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Hour Late on Your Bail, Spend the Weekend in Jail: Substantive Due Process and Pretrial Detention

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HOUR LATE ON YOUR BAIL, SPEND THE WEEKEND IN JAIL: SUBSTANTIVE DUE PROCESS AND PRETRIAL DETENTION

Abstract: On March 9, 2018, the United States Court of Appeals for the Tenth Circuit held, in *Dawson v. Board of County Commissioners of Jefferson County*, that the right to be free from pretrial detention absent a determination of guilt is not a fundamental right. Rather, the court held, it is a non-fundamental liberty interest. In so doing, the Tenth Circuit split with the United States Court of Appeals for the Ninth Circuit, which had held that the right is fundamental. The Tenth Circuit also diverged from the Ninth Circuit in its application of a test to determine whether the government's detention policy constituted unconstitutional punishment. On January 7, 2019, the Supreme Court denied *certiorari* in *Dawson*, declining to address the circuit split. This Comment argues that the most accurate reading of the Supreme Court's jurisprudence leads to the conclusion that the Court has recognized the right to be free from detention absent a determination of guilt as fundamental. This Comment further argues that the Supreme Court should have granted *certiorari* in *Dawson* to clarify the Tenth Circuit's application of the law in two key areas. Such clarification is necessary to reduce confusion among the circuits in future pretrial detention cases. Lastly, it argues that the Supreme Court should have taken this opportunity to add additional factors to the test to help courts determine whether a government's detention policy is excessive in relation to the government's interest.

INTRODUCTION

On the evening of Thursday, May 29, 2014, Kenneth Jerome Dawson was arrested for violating a restraining order and placed in custody at the Jefferson County Sheriff's Office.[1] Though he posted bond the next day and fulfilled his obligations of release, county policies required that he be detained through the weekend until 4 p.m. on Monday of the following week.[2] Dawson sued, arguing that Jefferson County had—without justification—infringed upon his fundamental right to be free from pretrial detention absent a determination of guilt.[3] In *Dawson v. Board of County Commissioners of Jefferson County* ("*Dawson II*"), the United States Court of Appeals for the Tenth Circuit found that the right to be free from pretrial detention absent a determina-

[1] Dawson v. Bd. of Cty. Comm'rs of Jefferson Cty. (*Dawson II*), 732 F. App'x 624, 625 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 862 (2019).

[2] *Id.* at 626.

[3] *Id.* at 625; *see also* Appellant's Reply Brief at 14–18, *Dawson II*, 732 F. App'x 624 (No. 16-cv-01281).

tion of guilt is not a fundamental right, but rather a non-fundamental liberty interest.[4] In so holding, the Tenth Circuit split with the United States Court of Appeals for the Ninth Circuit, which had held that the right is fundamental.[5] Dawson filed a petition for writ of certiorari in his case to the United States Supreme Court.[6] At stake was the constitutionality of many federal, state, county, and municipal policies concerning pretrial detention, and a chance for the Supreme Court to clarify the circumstances under which pretrial detention violates an individual's substantive due process rights.[7]

The Fourteenth Amendment's Due Process Clause states that "[n]o state shall . . . deprive any person of life, liberty, or property without due process of the law."[8] Courts have interpreted the Due Process Clause to mean, in part, that states cannot deprive an individual of life, liberty, or property without providing fair procedures.[9] This component of the Due Process Clause is referred to as "procedural due process."[10] In addition to the procedural component, the Supreme Court has recognized that there is a "substantive" component to the Due Process Clause, which protects individual liberties against certain government actions regardless of the procedures used to implement those actions.[11] That component of the Due Process Clause is referred to as "substantive due process."[12]

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[4] *Dawson II*, 732 F. App'x at 632.

[5] *See* Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 780 (9th Cir. 2014) (finding that it is a fundamental right to be free from pretrial detention absent a determination of guilt).

[6] *See generally* Petition for Writ of Certiorari, Dawson v. Bd. of Cty. Comm'rs of Jefferson Cty. (*Dawson III*), 139 S. Ct. 862 (2019) (No. 18-177) (arguing that the Court should grant *certiorari*).

[7] *Id.* at 23; *see also Dawson II*, 732 F. App'x at 638 (Tymkovich, C.J., concurring) (noting that the Tenth Circuit's decision in *Dawson II* will save federal courts from supervising pretrial detention policies in jails and prisons around the country and implying that applying the strict scrutiny standard to some of these policies might call their constitutionality into doubt).

[8] U.S. CONST. amend. XIV, § 1.

[9] *See* Carey v. Piphus, 435 U.S. 247, 259 (1978) (observing that procedural due process component of Due Process Clause protects against a government's deprivation of an individual's life, liberty or property without proper procedures); Matthews v. Eldridge, 424 U.S. 319, 333 (1976) (holding that the fundamental requirement of due process is an individual's opportunity to be heard at a meaningful time and in a meaningful manner before a government policy goes into effect).

[10] *See* Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501, 1501–02 (1999) (explaining that procedural due process is an inquiry into whether the government followed proper procedures before depriving an individual of life, liberty, or property).

[11] County of Sacramento v. Lewis, 523 U.S. 833, 845–46 (1998) (Kennedy, J., concurring) (stating that the notion that the Due Process Clause has a substantive component is no longer up for debate); Collins v. Harker Heights, 503 U.S. 115, 125 (1992); Daniels v. Williams, 474 U.S. 327, 331 (1986).

[12] *See* Chemerinsky, *supra* note 10, at 1501–02 (defining substantive due process as an inquiry into whether the government's infringement upon or deprivation of an individual's life, liberty, or property is justified by a sufficient purpose).

The Supreme Court has described two ways in which a government's action might violate an individual's substantive due process rights: either through a government action that infringes on a right without sufficient justification, or by depriving a person of life, liberty, or property in such an arbitrary way that it shocks the conscience.[13] The Court's jurisprudence in the substantive due process arena has created two different tests for lower courts to use in determining whether a government action or policy unconstitutionally burdens an individual's substantive due process rights: the so-called "rights" and "shocks-the-conscience" tests.[14] The Supreme Court has never clearly articulated when courts should apply one test over the other, but most courts apply the rights test to legislation and the shocks-the-conscience test to specific conduct by a government official or entity.[15] This Comment's analysis is limited to a discussion of the rights test.[16]

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[13] *See* United States v. Salerno, 481 U.S. 739, 746 (1987) (first citing Palko v. Connecticut, 302 U.S. 319, 325–26 (1937); and then citing Rochin v. California, 342 U.S. 165, 172 (1965)) (referencing *Palko* as support for the first proposition and *Rochin* as support for the second proposition).

[14] *Dawson II*, 723 F. App'x at 634; *see Lewis*, 523 U.S. at 846 (stating that the criteria to determine whether a substantive due process violation has occurred differ depending on whether the government action involves legislation or a specific act of a government official). Under the "rights" test, if a government action burdens a fundamental right, the action must be narrowly tailored to serve a compelling government interest. Reno v. Flores, 507 U.S. 292, 302 (1993); Dias v. City & County of Denver, 567 F.3d 1169, 1181 (10th Cir. 2009). On the other hand, if the government action burdens a non-fundamental right, the government is merely required to show the infringement bears a reasonable relation to a legitimate government interest. *Flores*, 507 U.S. at 302; *Dias*, 567 F.3d at 1181. Under the "shocks-the-conscience" test, government action violates substantive due process if it is so arbitrary that it "shocks the conscience" and "violates the decency of civilized conduct." *Rochin*, 342 U.S. at 172.

[15] *See Dawson II*, 732 F. App'x at 634 (stating that the Supreme Court has wavered on which test to apply); s*ee also* Nathan S. Chapman, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1788 (2012) (citing *Lewis*, 523 U.S. at 846) (explaining that *Lewis* holds that the shocks-the-conscience test is applicable in executive action claims). *Compare* Hancock v. County of Rensselaer, 882 F.3d 58, 65–66 (2d Cir. 2018) (explaining the court applies the rights test to legislation and the shocks-the-conscience test to executive action), *and* Handy-Clay v. City of Memphis, 695 F.3d 531, 547 (6th Cir. 2012) (explaining the two substantive due process tests and noting that for executive action to violate substantive due process, it must "shock the conscience"), *with* Slusarchuk v. Hoff, 346 F.3d 1178, 1181–82 (8th Cir. 2003) (pointing out confusion in the law and explaining that a plaintiff challenging executive action must satisfy both the rights test and the shocks-the-conscience test to prevail), *and* Hawkins v. Freeman, 195 F.3d 732, 738 (4th Cir. 1999) (holding that the shocks-the-conscience test is a threshold inquiry prior to applying the rights test for executive action, but only the rights test applies to legislative action), *and* Waldman v. Conway, 871 F.3d 1283, 1292 (11th Cir. 2017) (implying shocks-the-conscience test should be applied to executive action and rights test to legislative action, but not explicitly holding so). Since *Dawson II*, the Tenth Circuit appears to now follow a binary approach, as discussed in Chief Justice Timothy Tymkovich's concurrence, applying the rights test when the government action concerns a legislative act and the shocks-the-conscience test if the government action concerns executive action. *Dawson II*, 732 F. App'x at 636 (Tymkovich, C.J., concurring).

[16] *See infra* notes 17–22 and accompanying text. The court in *Dawson II* found that the "shocks the conscience" test was inapplicable, but the majority did not explain how it arrived at its

If a court chooses to apply the rights test to a substantive due process challenge, the next step in the inquiry is to determine whether a fundamental right is at issue.[17] That determination itself requires the two-step analysis laid out by the Supreme Court in *Washington v. Glucksberg*.[18] First, the reviewing court must carefully describe the asserted right at stake.[19] Second, the court must determine whether the right is "deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty such that neither liberty nor justice would exist" without the right.[20] If the right at issue is a fundamental right, a government action or policy may burden the right only if it is narrowly tailored to a compelling government interest.[21] On the other hand, if the right at issue is non-fundamental, a government

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conclusion. 732 F. App'x at 629; *see id.* at 636–37 (Tymkovich, J., concurring) (citing *Dias*, 567 F.3d at 1182) ("Since the Board of County Commissioners adopted the challenged policy by resolution, the policy is legislative. We therefore apply the 'rights' approach under *Dias*.").

[17] Washington v. Glucksberg, 521 U.S. 702, 721 (1997); Seegmiller v. LaVerkin City, 528 F.3d 762, 769 (10th Cir. 2008).

[18] *Glucksberg*, 521 U.S. at 720–21; *see Seegmiller*, 528 F.3d at 769 (finding the inquiry into whether a fundamental right is at issue is a two-step process that requires: (1) carefully describing the right at issue and (2) determining whether the right is deeply rooted in the nation's history). The Supreme Court has historically been reluctant to expand the doctrine of substantive due process. *See Glucksberg*, 521 U.S. at 720 (first citing *Collins*, 503 U.S. at 125; and then citing Moore v. City of East Cleveland, 431 U.S. 494, 502 (1977)) (explaining that the Court must exercise care in finding new fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court"); *see also* Peter Nicolas, *Fundamental Rights in a Post*-Obergefell *World*, 27 YALE J.L. & FEMINISM 331, 336 (2016) (stating that conservative justices in particular have historically been hesitant to identify and enforce fundamental rights not explicitly granted by the Constitution).

[19] *Glucksberg*, 521 U.S. at 721. The phrase "careful description" was intended to strike a balance between generality and specificity in framing the right at issue. Nicolas, *supra* note 18, at 338. As D.C. Circuit Judge Judith Rogers put it, when framing the right at issue, courts must employ enough specificity to base the right in its practical application, but enough generality to connect the right to its defining principles. Hutchins v. District of Columbia, 188 F.3d 531, 554 (D.C. Cir. 1999) (Rogers, J., concurring in part and dissenting in part).

[20] *Glucksberg*, 521 U.S. at 721 (internal quotations and citations omitted); *see Dias*, 567 F.3d at 1181. The first step of the two-step process—how narrowly or broadly the right is framed by a court—will typically determine the conclusion. Nicolas, *supra* note 18, at 338. If the right at issue is framed in specific terms, one is less likely to find that it is "deeply rooted in our nation's history." *Id.* On the other hand, if it is framed in fairly general terms, one is more likely to find historical support for the right. *Id.*

[21] *Flores*, 507 U.S. at 302. This standard is commonly referred to as "strict scrutiny." Roy G. Spece, Jr., *Scrutinizing Strict Scrutiny*, 40 VT. L. REV. 285, 295 (2015). Strict scrutiny can be traced to *Lochner v. New York* and the resulting line of cases. *Id.* (citing Lochner v. New York, 198 U.S. 45, 59 (1905)). Strict scrutiny emerged out of the principles that important rights deserve special protection, these rights are best protected by requiring sufficiently compelling government interests, and unneeded deprivation of individual rights is best avoided by requiring close attention to policy or law's over-broadness. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) (indicating that a higher level of scrutiny should apply to legislation that implicates important rights, such as those enumerated in the U.S. Constitution and Bill of Rights); *see also* Richard Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1273–75 (2006) (tracing the emergence of strict scrutiny in Supreme Court jurisprudence).

action or policy may burden the right as long as it is rationally related to a legitimate government interest.[22]

Part I of this Comment discusses the holdings of two seminal Supreme Court cases concerning the issue of pretrial detention, and provides the factual and procedural history of *Dawson II*.[23] Part II discusses the differing approaches the Ninth and Tenth Circuits have taken to analyzing substantive due process claims within the context of pretrial detention.[24] Part III argues that the Supreme Court's jurisprudence has recognized that the right to be free from detention absent a determination of guilt is a fundamental right, and that the Court should have granted *certiorari* to clarify the *Dawson II* court's application of the law and to modify the *Bell* test's third part.[25]

I. THE SUPREME COURT ON PRETRIAL DETENTION AND *DAWSON II*'S FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Section A of this Part discusses the holdings of two seminal Supreme Court cases concerning the issue of pretrial detention—*Bell v. Wolfish* and *United States v. Salerno*—and analyzes how the Court applied the fundamental rights framework in those cases.[26] Section B discusses the factual background and procedural history of *Dawson II*.[27]

A. The Supreme Court's Jurisprudence on Substantive Due Process in the Context of Pretrial Detention

Two Supreme Court cases help guide the fundamental rights inquiry in the context of pretrial detainment.[28] The first, *Bell v. Wolfish*, involved plaintiffs who were pretrial detainees who claimed that certain conditions of their confinement violated their substantive due process rights.[29] In an opin-

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[22] *Flores*, 507 U.S. at 305; *Seegmiller*, 528 F.3d at 771. This standard is commonly referred to as "rational basis review." *See Rational-Basis Review*, BLACK'S LAW DICTIONARY (10th ed. 2014) (describing rational basis review as a standard under which laws will be upheld as long as they bear some rational relation to a legitimate government interest).

[23] *See infra* notes 26–65 and accompanying text.

[24] *See infra* notes 66–89 and accompanying text.

[25] *See infra* notes 90–120 and accompanying text.

[26] *See infra* notes 28–46 and accompanying text.

[27] *See infra* notes 47–65 and accompanying text.

[28] *See Salerno*, 481 U.S. at 748 (finding that the Bail Reform Act of 1984 did not violate pretrial detainees' substantive due process rights); Bell v. Wolfish, 441 U.S. 520, 541–61 (1979) (holding that certain conditions of confinement of the Metropolitan Correctional Center did not amount to unconstitutional punishment before a determination of guilt and thus did not violate pretrial detainees' substantive due process rights); *Dawson II*, 732 F. App'x at 632 (stating that its analysis is guided by *Bell* and *Salerno*).

[29] *Bell*, 441 U.S. at 523. The challenged conditions included jail employees' practice of assigning two inmates to cells built for one inmate and conducting visual body-cavity searches of

ion written by Chief Justice Rehnquist, the Court reasoned that while it is unconstitutional to punish a pretrial detainee before a determination of guilt, regulation of prison conditions and procedures is permissible so long as it does not constitute punishment.[30] Absent a showing of an express intent to punish on the part of the officials who created the challenged condition, the determination of whether the condition amounted to punishment turned on whether the condition was reasonably related to a legitimate government interest.[31]

The *Bell* test for discerning unconstitutional punishment thus has three parts: (1) whether the detention condition was imposed for a punitive purpose; (2) if not, whether there is a legitimate government interest justifying the condition; and (3) if there a legitimate interest, whether the condition appears excessive in relation to the government interest.[32] If the condition was imposed for a punitive purpose or is excessive in relation to the government interest, it amounts to unconstitutional punishment.[33] The Court also stated that the government's legitimate interests in pretrial detention were not limited to assuring a detainee's presence at trial or safety of the community, but also included the government's need to manage a prison facility's "operational concerns."[34]

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inmates following a contact visit. *See id.* at 527. The first time the Supreme Court ruled on the rights of pretrial detainees was in *Bell*. Teresa Scarberry, *The Constitutional Right of Pretrial Detainees: A Healthy Sense of Realism?*, 41 OHIO ST. L.J. 1087, 1087 (1980). Viewing penal administration as a responsibility of the executive branch, U.S. courts have been hesitant to take up cases concerning this body of law. *Id.* at 1088.

[30] *Bell*, 441 U.S. at 535–37. The Court determined that the prison's conditions of confinement—including "double-bunking" and visual body-cavity searches of pretrial detainees—did not impermissibly amount to punishment because they were rationally related to legitimate government interests and, consequently, did not violate the plaintiffs' substantive due process rights. *Id.* at 561; *see also* Sonja Marret, Note, *Beyond Rehabilitation: Constitutional Violations Associated with the Isolation and Discrimination of Transgender Youth in the Criminal Justice System*, 58 B.C. L. REV. 351, 356–57 (2016) (explaining that the *Bell* Court held that substantive due process protects pretrial detainees from conditions that amount to punishment).

[31] *Bell*, 441 U.S. at 538. If the condition is reasonably related to a legitimate government interest, it does not amount to punishment and does not offend a pretrial detainee's substantive due process rights. *Id.* at 539. If the condition is not reasonably related to a legitimate government interest, a court may properly infer that the purpose of the condition is unconstitutional punishment. *Id.*

[32] *Id.* at 538; *see Lopez-Valenzuela*, 770 F.3d at 778–79 (discussing the *Bell* test and the application of each prong); Scott D. Himsell, Comment, *Preventive Detention: A Constitutional but Ineffective Means of Fighting Pretrial Crime*, 77 J. CRIM. L. & CRIMINOLOGY 439, 442–43 (1986) (presenting the three-part legislative purpose test established by the *Bell* Court).

[33] *See Lopez-Valenzuela*, 770 F.3d at 779 (explaining that a policy or law can amount to constitutionally impermissible punishment on a pretrial detainee if either it was imposed with punitive intent or if it was excessive in relation to the government interest).

[34] *Bell*, 441 U.S. at 541. The Court acknowledged the day-to-day management of prisons can be complicated and prison administrators should be afforded deference to adopt policies in accordance with their professional judgment. *Id.* at 547. In dissent, Justice Stevens concluded that

Eight years later, in *United States v. Salerno*, the Supreme Court addressed the right to be free from pretrial detention based on a substantive due process challenge to the Bail Reform Act of 1984 ("BRA").[35] The respondents challenged a provision of the BRA that required pretrial detention of arrestees charged with certain serious felonies if the government demonstrated by clear and convincing evidence during an adversarial hearing that no release conditions would assure the safety of the community.[36]

The Court began by applying *Bell*'s three-part test to determine whether the restriction on liberty authorized by the BRA constituted impermissible punishment.[37] First, the Court looked to the legislative intent of Congress and concluded that Congress did not formulate the BRA's pretrial detention provisions as punishment for dangerous arrestees.[38] Second, the Court found that the government's interest in preventing the release on bail of arrestees proven to be a danger to the community was both legitimate and compelling.[39] Third, the Court found that the BRA was not excessive in relation to the government interest justifying the pretrial detainment.[40]

Having established that the BRA was regulatory in nature and did not constitute impermissible punishment, the Court continued its analysis by

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this broad definition of a legitimate government interest would allow a prison to impose virtually any condition on a pretrial detainee without it amounting to unconstitutional punishment. *Id.* at 585 (Stevens, J., dissenting). Justice Marshall wrote a separate dissent, also criticizing the majority's inclusion of effective management of the detention facility as a legitimate government interest. *Id.* at 567 (Marshall, J., dissenting). Justice Marshall explained that the problem of such a broad definition of a legitimate government interest would be compounded by the Court's failure to engage in an analysis of whether the conditions of confinement were, in fact, excessive in relation to the purported legitimate government interest. *Id.* In his view, by deferring to the judgments of the prison administrators without conducting an analysis into the rationality of the government interest or excessiveness of the government policy in relation to that interest, the Court in effect abdicated its duty to decide whether the pretrial detainees were subject to unconstitutional punishment. *Id.* at 567–68.

[35] *Salerno*, 481 U.S. at 741.

[36] *Id.* The Supreme Court ultimately upheld the Bail Reform Act of 1984 ("BRA") as constitutional and reversed the Court of Appeals for the Second Circuit's decision. *Id.*

[37] *Id.* at 747.

[38] *Id.*

[39] *Id.* at 747–49.

[40] *Id.* at 747. The Court reasoned that the BRA was not excessive in relation to the government's compelling interest for three primary reasons. *Id.* at 750. First, the BRA operated only on individuals who had been arrested for a specific category of extremely serious offenses. *Id.* Second, Congress had found that these types of individuals are far more likely to present a danger to the community if released. *Id.* Third, the BRA required the government to convince a neutral decision-maker in an adversarial hearing by clear and convincing evidence that no conditions of an arrestee's release could reasonably assure the safety of the community. *Id.* Justice Marshall strongly dissented, believing the majority improperly accepted—without sufficient inquiry and analysis—that the BRA was regulatory rather than punitive in nature. *See id.* at 759 (Marshall, J., dissenting).

evaluating the BRA under the rights test.[41] First, the Court identified the type of right at issue as an individual's fundamental "interest in liberty," but it was unclear whether the Court was extending that broadly-framed recognition to the more specifically-framed right to be free from pretrial detention absent a determination of guilt.[42] Next, the Court appeared to apply strict scrutiny to determine that the BRA did not unjustifiably infringe upon the detainees' substantive due process rights.[43] However, because that area of the analysis was somewhat unclear, lower courts have disagreed on what level of scrutiny the Court applied in *Salerno*.[44] Furthermore, though it applied both tests in its analysis, the Court did not specify whether, in a substantive due process challenge concerning pretrial detention, lower courts should apply the rights test, the *Bell* test, or both.[45] Since *Bell* and *Salerno*, courts in at least three circuits have found that the right to be free from detention absent a determination of guilt is a fundamental right.[46]

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[41] *See id.* at 750–51 (majority opinion) (identifying the right involved as the fundamental right to liberty and appearing to apply strict scrutiny, in accordance with the rights test).

[42] *Id. Compare Dawson II*, 732 F. App'x at 631 (determining that *Salerno* did not recognize a fundamental right and thus involved rational basis review), *with Lopez-Valenzuela*, 770 F.3d at 780–81 (determining that *Salerno* recognized a fundamental right and thus involved strict scrutiny).

[43] *See Salerno,* 481 U.S. at 749–51 (identifying the government's interest—community safety—as compelling and explaining that the BRA was narrowly focused on an acute problem). The Court concluded that the BRA was narrowly tailored to a compelling government interest for the same three reasons it had found that the law was not excessive in relation to the government interest. *Id.* at 750. These three reasons were: the BRA only applied to a limited class of individuals; Congress reasonably determined that these individuals were more likely to present a danger to the community if released; and the government had to satisfy a high evidentiary standard to secure the detainee's continued detention. *Id.* The Court stated that where the government had proven an individual to be a danger to society, the government could constitutionally infringe upon the individual's fundamental right to liberty by requiring detention. *Id.* at 751.

[44] *Compare Dawson II*, 732 F. App'x at 631 (determining that *Salerno* did not recognize a fundamental right and thus involved rational basis review), *with Lopez-Valenzuela*, 770 F.3d at 780–81 (determining that *Salerno* recognized a fundamental right and thus involved strict scrutiny review). Even Chief Judge Tymkovich, concurring in *Dawson II*, expressed his confusion with *Salerno*'s analysis. *See* 732 F. App'x at 637–38 (Tymkovich, C.J., concurring) (acknowledging that the Supreme Court was not as clear as it could have been in *Salerno* and expressing no surprise that the Ninth Circuit interpreted the opinion differently).

[45] *See Salerno*, 481 U.S. at 746–51 (using the *Bell* test to scrutinize the BRA and appearing to use the rights test, but failing to specify whether both or either mode of analysis was sufficient in the inquiry).

[46] *Lopez-Valenzuela*, 770 F.3d at 780–81 (citing *Salerno*, 481 U.S. at 750) (applying the precedent of *Salerno* and finding that it is a fundamental right to be free from pretrial detention absent a determination of guilt); Schultz v. State, 330 F. Supp. 3d 1344, 1358 (N.D. Ala. 2018) (explaining that *Salerno* found a fundamental liberty interest and that the state may not incarcerate a pretrial detainee absent flight risks or showing of danger to community); Welchen v. County of Sacramento, No. 2:16-cv-00185-TLN-KJN, 2016 WL 5930563, at *10 (E.D. Cal. Oct. 11, 2016) (applying strict scrutiny to policies imposing restrictions on pretrial detention); Barnes v. District of Columbia, 793 F. Supp. 2d 260, 275 (D.D.C. 2011) (stating that individuals have a basic liberty interest in being free from incarceration absent a criminal conviction).

B. Dawson II*'s Factual Background and Procedural History*

On Thursday, May 29, 2014, police arrested Kenneth Jerome Dawson at his home in Lakewood, Colorado for allegedly violating a restraining order prohibiting him from contacting his wife.[47] The police brought Dawson to the Jefferson County Jail, where he was placed in the custody of the Jefferson County Sheriff's Office ("Sheriff's Office").[48] The next morning, Dawson's bond was set at $1,500 and his release was authorized subject to two conditions: his posting of the bond and the jail's staff or its vendor fitting him with a GPS monitoring device.[49] Later that same morning, Jefferson County Pretrial Services Department ("Pretrial Services") put a hold on Dawson's release, requiring him to remain in custody until Pretrial Services notified the Sheriff's Office otherwise.[50]

Two written policies of the Jefferson County Division of Justice Services authorized Dawson's hold: (1) Policy No. 3.1.43, "Pretrial Holds and Releases" ("Holding Policy"); and (2) Policy No. 3.1.68, "Electronic Monitoring" ("Monitoring Policy").[51] In accordance with the Monitoring Policy, pretrial detainees who posted bond after 1 p.m. on Friday and before 1 p.m. on the following Monday would be outfitted with a GPS monitor on Monday at 4 p.m.[52]

Dawson posted bond sometime after 1 p.m. on Friday, May 30, 2014.[53] That night, a Sheriff's Office employee notified Pretrial Services that Dawson had posted bond and was awaiting the fitment of a GPS monitoring device to effectuate his release.[54] Pretrial Services did not complete the fitment that night.[55] In fact, from the evening of Friday, May 30, until the afternoon of Monday, June 2—in accordance with the Holding and Monitoring Policies

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[47] *Dawson II*, 732 F. App'x at 625.

[48] *Id.*

[49] *Id.* at 625–26.

[50] *Id.* at 625.

[51] *Id.* at 626. Together, the Holding and Monitoring Policies authorized and required Pretrial Services staff to continue to detain a detainee until the detainee had been outfitted with a GPS monitoring device. Dawson v. Bd. of Cty. Comm'rs of Jefferson Cty. (*Dawson I*), No. 16-cv-01281-MEH, 2017 WL 5188341, at *1 (D. Colo. Jan. 3, 2017), *aff'd*, 732 F. App'x at 632. Once the detainee had been fitted with the monitoring device, the detainee could be released if he or she had posted bond. *Id.*

[52] *Dawson II*, 732 F. App'x at 626. The Monitoring Policy also provided that defendants who posted bond before 1 p.m. on Monday through Friday were outfitted with a GPS monitoring device later that same day, while defendants who posted bond after 1 p.m. Monday through Thursday were outfitted with the device the following day at 4 p.m. *Id.* In addition, the Monitoring Policy stated that all referral paperwork be provided to the jail's vendor no later than 2 p.m. in order to enable the vendor to outfit the pretrial detainee with the monitoring device by 4 p.m. that same day. *Id.*

[53] *Id.*

[54] *Dawson I*, 2017 WL 5188341, at *2.

[55] *Id.*

(collectively, "County Policies")—no one from Pretrial Services or the Sheriff's Office made any effort to fit Dawson with a GPS monitoring device or to otherwise facilitate his release.[56] Ultimately, Dawson was not fit with the GPS monitoring device and released until Wednesday, June 4, 2014.[57]

On May 27, 2016, Dawson brought a claim pursuant to 42 U.S.C. § 1983, alleging that the defendants infringed upon his right to be free from detention absent a determination of guilt in violation of the Fourteenth Amendment's Due Process Clause.[58] The District Court found that Dawson had failed to state a plausible § 1983 municipal liability claim against the county entities and granted the County's motion to dismiss.[59]

On appeal, Dawson argued that he had plausibly stated a claim to relief because the right to be free from detention absent a determination of guilt is a fundamental right that could not be infringed by any county policy unless that policy was narrowly tailored to a compelling government interest.[60] In the alternative, he argued that even if the court ruled that the right to be free from detention absent a criminal conviction is a non-fundamental right, the County Policies nonetheless violated substantive due process because they were not reasonably related to a legitimate government interest.[61]

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[56] *Id.* Although the Monitoring Policy required plaintiff to be outfitted with a GPS monitoring device on Monday, June 2, 2014, at 4 p.m., neither Pretrial Services nor the Sheriff's Office took any action to accomplish this task until Tuesday, June 3, 2014, when a Sheriff's Office employee sent an email to all Pretrial Services employees reminding them that plaintiff had met his bond and was only waiting on the GPS fitment for release. *Id.*

[57] *Id.*

[58] *Id.* at *1, *3. The defendants included the Sherriff's Office and Pretrial Services, as well as the Jefferson County Board of County Commissioners, Jefferson County Department of Human Services, and Jefferson County Division of Justice Services. *Id.* at *1. A Section 1983 claim enables plaintiffs to hold state actors responsible for the harms they cause when, in their official capacity, they infringe upon the constitutional rights of a United States citizen. 42 U.S.C. § 1983 (2012). Typically, defendants in Section 1983 actions are government employees who act under the color of state law because their jobs require them to exercise authority on behalf of the state. IVAN E. BODENSTEINER, 1 STATE & LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY § 1.3, Westlaw (database updated June 2018).

[59] *Dawson I*, 2017 WL 5188341, at *13 (finding that the county's policies did not violate Dawson's Fourteenth Amendment right to be free from unreasonably protracted detention because they were reasonably related to a legitimate government interest and did not "shock the conscience"). In the Tenth Circuit, there are three requirements for a municipal liability claim under Section 1983: "(1) the existence of an official policy or custom; (2) a direct causal link between the policy and the constitutional injury; and (3) that the defendant established the policy with deliberate indifference to an almost inevitable constitutional injury." *Dawson II*, 732 F. App'x at 628; *see also* Schneider v. City of Grand Junction Police Dep't, 717 F.3d 760, 767–69 (10th Cir. 2013). The *Dawson II* court held that Dawsom had properly pled the first two requirements, but not the third, since it did not view the county's holding and monitoring policies as violating any substantive due process right. 732 F. App'x at 628.

[60] Appellant's Opening Brief at 14, *Dawson II*, 732 F. App'x 624 (No. 17-1118). Dawson maintained that the County Policies would fail under a strict scrutiny standard. *Id.* at 17.

[61] *See* Appellant's Reply Brief, *Dawson II*, *supra* note 3, at 19. Dawson argued that a policy requiring a pretrial detainee who posted bond after 1 p.m. on a Friday to wait three days to be

The Tenth Circuit held that the right to be free from pretrial detention absent a determination of guilt is not a fundamental right but is instead a non-fundamental liberty interest which, when implicated by a government policy, is properly analyzed under rational basis review.[62] Under that analysis, the Tenth Circuit determined that the County Policies were constitutional.[63] The court denied Dawson's petition for a rehearing *en banc*, and he filed a petition for *writ of certiorari*.[64] The Supreme Court denied *certiorari* on January 7, 2019.[65]

II. THE CIRCUIT SPLIT: ANALYZING THE TWO DECISIONS

In 2014, the United States Court of Appeals for Ninth Circuit considered whether a controversial amendment—known as Proposition 100—to Arizona's Constitution violated individuals' substantive due process rights.[66] In ruling the law unconstitutional, the Ninth Circuit held that the right to be free from pretrial detention absent a determination of guilt is fundamental.[67] Section A of this Part discusses the Ninth Circuit's approach in that case, *Lopez-Valenzuela v. Arpaio*, to analyzing a substantive due process claim within the context of pretrial detention.[68] Section B discusses the United States Court of Appeals for Tenth Circuit's differing approach in *Dawson v. Board of County Commissioners of Jefferson County* ("*Dawson II*").[69]

A. Lopez-Valenzuela*'s Analysis: Rights Plus* Bell *Test*

In *Lopez-Valenzuela*, the Ninth Circuit considered a due process challenge to Proposition 100, an amendment to Arizona's Constitution.[70] Proposition 100 mandated that state courts must deny bail, irrespective of whether

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released is not reasonably related to the identified government interests of administrative convenience and efficient coordination between governmental entities. *Id.* at 19–20. Dawson contended that the policies cut against those interests because they caused the County to incur additional expenses and added to the responsibilities of jail staff. *Id.* at 20–21. He suggested that the County's true interest in maintaining the policy was preserving jail staff's weekend leisure time—an interest that would not qualify as legitimate. *Id.* at 19–20.

[62] *Dawson II*, 732 F. App'x at 632. The court then found that the county's policies were rationally related to a legitimate government interest—administrative efficiency—and upheld the district court's dismissal of the Dawson's claim. *Id.* at 632–33.

[63] *Id.*

[64] Petition for Writ of Certiorari, *Dawson III*, *supra* note 6, at 8, 23.

[65] *Dawson III*, 139 U.S. at 863.

[66] Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 775–76 (9th Cir. 2014).

[67] *See id.* at 780–81 (citing United States v. Salerno, 481 U.S. 739, 750 (1987)) (explaining that *Salerno* and its progeny recognize that freedom from pretrial detention absent a determination of guilt is a fundamental right).

[68] *See infra* notes 70–81 and accompanying text.

[69] *See infra* notes 82–89 and accompanying text.

[70] *Lopez-Valenzuela*, 770 F.3d at 775.

the arrestee posed a flight risk or a danger to the community, if there was sufficient evidence that the arrestee entered or remained in the United States illegally and committed a serious offense.[71] The plaintiffs argued that Proposition 100 violated their substantive due process rights because, under *Bell v. Wolfish*, it impermissibly imposed punishment before a determination of guilt, and, under *Washington v. Glucksberg*, it was not narrowly tailored to a compelling state interest.[72] The district court granted the defendants' partial motion for summary judgment, and the plaintiffs appealed.[73]

The Ninth Circuit conducted a two-part substantive due process inquiry to determine whether the challenged provisions of Proposition 100 violated the plaintiffs' substantive due process rights.[74] First, it deployed the rights test established by *Glucksberg*.[75] The court reasoned that the right to be free from pretrial detention is fundamental in nature.[76] Consequently, it applied strict scrutiny to the challenged provisions and found that although Arizona had a compelling state interest in ensuring detainees accused of serious crimes showed up for trial, the challenged provisions of Proposition 100 were not narrowly tailored to serve that interest.[77]

Second, the court applied the *Bell* test to determine whether the law amounted to punishment before a determination of guilt.[78] It first considered the legislative intent behind Proposition 100 and found that the record did not support a finding that Proposition 100 was motivated by an improper punitive

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[71] *Id.* Under Proposition 100, an arrestee deemed ineligible for bail at the initial court appearance could move for an evidentiary hearing. *Id.* At the follow-up hearing, known as a "Simpson/Segura" hearing, the arrestee could dispute whether there was probable cause that he or she entered or remained in the United States illegally, but, once that was found to be the case, could not refute Proposition 100's presumption that he or she posed an unmanageable flight risk. *Id.*

[72] *Id.* at 776.

[73] *Id.*

[74] *Id.* at 780. Based on its reading of *Salerno*, the court concluded that it would apply the *Bell* test in addition to the rights test. *Id.* at 778–80 In addition, the court looked to *Schall v. Martin*, where the Supreme Court applied both the *Bell* test and rights test to a state law authorizing pretrial detention of juveniles. *Id.* at 779 (citing Schall v. Martin, 467 U.S. 253 (1984)).

[75] *See id.* at 780–81 (discussing the rights test as the "familiar" substantive due process inquiry, requiring the court to determine if the right is fundamental, and, if it is, if the law infringing that right is narrowly-tailored to a compelling government interest).

[76] *See id.* (citing *Salerno*, 481 U.S. at 750) (explaining that *Salerno* and its progeny recognize the right to be free from pretrial detention absent a determination of guilt as fundamental in nature); *see also* Dawson v. Bd. of Cty. Comm'rs of Jefferson Cty. (*Dawson II*), 732 F. App'x 624, 637–38 (10th Cir. 2018) (Tymkovich, C.J., concurring) (noting that the court in *Lopez-Valenzuela* found the right to be free from pretrial detention is fundamental), *cert. denied*, 139 S. Ct. 862 (2019).

[77] *See Lopez-Valenzuela*, 770 F.3d at 782–84. The court reached its conclusion that the challenged provisions of Proposition 100 were not narrowly tailored to the state's compelling interest because the provisions (1) did not address a particularly acute problem, (2) were not limited to a specific category of extremely serious offenses, and (3) did not require an adversarial hearing at which the State was required to prove the arrestee posed an unmanageable risk of flight. *Id.*

[78] *Id.* at 789–91.

purpose.[79] It then considered whether the Proposition was excessive in relation to the state's compelling interest and determined that it was excessive because it purported to deal with a problem that had not been shown to exist and employed an overly-broad, irrefutable presumption that deprived detainees across the board of a fundamental right regardless of whether the they actually posed a risk of flight.[80] The court concluded that Proposition 100 failed both of the tests and invalidated the law as unconstitutional.[81]

B. Dawson II*'s Analysis: Rights Test Only*

The *Dawson II* court's substantive due process analysis began with a discussion of *Bell*.[82] Though the *Dawson II* court quoted directly from the section of the *Bell* opinion that explained the test for determining whether a government action amounts to impermissible punishment of a pretrial detainee, it did not apply the test in its ruling, nor did it explain why.[83] As a result, the court did not analyze whether the County Policies amounted to permissible regulation or impermissible punishment of a pretrial detainee—which the Supreme Court in *United States v. Salerno* and the Ninth Circuit in *Lopez-Valenzuela* did analyze.[84]

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[79] *Id.* at 790. This was in part due to the fact that Proposition 100 had passed via referendum and it was difficult to assign intent to an electorate. *Id.* Despite its finding, however, the court observed that there was significant evidence of punitive intent in the record. *See id.* at 790 & n.14 ("There is strong evidence that Proposition 100 was motivated at least in significant part by a desire to punish undocumented immigrants for (1) entering and remaining in the country without authorization and (2) allegedly committing the charged offense.").

[80] *Id.* at 791.

[81] *Id.* at 792. The court implied that a law would be unconstitutional were it to fail either one of the tests. *See id.* at 791 (stating that Proposition 100 violated the substantive due process component of Fourteenth Amendment on those "two independent grounds").

[82] *Dawson II*, 732 F. App'x at 630.

[83] *See id.* at 630–31 (emphasizing that the proper inquiry in a pretrial detention substantive due process claim is whether the policy at issue amounts to punishment of the detainee). The *Dawson II* court did not discuss whether the Board of County Commissioners adopted the holding and monitoring Policies for a punitive purpose or whether the policies were excessive in relation to the legitimate government interest used to justify them. *Id.* Although the majority in *Dawson II* did not articulate why it chose not apply *Bell*'s three-part test, Chief Judge Tymkovich, in concurrence, expressed his belief that the *Lopez-Valenzuela* two-part approach—applying the rights test and the *Bell* test—went outside of the overarching substantive due process framework the Supreme Court had announced in *Glucksberg*. *Id.* at 638 (Tymkovich, C.J., concurring).

[84] *See Salerno*, 481 U.S. at 747–48 (citing Bell v. Wolfish, 441 U.S. 520, 537 (1979)) (referring to the framework of *Bell* and concluding that the BRA was not imposed for a punitive purpose, but rather was imposed to satisfy a compelling government interest, and was not excessive in relation to that interest); *Lopez-Valenzuela*, 770 F.3d at 780 (explaining that it would use *Bell*'s framework to determine whether Proposition 100 imposed impermissible punishment before determination of guilt); *see also Dawson II*, 732 F. App'x at 630–32 (stating that as long as the policies are not imposed for the purpose of punishment, and instead rationally relate to a legitimate government interest, they are constitutional). The court did not engage in any analysis to deter-

While the *Dawson II* court did not apply *Bell*'s three-part analysis, it did deploy *Gluckberg*'s rights test.[85] First, it identified the right at issue as a detainee's right to be free from pretrial detention absent a determination of guilt when the detainee has fulfilled all of the conditions of release within his control.[86] Next, it considered whether the right was fundamental in nature and concluded, relying on its interpretation of *Salerno*, that the right was a non-fundamental right.[87] In accordance with its interpretation of *Salerno*, it then proceeded to apply rational basis review to the County Policies and concluded that the County Policies were constitutional because they were rationally related to at least one legitimate government interest.[88] The court also pointed to two other Tenth Circuit cases on pretrial detention in support of its conclusion, however, neither of those cases had undertaken a fundamental rights inquiry.[89]

III. THE FUNDAMENTAL NATURE OF PRE-TRIAL RELEASE, AND THE SUPREME COURT'S MISSED OPPORTUNITY TO CLARIFY THE STATE OF THE LAW

Section A of this Part argues that, although the Supreme Court has never explicitly stated as much, the most accurate reading of Court precedent leads to the conclusion that the right to be free from detention absent a

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mine whether the policies were imposed for a punitive purpose or were excessive in relation to the legitimate government interest. *Dawson II*, 732 F. App'x at 632.

[85] *Dawson II*, 732 F. App'x at 630.

[86] *Id.*

[87] *Id.* at 631. The *Dawson II* court concluded that the *Salerno* Court did not find a fundamental right at issue and had analyzed the challenged provisions of the BRA under rational basis review. *Id.* The *Dawson II* court interpreted *Salerno* as refusing to categorically state that pretrial detention offends some principle of justice so rooted in history as to be ranked fundamental. *Id.*

[88] *Id.* at 632–33. The court found that the county's policies were rationally related to the County's legitimate interest of obtaining "administrative convenience." *Id.*

[89] *Id.* at 631–32. In *Gaylor v. Does*, the plaintiff remained incarcerated for five days without a hearing and without information about his bail status, even though the judge had set the plaintiff's bail the day after his arrest. 105 F.3d 572, 574 (10th Cir. 1997). The defendants failed to provide a legitimate government interest in support of their policy of informing a detainee of his or her bond status only if he or she inquired about it. *Id.* at 577–78. Consequently, the court found that the policy constituted impermissible punishment. *Id.* In *Dodds v. Richardson*, the plaintiff challenged a county policy that prevented him from posting bail after work hours and before he had been arraigned before a judge. 614 F.3d 1185, 1189–90 (10th Cir. 2010). Similar to the holding in *Gaylor*, the Tenth Circuit held that the policy was unconstitutional because the county was not able to offer a legitimate government interest in support of the policy. *Id.* at 1193. The *Dawson II* court reasoned implicitly that since rational basis review had been applied in *Gaylor* and *Dodds*, it was also appropriately applied in the case at bar. *Dawson II*, 732 F. App'x at 632. Importantly, however, the plaintiffs in those cases had not argued that the court should apply strict scrutiny in its review of the policies, since the state had conceded it did not have a legitimate government interest in support of the policies. Appellant's Reply Brief, *Dawson II*, *supra* note 3, at 14–15.

determination of guilt is fundamental in nature.[90] Section B argues that the Supreme Court should have granted *certiorari* to clarify the *Dawson v. Board of County Commissioners of Jefferson County* ("*Dawson II*") court's use of rational basis review as a result of its interpretation of *United States v. Salerno*, and its failure to apply *Bell v. Wolfish*'s three-part analysis.[91] Such clarification appears necessary to prevent further confusion among lower courts in applying the law to pretrial detention cases.[92] Finally, Section C argues that the Court should have granted *certiorari* to modify the *Bell* test's third part, and in doing so encourage a more objective analysis among lower courts.[93]

A. The Right to Be Free from Pretrial Detention Absent a Determination of Guilt is a Fundamental Right

In *Salerno*, the Court implicitly held that the right to be free from detention absent a determination of guilt is fundamental in nature.[94] The Court noted that in the United States, liberty is the default norm and pretrial detention is the exception—and an exception that should be carefully limited by

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[90] *See infra* notes 94–99 and accompanying text.

[91] *See infra* notes 100–111 and accompanying text.

[92] *Compare* Welchen v. County of Sacramento, 343 F. Supp. 3d 924, 938 (E.D. Cal. 2018) (finding, under the precedent of *Lopez-Valenazuela*, that a pretrial-detainee-plaintiff survived motion to dismiss because he had pled sufficient facts to suggest the policy was excessive in relation to the government interest), *with* Williams v. Cook County, No. 2:16-cv-00185-TLN-DB, 2019 WL 952160, at *5 (N.D. Ill. Feb. 27, 2019) (citing Dawson v. Bd. of Cty. Comm'rs of Jefferson Cty. (*Dawson II*), 732 F. App'x 624, 630 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 862 (2019)) (dismissing a pretrial-detainee-plaintiffs' substantive due process claim with a quick cite to *Dawson II* by concluding their liberty interest was non-fundamental, and not engaging in a *Bell* test analysis on excessiveness in relation to the government interest).

[93] *See infra* notes 112–120 and accompanying text.

[94] *See* Hamdi v. Rumsfeld, 542 U.S. 507, 529 (2004) (plurality opinion) (stating that the most basic of liberty interests is being free from physical detention by the government and citing *Salerno* for the proposition that detention without trial is a carefully limited exception); Zadvydas v. Davis, 533 U.S. 678, 690 (2001) (explaining that freedom from detention by the government lies at the heart of the liberty protected by the Due Process Clause and citing *Salerno* for the proposition that government detention violates the clause unless there are adequate procedural safeguards); Reno v. Flores, 507 U.S. 292, 316 (1993) (O'Connor, J., concurring) (citing *Salerno* to explain that the detention of an individual by the government triggers heightened scrutiny and necessitates a sufficiently compelling government interest in order to survive substantive due process claim); Foucha v. Louisiana, 504 U.S. 71, 80–81 (1992) (recognizing that freedom from bodily restraint has always been a central liberty protected by the Due Process Clause and reasoning implicitly that *Salerno* applied strict scrutiny to the BRA); United States v. Salerno, 481 U.S. 739, 750–51 (1987) (making clear that the right at issue was, at its core, the individual's strong interest in liberty and emphasizing that the Court did not minimize the fundamental nature of the right); Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 780–81 (9th Cir. 2014) (holding that *Salerno* and the cases that followed it recognized that freedom from bodily restraint at the hands of the government has always been one of the most important rights protected by the Due Process Clause).

courts.[95] The Court conceded the existence of a general rule of substantive due process that prohibits the government from detaining a person prior to a determination of guilt without a "sufficiently weighty" justification.[96] The Court recognized that the BRA infringed a detainee's strong liberty interest and noted that its reasoning was not minimizing the fundamental nature of that right.[97] In its analysis, the Court employed the language of strict scrutiny: it described the government's interest as "compelling" and "overwhelming," and stated that the BRA was constitutional because it was narrowly focused and carefully delineated by Congress.[98] The Court's jurisprudence in a line of cases since *Salerno* has solidified the interpretation that the right to be free from pretrial detention absent a determination of guilt is fundamental in nature.[99]

B. The Supreme Court Should Have Clarified the Dawson II *Court's Application of the Law*

The Supreme Court should have granted *certiorari* to clarify the *Dawson II* court's application of the law in two areas: (1) the court's use of rational basis review as a result of its interpretation of *Salerno*, and (2) its failure to apply *Bell*'s three-part analysis.[100] As lower courts continue to take markedly different approaches to evaluating pretrial detainees' substantive due process claims, such clarification appears necessary to promote consistency and reduce confusion.[101]

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[95] *Salerno*, 481 U.S. at 755.

[96] *Id.* at 749, 750–51.

[97] *Id.* at 750.

[98] *Id.* at 750–51.

[99] *See Hamdi*, 542 U.S. at 529 (stating that the most basic of liberty interests is being free from physical detention by the government and citing *Salerno* for the proposition that detention without trial is a carefully limited exception); *Zadvydas*, 533 U.S. at 690 (explaining that freedom from detention by the government lies at the heart of the liberty protected); *Flores*, 507 U.S. at 316 (citing *Salerno* to explain that the detention of an individual by the government triggers heightened scrutiny and necessitates a sufficiently compelling government interest in order to survive substantive due process claim); *Foucha*, 504 U.S. at 80–81 (recognizing that freedom from bodily restraint has always been a central liberty protected by the Due Process Clause and reasoning implicitly that *Salerno* applied strict scrutiny to the BRA); *see also* Oviatt *ex rel.* Waugh v. Pearce, 954 F.2d 1470, 1474 (9th Cir. 1992) (stating that the essential liberty interest protected by the Due Process Clause is freedom from incarceration).

[100] *See infra* notes 101–111 and accompanying text.

[101] *See e.g.*, *Williams*, 2019 WL 952160, at *5; *Welchen*, 343 F. Supp. 3d at 938. In *Williams*, the plaintiffs had successfully posted their bonds. 2019 WL 952160, at *1. Nevertheless, the sheriff denied them entry into an electronic monitoring program and continued to detain them for periods ranging from three to twelve days. *Id.* The sheriff had denied their release pursuant to his new policy: independently reviewing state court decisions granting bond and refusing to comply with those decisions if he disagreed with them. *Id.* The plaintiffs brought a Section 1983 claim alleging the sheriff's policy resulted in "unwarranted bodily restraint" and violated their substantive due process rights protected by the Fourteenth Amendment. *Id.* at *4. In granting the sheriff's

The *Dawson II* court noted that in *Salerno* the Supreme Court refused to categorically hold that pretrial detention absent a determination of guilt offends some principle of justice so deeply rooted in society as to be ranked fundamental.[102] As a result, the *Dawson II* court concluded that the Supreme Court had explicitly declined to recognize the right as fundamental *in all circumstances*, and proceeded to apply rational basis review because the right at issue was non-fundamental.[103] But that is not what *Salerno* held, rather, it held that the government may infringe a detainee's fundamental right to be free from pretrial detention absent a determination of guilt under circumstances where the government has proved the detainee to be a danger to society.[104] In *Dawson II*, such a circumstance was not present; the Sheriff's Office continued to detain Dawson after he had posted bond not because the County had proved he was a danger to society, but because satisfying his remaining term of release—fitting him with a GPS monitoring device—was not administratively efficient or convenient.[105] A fuller and more comprehensive reading of *Salerno* suggests that the *Dawson II* court

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motion to dismiss the plaintiffs' substantive due process claim, the court gave a quick cite to *Dawson II*, stating that the right at issue was a "non-fundamental right" that did not meet the "rigorous substantive due process standard." *Id.* at *5 (citing *Dawson II*, 732 F. App'x at 630). The court did not mention *Bell* or its analysis. *Id.* In *Welchen*, an indigent and homeless man was arrested and then detained for six days before he was eventually discharged. 343 F. Supp. 3d at 928. He was detained for the extended period pursuant to California Penal Code Section 1269(b), which required he pay $10,000 in bail to secure his release. *Id.* Subsequent to his discharge from prison, he brought a Section 1983 claim against the county and the sheriff, alleging that they had violated his substantive due process rights by enforcing the state's bail law. *Id.* at 929. He further argued that the state's bail law was facially unconstitutional because it was not narrowly-tailored to a compelling interest and was excessive in relation to its purpose. *Id.* at 928–29. In denying the county's motion to dismiss, the district court analyzed the law under *Bell* and *Lopez-Valenzuela* and concluded that the plaintiff had pleaded sufficient facts to show the bail law had a punitive purpose or was excessive in relation to its purpose. *Id.* at 937–38 (citing *Lopez-Valenzuela*, 770 F.3d at 791–92). The court did not undergo a rights test analysis even though the plaintiff had alleged the county violated his fundamental right to pretrial liberty. *Id.*; Complaint at 13, *Welchen*, 343 F. Supp. 3d 924 (No. 2:16-cv-00185).

[102] *Dawson II*, 732 F. App'x at 631.

[103] *See id.* (reasoning implicitly that because *Salerno* did not categorically hold that government's infringement upon the right to be free from detention absent a determination of guilt *always categorically* violated substantive due process, it must not have recognized a fundamental right).

[104] *See Lopez-Valenzuela*, 770 F.3d at 780 (citing *Salerno*, 481 U.S. at 750) (finding that *Salerno* recognized a fundamental right and had approved of the BRA's infringement on the right only because it found the BRA to be narrowly-tailored to a compelling government interest); *see also Salerno*, 481 U.S. at 750–51 (holding that under circumstances where the government has proved a detainee to be a danger to society, it has a compelling interest—public safety—to support its infringement upon the detainee's fundamental right). So long as the law furthering the compelling interest is narrowly tailored, it will pass constitutional muster even though it implicates a fundamental right. *Lopez-Valenzuela*, 770 F.3d at 780.

[105] *See* Dawson v. Bd. of Cty. Comm'rs of Jefferson Cty. (*Dawson I*), No. 16-cv-01281-MEH, 2017 WL 5188341, at *1–2 (D. Colo. Jan. 3, 2017), *aff'd*, 732 F. App'x at 632.

should have applied strict scrutiny—or at least a more heightened level of scrutiny than it did.[106]

Next, the *Dawson II* court did not engage in the three-part analysis seemingly required by *Bell* to determine whether the detention policy constituted impermissible punishment.[107] The court did not evaluate whether the County Policies were adopted by the Board of County Commissioners for a punitive purpose, or whether the policies were excessive in relation to the legitimate government interest—administrative efficiency—justifying them.[108] If the court had undertaken such an analysis, it might have considered any number of facts or statistics that could have led it to conclude the County Policies were excessive in relation to the legitimate government interest and thus amounted to unconstitutional punishment before a determination of guilt.[109] Instead, it accepted the County's stated interest as a given, which effectively ended the inquiry.[110] In sum, given the split be-

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[106] *See Salerno*, 481 U.S. at 749–51 (applying heightened scrutiny to the BRA because the right at issue was fundamental); *see also* Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344, 1349 (2014) (suggesting the use of intermediate scrutiny to evaluate pretrial detention policies). If the *Dawson II* court had applied strict scrutiny, it would have had to consider whether administrative efficiency was a compelling government interest, and, if it was, whether the policies were narrowly tailored to effectuating that compelling interest. Spece Jr., *supra* note 21, at 295–96.

[107] *See Salerno*, 481 U.S. at 747–48 (utilizing the *Bell* test to determine that the BRA was not imposed for a punitive purpose, but rather was imposed to satisfy a compelling government interest, and was not excessive in relation to that interest); *Dawson II*, 732 F. App'x at 630–31 (not engaging in an analysis of whether the Board of County Commissioners had adopted the holding and monitoring policies for a punitive purpose or whether the policies were excessive in relation to the legitimate government interest used to justify them).

[108] *Dawson II*, 732 F. App'x at 630–31. In a concurring opinion, Tenth Circuit Chief Judge Tymkovich briefly argued that applying the *Bell* test in addition to the rights test announced in *Glucksberg*—as the court did in *Lopez-Valenzuela*—would create an additional and unnecessary due process framework. *Id.* at 638 (Tymkovich, C.J., concurring).

[109] *See* Appellant's Reply Brief, *Dawson II*, *supra* note 3, at 20–21. Plaintiff listed several reasons why the County Policies could be found excessive in relation to the County's interest. *Id.* First, when GPS monitoring is ordered for a detainee, the fitment process must be completed at some point and postponing it by three days does not make the process any more or less time-consuming. *Id.* Second, by detaining the detainee for three extra days, the County incurs additional expenses associated with caring for the detainee. *Id.* Third, by extending the detention period, the County increases its exposure to liability as well as the risk of injury to the detainee. *Id.* Consequently, Plaintiff argued that the court erred in its application of motion to dismiss pleading standards by basing its decision on whether the moving party had asserted a plausible government interest rather than on whether the non-moving party had stated a plausible claim for relief. Petition for Writ of Certiorari, *Dawson III*, *supra* note 6, at 21. Plaintiff argued that such an approach would encourage government actors in similar lawsuits to argue that *any* policy would increase administrative efficiency, knowing that such an argument could secure dismissal of the claim without affording the plaintiff any opportunity to test his or her assertion through discovery. *Id.*

[110] *See Dawson II*, 732 F. App'x at 633 (finding that since it is more convenient for the jail to refrain from conducting the GPS monitoring device fitment process over the weekend, the policies rationally related to a legitimate government interest, regardless of how little time the fitment process would take or how much administrative efficiency the county has actually obtained).

tween the Tenth and Ninth Circuit on these two points of law and the confusion it has continued to engender in the lower courts, the Supreme Court should have granted *certiorari* to clarify: (1) whether *Salerno* recognized a fundamental right, and (2) whether courts must use the rights test or the *Bell* test—or both tests—when considering a substantive due process challenge to a government pretrial detention policy.[111]

C. A More Objective Analysis: Recommendations for Modifying the Bell *Test*

In a criminal justice system where the use of GPS monitoring of pretrial detainees has increased and where courts have discerned an uptick in over-detention cases, the Supreme Court should have granted *certiorari* to modify the *Bell* test's third part in an effort to encourage lower courts to engage in a more objective analysis of whether the policy at issue is excessive in relation to the government interest.[112] As Justice Marshall pointed out in his dissent in *Bell*, the test as formulated does not supply lower courts with sufficiently objective criteria with which to undertake a reasoned analysis of whether the policy is excessive in relation to the legitimate government interest.[113] In cases like *Dawson II*, a county's motivation behind en-

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[111] *Compare id.* at 630–31 (reasoning that *Salerno* did not recognize a fundamental right, and not engaging in the *Bell* analysis of whether the policy was excessive in relation to the legitimate government interest at issue), *with Lopez-Valenzuela*, 770 F.3d at 780–81 (reasoning that *Salerno* did recognize a fundamental right, and engaging in the *Bell* analysis of whether the policy is excessive in relation to the legitimate government interest).

[112] *See* Dodds v. Richardson, 614 F.3d 1185, 1192 (10th Cir. 2010) (commenting that the type of claim brought by the plaintiff has become so common it has acquired its own term of art: "over-detention"); *Use of Electronic Offender-Tracking Devices Expands Sharply*, PEW CHARITABLE TR. (Sept. 7, 2016), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2016/09/use-of-electronic-offender-tracking-devices-expands-sharply [https://perma.cc/L9TK-CLDF]. According to a 2015 study, the number of accused and convicted criminal offenders in the United States who are monitored with ankle bracelets and other electronic tracking devices rose nearly 140 percent over ten years—from 53,000 in 2005 to 125,000 in 2015. *Id.* Courts have held that when only administrative tasks remain to process a detainee's release, delays of as little as thirty minutes can violate substantive due process. *See* Berry v. Baca, 379 F.3d 764, 769 (9th Cir. 2004) (finding that a twenty-six to twenty-nine hour delay in release precluded summary judgment for the government on a Section 1983 claim); Young v. City of Little Rock, 249 F.3d 730, 735–736 (8th Cir. 2001) (holding that holding a person for thirty-minutes after his release was ordered could violate a detainee's due process rights); O'Donnell v. Harris County, 227 F. Supp. 3d 706, 733 (S.D. Tex. 2016), *aff'd*, 892 F.3d 147 (5th Cir. 2018) (holding that a plaintiff had stated a claim in his due process challenge to post-arrest detention policies that resulted in an under-24-hour over-detention); Barnes v. District of Columbia, 793 F. Supp. 2d 260, 278 (D.D.C. 2011) (finding that an over-detention policy preventing release after 10 p.m. of a pretrial detainee who had been ordered released violated substantive due process); Holder v. Town of Newton, 638 F. Supp. 2d 150, 155–56 (D.N.H. 2009) (denying a town's motion to dismiss where detainee was held for nine hours as required by government policy after being granted release).

[113] *See* Bell v. Wolfish, 441 U.S. 520, 564–65 (1979) (Marshall, J., dissenting) (stating that the *Bell* Court took a standard that was sensitive to the deprivations imposed on detainees and

acting the policy will frequently not be a matter of public record.[114] As a result, it may be difficult for a court to objectively discern the first part of the *Bell* test—whether the legislative body enacting the policy did so with punitive intent.[115] In such cases, the excessiveness inquiry under *Bell*'s third part is determinative.[116] As such, the Court should have taken this opportunity to provide guidance to lower courts on how to engage in the third part of the *Bell* analysis.[117] A better standard might require courts, as part of the excessiveness inquiry, to evaluate certain objective criteria that would shift the analysis's focus to the nature and effect of the policy's infringement on the right at issue.[118] Such criteria could include the potential length of the pretrial detainment contemplated by the policy; availability of less excessive alternatives; practices in other similarly-situated detention facilities; and the recommendation of the Department of Justice and other professional organizations.[119] Without such additions, the door is open for state and

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turned it into a standard that almost always gives a pass to jail administrators). In their respective dissents, Justices Marshall and Stevens each contended that the Court should have adhered to the factors laid out in *Kennedy v. Mendoza-Martinez*, which they saw as more objective and instructive to the analysis of whether a given policy imposed impermissible punishment before determination of guilt. *Id.* (Marshall, J., dissenting) (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168 (1963); *id.* at 588 (Stevens, J., dissenting) (citing *Kennedy*, 372 U.S. at 168).

[114] *Id.* at 565–66 (Marshall, J., dissenting).

[115] *Id.* (observing that detainees challenging pretrial detention policies will bear a nearly insurmountable burden of proving punitive intent based on circumstantial evidence).

[116] *See* Scarberry, *supra* note 29, at 1106 (stating that, due to difficulty of determining punitive intent, the *Bell* inquiry will nearly always turn on excessiveness prong); *see e.g.*, *Lopez-Valenzuela*, 770 F.3d at 790–91 (invalidating Proposition 100 on excessiveness grounds rather than punitive intent because punitive intent was difficult, if not impossible, to discern); Littlefield v. Deland, 641 F.2d 729, 731 (10th Cir. 1981) (stating that court was unable to find punitive intent on part of county officials but finding a fifty-six-day detention of pretrial detainee was excessive and violated substantive due process).

[117] *See Bell*, 441 U.S. at 564–67 (implying that the *Bell* test as formulated by the majority is not capable of objectively evaluating the excessiveness of the policy); Himsell, *supra* note 32, at 464 (arguing that considering the length of the pretrial detention at issue as a factor in the *Bell* analysis would allow courts to better assess whether the policy is excessive in relation to the legitimate government interest); Wiseman, *supra* note 106, at 1349 (stating that since the Supreme Court has never explained whether the *Bell* analysis requires considering reasonable alternatives, the excessiveness inquiry is unclear).

[118] *Bell*, 441 U.S. at 564–65. Justice Marshall noted that the Due Process Clause focuses on the effect of the deprivation of a right, rather than on the intent of the persons inflicting the deprivation. *Id.* at 567. As a result, he concluded that the effect of the detention policy should occupy a far greater place in the analysis than it does in the majority's proposed test. *Id.* Justice Stevens also emphasized the need for courts to evaluate the effect of the detention. *Id.* at 588 (Stevens, J., dissenting); *see also* Jean Koh Peters, Schall v. Martin *and the Transformation of Judicial Precedent*, 31 B.C. L. REV. 641, 662 (1990) (stating that *Bell* and its progeny cases distorted the criteria laid out in *Mendoza-Martinez*—a distortion that led the excessiveness inquiry to focus on the policy and its conditions at the expense of its effect on the detainee).

[119] *See Bell*, 441 U.S. at 565 (Marshall, J., dissenting) (discussing potential criteria under which to evaluate the excessiveness prong); Himsell, *supra* note 32, at 464 (suggesting that the length of pretrial detention should be considered).

local governments to use a broadly stated interest in administrative efficiency to justify a detention policy without having to show that the efficiency obtained by the policy actually warrants the requisite infringement on liberty.[120]

CONCLUSION

The United States Court of Appeals for the Tenth Circuit's holding in *Dawson II*—that the right to be free from pretrial detention absent a determination of guilt is not a fundamental right, but rather a non-fundamental liberty interest—puts it at odds with the United States Court of Appeals for the Ninth Circuit. Previously, in *Lopez-Valenzuela*, the Ninth Circuit had held that the right to be free from pretrial detention absent a determination of guilt is a fundamental right. Although the Supreme Court's jurisprudence does not provide an immediately apparent answer to the question of which court came to the correct conclusion, the most accurate reading of the Court's jurisprudence indicates that the right to be free from detention absent a determination of guilt is fundamental in nature. Furthermore, the Supreme Court should have granted *certiorari* to clarify the *Dawson II* court's application of the law and to modify the *Bell* test's third part. Such clarifications would have provided courts with needed guidance on how to evaluate a pretrial detention substantive due process claim. To be sure, the implications of the Tenth Circuit's decision will remain significant, as its holding promotes a standard that affords wide-ranging deference to the policies of detention facilities around the nation and makes it easier for courts to pass on their responsibility to apply the proper level of scrutiny to the policy.

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[120] *See Bell*, 441 U.S. at 567 (cautioning that almost any restriction on pretrial detainees can be found to have some rational relation to an interest like administrative efficiency); Petition for Writ of Certiorari, *Dawson III*, *supra* note 6, at 21 (arguing that the approach taken by the *Dawson II* court would encourage governments in similar lawsuits to argue that *any* policy increases administrative efficiency, knowing that such an argument could secure dismissal of the claim without requiring the government to demonstrate the actual level of administrative efficiency obtained through the policy and without affording the plaintiff any opportunity to test its assertion through discovery).