
CONSTITUTIONAL LAW — SUBSTANTIVE DUE PROCESS — NINTH CIRCUIT DEEMS UNCONSTITUTIONAL ROUTINE SHACKLING IN PRETRIAL PROCEEDINGS. — *United States v. Sanchez-Gomez*, 859 F.3d 649 (9th Cir. 2017) (en banc), cert. granted in part, 138 S. Ct. 543 (2017).

Fundamental to the notion of criminal justice is the principle that criminal defendants are innocent until proven guilty.¹ But there exists some tension between that ideal and the lived experiences of many suspected criminals in the United States, for oftentimes, the pretrial processes of investigation and adjudication can seem punitive from the outset.² From invasive searches³ and pretrial detention,⁴ to perp walks⁵ and killings by police,⁶ many who encounter the criminal justice system as innocents are immediately subjected to practices resembling or exceeding⁷ punishments authorized for criminal offenses.⁸ Against this

¹ See, e.g., *Coffin v. United States*, 156 U.S. 432, 453 (1895) (“The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.”).

² See *Bell v. Wolfish*, 441 U.S. 520, 533 (1979) (characterizing “presumption of innocence” as an evidentiary doctrine with no application to the treatment of pretrial detainees).

³ See *Terry v. Ohio*, 392 U.S. 1, 16–17, 30 (1968) (observing, despite upholding its constitutionality, that stop-and-frisk is “a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment,” *id.* at 17).

⁴ See *Wolfish*, 441 U.S. at 538–39, 543, 551, 560 (rejecting pretrial detainees’ challenges to the conditions of confinement, including cramped living spaces, cavity searches, and a prohibition on hardcover books).

⁵ See Kyle J. Kaiser, Note, *Twenty-First Century Stocks and Pillory: Perp Walks as Pretrial Punishment*, 88 IOWA L. REV. 1205, 1232–34 (2003) (arguing that, in at least some cases, staged perp walks — wherein a suspect, not yet convicted, is walked past waiting cameras while in police custody — may amount to unconstitutional pretrial punishment).

⁶ Americans today are all too acquainted with extrajudicial police killings. The cases of Laquan McDonald, Tamir Rice, Walter Scott, and Freddie Gray provide recent examples of such killings. See PAUL BUTLER, *CHOKEHOLD: POLICING BLACK MEN 1* (2017) (recounting incidents).

⁷ See Ian Ayres & Daniel Markovits, Opinion, *Ending Excessive Police Force Starts with New Rules of Engagement*, WASH. POST (Dec. 25, 2014), <http://wapo.st/1xlSkvp> [<https://perma.cc/9UM7-MFSU>]. Professors Ian Ayres and Daniel Markovits note that, when a New York police officer suspected Eric Garner of selling stray cigarettes, the officer eventually killed him. *Id.* In New York, selling cigarettes is a misdemeanor not punishable by state-imposed force. *Id.* Likewise, in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), police allegedly handcuffed, arrested, booked, and searched the plaintiff — all for a traffic offense with a maximum penalty of a \$50 fine. *Id.* at 323–24. The Court found the stop, causing “mere[] gratuitous humiliation[],” *id.* at 346, to be constitutional, *id.* at 354. The contrast between permissible post-trial punishments and the extrajudicial use of force is especially stark in the context of killings by the state: though formal executions usually follow protracted legal processes, see Stephen F. Smith, *Has the “Machinery of Death” Become a Clunker?*, 49 U. RICH. L. REV. 845, 858–59 (2015), the Constitution allows extrajudicial police killings to prevent the escape of dangerous, but unconvicted, suspects, see *Tennessee v. Garner*, 471 U.S. 1, 3 (1985).

⁸ This fact has led to Professor Malcolm Feeley’s seminal observation that in many cases “the process is the punishment.” See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979).

backdrop, the Ninth Circuit in *United States v. Sanchez-Gomez*⁹ recently held unconstitutional a policy requiring most pretrial detainees to appear in trial courts wearing shackles.¹⁰ The court departed from its sister circuits¹¹ to conclude that the Constitution requires courts to justify and individualize the decision to shackle a criminal defendant in the courtroom.¹² That narrow holding will likely be of modest precedential effect, but it stands out for at least two reasons: (1) the court went out of its way to announce a new constitutional right — “the fundamental right to be free of unwarranted restraints”¹³ — thus making a novel contribution to substantive due process jurisprudence; and (2) despite its narrow holding, *Sanchez-Gomez* symbolically evinces judicial concern for the “dignity” of those who encounter the criminal justice system¹⁴ — a move that may be critical to the broader project of criminal justice reform.

On March 12, 2013, U.S. Marshal Steven Stafford wrote Chief Judge Moskowitz of the United States District Court for the Southern District of California to express a few safety concerns: a stabbing had recently occurred in the courtroom of Judge Irma Gonzalez; one prisoner had assaulted another in a magistrate judge’s courtroom; and officers had discovered defendants carrying “prisoner-made weapons” to court.¹⁵ Those incidents, combined with staffing problems, prompted Stafford to request the Chief Judge’s permission to implement the Marshals’ nationwide policy of producing “all in-custody defendants in full restraints for most non-jury proceedings.”¹⁶ Chief Judge Moskowitz obliged. Concluding that “courthouse and courtroom security is best left to the sound discretion of the U.S. Marshal, including the decision as to whether in-custody defendants should appear in restraints,” he gave his blessing to a near-uniform shackling policy.¹⁷ Thereafter, in nearly every pretrial proceeding, presumptively innocent

⁹ 859 F.3d 649 (9th Cir. 2017) (en banc) cert. granted in part, 138 S. Ct. 543 (2017).

¹⁰ *Id.* at 666.

¹¹ See *id.* at 680–81 (Ikuta, J., dissenting) (first citing *United States v. Zuber*, 118 F.3d 101, 102–04 (2d Cir. 1997) (holding that the Constitution does not require an individual finding of dangerousness before an individual may be shackled in a nonjury proceeding); then citing *United States v. LaFond*, 783 F.3d 1216, 1225 (11th Cir. 2015) (finding shackling to be constitutional, because the defendant’s “hearing occurred before only a district judge, not [before] a jury”).

¹² *Id.* at 661 (majority opinion).

¹³ *Id.* at 666.

¹⁴ *Id.* at 661 (“A presumptively innocent defendant has the right to be treated with respect and dignity in a public courtroom . . .”); cf. Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 57–61 (2000) (arguing that the Supreme Court used due process jurisprudence as a tool for addressing racial injustice in the Jim Crow South).

¹⁵ Motion to Order Mr. Sanchez-Gomez Unshackled During November 5, 2013 Court Appearance at Exhibit A, *United States v. Sanchez-Gomez*, No. 3:13-cr-04209 (S.D. Cal. Oct. 31, 2013), ECF No. 13.

¹⁶ *Id.*

¹⁷ *Id.*

criminal defendants would appear before the court in “five-point restraints,” their limbs constrained by handcuffs and leg shackles fastened to a belly chain.¹⁸ Judges could order the restraints removed — indeed, one judge banned the practice in her courtroom altogether¹⁹ — but, as a presumptive matter, the policy would apply indiscriminately. And indiscriminate it was: wheelchair-bound, vision-impaired, and broken-wristed alike, nearly all criminal defendants appeared in court bound by chains.²⁰

Rene Sanchez-Gomez, Moises Patricio-Guzman, Jasmin Isabel Morales, and Mark Ring — all represented by the Federal Defenders of San Diego — had each been shackled in their pretrial proceedings.²¹ In a consolidated case, they moved to have the practice banned, arguing that it violated their Fifth Amendment due process rights.²² District Judge Burns thought their complaint was better characterized as a Fourth Amendment claim,²³ but upheld the practice against both constitutional challenges: he found no due process violation,²⁴ and found that the seizure was reasonable under the Fourth Amendment.²⁵

Defendants petitioned the Ninth Circuit for review of the district court’s order. Eschewing the Fourth Amendment arguments, they argued that the shackling policy had deprived them of due process, given the traditional common law protections against unnecessary restraints.²⁶ Writing for the panel, Senior Judge Schroeder relied on the circuit’s decision in *United States v. Howard*²⁷ in holding that “a full restraint policy ought to be justified by a commensurate need”²⁸ and remanded the case for such a finding.²⁹ But the dodge would be short-lived; just under a year later, the court voted to have the case reheard en banc.³⁰

¹⁸ *United States v. Sanchez-Gomez*, 798 F.3d 1204, 1206 (9th Cir. 2015).

¹⁹ *Sanchez-Gomez*, 859 F.3d at 653.

²⁰ *Id.* at 654.

²¹ *Id.*

²² *See id.*; *United States v. Morales*, Nos. 13mj3858, 13mj3882, 13mj3928, 2013 WL 6145601, at *2 (S.D. Cal. Nov. 21, 2013). The Fifth Amendment provides that “No person shall be . . . deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

²³ Reporter’s Transcript of Motion Hearing re: Appeal of Magistrate Judge Decision at 130–31, *United States v. Sanchez-Gomez*, No. 3:13-cr-04209 (S.D. Cal. Dec. 2, 2013), ECF No. 39. The Fourth Amendment protects against the “unreasonable . . . seizure[]” of persons. U.S. CONST. amend. IV.

²⁴ *Morales*, 2013 WL 6145601, at *2.

²⁵ *Id.* at *4–7.

²⁶ Appellant’s Joint Opening Brief at 15–17, *United States v. Sanchez-Gomez*, 798 F.3d 1204 (9th Cir. 2015) (Nos. 13-50561, 13-50562, 13-50566, 13-50571), 2014 WL 809144.

²⁷ 480 F.3d 1005 (9th Cir. 2007).

²⁸ *Sanchez-Gomez*, 798 F.3d at 1209.

²⁹ *Id.* at 1206.

³⁰ *United States v. Sanchez-Gomez*, 831 F.3d 1263, 1264 (9th Cir. 2016).

The en banc court interpreted the action as a petition for a writ of mandamus;³¹ it denied the writ, but took the occasion to deem the challenged policy unconstitutional.³² In an opinion by Judge Kozinski,³³ the narrowest possible majority of the court³⁴ concluded that, though the defendants' cases had ended, and though the district court had revised its shackling policy, the case was not moot. Since the named claimants stood in for a functional class of many claimants — those who might possibly be harmed by shackling in the future — the majority allowed the action to go forward over Article III objections.³⁵ The court then announced its central holding: that, as a matter of constitutional due process, “[a] court must make an individualized decision that a compelling government purpose would be served and that shackles are the least restrictive means for maintaining security and order in the courtroom.”³⁶

Notably, the court characterized the right to be free of unnecessary shackles as a “fundamental right,” thus requiring the shackling policy to be supported by a “compelling governmental purpose.”³⁷ It found the protection against unnecessary shackling to be rooted in the common law, citing Blackstone’s observation that shackling was permitted only upon a showing of necessity.³⁸ And the court reasoned that its holding was supported by notions of courtroom dignity and decorum, along with a “presumptively innocent defendant[’s] . . . right to be treated with respect and dignity in a public courtroom, not like a bear on a chain.”³⁹ Since no compelling state interest could justify the blanket shackling policy, the policy amounted to an unconstitutional deprivation of liberty in violation of the Due Process Clause.⁴⁰

Judge Schroeder filed a concurring opinion to criticize what she saw as the dissent’s insensitivity to the “dignity with which court proceedings should be conducted” and “to the proper role of . . . judges . . . in determining how a courtroom should be run.”⁴¹ Judges are not jailers,

³¹ *Sanchez-Gomez*, 859 F.3d at 654–57.

³² *Id.* at 666. The court denied the writ of mandamus because the challenged policy was no longer in effect. *Id.*

³³ Judge Kozinski was joined by Chief Judge Thomas and Judges Reinhardt, Paez, and Berzon. Senior Judge Schroeder “fully concur[red]” in the opinion. *Id.* (Schroeder, J., concurring).

³⁴ The Ninth Circuit’s en banc court sits in panels of ten plus the Chief Judge. The majority here was comprised of six out of eleven judges.

³⁵ *Sanchez-Gomez*, 859 F.3d at 658–59.

³⁶ *Id.* at 661.

³⁷ *Id.* at 660. “Fundamental rights” and “compelling governmental purpose” are the language of strict scrutiny, the most stringent review of government action that threatens to impinge on due process rights. See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. REV.* 1267, 1269 (2007).

³⁸ *Sanchez-Gomez*, 859 F.3d at 662–64 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *317).

³⁹ *Id.* at 661.

⁴⁰ *Id.* at 666.

⁴¹ *Id.* at 666 (Schroeder, J., concurring).

she insisted, and presumptively innocent defendants ought not be required to “stand before a court in chains without having been convicted, or in many instances, without even having been formally charged with any crime.”⁴²

Judge Ikuta⁴³ dissented. She and four of her colleagues found the majority opinion to be mistaken in its historical observations, inattentive to Supreme Court precedent, and overreaching in its constitutional pronouncements.⁴⁴ They would not have reached the constitutional question at all, because, in their view, the case was moot: since the defendants’ criminal cases were closed, and since the appellants sought purely prospective relief, the dissenters would have dismissed the case for want of a justiciable “Case[.]” or “Controvers[y].”⁴⁵ Moreover, had they reached the merits of the case, they would have found the shackling practice to be constitutionally sound. Relying on Supreme Court precedent, a careful reading of the common law, and the general presumption against creating unnecessary circuit splits, the dissent insisted that courts were statutorily and constitutionally permitted to defer to the U.S. Marshals on questions of courtroom security.⁴⁶ Finally, the dissent cited prudential reasons weighing against the rule adopted by the court: the U.S. Marshals had testified that they were unable to predict the potential threat posed by a particular defendant. By requiring an articulation of the risk before restraining a defendant, the dissent quipped, the court had “substitute[d] the supposed wisdom of the ivory tower for the expertise of the United States Marshals Service” and had potentially created problems of courtroom safety.⁴⁷ In a different case — one properly before the court as an Article III matter — the dissenters would have upheld the practice as constitutional.⁴⁸

By announcing a new fundamental right, the Ninth Circuit in *Sanchez-Gomez* has added its voice to a broader discussion about the interplay of substantive due process, dignity, and criminal justice reform. That was a bold, but ultimately symbolic, move: the court’s holding is expressly limited to the discrete issue of shackling in the courtroom,⁴⁹ and can hardly be read to apply to other arenas of criminal

⁴² *Id.*

⁴³ Judge Ikuta was joined by Senior Judges O’Scannlain and Silverman and Judges Graber and Callahan.

⁴⁴ See *Sanchez-Gomez*, 859 F.3d at 666 (Ikuta, J., dissenting).

⁴⁵ U.S. CONST. art. III, § 2, cl. 1; see also *Sanchez-Gomez*, 859 F.3d at 666 (Ikuta, J., dissenting) (“We should not be hearing this case at all, much less using it to announce a sweeping and unfounded new constitutional rule with potentially grave consequences for state and federal court-houses throughout this circuit.”).

⁴⁶ *Sanchez-Gomez*, 859 F.3d at 677–81 (Ikuta, J., dissenting).

⁴⁷ *Id.* at 684.

⁴⁸ *Id.* at 683.

⁴⁹ *Id.* at 661.

justice. That self-conscious limitation does not muffle its impact on due process jurisprudence, but, as a precedential matter, the case will be of limited practical application.

Sanchez-Gomez is notable for its unique take on due process jurisprudence, in terms of both its content and its methodology. Fundamental rights are few and far between, and courts hesitate to create new ones.⁵⁰ They consist of those rights that are “deeply rooted in this Nation’s history and tradition”⁵¹ and “implicit in the concept of ordered liberty”⁵² (hence the Ninth Circuit’s foray into Blackstone), “such that ‘neither liberty nor justice would exist if they were sacrificed.’”⁵³ Among them are the right to marry,⁵⁴ to have children,⁵⁵ to have an abortion,⁵⁶ and to use contraception.⁵⁷ Substantive due process requires that government practices or statutes found to impinge on fundamental rights “be subjected to ‘strict scrutiny’”;⁵⁸ those government actions are constitutional only if they are “precisely tailored to serve a compelling governmental interest.”⁵⁹ Since fundamental rights are ostensibly grounded in the constitutional text, and since they can pose significant impediments to state action, courts can be hesitant to announce new ones.⁶⁰ But here, the Ninth Circuit seemed to do so with little hesitation: a more restrained approach would have allowed for the same result.⁶¹

⁵⁰ See, e.g., *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (“As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended.”); *Bowers v. Hardwick*, 478 U.S. 186, 195 (1986) (urging “great resistance to expand the substantive reach of [the Due Process Clause], particularly if it requires redefining the category of rights deemed to be fundamental”), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁵¹ *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion)).

⁵² *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

⁵³ *Id.* (quoting *Palko*, 302 U.S. at 326).

⁵⁴ *Id.* at 720 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

⁵⁵ *Id.* (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)).

⁵⁶ *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846–47 (1992)).

⁵⁷ *Id.* (citing *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965)).

⁵⁸ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 357 (1978) (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part).

⁵⁹ *Id.* at 299 (opinion of Powell, J.). Though the *Sanchez-Gomez* court did not explicitly invoke “strict scrutiny,” its insistence on a “compelling government purpose,” 859 F.3d at 661, is consistent with strict scrutiny review, see *Bakke*, 438 U.S. at 357 (Brennan, White, Marshall, and Blackmun, JJ., concurring in the judgment in part and dissenting in part); Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355, 384–85 (2006).

⁶⁰ See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 969–71 (1987) (arguing that the Supreme Court, in attempting to avoid constitutional overreach, has devised a tier of review between “mere rationality” and “strict scrutiny,” *id.* at 969, to protect “new areas of societal concern,” *id.* at 970).

⁶¹ The panel had also held the restraint policy unlawful, but without announcing a new fundamental right. It stated that “a full restraint policy ought to be justified by a commensurate need” and found that showing to be absent. *United States v. Sanchez-Gomez*, 798 F.3d 1204, 1209 (9th Cir. 2015); see also *id.* at 1207 (citing *Deck v. Missouri*, 544 U.S. 622, 626, 630–31 (2005)).

Instead, the court took pains to invoke one of the broadest mechanisms at its disposal: the pronouncement of a new constitutional right inherent in our concept of liberty, “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”⁶² The court’s constitutional pronouncement, and the strained process by which it arrived there, make for novel developments in due process jurisprudence.

Furthermore, by using substantive due process to expand the rights of pretrial detainees, the court’s decision contributes meaningfully to broader discourse surrounding criminal justice reform. In *United States v. Salerno*,⁶³ the Supreme Court found no constitutional infirmities in the practice of detaining criminal suspects before conviction.⁶⁴ Performing its substantive due process analysis, the Court reasoned that “[t]he government’s interest in preventing crime by arrestees is both legitimate and compelling,” thus justifying certain deprivations of an individual’s liberty interests.⁶⁵ In dissent, Justice Marshall criticized the majority’s “cramped concept of substantive due process”⁶⁶ and derided as a “false dichotomy” the Court’s separate treatment of due process considerations and the Eighth Amendment.⁶⁷ Scholars have subsequently echoed that sentiment, calling for a broader conception of substantive due process as a way to achieve criminal justice reform. Professor Eva Nilsen, for example, has argued that substantive due process may be an avenue to address problems of mass incarceration and conditions of confinement.⁶⁸ She observes that Germany, unlike the United States, does not have the problem of mass incarceration.⁶⁹ In the German system, incarceration operates as a “last resort” — and prisoners are treated respectfully, given meaningful work, and held in conditions intended to resemble life outside of custody.⁷⁰ The differences, she suggests, may be attributable in

⁶² *United States v. Salerno*, 481 U.S. 739, 751 (1987) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)) (defining fundamental rights).

⁶³ 481 U.S. 739.

⁶⁴ *Id.* at 747.

⁶⁵ *Id.* at 749.

⁶⁶ *Id.* at 760 (Marshall, J., dissenting).

⁶⁷ *Id.* at 759. The Eighth Amendment prohibits the infliction of “cruel and unusual punishment[.]” U.S. CONST. amend. VIII.

⁶⁸ Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 159–69 (2007). *But see, e.g.*, Paul D. Butler, Essay, *Poor People Lose: Gideon and the Critique of Rights*, 122 YALE L.J. 2176, 2187–89 (2013) (describing the “critique of rights” school of thought, which maintains that speaking in terms of rights may undermine progressive social movements); *id.* at 2189 (“Rights . . . are too abstract to be useful in deciding particular cases [and often] conflict with other rights.”); Darren Lenard Hutchinson, *Undignified: The Supreme Court, Racial Justice, and Dignity Claims*, 69 FLA. L. REV. 1, 61 (2017) (arguing that “dignity-based” due process arguments are unlikely to be successful in advancing racial justice).

⁶⁹ Nilsen, *supra* note 68, at 161–62.

⁷⁰ *Id.*

part to Germany's constitutional guarantee of human dignity⁷¹ — a protection that would “mark a fundamental change in U.S. punishment jurisprudence.”⁷² Likewise, Professor Carol Steiker has argued that American inattentiveness to the “dignity” of criminal defendants may have contributed to mass incarceration.⁷³ By giving judicial voice to those observations, *Sanchez-Gomez* meaningfully advances that conversation.

But, limited as it is to shackling in the courtroom, the Ninth Circuit's bold constitutional pronouncement will likely be of modest practical impact. Though the decision admonishes readers to “take seriously how we treat individuals who come into contact with our criminal justice system — from how our police interact with them on the street to how they appear in the courtroom,”⁷⁴ it otherwise does not purport to apply beyond courthouse doors.⁷⁵ And it is hard to imagine how it would: many individuals' interactions with police are traditionally analyzed under the Fourth and Eighth Amendments.⁷⁶

The Ninth Circuit's decision in *Sanchez-Gomez* should not be read too broadly: at base, it is a decision about when defendants may be shackled in courtrooms and for what reasons. But it should not be read too narrowly, either. The Ninth Circuit's decision to use substantive due process as a tool for criminal justice provides a theoretical freshness to old questions of criminal justice reform — and in that respect, its impact is potentially significant.

⁷¹ *Id.*

⁷² *Id.* at 162.

⁷³ Carol S. Steiker, “To See a World in a Grain of Sand”: Dignity and Indignity in American Criminal Justice, in *THE PUNITIVE IMAGINATION: LAW, JUSTICE, AND RESPONSIBILITY* 19, 19–20 (Austin Sarat ed., 2014).

⁷⁴ *Sanchez-Gomez*, 859 F.3d at 665.

⁷⁵ Even within the courtroom, *Sanchez-Gomez* could have a limited impact: arguably, for officers and courts wishing to shackle more criminal defendants, *Sanchez-Gomez* just requires more paperwork to satisfy its “individual finding” requirement. See Brief of Amici Curiae Senator Jeff Flake et al. in Support of Petitioner at 8–13, *United States v. Sanchez-Gomez*, No. 17-312, 2017 WL 4350725 (U.S. Sept. 28, 2017) (describing procedure for “dangerousness” determination required to justify shackling in light of *Sanchez-Gomez*).

⁷⁶ See, e.g., *Graham v. Connor*, 490 U.S. 386, 394 (1989) (citing *Tennessee v. Garner*, 471 U.S. 1, 7–22 (1985)) (excessive force during arrest analyzed under the Fourth Amendment); *Whitley v. Albers*, 475 U.S. 312, 318–26 (1986) (convicted prisoner's excessive force claim analyzed under the Eighth Amendment). By some accounts, the Supreme Court has directly limited the application of substantive due process to questions of pretrial confinement. See, e.g., E. Bryan MacDonald, Note, *Graham v. Connor: A Reasonable Approach to Excessive Force Claims Against Police Officers*, 22 PAC. L.J. 157, 183–84 (1990) (arguing that *Graham v. Connor*, 490 U.S. 386, endorses a procedural, not substantive, due process right for pretrial detainees alleging excessive force).