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 SCALIA, with whom JUSTICE THOMAS joins, concurring in the judgment.

Today's opinion gives the lie to those cynics who claim that changes in this Court's jurisprudence are attributable to changes in the Court's membership. It proves that the changes are attributable to nothing but the passage of time (not much time, at that), plus application of the ancient maxim, "That was then, this is now."

Just last Term, in *Washington* v. *Glucksberg*, 521 U. S. ___ , ___ (1997) (slip op., at 15–19), the Court specifically rejected the method of substantive-due-process analysis employed by JUSTICE SOUTER in his concurrence in that case, which is the very same method employed by JUSTICE SOUTER in his opinion for the Court today. To quote the opinion in *Glucksberg:*

> "Our established method of substantive-due-process analysis has two primary features: First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' . . . and 'implicit in the concept

> of ordered liberty' . . . . Second, we have required in substantive-due-process cases a 'careful description' of the asserted fundamental liberty interest. . . . Our Nation's history, legal traditions, and practices thus provide the crucial 'guideposts for responsible decision-making,' . . . that direct and restrain our exposition of the Due Process Clause. . . .
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> "JUSTICE SOUTER . . . would largely abandon this restrained methodology, and instead ask 'whether [Washington's] statute sets up one of those "arbitrary impositions" or "purposeless restraints" at odds with the Due Process Clause . . . . In our view, however, the development of this Court's substantive-due-process jurisprudence . . . has been a process whereby the outlines of the 'liberty' specially protected by the Fourteenth Amendment . . . have at least been carefully refined by concrete examples involving fundamental rights found to be deeply rooted in our legal tradition. This approach tends to rein in the subjective elements that are necessarily present in due-process judicial review." *Id.*, at ___ (slip op., at 16–17).

Today, so to speak, the stone that the builders had rejected has become the foundation-stone of our substantive-due-process jurisprudence. The atavistic methodology that JUSTICE SOUTER announces for the Court is the very same methodology that the Court called atavistic when it was proffered by JUSTICE SOUTER in *Glucksberg*. In fact, if anything, today's opinion is even more of a throw-back to highly subjective substantive-due-process methodologies than the concurrence in *Glucksberg* was. Whereas the latter said merely that substantive due process prevents "arbitrary impositions" and "purposeless restraints" (without any objective criterion as to what is arbitrary or purposeless), today's opinion resuscitates the *ne plus ultra*, the Napoleon Brandy, the Mahatma Ghandi, the Ce-

lophane[1] of subjectivity, th' ol' "shocks-the-conscience" test. According to today's opinion, this is the *measure* of arbitrariness when what is at issue is executive rather than legislative action. *Ante*, at 12.[2] *Glucksberg*, of course, rejected "shocks-the-conscience," just as it rejected the less subjective "arbitrary action" test. A 1992 executive-action case, *Collins* v. *Harker Heights*, 503 U. S. 115 (1992), which had paid lip-service to "shocks-the-conscience," see *id.*, at 128, was cited in *Glucksberg* for the proposition that "'[o]ur Nation's history, legal traditions, and practices . . . provide the crucial 'guideposts for responsible decisionmaking.'" *Glucksberg*, *supra*, ___ (slip op., at 16), quoting *Collins*, *supra*, at 125. In fact, even before *Glucksberg* we had characterized the last "shocks-the-conscience" claim to come before us as "nothing more than [a] bald assertio[n]," and had rejected it on the objective ground that the petitioner "failed to proffer any historical, textual, or controlling precedential support for [his alleged due process right], and we decline to fashion a new due process right out of thin air." *Carlisle* v. *United States*, 517 U. S. 416, 429 (1996).

Adhering to our decision in *Glucksberg*, rather than ask whether the police conduct here at issue shocks my

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[1] For those unfamiliar with classical music, I note that the exemplars of excellence in the text are borrowed from Cole Porter's "You're the Top," copyright 1934.

[2] The proposition that "shocks-the-conscience" is a test applicable only to executive action is original with today's opinion. That has never been suggested in any of our cases, and in fact "shocks-the-conscience" was recited in at least one opinion involving legislative action. See *United States* v. *Salerno*, 481 U. S. 739, 746 (1987) (in considering whether the Bail Reform Act of 1984 violated the Due Process Clause, we said that "[s]o-called 'substantive due process' prevents the government from engaging in conduct that 'shocks the conscience'"). I am of course happy to accept whatever limitations the Court today is willing to impose upon the "shocks-the-conscience" test, though it is a puzzlement why substantive due process protects some liberties against executive officers but not against legislatures.

unelected conscience, I would ask whether our Nation has traditionally protected the right respondents assert. The first step of our analysis, of course, must be a "careful description" of the right asserted, *Glucksberg*, 521 U. S., at ___ (slip op., at 16). Here the complaint alleges that the police officer deprived Lewis "of his Fourteenth Amendment right to life, liberty and property without due process of law when he operated his vehicle with recklessness, gross negligence and conscious disregard for his safety." App. 13. I agree with the Court's conclusion that this asserts a substantive right to be free from "deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender." *Ante*, at 1; see also *ante*, at 19.

Respondents provide no textual or historical support for this alleged due process right, and, as in *Carlisle*, I would "decline to fashion a new due process right out of thin air." 517 U. S., at 429. Nor have respondents identified any precedential support. Indeed, precedent is to the contrary: "Historically, th[e] guarantee of due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." *Daniels* v. *Williams*, 474 U. S. 327, 331 (1986) (citations omitted); *Collins*, *supra*, at 127, n. 10 (same). Though it is true, as the Court explains, that "deliberate indifference" to the medical needs of pretrial detainees, *City of Revere* v. *Massachusetts Gen. Hospital*, 463 U. S. 239, 244–245 (1983), or of involuntarily committed mental patients, *Youngberg* v. *Romeo*, 457 U. S. 307, 314–325 (1982), may violate substantive due process, it is not the deliberate indifference alone which is the "deprivation." Rather, it is that combined with "the State's affirmative act of restraining the individual's freedom to act on his own behalf– through incarceration, institutionalization, or other similar restraint of personal liberty," *DeShaney* v. *Winnebago County Dept. of Social Servs.*, 489 U. S. 189, 200 (1989).

"[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and *at the same time* fails to provide for his basic human needs . . . it transgresses the substantive limits on state action set by the . . . Due Process Clause." *Ibid.* (emphasis added). We have expressly left open whether, in a context in which the individual has *not* been deprived of the ability to care for himself in the relevant respect, "something less than intentional conduct, such as recklessness or 'gross negligence,'" can ever constitute a "deprivation" under the Due Process Clause. *Daniels, supra,* at 334, n. 3. Needless to say, if it is an open question whether recklessness can *ever* trigger due process protections, there is no precedential support for a substantive-due-process right to be free from reckless police conduct during a car chase.

To hold, as respondents urge, that all government conduct deliberately indifferent to life, liberty, or property, violates the Due Process Clause would make "'the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.'" *Daniels, supra,* at 332, quoting *Paul* v. *Davis,* 424 U. S. 693, 701 (1976) (other citation omitted). Here, for instance, it is not fair to say that it was the police officer alone who "deprived" Lewis of his life. Though the police car did run Lewis over, it was the driver of the motorcycle, Willard, who dumped Lewis in the car's path by recklessly making a sharp left turn at high speed. (Willard had the option of rolling to a gentle stop and showing the officer his license and registration.) Surely Willard "deprived" Lewis of his life in every sense that the police officer did. And if Lewis encouraged Willard to make the reckless turn, Lewis himself would be responsible, at least in part, for his own death. Was there contributory fault on the part of Willard or Lewis? Did the police officer have the "last clear chance" to avoid the acci-

dent? Did Willard and Lewis, by fleeing from the police, "assume the risk" of the accident? These are interesting questions of tort law, not of constitutional governance. "Our Constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels, supra,* at 332. As we have said many times, "the Due Process Clause of the Fourteenth Amendment . . . does not transform every tort committed by a state actor into a constitutional violation." *DeShaney, supra,* at 202 (citations omitted).

If the people of the State of California would prefer a system that renders police officers liable for reckless driving during high-speed pursuits, "[t]hey may create such a system . . . by changing the tort law of the State in accordance with the regular lawmaking process." 489 U. S., at 203. For now, they prefer not to hold public employees "liable for civil damages on account of personal injury to or death of any person or damage to property resulting from the operation, in the line of duty, of an authorized emergency vehicle . . . when in the immediate pursuit of an actual or suspected violator of the law." Cal. Veh. Code Ann. §17004 (West 1971). It is the prerogative of a self-governing people to make that legislative choice. "Political society," as the Seventh Circuit has observed, "must consider not only the risks to passengers, pedestrians, and other drivers that high-speed chases engender, but also the fact that if police are forbidden to pursue, then many more suspects will flee– and successful flights not only reduce the number of crimes solved but also create their own risks for passengers and bystanders." *Mays* v. *City of East St. Louis*, 123 F. 3d 999, 1003 (1997). In allocating such risks, the people of California and their elected representatives may vote their consciences. But for judges to overrule that democratically adopted policy

judgment on the ground that it shocks *their* consciences is not judicial review but judicial governance.

I would reverse the judgment of the Ninth Circuit, not on the ground that petitioners have failed to shock my still, soft voice within, but on the ground that respondents offer no textual or historical support for their alleged due process right. Accordingly, I concur in the judgment of the Court.