

KENNEDY, J., concurring

SUPREME COURT OF THE UNITED STATES

No. 96–1337

COUNTY OF SACRAMENTO, ET AL., PETITIONERS v.
TERI LEWIS AND THOMAS LEWIS, PERSONAL
REPRESENTATIVE OF THE ESTATE
OF PHILIP LEWIS, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

[May 26, 1998]

JUSTICE KENNEDY, with whom JUSTICE O’CONNOR joins,
concurring.

I join the opinion of the Court, and write this explanation of the objective character of our substantive due process analysis.

The Court is correct, of course, in repeating that the prohibition against deprivations of life, liberty, or property contained in the Due Process Clause of the Fourteenth Amendment extends beyond the command of fair procedures. It can no longer be controverted that due process has a substantive component as well. See, e.g., *Washington v. Glucksberg*, 521 U. S. ____ (1997); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U. S. 833 (1992); *Collins v. Harker Heights*, 503 U. S. 115, 125–128 (1992); *Michael H. v. Gerald D.*, 491 U. S. 110 (1989). As a consequence, certain actions are prohibited no matter what procedures attend them. In the case before us, there can be no question that an interest protected by the text of the Constitution is implicated: The actions of the State were part of a causal chain resulting in the undoubted loss of life. We have no definitional problem, then, in determining whether there is an interest sufficient to invoke due proc-

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ess. Cf. *Ohio Adult Parole Authority v. Woodard*, 523 U. S. ___ (1998).

What we do confront is the question of the standard of conduct the Constitution requires the State, in this case the local police, to follow to protect against the unintentional taking of life in the circumstances of a police pursuit. Unlike the separate question whether or not, given the fact of a constitutional violation, the state entity is liable for damages, see *Monell v. New York City Dept. of Social Servs.*, 436 U. S. 658, 694–695 (1978); *Canton v. Harris*, 489 U. S. 378 (1989), which is a matter of statutory interpretation or elaboration, the question here is the distinct, anterior issue whether or not a constitutional violation occurred at all. See *Collins v. Harker Heights*, *supra*, at 120, 124.

The Court decides this case by applying the “shocks the conscience” test first recognized in *Rochin v. California*, 342 U. S. 165, 172–173 (1952), and reiterated in subsequent decisions. The phrase has the unfortunate connotation of a standard laden with subjective assessments. In that respect, it must be viewed with considerable skepticism. As our opinion in *Collins v. Harker Heights* illustrates, however, the test can be used to mark the beginning point in asking whether or not the objective character of certain conduct is consistent with our traditions, precedents, and historical understanding of the Constitution and its meaning. 503 U. S., at 126–128. As JUSTICE SCALIA is correct to point out, we so interpreted the test in *Glucksberg. Post*, at 1–2. In the instant case, the authorities cited by JUSTICE SCALIA are persuasive, indicating that we would contradict our traditions were we to sustain the claims of the respondents.

That said, it must be added that history and tradition are the starting point, but not in all cases the ending point of the substantive due process inquiry. There is room as well for an objective assessment of the necessities of law

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enforcement, in which the police must be given substantial latitude and discretion, acknowledging, of course, the primacy of the interest in life which the State, by the Fourteenth Amendment, is bound to respect. I agree with the Court's assessment of the State's interests in this regard. Absent intent to injure, the police, in circumstances such as these, may conduct a dangerous chase of a suspect who disobeys a lawful command to stop when they determine it is appropriate to do so. There is a real danger in announcing a rule, or suggesting a principle, that in some cases a suspect is free to ignore a lawful police command to stop. No matter how narrow its formulation, any suggestion that suspects may ignore a lawful command to stop and then sue for damages sustained in an ensuing chase might cause suspects to flee more often, increasing accidents of the kind which occurred here.

Though I share JUSTICE SCALIA's concerns about using the phrase "shocks the conscience" in a manner suggesting that it is a self-defining test, the reasons the Court gives in support of its judgment go far toward establishing that objective considerations, including history and precedent, are the controlling principle, regardless of whether the State's action is legislative or executive in character. To decide this case, we need not attempt a comprehensive definition of the level of causal participation which renders a State or its officers liable for violating the substantive commands of the Fourteenth Amendment. It suffices to conclude that neither our legal traditions nor the present needs of law enforcement justify finding a due process violation when unintended injuries occur after the police pursue a suspect who disobeys their lawful order to stop.