slaves and

27. *See Know Your Rights*, ACLU, https://www.aclu.org/know-your-rights [https://perma.cc/5EZG-B4Y8] (last visited Oct. 12, 2024).

28. *See* PRINCIPLES OF THE LAW: POLICING § 1.03 (AM. L. INST. 2023).

29. *See* Joanna Schwartz, *Qualified Immunity Is Burning a Hole in the Constitution*, POLITICO (Feb. 19, 2023, 7:00 AM), https://www.politico.com/news/magazine/2023/02/19/qualified-immunity-is-burning-a-hole-in-the-constitution-00083569 [https://perma.cc/6MXX-46ZZ] ("Police officers' go-to defense against civil suits allows them to violate the Constitution with impunity.").

30. 42 U.S.C. § 1983.

31. Ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983).

abolitionists from violence by Klan members and their allies in law enforcement.[32] As such, the law quickly adopted a "race-centered view."[33] Congress enacted § 1983 pursuant to section five of the Fourteenth Amendment, which gives Congress the "power to enforce, by appropriate legislation, the provisions of this article,"[34] including the state guarantees of equal protection and due process of law found in section one.[35]

At first, § 1983 was "narrowly construed," "infrequently litigated," and often led to disappointing results for plaintiffs alleging racial discrimination.[36] Almost a hundred years later, the Court in 1961 strengthened the relevance and scope of § 1983 in *Monroe v. Pape*,[37] holding that plaintiffs could use § 1983 to sue state officers who violated their constitutional rights and noting that Congress intended § 1983 to provide a remedy to citizens deprived of constitutional rights.[38] *Monroe* also clarified that § 1983 can be sought independently or along with state tort remedies.[39]

Monroe led to a substantial increase in § 1983 litigation,[40] and today § 1983 is "the foundational means" for plaintiffs to sue government actors for civil rights violations.[41] This statute has afforded protection against a wide array of constitutional violations to protect those wronged by government actors[42] and has been a key tool for advancing racial justice and equality.[43]

To succeed on a § 1983 claim, plaintiffs must prove that the defendant (1) deprived them of "a right secured by the 'Constitution and laws' of the United States," and (2) acted "under [the] color of law," meaning pursuant to "any statute, ordinance, regulation, custom, or usage, of any State or Territory."[44] Plaintiffs can sue entire government entities under § 1983 as long as an "official policy" was "the moving force of the constitutional

32. *See* Katherine A. Macfarlane, *Accelerated Civil Rights Settlements in the Shadow of Section 1983*, 2018 UTAH L. REV. 639, 661.

33. Michael G. Collins, *'Economic Rights,' Implied Constitutional Actions, and the Scope of Section 1983*, 77 GEO. L.J. 1493, 1507 (1989).

34. U.S. CONST. amend. XIV, § 5.

35. *Id.* § 1 ("[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

36. Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1486–87 (1969).

37. 365 U.S. 167 (1961).

38. *See id.* at 171–72.

39. *See id.* at 183.

40. *See* Note, *supra* note 36, at 1486–87.

41. Nicholas Mosvick, *Looking Back at the Ku Klux Klan Act*, NAT'L CONST. CTR. (Apr. 20, 2021), https://constitutioncenter.org/blog/looking-back-at-the-ku-klux-klan-act [https://perma.cc/HKE9-TA67].

42. *See, e.g.*, John B. Tsimis, Note, *Looks Matter on Social Media: How Should Courts Determine Whether a Public Official Operates Their Social Media Account Under Color of State Law?*, 91 FORDHAM L. REV. 2061, 2068–72 (2023) (describing how today's § 1983 is used to protect First Amendment rights).

43. *See* Macfarlane, *supra* note 32, at 665–67.

44. Adickes v. S.H. Kress & Co., 398 U.S. 144, 150 (1970).

violation" causing the injury.[45] Finally, the Court clarified that § 1983 is not a source of substantive rights,[46] limiting § 1983 to purely constitutional violations.[47]

B. Civil Rights Actions for Overdetention in Baker v. McCollan

Plaintiffs who have experienced overdetention can sue government officers under § 1983 for violation of their constitutional rights.[48] In 1979, the Court addressed unconstitutional overdetention and the limits of § 1983 lawsuits in *Baker v. McCollan*.[49] Police officers arrested Linnie McCollan ("Linnie") at a traffic stop on December 30, 1972 due to a case of mistaken identity.[50] Linnie's brother, Leonard McCollan ("Leonard"), had obtained a driver's license that bore his photo with Linnie's information.[51] Leonard had been masquerading as Linnie ever since Leonard went to jail on narcotics charges and subsequently violated the terms of his bond.[52] The police issued an arrest warrant for "Linnie McCollan," which they used to arrest Linnie, despite his protests of mistaken identity.[53] Linnie remained in custody until January 2, 1973—at the end of the holiday weekend—when police compared his appearance to that of the photograph on file and recognized that he was not the wanted man.[54] Linnie filed a § 1983 lawsuit alleging that the police officers violated his Fourth and Fourteenth Amendment rights.[55] Linnie did not contest the validity of the warrant or the legality of his initial arrest,[56] but rather challenged his three-day detention despite his repeated protests of mistaken identity, as it should have been known before the lapse of the three-day period that Linnie was not the wanted man.[57]

The Court rejected Linnie's Fourteenth Amendment argument because the facts of this case—particularly the short period of the detention over a holiday weekend—indicated tortious actions by government actors, not a

45. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694–95 (1978). The Court later clarified that under limited circumstances, a government's "decision not to train certain employees about their legal duty to avoid violating citizens' rights" may lead to a § 1983 violation. Connick v. Thompson, 563 U.S. 51, 61 (2011).

46. *See* Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979).

47. *See* Paul v. Davis, 424 U.S. 693, 701 (1976) ("[S]uch a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States."); *see also* Daniels v. Williams, 474 U.S. 327, 335–36 (1986) ("[W]e reject the contention that the Due Process Clause of the Fourteenth Amendment embraces such a tort law concept.").

48. *See* Wells, *supra* note 25, at 617.

49. *See* 443 U.S. 137 (1979).

50. *See id.* at 140–41.

51. *See id.* at 140.

52. *See id.* at 140–41.

53. *See id.* at 141.

54. *See id.*

55. *See id.*

56. *See id.* at 143–44.

57. *See id.* at 143–45.

constitutional violation.[58] Justice William H. Rehnquist emphasized that detaining an arrested person who maintains their innocence pursuant to a valid warrant does not necessarily violate the Fourteenth Amendment, which is limited to "deprivations of liberty without due process of law."[59] The Fourteenth Amendment does not oblige officers executing valid warrants to "investigate independently every claim of innocence" nor to "perform an error-free investigation" when holding an individual accused of a crime.[60] The Court also rejected Linnie's Fourth Amendment argument, noting that Fourth Amendment protections only extend to the warrant and the initial interaction with law enforcement.[61] Applied in the instant case, law enforcement complied with the Fourth Amendment because the warrant was valid and there was probable cause to arrest Linnie.[62]

Looking beyond Linnie's case, the Court left open the possibility that, under certain unspecified procedural and temporal circumstances, overdetention can violate the Fourteenth Amendment.[63] In particular, Justice Rehnquist argued that "one in respondent's position could not be detained indefinitely in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards of the Fourth Amendment" and that "mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty . . . without due process of law.'"[64] Thus, a similar case with different facts may pose a substantive due process issue,[65] but courts must be wary to not equate an officer's negligent behavior to a constitutional violation.[66]

C. The Court's Evolving Jurisprudence on the Fourth and Fourteenth Amendments

In 1979, the *Baker* Court found no Fourth Amendment violation[67] and left open the possibility of Fourteenth Amendment substantive due process violations based on overdetention.[68] Since then, however, the Court's jurisprudence on the Fourth and Fourteenth Amendments has evolved: most notably, the Court has restricted the use of substantive due process and

58. *See id.* at 146 ("Just as '[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner,' false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official." (quoting Estelle v. Gamble, 429 U.S. 97, 106 (1976))).

59. *See id.* at 142.

60. *Id.* at 145–46.

61. *See id.* at 144.

62. *See id.*

63. *See id.* at 144–45.

64. *Id.*

65. *See id.* at 148 (Blackmun, J., concurring) (arguing that this decision should not "foreclose the possibility that a prisoner in respondent's predicament might prove a due process violation by a sheriff who deliberately and repeatedly refused to check the identity of a complaining prisoner against readily available mug shots and fingerprints").

66. *See id.* at 146 (majority opinion).

67. *See id.* at 144.

68. *See id.* at 144–45.

expanded the scope of the Fourth Amendment.[69] This section will examine the Court's evolving jurisprudence around the Fourth and Fourteenth Amendments to better understand the potential source of the constitutional protection against overdetention.

1. Retracting Fourteenth Amendment Substantive Due Process

The Fourteenth Amendment, ratified after the Civil War,[70] guarantees that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[71] Although courts have applied due process in varying ways, at the core of due process is "[f]reedom from imprisonment—from government custody, detention, or other forms of physical restraint."[72]

Courts distinguish between procedural and substantive due process.[73] Procedural due process deals with the adequacy of the process provided by the government,[74] such as the right to a hearing.[75] Substantive due process deals with wrongful actions by government actors "regardless of the fairness of the procedures used to implement them,"[76] which includes laws that infringe on the right to privacy or unacceptable actions by government actors.[77] Although substantive due process is not innate in the text of the Fourteenth Amendment, some scholars have argued that clause twenty-nine of the Magna Carta[78]—the 1215 English royal charter that first verbalized

69. *See* Eamonn O'Hagan, Note, *Judicial Illumination of the Constitutional "Twilight Zone": Protecting Post-arrest, Pretrial Suspects from Excessive Force at the Hands of Law Enforcement*, 44 B.C. L. REV. 1357, 1370 (2003).

70. *See 14th Amendment to the U.S. Constitution: Civil Rights (1868)*, NAT'L ARCHIVES, https://www.archives.gov/milestone-documents/14th-amendment#transcript [https://perma.cc/ZEC7-6HEM] (last visited Oct. 12, 2024).

71. U.S. CONST. amend. XIV, § 1. Congress modeled the Fourteenth Amendment after the Fifth Amendment, which is geared toward the federal government. *Id.* amend. V.

72. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

73. Due process also includes incorporation—the process by which amendments are made applicable to the states—but this is irrelevant to the overdetention analysis. *See* Zinermon v. Burch, 494 U.S. 113, 125 (1990).

74. *See id.* at 125–26.

75. *See, e.g.*, Ex parte Robinson, 86 U.S. 505, 512–13 (1873) (holding that lawyers are entitled to a hearing before they lose their law licenses); Lipke v. Lederer, 259 U.S. 557, 562 (1922) (holding that taxpayers are entitled to a hearing for tax collection issues); Goldberg v. Kelly, 397 U.S. 254, 264–65 (1970) (holding that seniors are entitled to a hearing prior to termination of welfare benefits).

76. *Zinermon*, 494 U.S. at 125 (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

77. *See infra* Part I.C.1.

78. The clause states:

> No freeman is to be taken or imprisoned or disseised of his free tenement or of his liberties or free customs, or outlawed or exiled or in any way ruined, nor will we go against such a man or send against him save by lawful judgement of his peers or by the law of the land. To no-one will we sell or deny of delay right or justice.

Magna Carta Translation, NAT'L ARCHIVES, https://www.archives.gov/exhibits/featured-documents/magna-carta/translation.html [https://perma.cc/X674-CHAT] (last visited Oct. 12, 2024).

the notion of due process[79]—includes a substantive component to its promise of due process[80] and that the framers likely understood the Due Process Clause to have more than pure procedural protections.[81]

Overdetention cases typically concern substantive rather than procedural due process because the failure to ensure entitlement to release—despite existing procedures, such as pretrial hearings—represents an "arbitrary, wrongful government action[]."[82] However, substantive and procedural due process may overlap.[83] For instance, the "inadequacy of police training" can be a due process violation "where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact."[84] Moreover, although the holding in *Baker* implied that overdetention falls under substantive due process,[85] the *Baker* dissent emphasized procedural issues that led to the plaintiff's overdetention.[86]

Substantive due process is further divided into three subcategories based on the source of the violation.[87] In the past, the Court has not always adhered to these categories,[88] but today it uses different standards for evaluating substantive due process violations: "shock the conscience" for executive abuses, "fundamental rights" for legislative abuses, and "unfair procedures"

79. In 1642, Sir Edward Coke, English barrister, judge, and politician, declared that "due process of law" stemmed from the Magna Carta. *See* 2 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND 50 (1797).

80. *See* Frederick Mark Gedicks, *An Originalist Defense of Substantive Due Process: Magna Carta, Higher-Law Constitutionalism, and the Fifth Amendment*, 58 EMORY L.J. 585, 640 (2009) (arguing that the framers incorporated "the higher-law constitutionalism of Coke and the English seventeenth century into their constitutional thinking," which included due process guaranteeing "a residual guarantee of substantive liberty against arbitrary actions of government, including (especially) those of the state legislatures"); *see also* Robert W. Emerson & John W. Hardwicke, *The Use and Disuse of the Magna Carta: Due Process, Juries, and Punishment*, 46 N.C. J. INT'L L. 572, 605–19 (2021) (detailing how the Court has used the Magna Carta to shape its substantive due process jurisprudence). *But see* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1692 (2012) (arguing that the Magna Carta "was understood to prohibit the Crown from depriving persons of rights without the authority of standing law, and the court maintained the jurisdiction to review the King's authority to do so").

81. *See* Timothy M. Tymkovich, Joshua Dos Santos & Joshua J. Craddock, *A Workable Substantive Due Process*, 95 NOTRE DAME L. REV. 1961, 1967 (2020).

82. *See* Zinermon v. Burch, 494 U.S. 113, 125 (1990).

83. *See* William Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 519 (1989) (arguing that executive substantive due process and procedural due process "have not had clearly articulated limits" as they both seek to "redress 'random and unauthorized' personal injury and property damage by government officials").

84. City of Canton v. Harris, 489 U.S. 378, 388 (1989).

85. *See* Baker v. McCollan, 443 U.S. 137, 145 (1979).

86. *See id.* at 150 (Stevens, J., dissenting) (characterizing the procedures employed at the time of the detention as "not reasonably calculated to establish that a person being detained for the alleged commission of a crime was in fact the person believed to be guilty of the offense").

87. *See* Tymkovich, Dos Santos & Craddock, *supra* note 81, at 2010–11.

88. *See id.* at 1989 (arguing that the Court has "flip-flopped" between the "shock the conscience" test and the "fundamental rights" test without clarifying which test it was applying).

or "arbitrary decisions" for judiciary abuses.[89] Because overdetention falls at the intersection of substantive due process and abuses by officers in the executive branch, courts employ the "shock the conscience" test and/or[90] the "deliberate indifference" test.[91]

Lower courts look to eras when the Court embraced and rejected substantive due process to shape their own jurisprudence. For example, in the mid-nineteenth and early-twentieth centuries, the Court struck down laws it saw as infringing on fundamental rights in two of the most decried cases in constitutional law: *Dred Scott v. Sanford*[92] and *Lochner v. New York*.[93] *Dred Scott*'s expansion of slaveholder rights was a major precursor to the Civil War,[94] and the post-*Lochner* Court struck down popular labor legislation, including minimum wage laws, pro-union laws, and laws establishing welfare systems for workers.[95] The dissent in *Lochner* articulated the unease around substantive due process, arguing that it invalidates the democratic process by "prevent[ing] the natural outcome of a dominant opinion."[96]

The Court changed course in the New Deal era by upholding laws that regulate economic activity.[97] Conversely, in the mid- and late-twentieth century, the Court struck down laws that infringed on privacy rights,

89. *See id.* at 2010–11; *see also* County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998) (noting that legislative substantive due process, unlike executive substantive due process, requires "historical examples of recognition of the claimed liberty protection at some appropriate level of specificity").

90. The "shock the conscience" and the "deliberate indifference" tests have been used concurrently and separately. Deliberate indifference can also be used as an indicator of conduct that shocks the conscience. *See* Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 531–32 (2008).

91. *See* Tymkovich, Dos Santos & Craddock, *supra* note 81, at 2010–11; *see also* Armstrong v. Squadrito, 152 F.3d 564, 571 (7th Cir. 1998) (arguing that executive substantive due process claims must follow a "shock the conscience" test rather than a fundamental rights and historical framing analysis).

92. 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (striking down a federal law that limited the expansion of slave states); *see* Cass R. Sunstein, *Constitutional Myth-Making: Lessons from the Dred Scott Case* (Univ. of Chi. L. Occasional Papers, Working Paper No. 37, 1996) (arguing that *Dred Scott* is the "birthplace" of substantive due process); *see also* KERMIT L. HALL, THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 889 (2d ed. 2005) (calling the *Dred Scott* decision "the worst ever rendered by the Supreme Court").

93. 198 U.S. 45 (1905) (striking down a statute prescribing maximum working hours for bakers); *see* David A. Strauss, *Why Was* Lochner *Wrong?*, 70 U. CHI. L. REV. 373, 373 (2003) (calling the *Lochner* decision "the most widely reviled decision of the last hundred years").

94. *See* Roberta Alexander, Dred Scott*: The Decision That Sparked a Civil War*, 34 N. KY. L. REV. 643, 660–61 (2007).

95. *See* Strauss, *supra* note 93, at 373; *see, e.g.*, Adair v. United States, 208 U.S. 161, 191–92 (1908) (striking down a statute that banned employers from firing employees for participating in labor unions); Adkins v. Children's Hosp., 261 U.S. 525, 560–62 (1923), *overruled by* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (striking down a minimum wage statute for women and children).

96. *Lochner*, 198 U.S. at 75–76 (1905) (Holmes, J., dissenting).

97. *See* Strauss, *supra* note 93, at 375–78 (describing the end of the "*Lochner* era"); *see, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 396–97 (1937) (upholding a state minimum wage statute); United States v. Carolene Prods. Co., 304 U.S. 144, 153–54 (1938) (upholding the federal government's power to prohibit filled milk in interstate commerce).

particularly with regard to contraception, reproductive autonomy, and family rights.[98] After this, the Court started using substantive due process again, albeit subtly: the Court in *Griswold v. Connecticut*,[99] instead of embracing substantive due process, decided that the right to contraception "suggest[s] that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance,"[100] and that multiple amendments "create zones of privacy" that guarantee the right to contraception.[101] The Court later built on this foundation in *Roe v. Wade*,[102] where it explicitly held that the Fourteenth Amendment protects the right to terminate a pregnancy.[103] Additionally, the Court developed its substantive due process jurisprudence regarding executive action in *Rochin v. California*,[104] holding law enforcement officers accountable for conduct that shocked the conscience.[105]

Substantive due process became controversial in the late twentieth century,[106] and the Court responded by cautioning against "expand[ing] the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."[107] Consequentially, the Court adopted an inconsistent approach to legislative substantive due process cases, upholding its past precedent in some cases and retracting it in others.[108] The Court also implemented "significant obstacles" for those accusing government actors of executive substantive due process

98. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (finding a constitutional right to contraception); Loving v. Virginia, 388 U.S. 1, 12 (1967) (finding a constitutional right to interracial marriage); Roe v. Wade, 410 U.S. 113, 166 (1973) (finding a constitutional right to abortion), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

99. 381 U.S. 479 (1965).

100. *Id.* at 484.

101. *Id.* (implicating the First Amendment's right of association, the Third Amendment's prohibition against soldiers quartering in homes, the Fourth Amendment's prohibition against unreasonable searches and seizures, the Fifth Amendment's right against self-incrimination, and the Ninth Amendment's possible guarantee of unenumerated rights).

102. 410 U.S. 113 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

103. *Id.* at 166.

104. 342 U.S. 165 (1952).

105. *See id.* at 171–72 (1952) (noting that the Court had a "duty of exercising a judgment, within the narrow confines of judicial power" to establish norms for due process).

106. *See* Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 64 (2006) ("Nothing in constitutional law is more controversial than substantive due process."); *see also* Gedicks, *supra* note 80, at 588–90 (arguing that the conservative movement undermined substantive due process through originalism, a judicial philosophy that pushes courts to interpret constitutional provisions as they were believed to be understood at the time of ratification).

107. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992); *see also* Moore v. City of E. Cleveland, 431 U.S. 494, 502 (1977) ("As the history of the *Lochner* era demonstrates, there is reason for concern lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court.").

108. *See* Conkle, *supra* note 106, at 66–68 (identifying different approaches the Court has taken to expand and retract substantive due process).

violations.[109] For instance, in *Graham v. Connor*,[110] the Court held that an amendment that "provides an explicit textual source of constitutional protection," rather than substantive due process, "must be the guide" for analyzing a constitutional violation.[111] Additionally, in *County of Sacramento v. Lewis*,[112] the Court tightened the *Rochin* test and emphasized the difference between tort law and constitutional violations.[113] The Court upheld the standard as "arbitrary conduct shocking to the conscience,"[114] but clarified that the conduct is only unconstitutional where "such extended opportunities to do better are teamed with protracted failure even to care"[115] and that an officer cannot be held liable, even for reckless conduct, where "unforeseen circumstances demand an officer's instant judgment."[116]

The latest guidance from the Court on substantive due process indicates a steep retraction of unenumerated rights—at least in the legislative context. In *Dobbs v. Jackson Women's Health Organization*,[117] the Court overturned *Roe* and ended the right to abortion.[118] The Court rebuked substantive due process as "freewheeling judicial policymaking" and asserted that rights must be grounded in "the history and tradition that map the essential components of our Nation's concept of ordered liberty."[119] Although *Dobbs* fell short of ending all privacy rights grounded in substantive due process, Justice Thomas implied in his concurrence that he would push the Court to overrule such cases.[120]

The retraction of substantive due process impacts the overdetention analysis.[121] For overdetention cases, lower courts look at the Supreme Court's rule from *Lewis*—the tighter version of the "shock the conscience" test from *Rochin*—to determine whether a substantive due process violation

109. *See* Levinson, *supra* note 90, at 535 (arguing that courts will reject claims on three fronts: if the plaintiff fails to (1) identify conduct that shocks the conscience, (2) establish an affirmative act by the executive, or (3) sue "under a more explicit constitutional guarantee").

110. 490 U.S. 386 (1989).

111. *Id.* at 395 (vacating a judgment because the plaintiff brought a Fourteenth rather than a Fourth Amendment claim).

112. 523 U.S. 833 (1998).

113. *See id.* at 848–50 (arguing that the Court "reject[s] the lowest common denominator of customary tort liability as any mark of sufficiently shocking conduct" and that "the Constitution does not guarantee due care on the part of state officials").

114. *Id.* at 836.

115. *Id.* at 853.

116. *Id.*

117. 142 S. Ct. 2228 (2022).

118. *See id.* at 2242.

119. *Id.* at 2248. In its rejection of substantive due process, the Court embraced its restrictive holding in *Washington v. Glucksberg*, 521 U.S. 702 (1997), which some foreshadowed as the end of substantive due process because of its emphasis on history and tradition. *Id.* at 720–21 ("[T]he 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 E. Cleveland, 431 U.S. 494, 503 (1977))); *see also* Lawrence v. Texas, 539 U.S. 558, 588 (2003) (Scalia, J., dissenting) (arguing that *Roe* has been "eroded" by *Glucksberg*).

120. *See Dobbs*, 142 S. Ct. at 2301 (Thomas, J., concurring).

121. *See infra* Parts II.B.1–3.

occurred.[122] Additionally, the guidance from the Court in *Graham* to prioritize other amendments over substantive due process and the more recent rebuke of substantive due process in *Dobbs* indicate a general unease around substantive due process.[123]

2. Expanding Fourth Amendment Seizures

The Fourth Amendment, with its guarantee "against unreasonable searches and seizures," is part of the original Bill of Rights[124] and applies to both the federal government and the states.[125] The plain text indicates protection against government searches and seizures that are "unreasonable" and without "probable cause."[126] Probable cause requires a reasonable basis for believing that someone committed a crime,[127] and an officer violates the Fourth Amendment when that basis is lacking.[128] Determining reasonableness requires a balancing test between "the nature and quality of the intrusion on the individual's Fourth Amendment interests [and] the importance of the governmental interests alleged to justify the intrusion."[129] However, probable cause is a flexible standard based in "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act,"[130] leaving exceptions for officers acting in good faith.[131]

Seizures arise when an officer, through physical force or show of authority, restrains another's liberty.[132] Historically, overdetention was not a Fourth Amendment issue because of the narrow conception of a seizure as "a single act" rather than a "continuous" one.[133] However, since the late twentieth century, the Court has expanded the scope of Fourth Amendment seizures

122. *See* Rosalie Berger Levinson, *Time to Bury the Shocks the Conscience Test*, 13 CHAP. L. REV. 307, 307–08 (2010).

123. *See supra* note 106 and accompanying text.

124. U.S. CONST. amend. IV; *The Bill of Rights: A Transcription*, NAT'L ARCHIVES, https://www.archives.gov/founding-docs/bill-of-rights-transcript [https://perma.cc/8TFB-83FV] (last visited Oct. 12, 2024).

125. *See* Mapp v. Ohio, 367 U.S. 643, 655 (1961).

126. U.S. CONST. amend. IV.

127. *See* Terry v. Ohio, 392 U.S. 1, 21–22 (1968) ("[W]ould the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" (quoting Carroll v. United States, 267 U.S. 132, 165 (1925))); *see also* Brigham City v. Stuart, 547 U.S. 398, 403 (2006) (emphasizing that reasonableness is the "touchstone of the Fourth Amendment").

128. *See* Rodriguez v. United States, 575 U.S. 348, 350–51 (2015).

129. Tennessee v. Garner, 471 U.S. 1, 8 (1985) (quoting United States v. Place, 462 U.S. 696, 703 (1983)).

130. Brinegar v. United States, 338 U.S. 160, 175 (1949).

131. *See, e.g.*, Hill v. California, 401 U.S. 797, 802–04 (1971) (holding that an arrest is proper where the police mistakenly but reasonably arrest an innocent individual instead of the defendant who they had probable cause to arrest); Maryland v. Garrison, 480 U.S. 79, 87–89 (1987) (holding that a search warrant containing a mistake remains valid as long as the police acts reasonably).

132. *See Terry*, 392 U.S. at 19 n.16; *see also* California v. Hodari D., 499 U.S. 621, 626 (1991).

133. Thompson v. Whitman, 85 U.S. 457, 471 (1873).

into the initial period of incarceration in such a way that may include overdetention, possibly making the Fourth Amendment a viable constitutional source for overdetention claims.[134] For instance, in *Gerstein v. Pugh*,[135] the Court held that a person "arrested without a warrant and charged by information" is entitled to a timely preliminary hearing on probable cause.[136] This holding implies that the probable cause requirement extends into the realm of initial detention and decreases as the duration of detention increases.[137] The Court went further in *Manuel v. City of Joliet*[138] where it held that the Fourth Amendment can be used for pretrial detention claims "when it follows[] the start of legal process in a criminal case" if government officials detain someone without probable cause, or if there is an issue in the legal process.[139] Finally, the Court has considered technological advancements when identifying a Fourth Amendment seizure to preserve a comparable level of privacy in the modern age.[140]

The continuing seizure theory advanced in Justice Ruth Bader Ginsburg's *Albright v. Oliver*[141] concurrence also offers a possible expansion of Fourth Amendment seizures.[142] Justice Ginsburg argued that the common law regarded both pretrial incarceration and other methods to secure court appearances as seizures meant to "[retain] control over a defendant's person."[143] Therefore, pretrial detainees and defendants released from custody are both "'seized' in the constitutionally relevant sense" because they are "scarcely at liberty" and "remain[] apprehended, arrested in [their]

134. *See* O'Hagan, *supra* note 69, at 1385.

135. 420 U.S. 103 (1975).

136. *See id.* at 116, 126; *see also* County of Riverside v. McLaughlin, 500 U.S. 44, 47, 56 (1991) (noting that Fourth Amendment protections extend into initial detention and holding that suspects arrested without a warrant must generally be granted a probable cause determination within forty-eight hours of arrest).

137. *See Gerstein*, 420 U.S. at 114 (clarifying that once the arrested person is detained, "the reasons that justify dispensing with the magistrate's neutral judgment evaporate" because "[t]here no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate"). The Court also stressed the increased need for a neutral determination of probable cause as the detention continues because of the damage extended detention causes on the arrested person's personal and professional life. *See id.* at 114.

138. 137 S. Ct. 911 (2017).

139. *Id.* at 918.

140. *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 34–35 (2001) (holding that the use of a thermal imager detecting heat radiating from the defendant's home was a search); Riley v. California, 573 U.S. 373, 387–91 (2014) (holding that police must get a warrant before searching a cell phone seized during an arrest); Carpenter v. United States, 138 S. Ct. 2206, 2217–19 (2018) (holding that the government use of cell-site location information from wireless carriers invaded defendant's "reasonable expectation of privacy").

141. 510 U.S. 266 (1994).

142. *See* Rebecca Laden, Note, *Bond Conditions as Fourth Amendment Seizures*, 44 CARDOZO L. REV. 1211, 1230–31 (2023) (describing the continuing seizure theory as "a temporal conceptualization of Fourth Amendment seizures as phenomena that extend past a singularly fixed moment").

143. *Albright*, 510 U.S. at 277–78 (Ginsburg, J., concurring).

movements."[144] Although the continuing seizure theory is not binding, some appellate courts have adopted it for overdetention claims.[145]

For overdetention cases, lower courts have considered the Court's expansion of Fourth Amendment seizures in *Gerstein* and *Manuel* to determine whether the Fourth Amendment is a viable solution for overdetention claims.[146] This suggests that appellate courts may likewise be influenced by the Court's jurisprudence on the role evolving technology plays in Fourth Amendment seizures, as well as Justice Ginsburg's continuing seizure theory.

II. THE CONSTITUTIONAL RIGHT AND SOURCE AGAINST OVERDETENTION

This part analyzes the circuit split concerning (1) the test for unconstitutional overdetention and (2) the constitutional source of the protection against overdetention.[147] Part II.A identifies the constitutional tests used for overdetention claims and distinguishes the totality of the circumstances test used by the majority of courts and the more rigid analyses used by the minority. Part II.B analyzes the varied approaches courts have taken in identifying the source of this constitutional right.

A. The Divide on the Tests Used for Constitutional Overdetention Claims

Baker did not establish a clear standard for lower courts to use in overdetention claims.[148] Most courts use a totality of the circumstances test, but a handful use more rigid tests.[149]

1. The Majority Test: Totality of the Circumstances

Totality of the circumstances tests are frequently used to answer questions of constitutional law as they recognize "the sometimes-competing needs and interests of our government and of individuals' rights to be free from government tyranny."[150] These tests involve an intense fact-finding analysis

144. *Id.* at 279.

145. *See, e.g.*, Russo v. City of Bridgeport, 479 F.3d 196, 207–08 (2d Cir. 2007); Schneyder v. Smith, 653 F.3d 313, 319–22 (3d Cir. 2011).

146. *See infra* Part II.B.3.

147. The large majority of these cases deal with criminal detention, but some deal with civil detention. *See, e.g.*, Armstrong v. Squadrito, 152 F.3d 564, 573 (7th Cir. 1998); *Schneyder*, 653 F.3d at 318–20.

148. *See supra* Part I.B.

149. *See* Petition for Writ of Certiorari at 15, Sosa v. Martin County, 144 S. Ct. 88 (2023) (No. 22-1145) (identifying the first question of the circuit split as whether to read *Baker* "as a case embodying a reasonableness analysis or one imposing a bright-line rule, regardless of any other relevant factual circumstances").

150. Sosa v. Martin County, 57 F.4th 1297, 1323 n.11 (11th Cir. 2023) (en banc) (Rosenbaum, J., dissenting) (noting that courts use totality of the circumstances tests to evaluate the constitutionality of searches and seizures, excessive force claims, and waiving the right against self-incrimination).

that considers all the available information instead of abiding by specific rules.[151] Courts that adopt this analysis for overdetention claims consider all the facts to determine whether the arrested person's constitutional rights were infringed.[152] Although the duration of the detention is a heavily weighed factor, courts also consider the general circumstances of the detention to determine whether the officers should have released the plaintiff.[153] Many of these courts use the "shock the conscience" test and/or the "deliberate indifference" test to determine whether the officers' actions were unconstitutional.[154]

The U.S. Courts of Appeals for the Sixth and Seventh Circuits explicitly embraced the totality of the circumstances test—albeit in cases where the detention lasted much longer than it did in *Baker*—by engaging with all the facts and noting how each set of particular circumstances lead to constitutional violations.[155]

The Sixth Circuit articulated its totality of the circumstances test for overdetention claims in *Seales v. City of Detroit*.[156] In *Seales*, the Sixth Circuit held that the plaintiff's detention of fourteen days based on false identity was unconstitutional "where officers were in possession of exculpatory evidence, and where [the plaintiff] repeatedly protested his misidentification."[157] The court highlighted the "availability and accessibility of exculpatory evidence" and clarified that "the duration of confinement matters insofar as it allows officers opportunities for a reasonable inquiry."[158]

The Seventh Circuit embraced the totality of the circumstances test in *Armstrong v. Squadrito*.[159] In *Armstrong*, the Seventh Circuit ruled in favor of a plaintiff who wrongfully spent fifty-seven days in detention after he turned himself in on a body attachment warrant, where the plaintiff made frequent requests to see a judge and was discouraged from filing an "inmate request form."[160] Like the Sixth Circuit, the Seventh Circuit opted for "appraisal of the totality of the circumstances rather than a formalistic examination of fixed elements."[161]

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151. Kit Kinports, *Probable Cause and Reasonable Suspicion: Totality Tests or Rigid Rules?*, 163 U. PA. L. REV. ONLINE 75, 75–76 (2014) (differentiating between "totality of the circumstances" tests and "bright-line rules").

152. *See Sosa*, 57 F.4th at 1323 (Rosenbaum, J., dissenting).

153. *See id.*

154. *See, e.g.*, Armstrong v. Squadrito, 152 F.3d 564, 581–82 (7th Cir. 1998); Berg v. County of Allegheny, 219 F.3d 261, 274–77 (3d Cir. 2000); Kennell v. Gates, 215 F.3d 825, 828–30 (8th Cir. 2000); Lee v. City of Los Angeles, 250 F.3d 668, 681–85 (9th Cir. 2001); Russo v. City of Bridgeport, 479 F.3d 196, 209–11 (2d Cir. 2007); Rivera v. County of Los Angeles, 745 F.3d 384, 389 (9th Cir. 2014); Seales v. City of Detroit, 724 F. App'x 356, 362–64 (6th Cir. 2018).

155. *See generally Seales*, 724 F. App'x 356; *Armstrong*, 152 F.3d 564.

156. 724 F. App'x 356 (6th Cir. 2018).

157. *Id.* at 364.

158. *Id.* at 363.

159. 152 F.3d 564 (7th Cir. 1998).

160. *Id.* at 564, 567–68.

161. *Id.* at 570.

Further, the U.S. Court of Appeals for the Ninth Circuit also endorsed the totality of the circumstances test. In line with the Sixth and Seventh Circuits' rejection of fixed elements, it explicitly rejected temporal limits. The court chose instead to use a fact-intensive analysis to determine whether "the circumstances indicated . . . that further investigation was warranted."[162] In *Lee v. City of Los Angeles*,[163] the Ninth Circuit found that officers violated the constitutional rights of an individual who was detained for a day prior to extradition.[164] Although the overdetention only lasted for a day—two days less than the detention in *Baker*—the circumstances indicated deliberate indifference to the plaintiff's rights, as well as a "conscious failure to train their employees in the procedures necessary to avoid the mistaken extradition and incarceration of mentally incapacitated persons."[165]

In *Garcia v. County of Riverside*,[166] the Ninth Circuit did not even mention the length of the detention, specifying only that the plaintiff was detained for "several days."[167] Rather, the court, using *Baker* as a guide, cited other facts such as differences in biometric identifiers and criminal history that indicated that the officers should have known that the plaintiff was entitled to the release.[168] Thus, just like the Sixth and Seventh Circuits, the Ninth Circuit engaged with all the available facts to determine the existence of a constitutional violation, but the Ninth Circuit expanded upon this analysis by noting that short periods of detention do not de facto bar a claim.

The U.S. Courts of Appeals for the Second and Eighth Circuits have only implicitly adopted the totality of the circumstances test. In *Russo v. City of Bridgeport*,[169] the Second Circuit faced a case where officers failed to investigate available exculpatory evidence which led to the plaintiff's 217-day incarceration.[170] The Second Circuit noted that the detention "was prolonged rather than short and carried constitutional implications," and that the officer's conduct shocked the conscience due to the ease with which the plaintiff could have been exonerated given the circumstances.[171] Additionally, in *Kennell v. Gates*,[172] the Eighth Circuit upheld a jury verdict where the trial court used the deliberate indifference standard[173] in an overdetention case of six days where the arrested person and the wanted person were siblings and looked physically similar but had different biometric identifiers.[174]

162. Rivera v. County of Los Angeles, 745 F.3d 384, 391 (9th Cir. 2014).
163. 250 F.3d 668 (9th Cir. 2001).
164. *See id.* at 683–85.
165. *Id.* at 684.
166. 817 F.3d 635 (9th Cir. 2016).
167. *Id.* at 640.
168. *See id.* at 641–42.
169. 479 F.3d 196 (2d Cir. 2007).
170. *See id.* at 208.
171. *Id.* at 209–10.
172. 215 F.3d 825 (8th Cir. 2000).
173. *See id.* at 828 n.4.
174. *See id.* at 826–27.

Finally, the U.S. Court of Appeals for the Third Circuit adopted the totality of the circumstances test in both criminal and civil contexts, affirming its widespread use. In the criminal context, in *Berg v. County of Allegheny*,[175] the Third Circuit stated that "an apparently valid warrant does not render an officer immune from suit if his reliance on it is unreasonable in light of the relevant circumstances" for an overdetention of five days.[176] The court clarified that the information that was readily available in this case—the age of the warrant, the invalid address, the plaintiff's socioeconomic status, documentation that he had completed his probation, his cooperativeness, and the nonviolent nature of the crime—rendered the overdetention unreasonable.[177] In the civil context, in *Schneyder v. Smith*,[178] the Third Circuit balanced the plaintiff's liberty interests against the government's interest in keeping her detained to compel her testimony at trial,[179] and held that her detention went on "for an unreasonable length of time—i.e., longer than the facts of the case warranted."[180]

2. Bright-Line Rules and Rigid Analyses from the Fifth and Eleventh Circuits

Although most appellate courts have adopted a totality of the circumstances test, some have used more rigid analyses and impose either higher standards on the plaintiff or require a minimum period of overdetention to consider the claim.[181]

The U.S. Court of Appeals for the Fifth Circuit imposed a heightened standard on plaintiffs seeking constitutional relief for overdetention claims, notably proof of actual knowledge of the overdetention. In *Harris v. Payne*,[182] law enforcement wrongfully detained the plaintiff for four months despite the fact that the wanted person's race, date of birth, and social security number differed, and the plaintiff made multiple protests of innocence.[183] The Fifth Circuit held that "allegations that an officer had exculpatory information in his possession but did not take the affirmative step of reviewing it are not sufficient to state a due process claim."[184] Rather, plaintiffs must "demonstrate that the officer knew or should have known that the plaintiff was wrongly detained."[185] Similarly, in *Porter v. Epps*,[186] the Fifth Circuit held that the plaintiff's detention of fifteen months beyond his

175. 219 F.3d 261 (3d Cir. 2000).
176. *Id.* at 268, 273.
177. *See id.* at 273.
178. 653 F.3d 313 (3d Cir. 2011).
179. *See id.* at 328–29.
180. *Id.* at 326.
181. *See, e.g.*, Harris v. Payne, 254 F. App'x 410, 420–21 (5th Cir. 2007); Porter v. Epps, 659 F.3d 440, 446–47 (5th Cir. 2011); Sosa v. Martin County, 57 F.4th 1297, 1301–02 (11th Cir. 2023) (en banc).
182. 254 F. App'x 410 (5th Cir. 2007).
183. *See id.* at 412–13.
184. *Id.* at 420.
185. *Id.*
186. 659 F.3d 440 (5th Cir. 2011).

imposed sentence due to an internal mistake was not deliberate indifference because the defendants had no "actual or constructive notice" of the violation.[187] Therefore, the Fifth Circuit does not consider the totality of the circumstances, but rather looks to whether there was tangible proof that officers knew of the wrongful detention.[188]

Plaintiffs were able to meet this high bar in a string of cases from 2022 to 2024 stemming out of systemic overdetention issues in Louisiana, with overdetentions ranging from 41 to 337 days.[189] As one circuit judge noted,

> Indeed, as our Court remains plagued by claims arising from inexplicable and illegal [overdetention] in Louisiana prisons, explanations scarcely arise, let alone satisfy scrutiny upon our review. The problem is endemic in Louisiana, where the process for calculating release dates is so flawed (to put it kindly) that roughly one in four inmates released will have been locked up past their release dates—for a collective total of 3,000-plus years.[190]

The Fifth Circuit ruled that defendants acted with deliberate indifference because the plaintiffs "introduce[d] evidence that each Defendant had 'actual or constructive notice' that their failure to adopt policies would result in constitutional violations."[191] In addition to the factual patterns in each case, the court relied on evidence that plaintiffs provided of widespread knowledge of the systemic overdetention issue in Louisiana prisons, such as: an internal study revealing "exposed" and "widespread" overdetention in Louisiana prisons,[192] testimony of employees at Louisiana prisons and testimony of the Attorney General of Louisiana regarding systemic overdetention,[193] and a legislative audit report noting Louisiana prisons' "problem in not knowing inmates' proper release date."[194]

The Eleventh Circuit in *Sosa v. Martin County*[195] also established a higher bar with a minimum time period for viable overdetention claims, thus deepening the circuit split.[196] Officers arrested Sosa twice based on a warrant issued twenty-two years prior in Harris County, Texas for a different man with the same name.[197] Both times, Sosa protested that his date of birth, height, weight, social security number, and tattoo information differed from

187. *Id.* at 447.

188. *See Harris*, 254 F. App'x at 420 ("[A]llegations that an officer had exculpatory information in his possession but did not take the affirmative step of reviewing it are not sufficient to state a due process claim.").

189. *See generally* Crittindon v. LeBlanc, 37 F.4th 177, 184 (5th Cir. 2022); Parker v. LeBlanc, 73 F.4th 400, 402 (5th Cir. 2023); Hicks v. LeBlanc, 81 F.4th 497, 500 (5th Cir. 2023); McNeal v. LeBlanc, 90 F.4th 425, 428 (5th Cir. 2024).

190. *Hicks*, 81 F.4th at 510.

191. *Crittindon*, 37 F.4th at 186 (citing *Porter*, 659 F.3d at 447). The subsequent cases relied on and cited the holding in *Crittindon*. *See Parker*, 73 F.4th at 404–05; *Hicks*, 81 F.4th at 505–07; *McNeal*, 90 F.4th at 432–33.

192. *Crittindon*, 37 F.4th at 183; *McNeal*, 90 F.4th at 429.

193. *See Parker*, 73 F.4th at 403–04; *McNeal*, 90 F.4th at 432.

194. *Parker*, 73 F.4th at 408; *see also McNeal*, 90 F.4th at 430.

195. 57 F.4th 1297 (11th Cir. 2023) (en banc).

196. *See id.* at 1302–03.

197. *See id.* at 1299.

that of the wanted man.[198] During the first arrest in 2014, authorities fingerprinted Sosa before releasing him three hours after the arrest.[199] During the second arrest in 2018, although Sosa once again noted the differences in identifiers, brought up the incident in 2014, and repeatedly protested his innocence, authorities kept Sosa in custody and released him only after fingerprinting him three days later.[200]

The Eleventh Circuit en banc held that there was no constitutional recourse to an overdetention of three days, regardless of surrounding facts that would make the overdetention more or less reasonable.[201] The court, stating "[o]ur decision begins and ends with *Baker*,"[202] claimed *Baker* held that "no violation of due process occurs if a detainee's arrest warrant is valid and his detention lasts an amount of time no more than the three days that Linnie was detained."[203] In other words, the majority took *Baker*'s "outcome" (a three day overdetention) and interpreted it as "the limiting principle the Supreme Court applied to reach that outcome."[204] It rejected the notion that *Baker* established "a fact-intensive, totality-of-the-circumstances analysis" and noted the lack of guidance on possible due process violations.[205] Moreover, it differentiated the present case from its precedent in *Cannon v. Macon County*,[206] in which the plaintiff was wrongfully detained for seven days, by arguing that the warrant in *Cannon* may have been invalid and that the detention in *Cannon* was longer than in *Baker*.[207]

The dissent in *Sosa* forcefully rejected the majority's interpretation of the Constitution, declaring it "misguided," "horrifying," and "wrong."[208] Quoting *Cannon*, Judge Robin S. Rosenbaum reiterated the Eleventh Circuit's 1993 holding that "the Constitution protects the 'right to be free from continued detention after it was or should have been known that the detainee was entitled to release.'"[209] Thus, a failure to verify an arrested person's identity can be sufficient to establish "deliberate indifference toward the plaintiff's due process rights" where it was known or should have been known that the arrested person was entitled to relief.[210] Following that logic, Sosa met this bar because "the jail had enough information to know (1) that a substantial likelihood existed that Sosa was not the wanted Sosa and (2) that they had the means readily available to rapidly confirm Sosa's identity."[211] Consequently, Judge Rosenbaum posited that the majority's

198. *See id.*
199. *See id.*
200. *See id.*
201. *See id.* at 1302–03.
202. *Id.* at 1300.
203. *Id.* at 1301.
204. *Id.* at 1318 (Rosenbaum, J., dissenting).
205. *Id.* at 1301 (majority opinion).
206. 1 F.3d 1558 (11th Cir. 1993).
207. *See Sosa*, 57 F.4th at 1302–03.
208. *Id.* at 1309 (Rosenbaum, J., dissenting).
209. *Id.* at 1309–10 (quoting *Cannon*, 1 F.3d at 1563).
210. *Id.* at 1310 (quoting *Cannon*, 1 F.3d at 1564).
211. *Id.* at 1316.

interpretation of *Baker*'s outcome as the Court's limiting principle was misguided.[212] Rather, the *Baker* Court used "legal reason . . . to determine that, for the circumstances present in *Baker*, a three-day detention wasn't a constitutional deprivation of liberty."[213] According to Rosenbaum, the limiting principle is not a three-day overdetention, but rather a "reasonableness test" where overdetention is unconstitutional when it becomes unreasonable to not verify an arrested person's identity, based on a totality of the circumstances test.[214]

Ultimately, Judge Rosenbaum rejected the majority's three-day rule and advanced key elements that made Sosa's detention different from the plaintiff's detention in *Baker*: (1) the technological advancements that took place between 1972 and 2018, which made checking fingerprints much more efficient and less laborious[215]; (2) Sosa was not framed, unlike Linnie; (3) Sosa's arrest occurred twenty-six years after the warrant, as opposed to two months in *Baker*; (4) Sosa, unlike Linnie, matched almost none of the identifiers in the warrant; (5) Sosa informed the officers that the same issue had previously occurred in 2014, where he was only detained for three hours; (6) Sosa's name is much more common in the United States than Linnie's name; and (7) no holiday weekend was involved in *Sosa*, unlike in *Baker*.[216] With its thorough rebuke of the majority's three-day rule, the *Sosa* dissent employed the fact-intensive analysis of the totality of the circumstances test, concluded that Sosa should have been entitled to relief, and demonstrated the deepening of the circuit split.[217]

B. A Debate on the Source of the Constitutional Right

The Supreme Court in *Baker* used substantive due process to evaluate Linnie's case and rejected the use of the Fourth Amendment for overdetention claims because the issue lied in the continued detention rather

212. *See id.* at 1318 ("[T]he Majority Opinion treats three days as some type of magic number that the Supreme Court arbitrarily shook out of a magic 8 ball . . . . That is not how the law works, and that is not what the Supreme Court did.").

213. *Id.*

214. *Id.* at 1320.

215. There was a database in place in the 1970s, but the technology has greatly improved since then. *See* Baker v. McCollan, 443 U.S. 137, 155 n.17 (1979). The FBI launched the Integrated Automated Fingerprint Identification System (IAFIS) in 1999, which "houses the largest collection of digital representations of fingerprint images, features from the digital fingerprint images, and criminal history information in the world." *Privacy Impact Assessment Integrated Automated Fingerprint Identification System (IAFIS)/Next Generation Identification (NGI) Biometric Interoperability*, FBI (Jan. 18, 2012), https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/freedom-of-information-privacy-act/department-of-justice-fbi-privacy-impact-assessments/iafis-ngi-biometric-interoperability [https://perma.cc/C6Y3-UUSB]. Since 2011, that transformed into the Next Generation Identification (NGI) system, which has ten-second response times and "offers additional officer safety and situational awareness by providing on-scene access to a national repository of wants and warrants." *Next Generation Identification (NGI)*, FBI, https://le.fbi.gov/science-and-lab/biometrics-and-fingerprints/biometrics/next-generation-identification-ngi [https://perma.cc/2K43-B2CD] (last visited Oct. 12, 2024).

216. *See Sosa*, 57 F.4th at 1324–26 (Rosenbaum, J., dissenting).

217. *See id.*

than the initial arrest.[218] Although some courts have adhered to *Baker*'s guidance, others have shifted toward the Fourth Amendment by expanding the scope of a Fourth Amendment seizure.[219]

1. Abiding by *Baker*'s Original Substantive Due Process Protection Against Overdetention

Some circuits have retained *Baker*'s original holding regarding the use of substantive due process for overdetention claims. These courts see Fourth Amendment protections as ending at the initial determination of probable cause during the arrest—which renders the Fourth Amendment inapplicable to overdetention claims—and adopt a substantive due process approach by determining whether the officer, in refusing to release the arrested person, exhibited deliberate indifference that shocked the conscience.[220]

In cases that applied totality of the circumstances tests, the Sixth and Seventh Circuits retained substantive due process for overdetention claims.[221] These courts rejected the Fourth Amendment analysis as an avenue for overdetention claims, interpreting the Fourth Amendment as confined to the initial arrest. For instance, in *Seales*, the Sixth Circuit dismissed a Fourth Amendment violation because it was not unreasonable for the police officer to believe that the arrested person was the wanted person.[222] The Sixth Circuit then used the Fourteenth Amendment to establish whether the officers exhibited deliberate indifference to evaluate the plaintiff's constitutional claims.[223] Similarly, in *Armstrong*, the Seventh Circuit clarified that the Fourteenth Amendment covers the initial period of confinement and that the Fourth Amendment should be limited to the period between a warrantless arrest and the preliminary hearing.[224] The Seventh Circuit then used a three-step, "shock the conscience" test to establish a substantive due process violation.[225]

In cases that applied a restrictive application of *Baker*'s holding, the Fifth and Eleventh Circuits also rejected the Fourth Amendment and stuck to a substantive due process analysis.[226] Although these courts differ from the Sixth and Seventh Circuits on the test establishing a constitutional right, they agree that the issue is rooted in the Fourteenth Amendment and refuse to expand the Fourth Amendment to the period beyond the initial arrest. In *Harris*, the Fifth Circuit held that there was no Fourth Amendment claim

218. *See* Baker v. McCollan, 443 U.S. 137, 143–44 (1979).
219. *See* Petition for Writ of Certiorari, *supra* note 149, at 15 (identifying the second question of the circuit split as whether to "rehome *Baker* claims, from the Fourteenth to the Fourth Amendment").
220. *See* Levinson, *supra* note 90, at 531.
221. *See supra* Part II.A.1.
222. Seales v. City of Detroit, 724 F. App'x 356, 361–62 (6th Cir. 2018).
223. *See id.* at 363.
224. Armstrong v. Squadrito, 152 F.3d 564, 569 (7th Cir. 1998).
225. *See id.* at 570–71.
226. *See supra* Part II.A.2.

because there was probable cause for the initial arrest,[227] and clarified that the Fourteenth Amendment should be used for overdetention claims, albeit very strictly.[228] The Eleventh Circuit in *Sosa* similarly rejected Sosa's Fourth Amendment claim because the officers had probable cause to arrest him.[229] The court then relied on the overdetention rule set three decades earlier in *Cannon* and decided to retain the Fourteenth Amendment for overdetention cases.[230]

2. A Mix of Jurisprudence from the Ninth Circuit

The Ninth Circuit has not rejected substantive due process but has slowly shifted away from *Baker*'s ruling and implied openness to procedural due process and the Fourth Amendment as solutions to overdetention claims.

In *Lee*, the Ninth Circuit used various sources to bolster its claim that the officers violated the Constitution, relying on substantive "and/or" procedural due process, as well as the Fourth Amendment.[231] For the substantive due process claim, the court noted that the officers acted "recklessly and with deliberate indifference to [the plaintiff's] right to due process" when they ignored the plaintiff's mental condition and failed to adequately compare the plaintiff's physical characteristics and fingerprints to those of the wanted person.[232] For the procedural due process claim, the court relied on the police department's "conscious failure to train their employees in the procedures necessary to avoid" the overdetention of those with mental disabilities.[233] Moreover, the court found two Fourth Amendment violations: (1) the plaintiff's arrest without probable cause and (2) the officers' failure to compare the plaintiff's physical characteristics and fingerprints to those of the wanted person.[234] Although the Ninth Circuit explained the rule forbidding arrests without probable cause,[235] the court provided no explanation for the contention that a failure to verify an arrested person's identity is a Fourth Amendment violation.[236]

Over ten years later in *Garcia*, the Ninth Circuit relied on a mix of substantive and procedural due process.[237] First, the Court distinguished between two due process violations: (1) "the circumstances indicated to the defendants that further investigation was warranted," meaning substantive due process, and (2) "the defendants denied the plaintiff access to the courts

227. *See* Harris v. Payne, 254 F. App'x 410, 418 (5th Cir. 2007).
228. *See id.* at 419–20.
229. *See* Sosa v. Martin County, 57 F.4th 1297, 1301 (11th Cir. 2023) (en banc).
230. *See id.* at 1302–03; *see also* Cannon v. Macon County, 1 F.3d 1558, 1562–63 (11th Cir. 1993) (holding that § 1983 false imprisonment claims must "establish that the imprisonment worked a violation of fourteenth amendment due process rights").
231. Lee v. City of Los Angeles, 250 F.3d 668, 684 (9th Cir. 2001).
232. *Id.*
233. *Id.*
234. *See id.* at 685.
235. *See id.*
236. *See id.*
237. Garcia v. County of Riverside, 817 F.3d 635, 640–42 (9th Cir. 2016).

for an extended period of time," meaning procedural due process.[238] Although the court noted that the overdetention case falls under the former,[239] it continually emphasized procedural mishaps as the cause of the constitutional violation[240] and quoted Ninth Circuit precedent emphasizing that lack of procedural safeguards led to the overdetention.[241] The court then concluded that the overdetention stemmed from the failure to verify the arrested person's identity and to adequately train staff to avoid misidentifications.[242] Thus, the rule stemmed from a substantive due process angle, but the court employed a procedural due process analysis to evaluate the constitutional violation.[243]

3. Shifting Toward a Fourth Amendment Protection Against Overdetention

The Second and Third Circuits have explicitly rejected substantive due process and adopted the Fourth Amendment as a remedy to overdetention claims.[244] Judge Rosenbaum's dissent in *Sosa* called for a shift toward the Fourth Amendment,[245] and the U.S. Court of Appeals for the Fourth Circuit expressed openness to Fourth Amendment analyses for overdetention claims.[246] In doing so, these courts consider Fourth Amendment seizures to continue past the point of the original arrest and into the period of overdetention.

In *Russo*, the Second Circuit advanced a Fourth Amendment framework for overdetention claims.[247] The court acknowledged that it was moving away from *Baker*, but held that the Court's guidance in *Graham* warranted the shift.[248] The court posited that an overdetention claim "fits comfortably under the coverage of the Fourth Amendment" based on Second Circuit precedent clarifying that those physically detained following arraignment are seized under the Fourth Amendment[249] as well as the Fourth Amendment's

238. *Id.* at 640 (quoting Rivera v. County of Los Angeles, 745 F.3d 384, 391 (9th Cir. 2014)).

239. *See id.*

240. *See id.* at 640–42.

241. *See id.* at 640 (citing Lee v. City of Los Angeles, 250 F.3d 668, 684 (9th Cir. 2001) and Fairley v. Luman, 281 F.3d 913, 918 (9th Cir. 2002)).

242. *See id.* at 642.

243. *See* Sosa v. Martin County, 57 F.4th 1297, 1314 n.6 (11th Cir. 2023) (en banc) (Rosenbaum, J., dissenting) (noting that the Ninth Circuit uses a procedural due process analysis for overdetention cases).

244. *See, e.g.*, Russo v. City of Bridgeport, 479 F.3d 196, 208–10 (2d Cir. 2007); Schneyder v. Smith, 653 F.3d 313, 319–24 (3d Cir. 2011).

245. *See Sosa*, 57 F.4th at 1334 (Rosenbaum, J., dissenting).

246. *See* Safar v. Tingle, 859 F.3d 241, 245–46 (4th Cir. 2017).

247. *See Russo*, 479 F.3d at 208.

248. *See id.*; *see also supra* Part I.C.1.

249. *Russo*, 479 F.3d at 208 ("We have observed that '[w]hen the accused is physically detained following arraignment, there can be no question that he has been seized within the meaning of the Fourth Amendment.'" (quoting Murphy v. Lynn, 118 F.3d 938, 944 (2d Cir. 1997))).

purpose to protect against unwarranted government interference.[250] The Second Circuit incorporated the "shock the conscience" test from substantive due process analyses into its understanding of Fourth Amendment reasonableness to determine whether the seizure complied with the Constitution, without explaining the need to combine both tests.[251]

In *Schneyder*, the Third Circuit also adopted the Fourth Amendment as the source for overdetention claims.[252] Here, the court went a step further than the Second Circuit and embraced Justice Ginsburg's continuing seizure theory from her concurrence in *Albright*, which maintains that pretrial restrictions of liberty for the purpose of securing one's presence in court are Fourth Amendment seizures.[253] The court also clarified its position on how to use other amendments for constitutional violations in the criminal legal system: (a) overdetention to ensure appearance in court falls under the Fourth Amendment, (b) imposition of "a deprivation amounting to punishment" on a pretrial detainee falls under the Fourteenth Amendment, and (c) post-conviction treatment falls under the Eighth Amendment.[254]

Other circuit courts have expressed openness to the Third Circuit's idea. For instance, Judge Rosenbaum's dissent in *Sosa* embraced the Second and Third Circuits' shift toward the Fourth Amendment for overdetention and called for future courts to follow suit.[255] The Fourth Circuit in *Safar v. Tingle*[256] also suggested that the Fourth Amendment, rather than the Fourteenth, is the proper guide to examine overdetention claims and "law enforcement's pretrial missteps."[257]

III. A TOTALITY OF THE CIRCUMSTANCES TEST GROUNDED IN SUBSTANTIVE DUE PROCESS IS THE BEST RESOLUTION TO THIS CIRCUIT SPLIT

This part calls on future courts to use a totality of the circumstances test and to adhere to a substantive due process analysis for future overdetention claims. Although the Supreme Court denied Sosa's petition for writ of certiorari to review this question,[258] the Court will eventually need to take on this issue if the courts of appeals continue to diverge on the test for overdetention and the constitutional source of the right. In the meantime, lower courts can, and should, continue to develop jurisprudence regarding

250. *See id.* (relying on the Court's reasoning in *Lewis* and *Albright*).

251. *See id.* at 209–10 ("[G]iven our decision—following the Supreme Court's admonition in *Graham*—to treat Russo's claim under the Fourth Amendment, the 'shock the conscience' requirement must now be understood as a crucial feature going to the 'unreasonableness' of the seizure.").

252. *See* Schneyder v. Smith, 653 F.3d 313, 328–29 (3d Cir. 2011).

253. *See id.* at 319–22.

254. *See id.* at 320.

255. *See* Sosa v. Martin County, 57 F.4th 1297, 1334 (11th Cir. 2023) (en banc) (Rosenbaum, J., dissenting).

256. 859 F.3d 241 (4th Cir. 2017).

257. *Id.* at 245.

258. *See* Sosa v. Martin County, 144 S. Ct. 88, *denying cert. to* Sosa v. Martin County, 57 F.4th 1297 (11th Cir. 2023).

the constitutionality of overdetention by using a totality of the circumstances test based in substantive due process.

Part III.A argues that most lower courts have correctly recognized that *Baker* established a totality of the circumstances test, and that this test is especially important given the technological advancements in the criminal legal system since the 1970s. Part III.B advocates for courts to adhere to a substantive due process analysis rather than shift toward a Fourth Amendment analysis, as substantive due process is the best source of protection for the constitutional violation.

A. Courts Should Use a Totality of the Circumstances Test to Evaluate Overdetention Claims

Based on the text the Supreme Court used, it seems clear that *Baker* established a totality of the circumstances test for overdetention claims. This test is better suited than any of the minority courts more rigid tests to evaluate overdetention claims given the varying facts of each case and technological advancement in the criminal legal system.

1. The Court's Language in *Baker* Established a Totality of the Circumstances Test

Although the focus in *Baker* was on Linnie's case[259] and the limits of due process violations,[260] the Court, in effect, created a totality of the circumstances test for overdetention claims, which most appellate courts have correctly recognized.[261] The language in *Baker*, although vague, calls on lower courts to consider a variety of factors.[262] This is evidenced by the Court's discussion of scenarios beyond Linnie's claim, which opens the door to constitutional challenges against overdetention.[263] This discussion is divided into three clauses.

First, the *Baker* Court noted that the Fourth Amendment alone cannot protect against unconstitutional overdetention. "Obviously, one in respondent's position could not be detained indefinitely in the face of repeated protests of innocence even though the warrant under which he was arrested and detained met the standards of the Fourth Amendment."[264] Here, the Court articulated the limits of the Fourth Amendment—which at the time only covered the period of the initial detention—in protecting the constitutional rights of those experiencing overdetention.[265] *Baker* clarified that the probable cause determination at the time of the initial arrest does not necessarily correlate with a constitutional deprivation of liberty.[266] In other

259. *See* Baker v. McCollan, 443 U.S. 137, 142–43 (1979).
260. *See id.* at 145.
261. *See infra* Part II.A.
262. *See Baker*, 443 U.S. at 144–45.
263. *See id.*
264. *Id.* at 144.
265. *See supra* Part I.C.2.
266. *See Baker*, 443 U.S. at 144.

words, continued detention may eventually become unconstitutional even though the initial arrest complied with the Fourth Amendment. There is thus a constitutional gap in protecting the rights of arrested persons in the context of overdetention.

Second, the Court introduced the Sixth Amendment right to a speedy trial[267] as an example of the limits of the Fourth Amendment. "For the Constitution likewise guarantees an accused the right to a speedy trial, and invocation of the speedy trial right need not await indictment or other formal charge; arrest pursuant to probable cause is itself sufficient."[268] Although the initial arrest can comply with the Constitution, the subsequent treatment of arrested persons can become unconstitutional based on how officials deal with them during their detention. This clause may also indicate the beginning of a fundamental rights analysis for a substantive due process claim for overdetention.[269] By evoking a constitutional amendment that protects individuals in contact with the criminal legal system, the Court brought attention to the various protections the state must guarantee to pretrial detainees. Thus, for overdetention cases, the deprivation of liberty is obvious in a traditional sense—because arrested persons are improperly detained—and is easier to digest than the deprivation of liberty that arises with legislation criminalizing abortion, birth control, or sexual autonomy.[270]

Third, and most importantly for this analysis, the Court introduced a constitutional right against overdetention. "We may even assume, *arguendo*, that, depending on what procedures the State affords defendants following arrest and prior to actual trial, mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of 'liberty . . . without due process of law.'"[271] Here, the Court opened the door for individuals to sue government officials for overdetention based on substantive due process. Although the Court included many guidelines, it noted "the procedures" the state offers to pretrial detainees, "repeated protests of innocence," and "the lapse of a certain amount of time" as relevant to a possible constitutional violation.[272] The mention of procedures indicates that even when procedural due process is satisfied—for instance, with a preliminary hearing—the state can still deprive individuals of their substantive due process rights by failing to release them. Then, the inclusion of repeated protests puts some of the onus on the arrested person to inform the state of its error. Finally, the ambiguous inclusion of the lapse of time, without clear limits, indicates that the facts in *Baker* do not necessarily provide an upper or lower limit to overdetention. In

267. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").
268. *Baker*, 443 U.S. at 144.
269. *See supra* Part I.C.1.
270. *See supra* Part I.C.1.
271. *Baker*, 443 U.S. at 145.
272. *Id.*

other words, the length of time "is necessarily context- and fact-dependent."[273]

The vague guidelines in *Baker* do not indicate a lack of foresight of what lower courts would need to rule on overdetention cases. Neither was the Court's holding so "narrow" that it would only apply to the facts of Linnie's case[274] without establishing a constitutional right against overdetention whatsoever.[275] Rather, the Court seemed to encourage lower courts to evaluate all the circumstances of each case. This, just like the dissent in *Sosa* advanced, is a totality of the circumstances test.[276]

Further evidence of the Court's intention is the fact that, in *Baker*, the Court engaged with all the facts—not just the length of Linnie's detention—and did not explicitly note a threshold for overdetention. Therefore, a three-day or more overdetention can remain within the bounds of constitutionality, just as an overdetention of one or two days can be unconstitutional given the surrounding factors.[277]

2. The Totality of the Circumstances Test Is Better Equipped to Evaluate Overdetention Claims

The totality of the circumstances test, rather than a "bright-line rule[],"[278] is better suited to evaluate overdetention claims, all of which involve differing and often unforeseeable factors. Considering all of the relevant circumstances, rather than a few specific factors like time or actual knowledge, is at the core of a totality of the circumstances test.[279] Although some factors—such as state procedures, protests of innocence, and length of time—may be particularly powerful or relevant,[280] no individual factor is determinative in a totality of the circumstances test.[281] Totality of the circumstances tests are regularly used in constitutional law to accommodate messy life circumstances and diverging interests when dealing with

273. *See* Petition for Writ of Certiorari, *supra* note 149, at 15.

274. Brief in Opposition to Petition for Writ of Certiorari at 16, Sosa v. Martin County, 144 S. Ct. 88 (2023) (No. 22-1145) (arguing that the Eleventh Circuit "correctly applied the actual narrow holding" by imposing a limit of three days for arrests involving valid warrants, and that applying the petitioner's standard would "overrule *Baker* or worse, expand it by recognizing a constitutional duty imposed upon a jailer to investigate, or reinvestigate, a claim of mistaken identity or innocence, particularly in the form of a substantive due process claim").

275. *Id.* at 20.

276. *See* Sosa v. Martin County, 57 F.4th 1297, 1321 (11th Cir. 2023) (en banc) (Rosenbaum, J., dissenting) ("[I]n determining that Baker had not violated Linnie's constitutional rights when he did not release Linnie for three days after Linnie was arrested, the Court accounted for the peculiarities of each of the following three things: (1) Linnie's situation; (2) the procedures the state provided to ensure Linnie was the wanted person; and (3) the period during which Linnie was detained. On its face, this, of course, is a totality-of-the-circumstances analysis.").

277. *See id.* at 1326 n.16.

278. *See supra* note 151 and accompanying text.

279. *See supra* Part II.A.1.

280. *See* Baker v. McCollan, 443 U.S. 137, 144–45 (1979).

281. *See supra* Part II.A.1.

deprivations of liberty by government actors.[282] By contrast, as Justice Stephen G. Breyer once noted, bright-line rules, with their insistence on specific and often arbitrary factors, fail to "recognize[] that no single set of legal rules can capture the ever-changing complexity of human life."[283]

Technological advancements in the modern criminal legal system have increased the urgency of totality of the circumstances tests for overdetention cases.[284] Courts should consider how new technology influences law enforcement's ability to make mistakes in detaining individuals and facilitates correct identification through fingerprinting.[285] For instance, modern fingerprinting is a double-edged sword: it makes it easier to quickly identify an arrested person[286] and increases the urgency of finding misidentifications due to errors that can arise with the use of artificial intelligence during arrests.[287] This is particularly the case for Black Americans[288] who are already at much higher risk of being subject to false arrests and overdetention.[289] This makes it much less reasonable for officers to take additional days to identify an overdetention than during the 1970s, when the Court released the *Baker* decision.[290]

Given that *Baker*'s totality of the circumstances test has only become more urgent with technological advancements in the past few decades, the dissent in *Sosa* correctly noted the factors in the plaintiff's overdetention that rendered it unconstitutional.[291] Of particular relevance are the technological advancements that took place between 1972 and 2018 (which made checking fingerprints much more efficient and less laborious), the fact that Sosa informed the officers of the same issue from 2014, when he was only detained for three hours, and that Sosa matched almost none of the identifiers in the warrant.[292] Each of these factors on their own should have put the officers on notice that they may have detained the wrong individual.[293] Additional factors differentiating Sosa's case from Linnie's only add to the unreasonable nature of the overdetention. For instance, Sosa was not framed, Sosa's arrest occurred twenty-six years after the warrant, Sosa matched almost none of the identifiers in the warrant, Sosa's name is common in the United States, and no holiday weekend took place during Sosa's detention.[294]

282. *See supra* note 150 and accompanying text.
283. *Georgia v. Randolph*, 547 U.S. 103, 125 (2006) (Breyer, J., concurring).
284. *See* Brief of the Rutherford Institute as Amicus Curiae Supporting Petitioner at 7, Sosa v. Martin County, 144 S. Ct. 88 (2023) (No. 22-1145).
285. *See supra* Part I.C.2.
286. *See supra* note 215 and accompanying text.
287. *See supra* note 23 and accompanying text.
288. *See supra* note 23 and accompanying text.
289. *See* GROSS, POSSLEY & STEPHENS, *supra* note 21, at ii, 26–28.
290. *See supra* Part II.A.2.
291. Sosa v. Martin County, 57 F.4th 1297, 1324–26 (11th Cir. 2023) (en banc) (Rosenbaum, J., dissenting).
292. *See id.*
293. *See id.*
294. *See id.*

Baker's totality of the circumstances test also demands that plaintiffs be able to present sensible proof of overdetention claims beyond evidence of the defendants' actual knowledge required in the Fifth Circuit. Although it is laudable that the Fifth Circuit allowed the overdetention cases from Louisiana to move forward,[295] the proof available to plaintiffs in that case, such as an internal study by Louisiana prisons or a legislative audit, will likely be unavailable in other cases unless the overdetention issue is as widespread and endemic as it is in Louisiana. Plaintiffs who do not meet those specific conditions and who experienced overdetention in the Fifth Circuit will face far too many barriers to successfully sue for unconstitutional overdetention in the Fifth Circuit.

Going forward, courts should consistently employ this fact-intensive totality of the circumstances test, rather than the three-day standard the *Sosa* majority employed[296] or the "actual or constructive notice" standard from the Fifth Circuit.[297] This test is key to protecting the constitutional rights of those in contact with the criminal legal system and particularly vulnerable individuals who are already at higher risk of overdetention, such as Black Americans.[298] Although the Court has refused to hear this issue in Sosa's case,[299] appellate courts should continue to use this mainstream totality of the circumstances test to ensure that they correctly afford plaintiffs their constitutional rights.

B. Courts Should Adhere to the Substantive Due Process Analysis Employed in Baker *as the Source of the Constitutional Right Against Overdetention*

Until the Court hears an overdetention case, lower courts should adhere to the substantive due process analysis. *Baker*'s version of substantive due process is the best source for the right against overdetention and better protects other constitutional rights for those in contact with the criminal legal system.

1. *Baker*'s Version of Substantive Due Process Is Not Subject to Controversies That Plague Substantive Due Process

Courts that abandoned substantive due process contend that they are following trends and jurisprudential controversies that make the Fourth Amendment, which has been consistently recognized and expanded by the Supreme Court, a more appropriate source for an unenumerated constitutional right.[300] Comparatively, substantive due process has been

295. *See supra* Part II.A.2.
296. *See supra* Part II.A.2.
297. *See supra* Part II.A.2.
298. *See* GROTHER, NGAN & HANAOKA, *supra* note 23.
299. *See* Sosa v. Martin County, 144 S. Ct. 88 (2023), *denying cert. to* Sosa v. Martin County, 57 F.4th 1297 (11th Cir. 2023).
300. *See supra* Part II.B.3.

tainted with reluctance and outright disapproval due to fears of a dangerous expansion of rights that undermine the democratic process.[301] In past decades, the Court has tightened the test around legislative and executive substantive due process in *Glucksberg* and *Lewis*, and it more recently rebuked the idea of substantive due process altogether in *Dobbs*.[302] The Court further pushed lower courts toward enumerated constitutional guarantees whenever possible in *Graham*.[303] The Court has generally cautioned against relying too heavily on substantive due process and declared in *Collins v. City of Harker Heights*[304] that "[a]s a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended."[305] Many appellate courts have followed suit: courts have used this quote from *Collins* to foreclose substantive due process claims, noting that they cannot grant cases for plaintiffs claiming substantive due process violations unless the Court has explicitly spoken on that issue.[306]

However, substantive due process is not an undifferentiated whole. In weighing the preference of the Fourth Amendment over substantive due process, it is important to consider the version of substantive due process courts use for overdetention claims. Most of the debate around substantive due process has been around the expansion of privacy rights in relation to marriage, contraception, or reproductive autonomy and the controversies around a newly created right.[307] In contrast, overdetention does not involve that process because the right at stake is not an amorphous interpretation of liberty and rather speaks to the core of the Due Process Clause: liberty from unjustified detention.[308] The question at the heart of overdetention claims is not whether individuals have a right to liberty, but rather whether their liberty was unconstitutionally denied. Thus, instead of a more traditional substantive due process claim that the Court attacked in *Dobbs*,[309] *Baker*'s version of substantive due process overlaps with procedural due process as it grapples with core concerns of procedural protections in the criminal legal system.[310] For instance, although the majority characterizes its method as substantive due process, Justice Stevens' dissent blamed the overdetention

301. *See supra* Part I.C.1.
302. *See supra* Part I.C.1.
303. *See supra* Part I.C.1.
304. 503 U.S. 115 (1992).
305. *Id.* at 125.
306. *See, e.g.*, Armendariz v. Penman, 75 F.3d 1311, 1319, 1326 (9th Cir. 1996); Hawkins v. Freeman, 195 F.3d 732, 738 (4th Cir. 1999); Harbury v. Deutch, 233 F.3d 596, 605 (D.C. Cir. 2000); Doe v. Miller, 405 F.3d 700, 714 (8th Cir. 2005); Schiavo *ex rel.* Schindler v. Schiavo, 403 F.3d 1289, 1296 (11th Cir. 2005); Abigail All. for Better Access to Developmental Drugs v. von Eschenbach, 495 F.3d 695, 702 (D.C. Cir. 2007); Maddox v. Stephens, 727 F.3d 1109, 1120 (11th Cir. 2013); Hillcrest Prop., LLP v. Pasco County, 915 F.3d 1292, 1299 (11th Cir. 2019); Johnson v. City of Philadelphia, 975 F.3d 394, 400 n.7 (3d Cir. 2020).
307. *See supra* Part I.C.1.
308. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001).
309. *See supra* Part I.C.1.
310. *See* Burnham, *supra* note 83, at 519.

on procedure that was "not reasonably calculated" to avoid the constitutional violation.[311]

Justice Rehnquist articulated this version of substantive due process to account for due process violations that would otherwise fall through the cracks due to the guise of facially adequate procedure. Even when the basic requirements of procedural due process are met, adequate process can nonetheless lead to substantive violations with conduct that exudes deliberate indifference or shocks the conscience.[312] In other words, once mistakes beyond procedure become evident, it becomes unconstitutional for the state to continue denying arrested persons their liberties despite good faith process.

Given the unique nature of *Baker*'s substantive due process, the warning in *Collins* does not apply to this case. Courts in overdetention cases are not dealing with an "unchartered area" where the "guideposts for responsible decisionmaking . . . are scarce and open-ended."[313] Rather, courts are grappling with an obvious form of liberty that lies at the heart of due process and its promise of "freedom from imprisonment."[314]

2. Substantive Due Process Is a Sounder Constitutional Source Against Overdetention Than the Fourth Amendment

Although various constitutional sources can adequately cover a constitutional right,[315] courts should adhere to the best source, which in this case is *Baker*'s version of substantive due process. The "shock the conscience" and "deliberate indifference" tests recognize actions by executive officials that are so arbitrary or fundamentally unjust that they rise to the level of unconstitutionality, which includes detaining someone once it was known or should have been known that they are entitled to release.[316] The fact that this constitutional right, like other unenumerated rights, is not found explicitly in the text of the Constitution should not render it invalid. Substantive due process has long been recognized as a component of due process and is a legitimate tool to protect constitutional rights according to Americans' evolving understanding of liberty and fundamental rights.[317] As long as courts are careful to not abuse substantive due process as a tool to

311. *See* Baker v. McCollan, 443 U.S. 137, 150 (1979) (Stevens, J., dissenting).
312. *See supra* Part I.C.1.
313. Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).
314. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).
315. *Compare* Romer v. Evans, 517 U.S. 620, 633–36 (1996) (using the Equal Protection Clause to ban discrimination based on sexual orientation), *with* Lawrence v. Texas, 539 U.S. 558, 578–79 (2003), *and* Obergefell v. Hodges, 576 U.S. 644, 671–76 (2015) (using the Due Process Clause to ban discrimination based on sexual orientation). *See also* Jorge Pereira, Note, *Seizure or Due Process?: Section 1983 Enforcement Against Pretrial Detention Caused by Fabricated Evidence*, 90 U. CHI. L. REV. 2313, 2317 (2023) ("[P]retrial detention caused by fabricated evidence violates both the Fourth Amendment and the Fourteenth Amendment.").
316. *See* Levinson, *supra* note 90, at 531.
317. *See supra* Part I.C.1.

instill their policy preferences,[318] substantive due process is a valid means to fill key gaps that exist—and will undoubtedly remain—in the text of the Constitution. *Baker* correctly recognized this, and many appellate courts have followed suit.[319]

Some courts have found that the Fourth Amendment is a legitimate source for the constitutional right against overdetention.[320] Noting the shift of jurisprudence from the Court that has expanded some Fourth Amendment protection,[321] various appellate courts broke with *Baker*'s holding and advocated for a Fourth Amendment framework to evaluate overdetention claims.[322] These courts did so by expanding the meaning of Fourth Amendment seizures to account for the very early stage of detention following arrest that is not explicitly accounted for in the text of the Constitution and by emphasizing the purpose of the Fourth Amendment: to protect the people from unnecessary police interference in the early stages of the criminal legal system.[323] In addition to this adjacent move in excessive force claims,[324] scholars have called for the shift toward other rights where courts have been unwilling or slow to move away from substantive due process.[325]

This argument for a shift away from substantive due process is unconvincing. Courts that follow *Graham* do not necessarily reject substantive due process as a constitutional protection against overdetention, but rather recognize that they must use the amendment that "provides an explicit textual source of constitutional protection" to abide by the Court's jurisprudence.[326] But it is a stretch to say that the Fourth Amendment provides an "explicit textual source": the Fourth Amendment was only understood to cover the initial seizure at arrest until very recently,[327] and some appellate courts have refused to adopt the Fourth Amendment for overdetention claims because they maintain an original interpretation of a Fourth Amendment seizure.[328]

Although the Fourth Amendment is not an explicit textual source that *Graham* calls for, the Fourth Amendment's promise is to protect the people from unwarranted law enforcement interference in the early stages of the criminal legal system.[329] In a way, the constitutional right against

318. *See supra* Part I.C.1.
319. *See supra* Part II.B.1.
320. *See supra* Part II.B.3.
321. *See supra* Part I.C.2.
322. *See supra* Part II.B.3.
323. *See supra* Part II.B.3.
324. *See* O'Hagan, *supra* note 69, at 1370.
325. *See* Stracener, *supra* note 17, at 234 (arguing that the court should use a Fourth Amendment framework for insufficiently updated or good warrants that lead to false arrests); *see also* Mary Helen Wimberly, Note, *Rethinking the Substantive Due Process Right to Privacy: Grounding Privacy in the Fourth Amendment*, 60 VAND. L. REV. 283, 321–22 (2007) (arguing that the court should use a Fourth Amendment framework for right to privacy cases).
326. Graham v. Connor, 490 U.S. 386, 395 (1989).
327. *See supra* Part I.C.2.
328. *See supra* Part II.B.1.
329. *See supra* Part I.C.2.

overdetention can be interpreted as a "penumbra" of the Fourth Amendment, just like the right to contraception was a "penumbra" of several constitutional amendments in *Griswold*, a seminal case in substantive due process jurisprudence.[330] *Griswold* held that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance" to advance a substantive due process reasoning for the right to contraception.[331] By expanding existing constitutional amendments to cover unenumerated fundamental rights, the Court used "'reasoning-by-interpolation,' drawing logical inferences by looking at relevant parts of the Constitution as a whole and their relationship to one another."[332] Although the Court no longer uses this penumbral reasoning, it served as the opening to substantive due process and led to the explicit usage of the Fourteenth Amendment to expand unenumerated rights.[333] If the constitutional source against overdetention is attributed to the Fourth Amendment due to its general promise of protection against unreasonable detention, even though the Fourth Amendment was not originally understood to cover detention after the initial arrest,[334] the Fourth Amendment would have a penumbra that covers the constitutional right against overdetention, just as other constitutional amendments had penumbras to cover the constitutional guarantee to privacy, and therefore the right to contraception.[335]

Because penumbral reasoning is the philosophical root of substantive due process, the Fourth Amendment extension to cover overdetention indicates a practical similarity to substantive due process. As courts abandon substantive due process, they are forced to increase their reliance on the Fourth Amendment to fill in the gaps that can lead to constitutional violations in the criminal legal system, which is one of the main goals of substantive due process itself.[336] Ultimately, however, the reasoning these courts use to evaluate the constitutional violation is the same. For instance, the use of the Fourth Amendment to shield a substantive due process analysis was on full display in the Second Circuit's decision in *Russo*, where the court declared

330. *See supra* note 101 and accompanying text.

331. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). Although the holding did not mention substantive due process, the concurrences did so explicitly. *See id.* at 500 (Harlan, J., concurring); *id.* at 495 (Goldberg, J., concurring). Moreover, the dissent decried *Griswold*'s holding as Lochnering. *See id.* at 514–15 (Black, J., dissenting).

332. Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbral*, 77 B.U. L. REV. 1089, 1092 (1997) (quoting Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1334–36 (1992)).

333. *See* Katherine Watson, *When Substantive Due Process Meets Equal Protection: Reconciling* Obergefell *and* Glucksberg, 21 LEWIS & CLARK L. REV. 245, 255–56 (2017).

334. *See supra* Part I.C.2.

335. *See Griswold*, 381 U.S. at 484.

336. Attorneys may also be subject to this pressure and change their strategy to get the best outcome for their client. *See* Levinson, *supra* note 90, at 573 ("In light of the reluctance of many lower courts to recognize substantive due process violations and to impose a draconian shocks-the-conscience standard, plaintiffs might be well advised to explore the Fourth Amendment and its reasonableness standard to buttress their claims of abuse of government power.").

the Fourth Amendment as the source of overdetention but ultimately used the substantive due process "shock the conscience" test to evaluate the constitutionality of the overdetention.[337] More broadly, this penumbral reasoning pervades Justice Ginsburg's concurrence in *Albright*, where she argued that the Court should reject substantive due process and adopt the Fourth Amendment by interpreting the Fourth Amendment's instructions as "more purposive and embracing" than the plain text.[338] Thus, just as the *Griswold* majority was attempting to mask its use of substantive due process, the shift toward the Fourth Amendment is ultimately a guise to reject substantive due process in theory but continue to use it in practice.[339]

3. A Shift Away from Substantive Due Process for Overdetention Claims Could Have Dangerous Implications for Other Constitutional Protections in the Criminal Legal System

Whether courts use substantive due process or the Fourth Amendment, they are broadly protecting a constitutional right.[340] Still, it is important to safeguard substantive due process for overdetention claims and criticize the shift toward the Fourth Amendment.

In the narrower sense, given the philosophical similarity between substantive due process and the expansion of the Fourth Amendment, this trend toward the Fourth Amendment may hint to courts' attempt at balancing their philosophical agreement with the promise of substantive due process and the political reality that has made the judiciary hostile to unenumerated rights. In other words, lower courts may only be initiating their shift because of the Court's increasing disdain toward substantive due process—not because of their own rejection of unenumerated rights—to ensure the continued protection of the constitutional right against overdetention. Given this similarity, courts should use substantive due process rather than hide behind a constitutional amendment that is not fully tailored to the right in question, especially in this case where the version of substantive due process used is not subject to controversy.[341]

In the broader sense, a demise of substantive due process—and especially a version of substantive due process that is so tied up with procedural due process—may indicate a dangerous decline for constitutional protections in the criminal legal system. For certain claims, such as overdetention cases and § 1983 excessive force claims, this danger is not as evident because appellate courts can point to *Graham* with relative ease to justify this shift from substantive due process to the Fourth Amendment through the expansion of seizures.[342] However, for claims that cannot be attached to

337. *See* Russo v. City of Bridgeport, 479 F.3d 196, 209–10 (2d Cir. 2007).
338. Albright v. Oliver, 510 U.S. 266, 277 (1994) (Ginsburg, J., concurring).
339. *See Griswold*, 381 U.S. at 495 (Goldberg, J., concurring).
340. *See* Pereira, *supra* note 315, at 2317–18.
341. *See supra* Part III.B.1.
342. *See supra* Part I.C.2.

another amendment, it is unclear whether courts would reluctantly hold on to substantive due process or foreclose the constitutional right entirely. Courts that continue rejecting substantive due process where it was previously recognized, even where another amendment is available to use, are setting a dangerous precedent that may lead to the dissolution of rights plaintiffs currently hold, particularly their ability to challenge officers' conduct where their behavior exhibited deliberate indifference that shocked the conscience.[343]

The Court has refused to hear this issue, but lower courts evaluating overdetention claims should adhere to the traditional substantive due process analysis, rather than the Fourth Amendment analysis. Although plaintiffs' constitutional rights will be protected no matter the constitutional source, this version of substantive due process is not only the better doctrinal source, but it is also not subject to the mainstream criticisms that has placed substantive due process on shaky grounds.[344]

CONCLUSION

The totality of the circumstances test grounded in substantive due process is the best resolution to the circuit split over how to determine when overdetention becomes unconstitutional. First, unlike more rigid tests or bright-line rules, the totality of the circumstances test accounts for multiple factors, including the length of time of the detention, to more accurately decipher whether officers acted with deliberate indifference or engaged in behavior that shocked the conscience in their decision to extend the unwarranted detention. Second, courts should continue to use *Baker*'s version of substantive due process, rather than switching the source of this constitutional right to the Fourth Amendment. *Baker*'s version of substantive due process—which is not subject to the same level of controversy as mainstream substantive due process—is the strongest source for the right against overdetention and better protects other constitutional rights for those in contact with the criminal legal system.

343. *See supra* Part I.C.1.
344. *See supra* Part I.C.1.