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ROLLING JOHN BINGHAM IN HIS GRAVE: THE REHNQUIST COURT MAKES SPORT WITH THE 14TH AMENDMENT

*Stephen E. Gottlieb**

I. MULTIPLE 14TH AMENDMENTS

A. The Rehnquist Court has created multiple 14th Amendments by manipulating strict scrutiny and the internet test.

The Warren Court organized the concept of strict scrutiny in *Shelton v. Tucker*.¹ Where the defendant was obligated to treat people without regard to membership in a suspect class and failed to do that, the Court would hold them liable for their behavior unless it was done for a compelling public reason and there was no less damaging alternative.

The concept of strict scrutiny had nothing to do with intentions. The issue for the Warren Court was whether one party had injured another because of a forbidden reason. That concept of causation was understood broadly. The Court was not looking into people's minds, rather it looked at their behavior. If the behavior was tied to race, religion or other "suspect" categories it was not permissible. The Court drove this point home in *Palmer v. Thompson*,² holding that the closing of a swimming pool applied to everyone, not just blacks, and that the Court was uninterested in the actors' motivations.³

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1. *Shelton v. Tucker*, 364 U.S. 479 (1960).
2. *Palmer v. Thompson*, 403 U.S. 217 (1971).
3. *Id.* at 225-27.

The Court's method had little to do with formal neutrality. The Warren Court held in *Sherbert v. Verner*,⁴ that rules that had no direct relationship to religion but that disadvantaged members of specific faiths did not escape legal scrutiny.⁵ Specifically, the Court held that a Sabbath observer did not lose rights to unemployment compensation when the employer refused to accommodate the employee's religious need.⁶

The reinterpretation began under the Burger Court. In *Police Dep't of Chicago v. Mosley*,⁷ the Court held that neutrality was the touchstone of the First Amendment.⁸ The fundamental problem which the Amendment was designed to deal with was government tilting toward some speakers and away from others. As Marshall originally wrote that opinion it did not confine the speech clause to that insight but later cases peeled away other governmental obligations.⁹ In *Washington v. Davis*,¹⁰ the Court rejected *Palmer*.¹¹ Henceforth, the definition of discrimination was malevolent intent.

Congress fought back in the Civil Rights Act of 1991¹² and insisted that it meant unjustified discriminatory effects. But discriminatory intent stuck as the constitutional standard. That definition looks like a factual judgment. We have to look at the evidence and decide whether some person or entity meant to discriminate. It is also a convenient camouflage. If it all depends on the facts, and how we interpret them, how do you criticize a decision about discrimination?

II. SUPREME DISCRIMINATION

A. A Fourteenth Amendment for Whites

Actually it is very simple. The Court discriminates.

Despite loud protests that the Court evaluates all equal protection cases with the same "skepticism . . . consistency . . . [and] congruence"

4. *Sherbert v. Verner*, 374 U.S. 398 (1963).

5. *Id.* at 406-07.

6. *Id.* at 408-09.

7. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972).

8. *Id.* at 99.

9. See generally, Stephen E. Gottlieb, *The Speech Clause and the Limits of Neutrality*, 51 ALB. L. REV. 19 (1986).

10. *Washington v. Davis*, 426 U.S. 229 (1976).

11. *Id.* at 243-45.

12. Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

regardless of race or jurisdiction,¹³ there are separate, distinct and unequal Fourteenth Amendments for whites and blacks.¹⁴

White complaints of black advantage are strictly scrutinized. And, in fact, the Court readily draws an inference of discriminatory intent against blacks and those who act on their behalf.

In *Shaw v. Reno*,¹⁵ although the Court noted “the difficulty of determining from the face of a single member districting plan that it purposefully distinguishes between voters on the basis of race,”¹⁶ the Court drew an inference of intent to segregate the races based on the district lines. It held that “redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification” states a claim upon which relief can be granted.¹⁷ And it concluded that this was an example of the principle that “statutes that, although race neutral, are, on their face, ‘unexplainable on grounds other than race’” and must “be narrowly tailored to further a compelling governmental interest” [*i.e.* “strict scrutiny”].¹⁸

In other words, this was a disparate effects case, except that the Court claims to use the effects to measure the intent. And the effects are complex. The districts do not produce proportional representation—blacks get less than that.¹⁹ The districts are biracial despite the claim of segregation.²⁰ And the districts produced effects other than the separation of white and black voters—particularly protection of

13. *Adarand Constructors v. Peña*, 515 U.S. 200, 223-24 (1995). The Court defined skepticism, consistency and congruence:

First, skepticism: “Any preference based on racial or ethnic criteria must necessarily receive a most searching examination,” Second, consistency: “[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification,” [sic] And third, congruence: “Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment,” [sic] Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.

Id. (citations omitted).

14. The argument below expands on a brief discussion in Stephen E. Gottlieb, *Tears for Tiers on the Rehnquist Court*, 4 U. PA. J. CONST. L. 350, 351-354 (2002).

15. *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (holding “political apartheid” unconstitutional).

16. *Shaw*, 509 U.S. at 646.

17. *Id.* at 642.

18. *Id.* at 643 (quoting *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977)).

19. *See id.* at 659 (White, J., dissenting).

20. The Court describes the districts involved as “majority-black districts.” *Id.* at 635.

incumbents.²¹ Therefore, the evidence was ambiguous. The Court was willing to take ambiguous evidence and draw the conclusion that districters had intentionally discriminated against whites in favor of blacks.

In *Miller v. Johnson*,²² the Court wrote:

Although by comparison with other districts the geometric shape of the Eleventh District may not seem bizarre on its face, when its shape is considered in conjunction with its racial and population densities, the story of racial gerrymandering seen by the District Court becomes much clearer.²³

The other factor that impressed the Court was the negotiation between the State of Georgia and the U.S. Department of Justice under § 5 of the Voting Rights Act of 1965,²⁴ which “requires that the proposed change ‘not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.’”²⁵ In effect the Court necessarily drew two inferences, first, that the State of Georgia had not been discriminating against African-Americans in proposing alternative boundaries to which the Attorney General objected, and second, that the actual boundaries were “predominantly” motivated by race, not by other political objectives. The inference that Georgia’s other proposals were not discriminatory was necessary because only if those borders were proper could the Department of Justice’s objections and suggestions have been improper. The Court drew those inferences from ambiguous evidence of shape and demographic data.

Bush v. Vera,²⁶ was another districting case in which the Court saw a tension between the Equal Protection Clause and the Voting Rights Act. The Court said that it was “a mixed motive suit”²⁷ in which other goals, “particularly incumbency protection”²⁸ played a role. The question, therefore, was, which “was the ‘predominant factor’ in the drawing of each of the districts?”²⁹ Although other districts displayed equally bizarre shapes when examined either descriptively or

21. *Bush v. Vera*, 517 U.S. 952, 959 (1996).

22. *Miller v. Johnson*, 515 U.S. 900 (1995).

23. *Id.* at 917.

24. *Voting Rights Act of 1965*, 42 U.S.C. § 1973(c) (2000).

25. *Miller*, 515 U.S. at 906 (quoting 42 U.S.C. § 1973(c)).

26. *Bush*, 517 U.S. 952.

27. *Id.* at 959.

28. *Id.*

29. *Id.* at 959.

mathematically,³⁰ and the involvement of incumbents in shaping the districts to their own advantage explained much of the variations in shape,³¹ the Court concluded that race was the predominant factor. The Court looked at the availability to the districts' designers of precise racial data, the shapes of the districts, the districters' disregard of "traditional districting criteria," and the desire to create majority-minority districts, and determined that race predominated over incumbency protection or other purposes.³² In other words, in *Bush*, like *Shaw*, the Court inferred from ambiguous information that districters intentionally discriminated against whites in favor of blacks.

Complaints of white behavior are not strictly scrutinized.³³ In fact, in *Reno v. Bossier Parish School Board*,³⁴ the Court refused to permit the Attorney General to block a redistricting plan under Section 5 of the Voting Rights Act of 1965,³⁵ even if it is illegal under Section 2 which provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . .³⁶

Sections two and five are written in nearly identical language except for the preclearance requirement of Section 5, but the Court interpreted Section 5 as applying only to retrogression from prior voting plans no matter how discriminatory.³⁷

B. A Fourteenth Amendment for Blacks

The Court draws no inference of intent when blacks have been discriminated against, excluded or segregated.

One very stark decision was in *United States v. Armstrong*.³⁸ In *Armstrong*, defendants alleged that the prosecutor sent white crack defendants back to state courts, but kept black crack defendants in

30. *Id.* at 1019 (Stevens, J., dissenting).

31. *Id.* at 963-64, 967, 969.

32. *Bush*, 517 U.S. at 963.

33. *See, e.g.*, *Brown v. Thomson*, 462 U.S. 835 (1983) (Rehnquist and O'Connor joined the decision upholding reapportionment with an 89% deviation among districts).

34. *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320 (2000).

35. 42 U.S.C. § 1973(c) (2000).

36. 42 U.S.C. § 1973.

37. *See Reno*, 528 U.S. 320; *see also Beer v. United States*, 425 U.S. 130 (1976).

38. *U.S. v. Armstrong*, 517 U.S. 456 (1996).

federal courts where the sentencing disparity was 10-1.³⁹ Justice Stevens, dissenting, set out the facts:

[T]he Government[] . . . submitted a list of more than 3,500 defendants who had been charged with federal narcotics violations over the previous three years. It also offered the names of 11 nonblack defendants whom it had prosecuted for crack offenses. All 11, however, were members of other racial or ethnic minorities. The District Court was authorized to draw adverse inferences from the Government's inability to produce a single example of a white defendant, especially when the very purpose of its exercise was to allay the court's concerns about the evidence of racially selective prosecutions. As another court has said: "Statistics are not, of course, the whole answer, but nothing is as emphatic as zero. . . ."⁴⁰

Nevertheless, the Court did not draw any inference of discrimination, did not remand for further findings of fact, and did not permit the district court judge to continue an inquiry which, based upon her experience, she thought merited.⁴¹ Instead the Court concluded that, without discovery, and without permitting discovery, the defendants would have to produce similarly situated white defendants.⁴² In other words, no inference of discrimination was available in a situation in which *only* minorities were prosecuted in federal courts for crack related offenses.

In *Hernandez v. New York*,⁴³ the prosecutor excluded prospective jurors because they were bilingual, that is they spoke both English and Spanish, from a trial in which many of the witnesses would speak only Spanish and, therefore, unlike jurors who spoke no Spanish, bilingual jurors would actually be able to understand the witnesses without the benefit of a translator.⁴⁴ I'm sure it seems horrible to imagine jurors who can actually understand what the witness is saying. That is not usually a ground for disqualification in other trials. And it correlated very strongly with Hispanic origins. Nevertheless, the U.S. Supreme Court decided that it did not look like a pretext and did not raise an inference of discrimination in empaneling the jury.⁴⁵

39. *Id.* at 479-81.

40. *Id.* at 482 n.6 (Stevens, J., dissenting) (citations omitted).

41. *Id.* at 470.

42. *Id.* at 465-66, 469.

43. *Hernandez v. New York*, 500 U.S. 352 (1991).

44. *Id.* at 355-56.

45. *Id.* at 375.

In *Wards Cove Packing Co. v. Atonio*,⁴⁶ the Court saw no inference of discrimination in a completely segregated workforce in which white, Filipino and Alaska Native workers were separately recruited, housed, and fed for different jobs in different buildings at the same locations.⁴⁷ Stevens, joined by Brennan, Marshall and Blackmun commented in dissent that the:

Evidence included this response in 1971 by a foreman to a college student's inquiry about cannery employment: "We are not in a position to take many young fellows to our Bristol Bay canneries as they do not have the background for our type of employees. Our cannery labor is either Eskimo or Filipino and we do not have the facilities to mix others with these groups."⁴⁸ (citations omitted).

Congress fought back with the Civil Rights Act of 1991, insisting that the Court change its treatment of discriminatory effects and burdens of proof,⁴⁹ but the Court's handling of the redistricting and other cases discussed above promptly demonstrated the Court's control over the agenda and the findings.

Despite its claim of skepticism, consistency and congruence, the Court draws very different inferences about whites and blacks, whitewashing one and tarring the other. Indeed, the Rehnquist Court's rejection of affirmative action takes on a very different cast in view of its treatment of discrimination claims under the Fourteenth Amendment. It has indeed been a rejection not just of affirmative action but of black claims in almost any guise.

C. A Fourteenth Amendment for Other Friends of the Rehnquist Court

The multiplicity of Fourteenth Amendments in the hands of the Rehnquist Court goes further than the black versus white distinction obvious in its decisions.

One of the sharpest turnarounds in the Court's equal protection rules was in *Bush v. Gore*.⁵⁰ Although the Court has insisted that discrimination is defined by intentions,⁵¹ the Court dispensed with intent

46. *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989), *aff'd in part and rev'd in part*, *Antonio v. Wards Cove Packing Co.*, 275 F.3d 797 (9th Cir. 1993).

47. *Id.* at 647-52.

48. *Id.* at 663 n.4 (Stevens, J., dissenting) (citations omitted).

49. See Joan Biskupic, "Provisions: The Civil Rights Act of 1991," CONG. Q. WKLY. REP. Dec. 7, 1991, at 3620.

50. *Bush v. Gore*, 531 U.S. 98 (2000).

51. *Hunt v. Cromartie*, 526 U.S. 541, 558 (1999) (Stevens, J., concurring); *M.L.B. v. S.L.J.*, 519 U.S. 102, 135-36 (1996) (Thomas, J., dissenting); *Bush v. Vera*, 517 U.S. 952, 1001 (1996)

for George Bush's complaint about Florida election procedures.

And there is no intent test with respect to discriminatory police stops. The Court held in *Whren v. United States*⁵² that the subjective intent of a policeman or trooper is irrelevant to the legality of a decision to stop motorists.⁵³ It drove that point home in *Atwater v. City of Lago Vista*⁵⁴ in which the Court held that the arresting officer's obvious misbehavior was not an extraordinary circumstance which justifies calling the arrest into question.⁵⁵ In *Atwater*, a policeman arrested a young woman for not wearing her seatbelt even though the offense does not carry any jail time, even though he nearly stranded several young children as he prepared to haul her off and even though the arrest was in obvious response to a personal animus against Mrs. Atwater.⁵⁶ In other words, intentional misuse of public power is not a cause for review of arrests.

D. A Fourteenth Amendment for States

There is also a separate Fourteenth Amendment for states. Part of the special rules for states involve unwritten exceptions in the rules governing states. The Rehnquist Court insists that rights claimed against the state or federal governments have to be explicit, but its rewriting of congressional power has been based on the unwritten concept of federalism.

In *City of Boerne v. Flores*,⁵⁷ the Court wrote that "[b]road as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA [the Religious Freedom Restoration Act]

(Thomas, J., joined by Scalia, J., concurring in the judgment); *Miller v. Johnson*, 515 U.S. 900, 916 (1995); *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 540 (1993); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 272, 275 (1993); *Hernandez v. New York*, 500 U.S. 352, 360 (1991) (Kennedy, J., plurality opinion); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 684 (Powell, J., concurring in part and dissenting in part); *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987); *Maine v. Moulton*, 474 U.S. 159, 188 (1985) (Burger, C.J., dissenting); *Wayte v. United States*, 470 U.S. 598, 610 (1985); *Crawford v. Bd. of Educ.*, 458 U.S. 527, 552 (1982) (Marshall, J., dissenting); *Washington v. Seattle Sch. Dist.*, 458 U.S. 457, 471 (1982); *Harris v. McRae*, 448 U.S. 297, 323 (1980); *City of Mobile v. Bolden*, 446 U.S. 55, 71 (1980) (Stewart, J., plurality opinion); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 510 (1979) (Rehnquist, J., dissenting); *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

52. *Whren v. U.S.*, 517 U.S. 806 (1996).

53. *Id.* at 813.

54. *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

55. Compare *id.* at 360 (O'Connor, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting), with *Whren*, 517 U.S. 806.

56. *Atwater*, 532 U.S. at 323-24.

57. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

contradicts vital principles necessary to maintain separation of powers and the federal balance.”⁵⁸

*U.S. v. Morrison*⁵⁹ (striking the Violence Against Women Act⁶⁰ or “VAWA”), based on some explanatory language in *United States v. Lopez*⁶¹ (striking the Gun Free Schools Act),⁶² held that only economic activity affecting interstate commerce fell within congressional power. The two cases relied on the Court’s conception of a federal system in which state police powers create an enclave in which the federal government may not trench even in the exercise of its federal powers and purposes.⁶³ Justice Souter, in dissent, commented that “the majority [did not] fail[] to see causal connections in an integrated economic world,”⁶⁴ that is, the impact of violence on interstate economic activity. Under traditional doctrine, stemming from the work of John Marshall, congressional power extended to the effects of intrastate activity on interstate commerce. The restriction to the effects of economic activity was not logically required by the Constitution or prior interpretation. “The legitimacy of the Court’s current emphasis on the noncommercial nature of regulated activity, then, does not turn on any logic serving the text of the Commerce Clause or on the realism of the majority’s view of the national economy.”⁶⁵ But

in the minds of the majority there is a new animating theory that makes categorical formalism seem useful again. . . . It is the instrument by which assertions of national power are to be limited in favor of preserving a supposedly discernible, proper sphere of state autonomy to legislate or refrain from legislating as the individual States see fit.⁶⁶

Similarly sovereign immunity is entirely non-textual. Indeed there is good reason to believe that the federal question provision of Article III was intended to allow enforcement of federal law against nonconsenting

58. *Id.* at 536.

59. *U.S. v. Morrison*, 529 U.S. 598 (2000).

60. Violence Against Women Act of 1994, Pub. L. No. 107-249, 108 Stat. 1902 (codified as amended in scattered sections of 16 U.S.C., 18 U.S.C., and 42 U.S.C.) (42 U.S.C. § 13981 was held unconstitutional in *Morrison*).

61. *U.S. v. Lopez*, 514 U.S. 549 (1995).

62. Gun-Free Schools Act, 20 U.S.C. § 7151 (2002).

63. *Morrison*, 529 U.S. at 611. “Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur.” *Id.* (quoting *Lopez*, 514 U.S. at 577).

64. *Id.* at 644 (Souter, J., dissenting).

65. *Id.* at 645.

66. *Id.* at 644-45.

states.⁶⁷ Moreover, the precise language of the Eleventh Amendment is written in such a way that it has no textual implications for federal question jurisdiction even while barring diversity jurisdiction in suits against a state. The Court eventually conceded that its sovereign immunity and Eleventh Amendment rules were not required by the text of the Constitution and resorted to general principles of federalism instead.⁶⁸ Nevertheless, the Court has significantly narrowed federal power over the states on the basis of the extra-constitutional rule of sovereign immunity which it includes in its equally extra-constitutional spirit of federalism.

Most recently, in *Federal Maritime Comm'n v. South Carolina Ports Authority*,⁶⁹ the Court held that the Federal Maritime Commission cannot adjudicate a private party's complaint against a nonconsenting State because of the state's sovereign immunity.⁷⁰ In *Board of Trustees of the University of Alabama v. Garrett*,⁷¹ it held that state employees could not sue in federal court for money damages for violation Title I of the ADA.⁷² *Alden v. Maine*⁷³ held that a state could not be bound by federal law even in a suit for money damages in its own courts.⁷⁴ In

67. See *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247-302 (1985) (Brennan, J., dissenting).

68. *Alden v. Maine*, 527 U.S. 706, 712-13 (1999). See also *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 122 S. Ct. 1864, 1871 (2002) ("[T]he Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity." Cf. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition of our constitutional structure which it confirms"); *Seminole Tribe v. Florida*, 517 U.S. 44, 54 (1996) (same). In *Alden v. Maine*, the Court wrote:

The Eleventh Amendment makes explicit reference to the States' immunity from suits "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." We have, as a result, sometimes referred to the States' immunity from suit as "Eleventh Amendment immunity." The phrase is convenient shorthand but something of a misnomer, for the sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

Alden, 527 U.S. at 712-13 (citations omitted).

69. *Fed. Mar. Comm'n v. S.C. Ports Auth.*, 535 U.S. 743 (2002).

70. *Id.* at 1874.

71. *Bd. Tr. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

72. *Id.* at 374.

73. *Alden*, 527 U.S. 706 (1999).

74. *Id.* at 712.

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.,⁷⁵ and *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*,⁷⁶ the Court held that even a claim under the patents and copyrights clause of Article I, over which Congress has plenary powers, could not be maintained against a state defendant without state waiver,⁷⁷ and it held that Congress could not abrogate the defense under its Article I power⁷⁸ nor could the courts infer waiver from state activities governed by the patents and copyrights clause.⁷⁹ In effect the states can decide whether to comply free of any enforcement mechanism, subject only to the promise that if the situation gets sufficiently serious Congress might some day have power to require compliance under the Due Process clause of the Fourteenth Amendment for violation of rights protected under the Fourteenth Amendment.

In those ways the Court has carved out a special exception for states under the Fourteenth Amendment.

E. A Fourteenth Amendment for Business

There is a Fourteenth Amendment for business. For example, the Court has trouble with too much but not too little damages. There is no indication that the Court has any problem with a cap on damages.

In *Correctional Services Corp. v. Malesko*,⁸⁰ the Court discussed at length the implication of a constitutional claim for damages for the violation of rights:

In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971), we recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights.⁸¹

The Court noted that it had limited *Bivens* to suits against individual officers despite the insufficient remedies that would be available to *Bivens* plaintiffs.⁸² Lack of another remedy was insufficient to justify a

75. *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) [hereinafter *Coll. Sav. Bank*].

76. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) [hereinafter *Fla. Prepaid Bd.*].

77. *Coll. Sav. Bank*, 527 U.S. at 672-75.

78. *Fla. Prepaid Bd.*, 527 U.S. at 647-48.

79. *Coll. Sav. Bank*, 527 U.S. at 675-87.

80. *Corr. Services Corp. v. Makesko*, 534 U.S. 61 (2001).

81. *Id.* at 66.

82. *Id.* at 67-68.

In the decade following *Bivens*, we recognized an implied damages remedy under the

Bivens action.⁸³ The Court had not extended *Bivens* since 1979, under then Chief Justice Burger.⁸⁴ The Court noted that it had recently concluded that extending a *Bivens* remedy to the agency involved would weaken the aim of targeting the responsible individuals although it would help to make plaintiffs whole.⁸⁵ *Bivens* had thus been limited to

Due Process Clause of the Fifth Amendment and the Cruel and Unusual Punishment Clause of the Eighth Amendment. In both *Davis* and *Carlson*, we applied the core holding of *Bivens*, recognizing in limited circumstances a claim for money damages against federal officers who abuse their constitutional authority. In *Davis*, we inferred a new right of action chiefly because the plaintiff lacked any other remedy for the alleged constitutional deprivation. In *Carlson*, we inferred a right of action against individual prison officials where the plaintiff's only alternative was a Federal Tort Claims Act (FTCA) claim against the United States. We reasoned that the threat of suit against the United States was insufficient to deter the unconstitutional acts of individuals. We also found it "crystal clear" that Congress intended the FTCA and *Bivens* to serve as "parallel" and "complementary" sources of liability.

Id. (citations omitted).

83. *Id.* at 68-69.

In *Schweiker v. Chilicky*, we declined to infer a damages action against individual government employees alleged to have violated due process in their handling of Social Security applications. We observed that our "decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." In light of these decisions, we noted that "the absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." We therefore rejected the claim that a *Bivens* remedy should be implied simply for want of any other means for challenging a constitutional deprivation in federal court. It did not matter, for example, that "the creation of a *Bivens* remedy would obviously offer the prospect of relief for injuries that must now go unredressed." So long as the plaintiff had an avenue for some redress, bedrock principles of separation of powers foreclosed judicial imposition of a new substantive liability.

Id. (citations omitted).

84. *Corr. Services Corp.*, 534 U.S. at 68.

Since *Carlson* we have consistently refused to extend *Bivens* liability to any new context or new category of defendants. In *Bush v. Lucas*, we declined to create a *Bivens* remedy against individual Government officials for a First Amendment violation arising in the context of federal employment. Although the plaintiff had no opportunity to fully remedy the constitutional violation, we held that administrative review mechanisms crafted by Congress provided meaningful redress and thereby foreclosed the need to fashion a new, judicially crafted cause of action. We further recognized Congress' institutional competence in crafting appropriate relief for aggrieved federal employees as a "special factor counseling hesitation in the creation of a new remedy." We have reached a similar result in the military context, even where the defendants were alleged to have been civilian personnel.

Id. (citations omitted).

85. *Id.* at 69-70.

Most recently, in *FDIC v. Meyer*, we unanimously declined an invitation to extend *Bivens* to permit suit against a federal agency, even though the agency—because Congress had waived sovereign immunity—was otherwise amenable to suit. Our opinion emphasized that "the purpose of *Bivens* is to deter *the officer*," not the agency.

the specific facts of the two succeeding Burger Court extensions.⁸⁶ The purpose is individual deterrence, not agency action,⁸⁷ compensation, or discouraging future harms and the Rehnquist Court will not undertake those objectives.⁸⁸

Failure to provide adequate remedies does not appear to be a

We reasoned that if given the choice, plaintiffs would sue a federal agency instead of an individual who could assert qualified immunity as an affirmative defense. To the extent aggrieved parties had less incentive to bring a damages claim against individuals, “the deterrent effects of the *Bivens* remedy would be lost.” Accordingly, to allow a *Bivens* claim against federal agencies “would mean the evisceration of the *Bivens* remedy, rather than its extension.” We noted further that “special factors” counseled hesitation in light of the “potentially enormous financial burden” that agency liability would entail.

Id. (citations omitted).

86. *Id.* at 70.

From this discussion, it is clear that the claim urged by respondent is fundamentally different from anything recognized in *Bivens* or subsequent cases. In 30 years of *Bivens* jurisprudence we have extended its holding only twice, to provide an otherwise nonexistent cause of action against individual officers alleged to have acted unconstitutionally, or to provide a cause of action for a plaintiff who lacked any alternative remedy for harms caused by an individual officer’s unconstitutional conduct. Where such circumstances are not present, we have consistently rejected invitations to extend *Bivens*, often for reasons that foreclose its extension here.

Id.

87. *Corr. Services Corp.*, 534 U.S. at 70-71.

The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations. *Meyer* made clear that the threat of litigation and liability will adequately deter federal officers for *Bivens* purposes no matter that they may enjoy qualified immunity are indemnified by the employing agency or entity or are acting pursuant to an entity’s policy. *Meyer* also made clear that the threat of suit against an individual’s employer was not the kind of deterrence contemplated by *Bivens*. . . . This case is, in every meaningful sense, the same. For if a corporate defendant is available for suit, claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury. On the logic of *Meyer*, inferring a constitutional tort remedy against a private entity like CSC is therefore foreclosed.

Id. (citations omitted).

88. *Id.* at 71.

Respondent claims that even under *Meyer*’s deterrence rationale, implying a suit against private corporations acting under color of federal law is still necessary to advance the core deterrence purpose of *Bivens*. He argues that because corporations respond to market pressures and make decisions without regard to constitutional obligations, requiring payment for the constitutional harms they commit is the best way to discourage future harms. That may be so, but it has no relevance to *Bivens*, which is concerned solely with deterring the unconstitutional acts of individual officers. If deterring the conduct of a policy-making entity was the purpose of *Bivens*, then *Meyer* would have implied a damages remedy against the Federal Deposit Insurance Corporation; it was after all an agency policy that led to *Meyer*’s constitutional deprivation. But *Bivens* from its inception has been based not on that premise, but on the deterrence of individual officers who commit unconstitutional acts.

Id. (citations omitted).

constitutional issue.⁸⁹

But too much damages is a constitutional issue.

In *Pacific Mutual Life Ins. Co. v. Haslip*,⁹⁰ the Court held that the Alabama procedure for awarding punitive damages complied with due process.⁹¹ The jury instructions combined with an opportunity for review were sufficient.⁹² In *Honda Motor Co. v. Oberg*,⁹³ the Court required judicial review of the size of punitive damage awards or an equivalently protective substitute procedure.⁹⁴ In *BMW of North America v. Gore*,⁹⁵ the Court held that the amount of the award was so grossly excessive that the defendant could not have had fair notice of the liability and therefore it violated the Due Process Clause regardless of other procedural protections.⁹⁶ And in *Cooper Indus. v. Leatherman Tool Group, Inc.*,⁹⁷ the Court overturned an award of punitive damages and required federal courts of appeals to review the constitutionality of punitive damage awards de novo rather than by the abuse of discretion standard.⁹⁸

III. CONCLUSION

The argument has focused above on areas in which comparable claims have been treated differently depending on the identities of the parties and the kinds of parties generally involved in those particular cases. Sometimes the law changes. Sometimes the burden of proof changes. Sometimes inferences drawn from similar proof reverses. Equal protection has been reduced to a mirage. John Bingham is writhing in his grave.

89. Lack of a sufficient damage remedy comes up in a variety of contexts. See *Dooley v. Korean Air Lines Co.*, 524 U.S. 116 (1998) (applying the limitations of the Death on the High Seas Act); *Gasperini v. Ctr. for Humanities*, 518 U.S. 415 (1996) (remanding for application of New York's statutory cap on damages); *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217 (1996) (applying the restrictions of the Warsaw Convention). See also *Alden v. Maine*, 527 U.S. 706 (1999), *Coll. Sav. Bank*, 527 U.S. 666 (1999), and *Fla. Prepaid Bd.*, 527 U.S. 627 (1999) (rendering a number of federal statutes unenforceable).

90. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *But see id.* at 44 (O'Connor, J., dissenting).

91. *Id.* at 19.

92. *Id.* at 19-22.

93. *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994).

94. *Id.* at 431-36.

95. *BMW of N. Am. v. Gore*, 517 U.S. 559 (1996).

96. *Id.* at 585-86.

97. *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

98. *Id.* at 431.