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Absolute Official Immunity in Constitutional Litigation

Michael L. Wells

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Carter Professor, University of Georgia Law School. The author thanks Dan Coenen for helpful comments on a draft of this Article.

ABSOLUTE OFFICIAL IMMUNITY IN CONSTITUTIONAL LITIGATION

Michael L. Wells[*]

Absolute official immunity blocks recovery of damages for constitutional violations committed by legislators, judges, prosecutors, and witnesses, no matter how egregious the violation. Under the Supreme Court's "functional approach," application of the doctrine does not turn on the officer's title, but on function. Social workers, parole boards and others enjoy official immunity when they engage in legislative, adjudicative, or prosecutorial functions. The policy underlying absolute immunity is that constitutional litigation will produce unacceptable social costs, mainly by discouraging officials from acting boldly and effectively in the public interest. This Article criticizes the Court's exclusive focus on function. While it may be necessary to sacrifice the vindication of constitutional rights and deterrence of violations in some circumstances, the function-based approach gives too much weight to the costs of constitutional remedies and pays too little attention to the vindication and deterrence benefits. Shifting from function to a more nuanced cost-benefit methodology would make good sense—and all the more so because the re-framing would support the recognition of multiple exceptions to present-day absolute-immunity rules, thus better serving the overarching remedial goals of constitutional tort law.

[*] Carter Professor, University of Georgia Law School. The author thanks Dan Coenen for helpful comments on a draft of this Article.

TABLE OF CONTENTS

I. INTRODUCTION

Official immunity often blocks recovery of damages for constitutional violations, even when the plaintiff can prove breach, damages, and a causal link. In *Pierson v. Ray*,[1] the leading modern official immunity case, the Supreme Court divided official acts into two broad categories. Some officers may assert qualified immunity, while others are entitled to an even more protective absolute immunity.[2] Qualified immunity protects officers engaged in administrative and executive functions, including cabinet officials,[3] prison officials,[4] presidential advisors,[5] state governors,[6] police officers,[7] and school administrators.[8] The immunity is "qualified" in the sense that it is lost when the officer has violated a "clearly established" right.[9] Legislators,[10] judges,[11] prosecutors,[12] and

[1] 386 U.S. 547, 555 (1967).

[2] *Id.*

[3] *See* Butz v. Economou, 438 U.S. 478, 507 (1978) (holding that cabinet officials are entitled to qualified immunity); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 809 (1982) (noting the extension of qualified immunity to cabinet officials).

[4] *See* Procunier v. Navarette, 434 U.S. 555, 561 (1978) (finding that prison officials can rely on qualified immunity).

[5] *See* Harlow v. Fitzgerald, 457 U.S. 800, 809–13 (1982) (determining that presidential aides could rely on a defense of qualified immunity).

[6] *See* Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974) (providing a qualified immunity defense to state governors).

[7] *See Pierson*, 386 U.S. at 555 (finding that qualified immunity applied to police officers).

[8] *See* Wood v. Strickland, 420 U.S. 308, 321–22 (1975) (holding that school administrators are entitled to qualified immunity).

[9] Harlow v. Fitzgerald, 457 U.S. 800, 818–19 (1982). In practice, qualified immunity as currently applied has provoked considerable criticism. *See, e.g.*, Jessop v. City of Fresno, 936 F.3d 937, 940 (9th Cir. 2019) (explaining that the qualified immunity analysis first requires a finding of constitutional violation); *see also* Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1799 (2018) (arguing that qualified immunity should be abolished).

[10] *See* Bogan v. Scott-Harris, 523 U.S. 44, 48–54 (1998) (providing legislators absolute immunity for legislative acts).

[11] *See* Mireles v. Waco, 502 U.S. 9, 9–11 (1991) (per curiam) (holding that judges retain absolute judicial immunity for all judicial acts).

[12] *See* Van de Kamp v. Goldstein, 555 U.S. 335, 344–45 (2009) (finding that prosecutors enjoy absolute immunity for all prosecutorial actions that are not purely administrative).

witnesses[13] enjoy "absolute" immunity, even when they act maliciously and violate clear rules.[14]

The absolute/qualified distinction is not based on job title. The Court applies a function-based approach, in which the first step of the official immunity analysis, and sometimes the last, is to characterize the type of act taken by the official.[15] For example, absolute immunity applies to a prosecutor's decision to conduct the criminal litigation, but not to his actions in the course of a criminal investigation.[16] The function-based approach applies to officers who exercise the relevant function, no matter what position they hold.[17] Absolute immunity does not apply to a judge who violates rights when acting as an administrator,[18] but it may protect a parole board member from liability for adjudicating a prisoner's request for early release.[19]

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[13] *See* Rehberg v. Paulk, 566 U.S. 356, 366–67 (2012) (extending judicial immunity to federal grand jury witnesses).

[14] *See, e.g.*, John C. Jeffries, Jr., *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 209–31 (2013) [hereinafter Jeffries, *The Liability Rule*] (criticizing the current scope of absolute immunity); *see also, e.g.*, Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 54 (arguing that the scope of prosecutorial immunity is overbroad); JOHN C. JEFFRIES, JR., PAMELA S. KARLAN, PETER W. LOW & GEORGE A. RUTHERGLEN, CIVIL RIGHTS ACTIONS: ENFORCING THE CONSTITUTION 88–89 (W. Acad. Publ'g 4th ed. 2018) [hereinafter JEFFRIES ET AL., CIVIL RIGHTS ACTIONS] (collecting sources critical of absolute immunity).

[15] The Court often refers to this approach as "functional." Because it applies whenever the officer is exercising the relevant function, I often call it a "function-based" approach. *See, e.g.*, *Rehberg*, 566 U.S. at 363 (discussing the "functional approach" in connection with witness immunity); Burns v. Reed, 500 U.S. 478, 486 (1991) (distinguishing between prosecutorial functions, for which absolute immunity is available, and investigatory acts, for which prosecutors may assert only qualified immunity); *see also* Sup. Ct. of Va. v. Consumers Union of the U.S., 446 U.S. 719, 734 (1980) (holding that the Virginia Supreme Court not only adjudicates but also sometimes acts as a legislature, and sometimes as a prosecutor, in connection with the promulgation and enforcement of bar disciplinary rules).

[16] *Compare* Imbler v. Pachtman, 424 U.S. 409, 424–27 (1976) (describing why absolute immunity applies to a prosecutor acting within the scope of his duties in initiating and pursuing criminal prosecution), *with* Burns v. Reed, 500 U.S. 478, 486 (1991) (noting that the Court in *Imbler* declined to decide whether absolute immunity extended to a prosecutor's investigative actions).

[17] *See* Forrester v. White, 484 U.S. 219, 227 (1988) ("[I]mmunity is justified and defined by the *functions* it protects and serves, not by the person to whom it attaches.").

[18] *See id.* at 230 (finding that administrative decisions are not regarded as judicial acts and holding absolute immunity did not apply to a judge sued for a nonjudicial act).

[19] *See, e.g.*, Brown v. Cal. Dep't of Corr., 554 F.3d 747, 751 (9th Cir. 2009) (holding that a parole officer who advocated for a prisoner's continued imprisonment was entitled to absolute immunity); Figg v. Russell, 433 F.3d 593, 598 (8th Cir. 2006) (finding absolute immunity

Some critics of official immunity direct their fire mainly at the qualified version, probably because it applies to more officials and is more heavily litigated.[20] Sometimes the thrust of the critique is that official immunity should be jettisoned altogether, because vindication and deterrence should prevail throughout constitutional tort law.[21] Ever since *Pierson*, however, the Court has rejected that step.[22] The leading case on the aims and limits of official immunity is *Harlow v. Fitzgerald*.[23] Under the *Harlow* framework, constitutional tort liability serves to vindicate constitutional rights and deter violations.[24] Official immunity is a necessary counterweight because constitutional tort suits give rise to "social costs," such as the concern that officials will exercise too much caution when they fear liability for their actions, to the detriment of

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applied to a parole board's actions regarding a prisoner's parole and suspended sentence); *see also* Tobey v. Chibucos, 890 F.3d 634, 650 (7th Cir. 2018) (finding that absolute immunity applies to probation officers engaged in quasi-judicial functions).

[20] *See generally* Samuel L. Bray, *Foreword: The Future of Qualified Immunity*, 93 NOTRE DAME. L. REV. 1793 (2018) (providing critiques of qualified immunity).

[21] *See, e.g.*, Donald L. Doernberg, *Taking Supremacy Seriously: The Contrariety of Official Immunities*, 80 FORDHAM L. REV. 443, 444 (2011) (arguing that the Court "has led itself astray with its immunity doctrines," which "condone and protect official disobedience to constitutional commands establishing individual rights" thus negating "constitutional supremacy" and undermining "the rule of law"); *see also* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CAL. L. REV. 933, 937–38 & n.13 (2019) [hereinafter Fallon, *Bidding Farewell*] (citing sources). Note, however, that Fallon disagrees with that view. *See id.* at 938 ("Sensibly, our tradition has never held out such a promise.").

[22] Professor Fallon argues, persuasively, that abolition of official immunity would have unintended and (from the perspective of enforcement of constitutional norms) destructive consequences, because the "social costs of rights and causes of action that have led the courts to develop immunity doctrines in our actual world would impel other, compensating changes in the law if immunity were abolished," including changes in "the nature and scope of causes of action to recover damages for constitutional violations." Richard H. Fallon, Jr., *Asking the Right Questions About Officer Immunity*, 80 FORDHAM L. REV. 479, 486 (2011) [hereinafter Fallon, *Asking the Right Questions*].

[23] 457 U.S. 800, 814 (1982).

[24] *See, e.g.*, Forrester v. White, 484 U.S. 219, 223 (1988) ("To the extent that the threat of liability encourages [government] officials to carry out their duties in a lawful and appropriate manner, and to pay their victims when they do not, it accomplishes exactly what it should."); Memphis Cmty. School Dist. v. Stachura, 477 U.S. 299, 306–07 (1986) (discussing the important purposes compensation and deterrence have in constitutional tort liability); *Harlow*, 457 U.S. at 813–14 ("In situations of abuse of office, an action for damages may offer the only realistic avenue of constitutional guarantees."); Robertson v. Wegmann, 436 U.S. 584, 590–91 (1978) ("The policies underlying § 1983 include compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law.").

effective government. Broadly conceived, the goal of official immunity doctrine is to achieve an "accommodation" between the conflicting values.[25]

The absolute version of official immunity raises a distinct set of issues. Absolute immunity is "strong medicine," which frustrates the remedial goals of § 1983 litigation whenever a court, applying the function-based approach, concludes that the act falls within one of the specially protected categories.[26] The Court built its absolute immunity doctrine in three early cases: *Tenney v. Brandhove*,[27] decided in 1951, *Pierson v. Ray*,[28] decided in 1967, and *Imbler v. Pachtman*,[29] decided in 1976. Thus the doctrine had crystallized six years before *Harlow*, a 1982 case. Within *Harlow*'s cost-benefit framework, however, absolute immunity seems to be justified only when the costs of constitutional litigation are especially great, or the vindication and deterrence benefits are especially low.[30]

The thesis of this Article is that the function-based approach does not reliably identify situations in which the cost-benefit calculation would justify absolute immunity. In this sense, the function-based approach is inadequate to the task it is asked to perform.[31] Under the Court's doctrine, absolute immunity bars recovery once a court determines that the officer's function is legislative, judicial, prosecutorial, or testimonial.[32] Yet liability is justified for some constitutional torts committed in the course of those functions when

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[25] *Harlow*, 457 U.S. at 814.

[26] *See Forrester*, 484 U.S. at 230 (characterizing absolute immunity as "strong medicine").

[27] *See* Tenney v. Brandhove, 341 U.S. 367, 367 (1951) (holding that legislators have full immunity from suits under 8 U.S.C. §§ 43 and 47 for acts committed within the scope of their duties).

[28] *See* Pierson v. Ray, 386 U.S. 547, 553–55 (1967) (holding that judges have full immunity from suits under 42 U.S.C. § 1983 for acts committed within the scope of their duties).

[29] *See* Imbler v. Pachtman, 424 U.S. 409, 410 (1976) (holding that state prosecutors have full immunity from suits under 42 U.S.C. § 1983 resulting from acts within the scope of their duties).

[30] *See Harlow*, 457 U.S. at 814 (noting the importance of the vindication of constitutional guarantees, but also the costs attendant to the denial of absolute immunity to public officers).

[31] Critics of absolute immunity doctrine sometimes endorse the functional approach, though with reservations. John Jeffries, for example, states that "all immunities should rest on a functional foundation." Jeffries, *The Liability Rule*, *supra* note 14, at 221. In order to achieve analytical clarity, however, he also finds it necessary to acknowledge that "functional" is an unsatisfactory term, which "might refer to the nature of the act . . . or it might refer to a purposive inquiry into whether the immunity serves the reasons behind it." *Id.* at 217.

[32] *See supra* notes 10–14 and accompanying text.

the benefits of § 1983 litigation are high enough to override the costs. Standing alone, function is a clumsy tool for identifying situations in which the costs of immunity are lower than the benefits. To identify those cases, the official immunity doctrine should be revised. And to align with the *Harlow* framework, the doctrine should diminish the role of function and focus directly on costs and benefits of constitutional tort litigation in a given context. Regardless of function, absolute immunity should apply only when the social costs of constitutional tort override the benefits.

Part II describes both the "absolute" and "qualified" prongs of official immunity doctrine. Part III identifies the advantages of a cost-benefit model of official immunity over the Supreme Court's strictly function-based approach. Part IV argues that moving away from strict adherence to the function-based approach, to a focus on costs and benefits, would more fully illuminate the issues that arise in official immunity cases and would also supply grounds for limiting the scope of the current absolute immunity doctrine. Part V suggests some reforms of current doctrine in line with this approach.

II. OFFICIAL IMMUNITY IN THE SUPREME COURT

Under 42 U.S.C. § 1983, victims of constitutional violations may sue "every person" who violates federal rights "under color of" state law.[33] The statute was first enacted as Section 1 of the Civil Rights Act of 1871, but "under color of"—a term left undefined in the statute—was interpreted narrowly for many decades and the statute was rarely used for ninety years.[34] In *Monroe v. Pape*,[35] the Supreme Court read "under color of" to include unconstitutional

[33] 42 U.S.C. § 1983.

[34] *See* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 986 (7th ed. 2015) (noting the statute "spawned relatively few cases for many decades" because its "language partly tracks the wording of the Fourteenth Amendment's Privileges or Immunities Clause"); Louise Weinberg, *The Monroe Mystery Solved: Beyond the "Unhappy History" Theory of Civil Rights Litigation*, 1991 BYU L. REV. 737, 742 (1991) (describing civil rights filings as "sparse" until the *Monroe* case in 1961).

[35] *See* Monroe v. Pape, 365 U.S. 167, 183 (1961) (stating that "[i]t is no answer that the State has a law which if enforced would give relief" as "[t]he federal remedy is supplementary to the state remedy").

acts by officers even if state law provided a remedy.[36] That holding, coupled with the Warren Court's broad reading of the substantive guarantees of the Bill of Rights and the Fourteenth Amendment, contributed to an exponential increase in § 1983 litigation.[37]

A. QUALIFIED IMMUNITY

In *Pierson v. Ray*,[38] a near-unanimous 1967 case, the Court authorized qualified immunity for police officers and absolute immunity for judges.[39] The case arose out of an incident that occurred during the Civil Rights Movement of the 1960s, in which Mississippi police officers had arrested civil rights workers who had refused to leave a segregated bus terminal.[40] Following a bench trial, a Mississippi judge convicted them of misdemeanors under a "breach of the peace" statute.[41] A few years later, in *Thomas v. Mississippi*, the Supreme Court overturned convictions under the Mississippi statute for similar conduct.[42] Armed with the *Thomas* holding, the *Pierson* civil rights workers sued the police officers and the judge for damages under § 1983.[43] Citing both history and basic fairness, the Court in *Pierson* ruled that the officers were immune so long as they acted in "good faith" and with "probable cause."[44] In the coming years, the Court adopted a similar rule for prison

[36] For a discussion of the background of the statute, the Court's opinion, and early post-*Monroe* caselaw, see generally Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965).

[37] *See* FALLON ET AL., *supra* note 34, at 994–95 (stating that § 1983 litigation "has grown rapidly since Monroe" and arguing that "the large increase in civil rights cases after Monroe was caused . . . by the Warren Court's expansion of protections afforded by the Bill of Rights").

[38] Pierson v. Ray, 386 U.S. 547, 551–57 (1967).

[39] Justice Douglas dissented, but only to the Court's ruling in favor of absolute judicial immunity. *Id.* at 558–67.

[40] *See id.* at 547 (stating that a group of white and Black clergymen "attempted to use a segregated interstate bus terminal waiting room in Jackson, Mississippi" in order to "promote racial integration").

[41] *Id.*

[42] 380 U.S. 524 (1965).

[43] *Pierson*, 386 U.S. at 549–50.

[44] *See id.* at 557 (holding that "the defense of good faith and probable cause" is available).

guards,[45] state governors,[46] and U.S. executive branch officers.[47] The next step came in *Wood v. Strickland*,[48] in which high school students sued school board members for suspending them without due process. The Court adopted a two-pronged test: "[A] school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took . . . would violate the constitutional rights of the students affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student."[49] *Wood*'s focus on the officers' duties as school board members is typical of the early cases.[50]

Harlow v. Fitzgerald[51] altered this approach in two ways. First, it dropped the officer-by-officer approach in favor of a single rule for all officers who exercise discretion in executive or administrative functions.[52] Second, it justified the rule not by fairness to the officer or historical antecedents, but by the need to minimize the "social costs" of constitutional tort litigation.[53] That need, in turn, should be balanced against the plaintiff's interest in vindicating rights and deterring violations.[54] Across all administrative and executive functions, the "accommodation" of competing interests could best be achieved by immunity unless the officer violated "clearly established" constitutional rights "of which a reasonable person would have known."[55] Later cases made clear that this is an objective test that does not depend on the subjective beliefs of the

[45] *See* Procunier v. Navarette, 434 U.S. 555, 562 (1978) (holding that qualified immunity applies to prison guards).

[46] *See* Scheuer v. Rhodes, 416 U.S. 232, 247–49 (1974) (holding that qualified immunity covered the actions of state governors).

[47] *See* Butz v. Economou, 438 U.S. 478, 524–28 (1978) (holding that qualified immunity covered the actions of executive officers).

[48] 420 U.S. 308, 309–310 (1975).

[49] *Id.* at 322.

[50] *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232, 247–48 (1974) (holding that officers must have a duty).

[51] 457 U.S. 800 (1982).

[52] This point is made explicitly in Justice Brennan's concurring opinion. *See id.* at 821 (Brennan, J., concurring) (explaining that the Court's new standard applies "across the board").

[53] *See id.* at 814 (finding that "societal costs" are present throughout litigation).

[54] *See id.* at 813–14 (finding that the Court must strike an inevitable balance).

[55] *Id.* at 818.

officer.[56] The contours of this doctrine and its proper application are hotly contested issues, but they are not the concern of this Article.

B. ABSOLUTE IMMUNITY

Qualified immunity is the default rule, with absolute immunity available only to officers engaged in legislative, judicial, prosecutorial, or testimonial functions.[57] Availability of absolute immunity does not depend on an officer's title.[58] The officer's function determines whether an officer may successfully assert absolute immunity.[59] A judge engaged in an "administrative" task, such as managing subordinates, is limited to qualified immunity.[60] On the other hand, any officer engaged in a legislative, judicial or prosecutorial function is protected by absolute immunity.[61] The Court has held, for example, that judges act as legislators when they promulgate a code of ethics for lawyers, and as prosecutors when they enforce the bar disciplinary rules.[62] When the doctrine applies, the "absolute" nature of the immunity means that a plaintiff cannot overcome it by showing that the officer knew he was violating constitutional rights, or even by showing that the officer was motivated by malice or racism or some other constitutionally impermissible aim.[63]

1. Legislative Immunity. A decade before *Monroe,* the Court had already introduced absolute immunity into constitutional tort law

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[56] *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 641 (1987) (noting that the test "does not reintroduce into qualified immunity analysis the inquiry into officials' subjective intent").

[57] The U.S. President is an exception to this rule. The President engages in executive functions, yet is absolutely immune, at least from damages. *See* Nixon v. Fitzgerald, 457 U.S. 731, 732 (1982) (holding that the President possesses absolute immunity).

[58] *See supra* note 15 and accompanying text.

[59] *See supra* note 15 and accompanying text.

[60] *See* Forrester v. White, 484 U.S. 219, 224–28 (1988) (finding "administrative" acts to be distinct from judicial decisions); *see also* HIRA Educ. Services N. Am. v. Augustine, 991 F.3d 180, 190 (3rd Cir. 2021) (finding that legislators' actions that are "most accurately described as political 'errands' . . . are not entitled to absolute immunity").

[61] *See supra* notes 10–14.

[62] *See* Sup. Ct. of Va. v. Consumers Union of the U.S., 446 U.S. 719, 720 (1980) (finding that when the Court acts as legislators they are immune from suit). For a recent illustrative case, see *Jones v. Allison*, 9 F.4th 1136, 1141–42 (9th Cir. 2021) (finding that the California Department of Corrections and Rehabilitation acted as legislators in adopting regulations).

[63] *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 416 (1976) (finding that public officials are immune from civil liability for acts done as part of official functions).

in *Tenney v. Brandhove*.[64] Tenney and other defendants were members of a California Senate "Fact-Finding Committee on Un-American Activities,"[65] which investigated Brandhove for his allegedly communist sympathies. Brandhove sued under the 1871 statute,[66] charging that the investigation violated his First Amendment rights. Under the statute, "[e]very person" who violates rights may be sued for violations of constitutional rights.[67] It contains no proviso for official immunity for legislators or anyone else.

Yet the Court, with only Justice Douglas dissenting, ruled in *Tenney* that legislators were absolutely immune from liability.[68] Justice Frankfurter's opinion for the Court relied mainly on history. He traced the absolute immunity of legislators back to the seventeenth century English parliament, which fought for immunity as part of its ultimately successful struggle for "independence from the Crown."[69] When the American colonists fought for and won their independence from Britain, they took "[f]reedom of speech and action in the legislature . . . as a matter of course."[70] The framers of the U.S. Constitution guaranteed that freedom in the Speech and the Debate Clause of Article I, § 6.[71] This "provision . . . was a reflection of political principles already firmly established in the States,"[72] several of whom had already included such a provision in their own constitutions. The tradition continued as new states were admitted.[73] By 1951, "[f]orty-one of the forty-eight States . . . [had] specific provisions in their Constitutions

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[64] 341 U.S. 367 (1951).

[65] *Id.* at 369.

[66] The statute was then codified as 8 U.S.C. § 43. *See id.* ("This action is based on §§ 43 and 47 (3) of Title 8 of the United States Code.").

[67] 8 U.S.C. § 43.

[68] *Tenney*, 341 U.S. at 379.

[69] *Id.* at 372.

[70] *Id.*

[71] *Id.*; *see also* U.S. CONST. art. I, § 6, cl. 1 ("The Senators and Representatives shall . . . in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.").

[72] *Tenney*, 341 U.S. at 373.

[73] *See id.* at 375 ("As other States joined the Union or revised their Constitutions, they took great care to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability.").

protecting the privilege."[74] Against this background, the Court could not "believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well-grounded in history and reason by covert inclusion in the general language before us."[75]

2. Judicial Immunity. Six years after *Monroe* expanded the scope of § 1983, the Court revisited the official immunity doctrine in *Pierson v. Ray*.[76] In addition to its qualified immunity ruling on immunity for the police officers involved in the case,[77] the Court held that the judges who enforced the faulty Mississippi statute were entitled to *absolute* immunity.[78] Following *Tenney*'s historical analysis, the Court cited both an 1868 English case[79] and an 1872 U.S. Supreme Court case,[80] to support the proposition that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction."[81] Though § 1983 is broadly written and the text includes no judicial immunity, "[t]he legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities."[82] *Tenney*'s reasoning applied equally to judges, because "[t]he immunity of judges for acts within the judicial role is equally well-established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine."[83]

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[74] *Id.*

[75] *Id.* at 376. For recent applications of the doctrine, see Kent v. Ohio House of Representatives Democratic Caucus, 33 F.4th 359, 360 (6th Cir. 2022) (holding that the Ohio House of Representatives Democratic Caucus performed a legislative act protected by absolute immunity when it expelled a representative); Cushing v. Packard, 30 F.4th 27, 30 (1st Cir. 2022) (considering legislative absolute immunity in deciding whether votes can be cast remotely).

[76] 386 U.S. 547 (1967).

[77] *See supra* note 44.

[78] *See Pierson*, 386 U.S. at 553 ("We find no difficulty in agreeing with the Court of Appeals that Judge Spencer is immune from liability for damages for his role in these convictions [arising under the Mississippi statute.").

[79] Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1868).

[80] *See* Bradley v. Fisher, 13 Wall. 335, 344 (1972) (discussing judicial immunity in a civil action brought by an attorney against a judge he came before).

[81] *Pierson*, 386 U.S. at 553–54; *see also* Imbler v. Pachtman, 424 U.S. 409, 423 n.20 (1976) (citing earlier cases).

[82] *Pierson*, 386 U.S. at 554.

[83] *Id.* at 554–55.

3. Prosecutorial Immunity. In *Imbler v. Pachtman*, the plaintiff claimed that a prosecutor had knowingly elicited perjured testimony to convict him of a crime.[84] The Court extended the absolute immunity rule to prosecutors, thereby denying him a chance to prove his allegations.[85] In explaining the holding, the Court began with *Tenney*.[86] Standing alone, however, the historical reasoning of *Tenney* would not suffice, because the 1871 law did not recognize absolute immunity for prosecutors.[87] In fact, the institution of local prosecutors employed by municipal governments did not develop until the late nineteenth century.[88] The first case on absolute prosecutorial immunity was *Griffith v. Slinkard*, decided by the Indiana Supreme Court in 1896.[89]

In *Imbler*, the Court had no choice but to introduce a role for judges in making the absolute immunity doctrine. It did so by endorsing an open-textured principle of statutory interpretation, "that § 1983 is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them."[90] It thus mattered to the Court that, regardless of where things stood in 1871, "[t]he *Griffith* view on prosecutorial immunity became the clear majority rule on the issue."[91] Justice Powell's opinion for the Court then shifted from history to policy. He asked "whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983,"[92] and concluded that absolute immunity was necessary to ensure "the

[84] *Imbler*, 424 U.S. at 416 (stating that the plaintiff accused the defendant of allowing perjured testimony).

[85] *See id.* at 420 ("[A] prosecutor enjoys absolute immunity from § 1983 suits for damages when he acts within the scope of his prosecutorial duties."). For criticism of *Imbler*, see generally Johns, *supra* note 14.

[86] *See Imbler*, 424 U.S. at 417 ("This Court first considered the implications of the statute's literal sweep in *Tenney v. Brandhove* . . . .").

[87] *See id.* at 421–24 (providing a history of prosecutorial immunity).

[88] *See* Filarsky v. Delia, 566 U.S. 377, 384–85 (2012) (discussing the nineteenth century history).

[89] *See* 44 N.E. 1001, 1001 (Ind. 1896) (discussing prosecutorial immunity where a plaintiff accused the prosecutor in his case of incriminating him).

[90] *Imbler,* 424 U.S. at 418.

[91] *Id.* at 422.

[92] *Id.* at 424.

vigorous and fearless performance of the prosecutor's duty that is essential to the proper functioning of the criminal justice system."[93]

Imbler marks a shift from an earlier, more rigid approach to absolute immunity. According to *Imbler*, *Tenney* "established" the "read in harmony" principle,[94] yet this proposition appeared nowhere in the *Tenney* opinion, which focused exclusively on legislative immunity and its pre-1871 history.[95] Most post-*Imbler* cases are concerned with whether particular functions are prosecutorial. More specifically, the Court has held that prosecutors perform an investigative (rather than a prosecutorial) function when they give legal advice to the police in connection with an investigation,[96] that statements made by a prosecutor at a press conference were not covered by prosecutorial immunity,[97] and that a prosecutor's sworn statements in an application for an arrest warrant were not within prosecutorial immunity.[98] On the other hand, the Court held in *Van de Kamp v. Goldstein* that absolute immunity does apply to a chief prosecutor's supervision of his assistants, on the ground that this "administrative obligation" is nonetheless "directly connected with the conduct of a trial."[99] The lower federal courts regularly face the issue of what activities fall within absolute prosecutorial immunity.[100]

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[93] *Id.* at 427–28. For recent applications of the doctrine, see generally Chilcoat v. San Juan Cnty., 41 F.4th 1196 (10th Cir. 2022); Kassa v. Fulton Cnty., 40 F.4th 1289 (11th Cir. 2022); Greenpoint Tactical Income Fund LLC v. Pettigrew, 38 F.4th 555 (7th Cir. 2022); Anilao v. Spota, 27 F.4th 855 (2d Cir. 2022).

[94] *Imbler*, 424 U.S. at 418.

[95] *See, e.g.*, Tenney v. Brandhove, 341 U.S. 367, 372 (1951) ("The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries.").

[96] Burns v. Reed, 500 U.S. 478, 496 (1991).

[97] Buckley v. Fitzsimmons, 509 U.S. 259, 276–78 (1993).

[98] Kalina v. Fletcher, 522 U.S. 118, 129–31 (1997).

[99] 555 U.S. 335, 344 (2008).

[100] *See, e.g.*, Truman v. Orem City, 998 F.3d 1164, 1171 (10th Cir. 2021) (applying the qualified immunity rule to claim that prosecutor fabricated evidence); Jones v. Cummings, 998 F.3d 782, 787–88 (7th Cir. 2021) (noting that absolute immunity applies to claim that prosecutors filed untimely amendments to criminal charges); Watkins v. Healy, 986 F.3d 648, 660–64 (6th Cir. 2021) (discussing the "[a]dvocacy [v]ersus [i]nvestigation" issue); *see also* Johns, *supra* note 14, at 89–106 (discussing conflicts among lower federal courts on these issues); Jeffries, *The Liability Rule*, *supra* note 14, at 225 (arguing that "[t]he problem is not just the inevitable difficulty of drawing lines; the problem is that the line is drawn in the wrong place").

4. Witness Immunity. Briscoe v. LaHue[101] and *Rehberg v. Paulk*[102] built on the judicial and prosecutorial immunity holdings to fashion a general principle of "absolute immunity from subsequent damages liability for all persons—governmental or otherwise—who were integral parts of the judicial process."[103] Under this principle, trial and grand jury witnesses are protected.[104] In these cases, the Court cited pre-1871 cases that recognized absolute witness immunity,[105] but it also gave significant weight to the legislative history of the Civil Rights Act of 1871,[106] and to policy considerations.[107] In *Briscoe*, for example, the Court considered, but rejected, an exception for police officers' testimony, explaining that litigation permitted under the proposed carve-out could "consume[] a considerable amount of time and resources."[108] On the other hand, the Court draws a rather fine line between ordinary witness testimony, which is protected by absolute immunity, and statements made by a police officer or a prosecutor in testimony or in an affidavit filed to support a warrant, which receive only qualified immunity.[109]

5. Presidential Immunity. As we have seen, qualified immunity applies to officers engaged in other functions, including legislators, judges, and prosecutors when engaged in tasks like firing underlings.[110] But there is one exception to this rule. The exception involves the U.S. President, who, according to *Nixon v. Fitzgerald*, is absolutely immune for his official functions.[111] In *Nixon,* the

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[101] 460 U.S. 325 (1983).

[102] 566 U.S. 356 (2012).

[103] *Briscoe*, 460 U.S. at 335.

[104] *See id.* at 345–46 (trial witnesses); *Rehberg*, 566 U.S. at 375 (grand jury witnesses).

[105] *See, e.g.*, *Briscoe*, 460 U.S. at 331–34 (collecting cases).

[106] *See, e.g., id.* at 336–41 ("The debates of the 42nd Congress do not support petitioners' contention that Congress intended to provide a [Section] 1 damages remedy against police officers or any other witnesses.").

[107] *See id.* at 342–43 ("[T]o the extent that traditional reasons for witness immunity are less applicable to government witnesses, other considerations of public policy support absolute immunity more emphatically for such persons than for ordinary witnesses.").

[108] *Id.* at 343.

[109] *See* Kalina v. Fletcher, 522 U.S. 118, 123–31 (1997) (justifying this distinction).

[110] *See, e.g.*, Forrester v. White, 484 U.S. 219, 229–30 (1988) (rejecting analysis that "distinguish[es] judges from other public officials who hire and fire subordinates").

[111] *See* Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) ("[W]e hold that petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts.").

Court said that absolute immunity was justified by the risk that litigation would occupy too much of the President's attention.[112] This particular officer "occupies a unique position in the constitutional scheme,"[113] and is "entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity" on many foreign and domestic topics.[114] In the case of the President, "diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government."[115] Thus, the President cannot be sued for damages for actions taken within the "outer perimeter" of presidential duties.[116] On the other hand, the Court significantly limited the scope of presidential immunity in *Clinton v. Jones*, holding that the risk of diversion of energies did not stand in the way of a suit brought against the President for conduct unrelated to his official functions.[117]

III. OBJECTIONS TO THE FUNCTION-BASED APPROACH

Constitutional tort suits enable litigants to vindicate their constitutional rights and deter violations. Any official immunity impedes those goals, and absolute immunity is an especially severe hindrance. The Supreme Court's broad rationale for official immunity is that suits for damages produce not only vindication and deterrence benefits, but also "social costs," that require "the best attainable accommodation of competing values."[118] Given the need to balance competing values, it seems to follow that absolute

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[112] *See id.* at 751 ("Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government.").

[113] *Id.* at 749.

[114] *See id.* at 750 (noting that "[t]hese [responsibilities] include the enforcement of federal law . . . the conduct of affairs . . . and management of the Executive Branch").

[115] *Id.* at 751.

[116] *See id.* at 756 (recognizing "absolute Presidential immunity" for acts in "outer perimeter" of official presidential duties).

[117] *See* Clinton v. Jones, 520 U.S. 681, 692–706 (1997) (discussing the rationale for placing limits on presidential immunity); *see also* Trump v. Vance, 140 S. Ct. 2412, 2431 (2020) (deciding that the President has no absolute immunity from state court subpoenas in connection with a criminal investigation). It is unclear whether *Clinton* applies to unofficial presidential acts that occur during the President's term. *Trump,* by contrast, involved a criminal investigation of non-presidential conduct that continued into the President's term. *Id.* at 2420–21.

[118] Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

immunity should be applied only when the social costs of constitutional tort litigation are especially high, or the benefits especially low. The functional approach is inadequate to that task. All constitutional tort litigation serves the plaintiff's interest in a remedy, and all of it generates social costs. But neither the costs nor the benefits vary in lockstep fashion when the litigation involves legislative, judicial, prosecutorial, and testimonial functions.

A. BENEFITS OF CONSTITUTIONAL TORT SUITS

All constitutional remedies produce a benefit, in the sense that they contribute to effective enforcement of constitutional rights. But that benefit may vary depending on the situation. To what extent, if at all, does the enforcement of constitutional norms depend on the availability of a backward-looking remedy for damages? If the answer were "very little," then objections to absolute immunity would be correspondingly weak.[119] In some contexts, however, the answer is "very much," and the objections to absolute immunity may be compelling.

1. Vindication, Compensation, and Deterrence. Remedies for constitutional violations depend on the context in which the violations occur. Sometimes, a constitutional right may be raised defensively as a shield against civil or criminal liability. Consider a situation in which a person is prosecuted for a crime or sued for civil damages. The target of the enforcement proceeding may have a constitutional defense, such as the First Amendment limits on liability for defamation,[120] or intentional infliction of emotional distress,[121] or distribution of non-obscene pornography.[122]

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[119] *See* Vega v. Tekoh, 142 S. Ct. 2095, 2107 (2022) (holding that the costs of allowing § 1983 suit for damages for *Miranda* violations exceed the benefits).

[120] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964) (prohibiting "a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not").

[121] *See, e.g.*, Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 53 (1988) (holding that the First Amendment prohibit public figures and public officials from recovering damages for the tort of intentional infliction of emotional distress).

[122] *See, e.g.*, Jenkins v. Georgia, 418 U.S. 153, 161 (1974) (holding that a film is not obscene under the constitutional standards and that appellant's conviction therefore contravened the First Amendment).

Apart from enforcement proceedings, constitutional issues also arise in the course of everyday interactions with government. In some situations, the holder of a constitutional right may become a plaintiff and attempt to use the Constitution as a sword, either to obtain prospective or retrospective relief. Prospective relief may be available when government officers engage in ongoing violations of rights or threaten future violations, as they do when they forbid persons from speaking on public property, or maintain racially segregated school systems, or maintain dangerous prisons. In such cases, plaintiffs injured by the practice may sue for forward-looking injunctive or declaratory relief.[123]

Constitutional tort litigation involves retrospective relief. The constitutional violation has already occurred by the time remedial action is practicable. Because the violation exists only in the past, it is impossible to raise the Constitution either as a shield or as a basis for prospective relief. A suit for damages is the only available remedy. This is so, for example, when a police officer kills a person without justification or a prison guard fails to protect an inmate. The categories are not airtight. A § 1983 suit for damages may be viable even in the defensive and prospective relief categories, because the violation may not be fully remedied without recovery for past harm. For example, a student expelled from school for protected speech may sue for both the past wrong and reinstatement.

Both the structure and the aims of suits for damages for constitutional violations follow the common law model, at least in their broad outlines. As in ordinary tort law, a suit for damages may be helpful, and sometimes absolutely necessary, to vindicate plaintiffs' constitutional rights, compensate plaintiffs for injuries caused by the violations of rights, and deter future violations of rights.[124] Victory on the merits achieves some measure of

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[123] *See Ex parte* Young, 209 U.S. 123, 125 (1908) ("[A] Federal court may enjoin an individual or a state officer from enforcing a state statute on account of its unconstitutionality."); *see also* FALLON ET AL., *supra* note 34, at 927 (discussing the significance of *Ex parte Young*).

[124] *See, e.g.*, Forrester v. White, 484 U.S. 219, 223 (1988) ("Suits for monetary damages are meant to compensate the victims of wrongful actions and to discourage conduct that may result in liability."); Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 306–10 (1986) (discussing rationales for damages in tort cases); Robertson v. Wegmann, 436 U.S. 584, 590–91 (1978) ("The policies underlying § 1983 include compensation of persons injured by

vindication, an award of damages compensates for the harm, and the litigation sends a signal to other officers who may be deterred from violations by fear that they will be made to pay.

2. Remedial Equilibration. In an ordinary tort suit, the plaintiff typically wins by showing duty, breach, and causation. One view of constitutional litigation is that, at least in principle, the tort model should govern, and a remedy should be provided for every violation of a constitutional right.[125] This view recognizes that remedies are not, in fact, always available, but emphasizes "the priority of rights over remedies," with the latter "consigned to the . . . sphere of policy, pragmatism, and politics."[126] A problem with the "priority of rights over remedies" emphasis is that it is unrealistic and unworkable to ignore the costs of constitutional remedies. In a series of articles, Richard Fallon has shown that rights and remedies are not separate domains, but are parts of a single system.[127] Thus, "substantive constitutional rights, causes of action to enforce those rights, and immunity doctrines form a package, any individual element of which is potentially adjustable to preserve or enhance the attractiveness of the package overall."[128] Under this "Equilibration Thesis," as he calls it,[129] courts and legislatures should not set up all-or-nothing remedial regimes but should make contextual judgments about the costs and benefits of remedies. Broadly

deprivation of federal rights and prevention of abuses of power by those acting under color of state law.").

[125] *See supra* note 21 (highlighting the view that tort law should serve as the foundation for constitutional litigation). For a sympathetic and historically-oriented discussion of this view, see James E. Pfander, *Dicey's Nightmare: An Essay on the Rule of Law*, 107 CALIF. L. REV. 737, 744 (2019).

[126] Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 857 (1999).

[127] *See* Fallon, *Asking the Right Questions*, *supra* note 22, at 507 (critiquing those that limit analysis of official immunity to textual, historical, and presidential analysis); *see also* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—and Their Connections to Substantive Rights*, 92 VA. L. REV. 633, 639 (2006) (maintaining that judgments about the necessity of remedies appropriately shape justiciability arguments but existing law remains limited).

[128] Fallon, *Bidding Farewell*, *supra* note 21, at 963.

[129] *See id.* at 963 & n. 144 (referring to Fallon's idea that constitutional rights, causes of action to enforce those rights, and qualified immunity form a package as the "Equilibration Thesis").

speaking, official immunity can be justified if and when the costs of a remedy are sufficiently high, or the benefits sufficiently low.[130]

Fallon defends the Court's function-based approach as a rough guide to the domain of absolute immunity.[131] I am unconvinced that the crude distinctions made by the function-based approach are up to the task of drawing optimal lines between absolute and qualified immunity. When official immunity is viewed as a matter of cost and benefit, it becomes apparent that the function-based approach, standing alone, fails to identify all relevant considerations. Because absolute immunity is a complete bar to recovery, its application is warranted only when the costs of allowing a damages suit are especially high, or the benefits especially low—no matter what function is involved. The difficulty is that the Court has ignored this point by endorsing absolute immunity in blunderbuss fashion for virtually all forms of legislative, judicial, prosecutorial, and testimonial behavior.

B. ACCOMMODATING COMPETING VALUES: OFFICIAL IMMUNITY

In theory, official immunity doctrine might consist of either (1) absolute immunity for all officers in all circumstances, or (2) no immunity for any officer in any circumstances, or (3) some level of immunity for some or all officers in some or all circumstances. The Court has adopted cost-benefit as its guidepost and has consequently rejected both (1) and (2), because the former allows too little vindication and deterrence, while the latter would oblige officers, or the governments for which they work, to absorb too many of the costs of constitutional violations.[132]

1. "Social Costs." In *Harlow v. Fitzgerald*, the Court adopted a version of the third alternative, on the view that "[t]he resolution of

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[130] *See id.* at 939 ("Sometimes we may be best off, on balance, with relatively expansive definitions of rights but with limitations on damages remedies that would make those rights' social costs inordinately large.")

[131] *See* Fallon, *Asking the Right Questions*, *supra* note 22, at 493 ("[O]fficials performing some functions are more likely to be the targets of greater numbers of distracting, yet ultimately meritless, suits than are officials performing other functions; and constitutional violations by judges and prosecutors are more likely to be deterred and adequately remedied by mechanisms that immunity does not displace, such as dismissals of indictments and reversals on appeal, than are violations by officials performing other functions.").

[132] *See* Harlow v. Fitzgerald, 457 U.S. 800, 806–14 (1982) (arguing that some level of immunity for all or some officers should attach in certain situations).

immunity questions inherently requires a balance between the evils inevitable in any available alternative,"[133] and the object of choosing immunity rules is to obtain "the best attainable accommodation of competing values."[134] The vindication and deterrence benefits of constitutional tort litigation come at "social costs," which "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."[135] Of particular importance is the additional concern that "fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible public officials, in the unflinching discharge of their duties."[136] According to the Court, these costs justify some immunity for all officers engaged in "discretionary" functions, i.e., those that require the exercise of judgment,[137] despite the diminished enforcement of constitutional guarantees that is a necessary consequence of official immunity.

The intuition that officials can be overly cautious is easily grasped. But underlying the Supreme Court's synthesis of immunity is a more subtle form of economic reasoning. That reasoning reflects recognition that public officials differ from private actors. In the private sphere, persons can (often) capture the benefits of their actions. The risk of tort liability, however, constrains a person from taking too many risks to others in the effort to produce those gains. Ideally, the threat of liability will act as a counterweight, leading the actor to take only those risks that are cost-justified. A person who takes risks even though the benefits are not worth the costs will be liable for damages. This idea is embodied in the Hand Formula, which holds that an actor is negligent when the cost of an untaken precaution is less than its benefit in accident reduction.[138]

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[133] *Id.* at 813–14.

[134] *Id.* at 814.

[135] *Id.*

[136] *Id.* (internal quotation marks omitted).

[137] For a discussion of the historical origins of the "Discretion Model" of official immunity, see Ann Woolhandler, *Patterns of Official Accountability and Discretion*, 37 CASE W. RES. L. REV. 396, 422–32 (1987).

[138] *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (propounding the Hand Formula); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 3 (defining negligence in these terms); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972) (considering the Hand Formula as part of a wider discussion about "the social function of liability for negligent acts").

Public officials stand on a different footing.[139] Absent immunity, they face "asymmetric incentives,"[140] in the sense that they will be liable for injuries caused by their acts but will not capture the benefits. In addition, "governmental action frequently is coercive in nature," a feature which may exacerbate the situation and "motivate suit . . . more often than would occur with the user of a commercial product."[141] Even when bold actions produce great benefit, they will be inclined to refrain from taking them because they can be held liable if something goes wrong. There is, in short, a specialized danger that, absent a grant of immunity, public officials will take too few risks and too many precautions.[142] This efficiency-squelching tendency extends to all government officers, as opposed to private citizens, engaged in "discretionary" activities involving the exercise of judgement-based choices.[143] Official immunity corrects this real-world asymmetry by offsetting the natural incentive for public officers to act with excessive caution.

2. Other Grounds for Qualified Immunity. Along with social costs, two other considerations support qualified immunity, though not necessarily the current version. First, it seems unjust to impose liability unless officials have "fair notice" of illegality, a theme the

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[139] *See* Ronald A. Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1153 (1981) (discussing "overdeterrence").

[140] *See* Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 352 (2000) (discussing "asymmetric incentive" arguments as applied to both street-level and policymaking government officials).

[141] Cass, *supra* note 139, at 1156.

[142] *See id.* at 1156 & n.178 ("A liability standard . . . designed to reduce police incentives to overarrest[] might result in a pattern of underarrest."); *see also id.* at 1164–65 (arguing that "[g]overnmental enterprises . . . are less likely than private, profit-making entities to respond appropriately when one of their employees is subject to an overdeterrent liability constraint").

[143] Police officers, and very likely other officers as well, are typically indemnified by the governments that employ them. *See* Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 889–90 (2014) (finding that "[p]olice officers are virtually always indemnified"); *see also* FALLON ET AL., *supra* note 34, at 1041–42 (discussing indemnification and its relevance). At first glance, indemnification undercuts the rationale for official immunity. But indemnification does not eliminate the loss. The loss is shifted to the government, which then has an incentive to require officers to be especially cautious. Liability insurance is often available, but insurers, in order to lower their own outlays, put pressure on governments to take steps to minimize losses. *See* John Rappaport, *How Private Insurers Regulate Public Police*, 130 HARV. L. REV. 1539, 1549 (2017) ("[I]nsurance companies can and do shape police behavior.").

Court emphasized in early immunity cases,[144] but has neglected since *Harlow*.[145] Second, official immunity from damages creates a gap between rights and remedies. John Jeffries has argued that this "right-remedy gap" facilitates innovation in constitutional law.[146] In its absence, newly articulated constitutional claims would be especially costly, as they would result in liability for conduct thought to be constitutionally valid at the time.[147] That being so, judges may be more reluctant to recognize those claims in the first place.[148]

Whatever the merit of these rationales, neither of them provides a sound basis for the imposition of absolute immunity. Because absolute immunity protects officials even for violations of settled law, it has no connection to the desideratum of facilitating constitutional innovation. In similar fashion, concerns about ensuring fair notice provide a sound justification for awarding qualified immunity when a court breaks new ground in finding a constitutional violation. But those concerns cannot justify absolute immunity, which blocks recovery even when officers act maliciously or in bad faith.[149]

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[144] *See, e.g.*, Pierson v. Ray, 386 U.S. 547, 555 (1967) (reasoning that "[a] policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does"); *see also* Wood v. Strickland, 420 U.S. 308, 321 (1975) ("The official himself must be acting sincerely and with a belief that he is doing right . . . ."); Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (stating that official immunity must take account of "all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based").

[145] For a discussion regarding the developments to qualified immunity since *Harlow* and a defense of the "fair notice" rationale, see Nathan S. Chapman, *Fair Notice, the Rule of Law, and Reforming Qualified Immunity*, 75 FLA. L. REV. 1, 60 (2023).

[146] *See* John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 90 (1999) [hereinafter Jeffries, *The Right-Remedy Gap*] (establishing that the limitation of money damages reduces the cost of innovation and thereby enhances the growth of constitutionalism through redirection of resources from ex post relief to prevention of future harm).

[147] *See id.* at 99 (discussing how constitutional innovations and money damages are inexplicably linked as new developments on application occur then restitution costs rise).

[148] *See id.* at 90, 109 (arguing that the higher costs are for innovations on constitutional claims, generally seen in the form unrestricted monetary damages, the less likely the courts are willing to apply damages to such claims).

[149] *See* Imbler v. Pactman, 424 U.S. 409, 427 (1976) (describing how even in the face of genuine wrongs, wrought by malicious and bad faith actions against the citizen's liberty, absolute immunity leaves them without any form of redress).

C. THE COURT'S RATIONALES FOR ABSOLUTE IMMUNITY

Any form of official immunity reduces the chance that officers will be too cautious. The difference in impact on incentives is that "absolute immunity reduces the cost of overdeterrence to a minimum."[150] What, then, is the basis for distinguishing between two classes of officials, with some receiving only qualified immunity and others the absolute version? The Court's absolute immunity opinions rely in part on an amped-up version of the social costs rationale, and, in part, on the history of official immunity.

1. Social Costs. *Harlow*'s balancing approach implies that absolute immunity would require an especially compelling justification because it completely denies the vindication, compensation, and deterrence goals of § 1983 every time the defendant's violation of the plaintiff's constitutional right occurs in the exercise of a legislative, judicial, or prosecutorial function.[151] Yet *Tenney*,[152] *Pierson*,[153] *Imbler*,[154] and other absolute immunity opinions contain no recognition that absolute immunity comes at a higher price than qualified immunity.[155] That omission reflects a weakness in the Court's rationale for absolute immunity. Having ignored the value of the remedy, the Court avoids the need to explain why that value must be absolutely sacrificed.

On the "social costs" side of the ledger, the Court invokes the effective government rationale across all immunity contexts. For

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[150] Cass, *supra* note 139, at 1156.

[151] *See* Harlow v. Fitzgerald, 457 U.S. 800, 808–09 (1982) (recounting that even extensive factors of a defendant's power, function, and accountability were insufficient to justify absolute immunity, indicating that there must be something beyond the blanket considerations to the role of the defendant).

[152] *See* Tenney v. Brandhove, 341 U.S. 367, 377 (1951) (referring to governmental immunity simply as "immunity" without designation to a particular classification).

[153] *See* Pierson v. Ray, 386 U.S. 547, 555 (1967) (going only as far to say that absolute immunity had never been granted to officers at this time but avoided discussing the cost of such application in favor of recognizing good faith of the officers).

[154] *See* Imbler v. Pactman, 424 U.S. 409, 427 (1976) (determining that qualified immunity would likely have a higher social cost than absolute immunity).

[155] *See, e.g.*, Burns v. Reed, 500 U.S. 478, 486 (1991) (discussing only the potential impacts to a state officials function if not granted absolute immunity but at no point considering the higher burden placed on society by granted absolute immunity); Forrester v. White, 484 U.S. 219, 224 (1988) (discussing how the Court has been "sparing" in recognizing absolute immunity but only on the basis of constitutional schemes and unique functions of certain officials not even contemplating the cost on the citizenry).

administrative and executive functions, the "social costs" of constitutional damages litigation "include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office."[156] Even if someone accepts a government job, there is "the danger that the fear of being sued will 'dampen the ardor [of public officials] in the unflinching discharge of their duties.'"[157] This explanation hardly differs from the rationale for absolute immunity based on the function of the government actor.[158]

The Court's function-based approach relies on a dubious intuitive judgment to the effect that legislative, judicial, prosecutorial, and testimonial decision-making somehow will end up being engaged in with too much caution unless subject to absolute, rather than qualified, immunity. Prosecutorial immunity, for example, is based on the "concern that harassment by unfounded litigation would cause a deflection of the prosecutor's energies from public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by public trust."[159] In similar fashion, legislators are afforded absolute immunity because "the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability," as well as worry that "the threat of liability may significantly deter service in local government."[160] And the threat of liability "would provide powerful incentives for judges to avoid rendering decisions likely to provoke such suits."[161] And in justifying testimonial immunity, the Court has reasoned that "a witness' fear of retaliatory litigation may deprive the tribunal of critical evidence."[162] But these concerns are exactly the same concerns that have given rise to only a *qualified* immunity for

[156] *Harlow*, 457 U.S. at 814.

[157] *Id.* at 814 (citing Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949)).

[158] *See id. at* 806–07 (establishing a near identical explanation to the social costs concerns that in order for the government official to function "absolute immunity might well be justified to protect the unhesitating performance").

[159] *Imbler*, 424 U.S. at 423.

[160] Bogan v. Scott-Harris, 523 U.S. 44, 52 (1998).

[161] Forrester v. White, 484 U.S. 219, 227 (1988).

[162] Rehberg v. Paulk, 566 U.S. 356, 367 (2012).

executive branch officials.[163] So why should that rationale support absolute immunity in one context but not the other?

On occasion, the Court has sought, however haltingly, to answer this question. In *Imbler v. Pachtman*, for example, the Court asserted that "[i]t is fair to say, we think, that the honest prosecutor would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials."[164] But this assertion has a strikingly question-begging quality. The Court offers no basis for its "greater difficulty" concern.[165] Prosecutors need immunity because "[t]he public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability."[166] The same point could be made about other government agencies, such as schools, the police, or the fire department.

The Court's treatment of judicial immunity suffers from the same shortcoming. With respect to judges, the Court has observed, "the nature of the adjudicative function requires a judge frequently to disappoint some of the most intense and ungovernable desires that people can have."[167] A judge "should not have to fear that unsatisfied litigants may hound him with litigation," because that burden "would contribute not to principled and fearless decision-making but to intimidation."[168] But this point applies no less to police officers than to judges; indeed, police officers typically have much less time to react and far less knowledge of the law than do judges or prosecutors, while public school and college disciplinary committees often adjudicate disciplinary issues in contexts that closely resemble civil and criminal trials.[169] Moreover, many executive officials are distinctly vulnerable to being "hound[ed]"[170] by persons negatively affected by their decisions. School authorities, for example, have ongoing and repeated contact with parents and

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[163] *See* discussion *supra* section II.A (exploring the development of qualified immunity and policy concerns that guided the Court).

[164] *Imbler*, 424 U.S. at 425.

[165] *Id.*

[166] *Id.* at 424.

[167] Forrester v. White, 484 U.S. 219, 226 (1988).

[168] Pierson v. Ray, 386 U.S. 547, 554 (1967).

[169] *See* Wood v. Strickland, 420 U.S. 308, 312–13 (1975) (describing the school disciplinary process, including a formal disciplinary hearing and a factfinding goal of the school board).

[170] *Pierson*, 386 U.S. at 554.

students, and key executive branch officials must interact daily with the employees that they supervise.

A skeptical reader of the opinions might be inclined to agree with Justice Rehnquist's assessment that the Court's distinctions reflect the "personal experience" of judges, who "may not know or may have forgotten that similar pressures exist in the case of nonjudicial public officials to whom difficult decisions are committed."[171] A more charitable explanation would put the cases in historical context. Notice the sequence in which the Court adjudicated official immunity issues. All of the leading cases on absolute immunity—including *Tenney*, *Pierson*, and *Imbler*—were decided before *Harlow* held, in 1982, that qualified immunity is governed by an objective "clearly established law" test.[172] During the pre-*Harlow* period, qualified immunity could be defeated by showing an officer's "impermissible motivation,"[173] or absence of "good-faith belief" in the legality of the act.[174] Faced with a hard choice between subjecting all officials to the "substantial costs that attend the litigation of the subjective good faith of government officials,"[175] on the one hand, and allowing some officials avoid litigation on the other, the Court may have viewed absolute immunity for certain historically-defined categories as an attractive compromise. *Harlow*'s reworking of qualified immunity affords grounds for reconsidering the scope of absolute immunity, even though the Court has ignored those grounds for the past forty years.

2. The Role of History. The origin of § 1983 in the Civil Rights Act of 1871 looms over judicial work in interpreting the statute. On a range of issues, the Supreme Court has cited history to support § 1983 holdings. In keeping with this pattern, the Court has repeatedly defended absolute immunity on historical grounds. *Tenney*, *Pierson*, and *Imbler* cite nineteenth century authority for

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[171] Butz v. Economou, 438 U.S. 478, 528 n.* (1978) (Rehnquist, J., concurring in part and dissenting in part).

[172] *Tenney* was decided in 1951, *Pierson* in 1967, and *Imbler* in 1976. *Harlow* is a 1982 case. *See supra* text accompanying notes 27–29.

[173] *Wood*, 420 U.S. at 322.

[174] Scheuer v. Rhodes, 416 U.S. 232, 248 (1974); *see Pierson*, 386 U.S. at 557 (noting that qualified immunity for police officers requires a showing of, among other things, a reasonable, good faith belief that the officer's arrest was constitutional)

[175] Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982).

the absolute immunity of legislators, judges, and prosecutors.[176] History deserves some weight in the formulation of official-immunity doctrine, as it does in most areas of law, because stability and reliance deserve respect. In any event, whether nineteenth century practice is a strong enough consideration to override the vindication and deterrence values—which themselves drove the enactment of § 1983 as a historical matter—raises a separate question, and one the Court has never directly addressed.

William Baude makes a special type of historical argument that may carry the day in favor of absolute immunity. For Baude, official immunity is a matter of statutory interpretation, and nineteenth century history is a guide to the interpretation of § 1983.[177] He argues that qualified immunity is "unlawful," because the historical materials, as he reads them, do not support the inference that qualified immunity was incorporated into the Civil Rights Act of 1871.[178] Notably, Baude does not address in any significant way the subject of absolute immunity in laying out his critique of the qualified-immunity version. The logic of his argument, however,

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[176] For resort to history in absolute immunity cases, see discussion *supra* Part II. Other contexts in which history figures prominently in the Court's rationale include punitive damages, Smith v. Wade, 461 U.S. 30, 34 (1983) ("[W]e look[] first to the common law of torts (both modern and as of 1871), with such modification or adaptation as might be necessary to carry out the purpose and policy of the statute."), and municipal government liability, Owen v. City of Independence, 445 U.S. 622, 635–50 (1980) (emphasizing that the legislative history of § 1983 supports a deeply rooted tradition of government immunity).

[177] *See* William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 55 (2018) (recommending courts look at history to interpret the breadth of the statute).

[178] *See id.* ("[T]here was no well-established, good-faith defense in suits about constitutional violations when Section 1983 was enacted, nor in Section 1983 suits early after its enactment."). Baude's position has attracted sympathetic citations from Justices Thomas, see Ziglar v. Abbasi, 137 S. Ct. 1843, 1871 (2017) (Thomas, J., concurring in part and concurring in the judgment) (citing Baude to support the proposition that common-law immunity differed significantly from our current doctrine), and Sotomayor, see Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) (using Baude's work to support the claim that Supreme Court qualified immunity decisions often find in favor of the officials). For a contrary view of the historical status of qualified immunity, see Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1344 (2021) ("The 19th century common law did recognize a freestanding qualified immunity protecting all government officers' discretionary duties—like qualified immunity today."). *But see* William Baude, Reply, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 STAN. L. REV. ONLINE 115, 115 (2022) (arguing that Keller is wrong, because the cases he relies on actually involve "quasi-judicial" immunity). For present purposes, it is not necessary to take sides in the debate between Baude and Keller over nineteenth century tort law.

suggests that he would regard absolute immunity as properly applied to at least judges and legislators because—but only because—that immunity existed as a general matter for these officials in 1871.[179]

Most Supreme Court opinions do not accord with this approach. They advert to the nature of background common-law principles as only one of several factors relevant in formulating immunity rules under § 1983. Consistent with this methodology, the Court has never distinguished between how official immunity doctrine applies in § 1983 suits—to which Professor's Baude's brand of a "statutory interpretation" approach would apply—and to suits against federal officers founded on the principle of *Bivens v. Six Unknown Named Federal Narcotics Agents*,[180] which does not involve any question of statutory interpretation at all. In sum, while one set of cases involves application of a statute and the other does not, the Court has never suggested that this distinction is of significance.[181]

At the same time, some cases that align with Professor Baude's "statutory interpretation" view of § 1983 adjudication do exist. In *Tower v. Glover*, for example,[182] a public defender was sued by a disappointed client for violating the client's constitutional rights. The public defender argued that the absolute immunity of judges and prosecutors should be extended to public defenders.[183] In declining to take this step, the Court disclaimed any law-making role for itself. According to Justice O'Connor's majority opinion, the Court did "not have a license to establish immunities from § 1983 actions in the interests of what we judge to be sound public policy."[184] Rather, "[i]t is for Congress to determine whether § 1983

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[179] *See supra* text accompanying note 176.

[180] *See* 403 U.S. 388, 388 (1971) (holding that there is an implied cause of action for injuries obtained consequent upon a fourth amendment violation by federal officials).

[181] For example, the leading qualified immunity case is *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), which is a *Bivens* case. *Harlow* is based entirely on policy considerations, yet the Court stated that the rule would apply to § 1983 cases as well. *Id.* at 819 n.30. For the Court's most detailed discussion of this point, see Butz v. Economou, 438 U.S. 478, 496–504 (1978) ("[W]e deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials.").

[182] 467 U.S. 914, 916 (1984) (describing the claims brought against the public defenders under §1983); *see* FALLON ET AL., *supra* note 34, at 1041 (explaining that the Court in *Tower* described the appropriate inquiry for determining the scope of immunity).

[183] *See Tower*, 467 U.S. at 916 (summarizing the public defender's argument).

[184] *See id.* at 922–23.

litigation has become too burdensome . . . and, if so, what remedial action is appropriate."[185] *Tower* suggests that the content of § 1983 is to be determined solely by Congress, so that it will recognize an immunity only "[i]f an official was accorded immunity from tort actions at common law when the Civil Rights Act was enacted in 1871."[186] As a similar immunity case puts the relevant point, the Court's "role is to interpret the intent of Congress in enacting § 1983, not to make a freewheeling policy choice."[187]

The objection to absolute immunity in *Tower* was that public defenders did not exist in 1871 and private lawyers had no official immunity.[188] The flipside of this reasoning suggests, however, that absolute immunity should exist for judges and legislators because "the legislative record gives no clear indication that Congress meant to abolish wholesale all common-law immunities"[189] at the time of that statute's enactment.

Whether Baude is correct to question the legality of qualified immunity, he is on solid ground when he calls attention to the incoherence of an approach to § 1983 that sometimes treats the immunity issue as a matter of statutory interpretation and sometimes as a matter of common-law-like judicial decision-making.[190] As between the two approaches, however, the common law method is far more consistent with § 1983 case law. If qualified immunity were an isolated or anomalous aspect of § 1983 doctrine, Baude's approach to statutory interpretation might be a plausible ground both for eliminating qualified immunity and for locking the Court's current version (or at least much that version) of absolute immunity. If Baude is right, Congress decided the official-immunity issue in 1871 and the Court should never have undertaken its many

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[185] *Id.* at 923.

[186] *Id.* at 920. Even *Tower* does not fully support Baude's approach. The opinion leaves room for judicial involvement in deciding immunity cases. Immunity might still be denied "if § 1983's history or purposes nonetheless counsel against recognizing the same immunity in § 1983 actions." *Id.* This proviso leaves room for arguments that absolute immunity might conflict with the statute's remedial purposes and that, all things considered, some kind of qualified immunity best serves those purposes.

[187] Malley v. Briggs, 475 U.S. 335, 342 (1986).

[188] *See Tower*, 467 U.S. at 921–22 (discussing how public defenders and private lawyers did not have immunity in 1871).

[189] Pierson v. Ray, 386 U.S. 547, 554 (1967).

[190] *See* Baude, *supra* note 177, at 45 (explaining how "the Supreme Court have offered three different justifications" for § 1983).

efforts in the official-immunity cases to balance the values of vindication and deterrence against the creation of "social costs."

But Baude is wrong, at least to the extent that he aims to describe the Supreme Court's approach to § 1983. Across the wide spectrum of § 1983 issues, judicial decision-making pursuant to the common law method are ubiquitous—just as is the case in its dealing with other broadly phrased super statutes, such as the Sherman Antitrust Act. Of particular importance here, the Court had often engaged in common-law-like decision-making in its handling of absolute-immunity-related questions in § 1983 cases. As noted earlier, for example, the Court ruled in *Imbler v. Pachtman*[191] that prosecutors may assert absolute immunity, even though the first American prosecutorial immunity case, *Griffith v. Slinkard*,[192] was decided in 1896. The Court, in short, did not fix its gaze on the state of the law in 1871. To the contrary, the Court undertook a "considered judgment" of a later-emerging "immunity historically accorded the relevant official" and—of particular importance—"the interests behind it."[193] Upon finding support for an immunity in the common law, the Court then asks "whether the same considerations of public policy that underlie the common-law rule likewise countenance absolute immunity under § 1983."[194]

Indeed, even the Court's post-*Tower* jurisprudence recognizes that its work with § 1983 involves more than a narrow-gauged search for background principles that existed when that statute came into being. Thus, Justice Scalia (very accurately) observed in *Kalina v. Fletcher* that the Court's function-based approach to immunity law had "produced some curious inversions of the common law as it existed in 1871, when § 1983 was enacted."[195] Thereafter, in *Rehberg v. Paulk*,[196] Justice Alito—writing for a unanimous Court—observed that the absolute immunity cases "have not mechanically duplicated the precise scope of the absolute immunity that the common law provided."[197] The Court thus

[191] 424 U.S. 409 (1976)

[192] 44 N.E. 1001 (Ind. 1896)

[193] Imbler v. Pactman, 424 U.S. 409, 421 (1976).

[194] *Id.* at 424.

[195] Kalina v. Fletcher, 522 U.S. 118, 131–32 (1997) (Scalia, J., concurring).

[196] 566 U.S. 356 (2012).

[197] *Id.* at 364.

rejected the notion "that § 1983 is simply a federalized amalgamation of pre-existing common-law claims."[198]

Common-law-like reasoning in § 1983 litigation, built on implementing the underlying purposes of the statute, is hardly confined to official immunity doctrine. It dominates virtually every area of constitutional tort law. For example, *Monell v. Department of Social Services* rejected application of background rules regarding vicarious liability rule in suits against municipal governments.[199] In similar fashion, *Owen v. City of Independence* rejected any immunity for local governments despite nineteenth century doctrines that shielded their governmental and discretionary activities.[200] *Allen v. McCurry* applied modern—as opposed to historic—issue-preclusion doctrines to § 1983 litigation,[201] rejecting in particular an approach that would have followed 1871 rules, under which "mutuality of estoppel" would bind a plaintiff to prior adjudication only if the defendant were likewise so bound.[202] In *Memphis Community School District v. Stachura*, the Court cited twentieth century treatises in adopting the principle that "the level of damages [in § 1983 suits] is ordinarily determined by principles derived from the common law of torts."[203] Taking this same approach, *Mount Healthy City School District Board of Education v. Doyle* modified the modern common law cause in fact rule for first amendment retaliation claims, without taking even the quickest glance at 1871 doctrine.[204] *Fair Assessment in Real Estate Ass'n, Inc. v. McNary* rejected federal jurisdiction over a § 1983 damages case alleging illegally collected taxes, on the basis of the judge-made "principle of comity."[205] This theme extends to the lower federal courts, which have wrestled with issues the Supreme Court has yet

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[198] *Id.* at 366.

[199] *See* 436 U.S. 658, 691–95 (1978) ("We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents.").

[200] *See* 445 U.S. 622, 644–50 (1980) ("In sum, we can discern no 'tradition so well grounded in history and reason' that would warrant the conclusion that in enacting § 1 of the Civil Rights Act, the 42d Congress *sub silentio* extended to municipalities a qualified immunity based on the good faith of their officers.").

[201] 449 U.S. 90 (1980).

[202] *Id.* at 96–99.

[203] 477 U.S. 299, 306 (1986).

[204] 429 U.S. 274, 285–87 (1977).

[205] 454 U.S. 100, 100 (1981); *see* FALLON ET AL., *supra* note 34, at 1091–92 (discussing the principle of comity).

to address, and which have not hesitated to apply modern tort principles that were unknown in 1871. For example, lower courts have freely adopted modern tort principles for such issues as recovery for non-spousal consortium,[206] the fear of developing cancer as a result of the defendant's constitutional violation,[207] and joint liability for an arguably divisible injury.[208]

This vast body of § 1983 case law shows that *Tower* is simply not a representative case—or at least that its reasoning is properly confined to the discrete question concerning public defenders that the case presented. *Tower*'s ardent profession of fealty to 1871 is an outlier, while the common law method is the norm.[209] References to tort doctrine as it existed in 1871 can be found the Court's § 1983 opinions, but usually provide only a starting point for the Court's analysis. Indeed, as the Court explained only six years ago, "[c]ommon-law principles are meant to guide rather than to control the definition of § 1983 claims, serving 'more as a source of inspired examples than of prefabricated components.'"[210] Taken as a whole, the case law aligns with the view—espoused by Cass Sunstein,[211] Richard Fallon,[212] William Eskridge,[213] Jack Beermann,[214] and others[215]—that § 1983 is a "common law statute," similar to the

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[206] *See* Bell v. City of Milwaukee, 746 F.2d 1205, 1250 (7th Cir. 1984) (holding that there was no controlling common law rule operative at the time § 1983 was enacted that would bar recovery for lost society and companionship).

[207] *See* Clark v. Taylor, 710 F.2d 4, 14 (1st Cir. 1983) (allowing a significant jury award in light of "the greatly increased risk that [plaintiff] may develop cancer").

[208] *See* Cooper v. Casey, 97 F.3d 914, 919 (7th Cir. 1996) (concluding that an apportionment of compensatory damages among defendants was impossible when the "quantity of pain in which the contributions of the individual defendants could not be distinguished").

[209] *See* Fallon, *Bidding Farewell*, *supra* note 21, at 992–93 ("[T]he Supreme Court, in a diverse swath of § 1983 cases, has assumed an entitlement to take substantive interpretive liberties.").

[210] Manuel v. City of Joliet, 137 S. Ct. 911, 921 (2017) (citing Hartman v. Moore, 547 U.S. 250, 258 (2006)).

[211] Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 421–22 (1989).

[212] Fallon, *Bidding Farewell*, *supra* note 21, at 993.

[213] William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1052 (1989).

[214] Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 CHI.-KENT L. REV. 695, 700 (1997).

[215] Hillel Y. Levin & Michael L. Wells, *Qualified Immunity and Statutory Interpretation: A Response to William Baude*, 9 CAL. L. REV. ONLINE 40, 42 (2018); *cf.* Larry Kramer & Alan O. Sykes, *Municipal Liability Under § 1983: A Legal and Economic Analysis*, 1987 SUP. CT. REV.

equally sweeping Sherman Antitrust Act.[216] These sorts of statutes, by design, give considerable leeway to judges to employ the common-law method to resolve the many issues left open by sparse texts put in place to endure over long stretches of time.

IV. A COST-BENEFIT APPROACH TO ABSOLUTE IMMUNITY

The most promising approach for framing rules of absolute immunity under § 1983 is one that requires courts to reorient the doctrine under *Harlow*'s cost-benefit framework.[217] Working within that model, courts should focus on the benefit component of the remedial cost-benefit calculus. The value of a damages remedy in assuring effective enforcement of constitutional guarantees varies depending on context. In some absolute immunity contexts, that value will be comparatively low, because other types of relief may well be available for violations within the absolute immunity categories.[218] When this is the case, the right-holder will be able to vindicate the right and deter violations, at least to some extent, despite absolute immunity. At the same time, this rationale dictates that grants of absolute immunity should be limited to situations in which the value of providing § 1983 relief is comparatively low. Conversely, the scales tip against absolute immunity when other remedies are lacking, or constitutional tort liability has a significant impact beyond the confines of the litigation, or for some other reason.

249, 257 ("[T]he language of § 1983 was not intended to define fully the extent of liability, which would be determined by the courts through common-law adjudication."); Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 622 & n.49 (1981) (making a similar point).

[216] *See* Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 688 (1978) ("The legislative history [of the Sherman Act] makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.").

[217] *See supra* notes 24–25 and accompanying text (discussing the *Harlow* framework).

[218] By referring to the "low benefits of constitutional tort" to describe this aspect of the analysis, I mean to focus on the "effective enforcement of constitutional norms" rationale for constitutional tort. Viewed as a rationale for absolute immunity, the same factor might as well be called "low costs of absolute immunity." *See* Cass, *supra* note 139, at 1135 (discussing the transfer of costs of official action from others to a police officer).

A. THE "LOW BENEFITS OF CONSTITUTIONAL TORT" RATIONALE FOR ABSOLUTE IMMUNITY

Throughout the law of constitutional remedies, the limited benefit of providing a remedy counts as a rationale for denying relief. Plaintiffs suing for prospective relief have no standing to sue if they assert a "generalized grievance" rather than a concrete injury,[219] or if the relief they seek will likely not redress the harm they have incurred,[220] or if the claimed injury is too speculative.[221] If the prospective benefit is too uncertain, the suit will be dismissed for lack of ripeness or on other justiciability grounds.[222] Even if plaintiffs have a stake in the success of a suit at the outset of litigation, their cases will be dismissed as moot if changed circumstances make it impossible for a court to grant relief.[223] A general principle underlying all of these doctrines is that the costs, in terms of judicial resources and interference with other branches of government, are not worth bearing unless the benefit of letting the case move forward is substantial.

In some situations, a claimed tort damages remedy has a comparatively "low benefit" quality—and a failure to afford it will come at little cost—because other types of relief remain available, so that the right-holder can vindicate the right outside the context of § 1983 litigation, at least to some extent.[224] Consider a case in

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[219] *See* United States v. Richardson, 418 U.S. 166, 175 (1974) (rejecting the basis for standing when a mere generalized grievance has been asserted).

[220] *See* Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 185 (2000) ("[T]he asserted defect is not injury but redressability."); Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 45–46 (1976) ("[T]he complaint suggests no substantial likelihood that victory in this suit would result in respondents' receiving the hospital treatment they desire.").

[221] *See* Clapper v. Amnesty Int'l USA, 568 U.S. 398, 401–02 (2013) ("[R]espondents' theory of *future* injury to too speculative to satisfy the well-established requirement that threatened injury must be 'certainly impending.'").

[222] *See*, *e.g.*, Nat'l Park Hosp. Ass'n v. Dept. of the Interior, 538 U.S. 1, 10 (2003) (rejecting the argument that "mere uncertainty as to the validity of a legal rule constitutes a hardship for purposes of the ripeness analysis").

[223] *See*, *e.g.*, Already, LLC v. Nike, Inc., 568 U.S. 85, 91–100 (2013) (explaining that where a plaintiff's only legally cognizable injury ceases and cannot reasonably be expected to recur, the case is moot as there is no live controversy); Camreta v. Greene, 563 U.S. 692, 709–13 (2011) (holding a plaintiff's claim is moot when the plaintiff no longer needs protection from a challenged practice).

[224] *See*, *e.g.*, Butz v. Economou, 438 U.S. 478, 512 (1978) (discussing other remedies for judicial errors).

which someone is convicted of a crime on account of an unconstitutional ruling by the trial judge. The convict becomes a § 1983 plaintiff, sues the judge, and loses on account of absolute judicial immunity. The lack of a damages remedy is not fatal to enforcement of the convict's rights, as those rights may still be vindicated by reversal of the unconstitutional ruling on appeal, or by post-conviction relief in separate state or federal habeas corpus litigation.[225] An injunction that orders officials to improve unconstitutional conditions at a mental hospital may not afford a complete remedy for the patients, but still vindicates the underlying constitutional norm.[226] In these situations, the cost of official immunity does not rise to its highest level. In other contexts, however, the lack of a damages remedy effectively means no remedy at all. When people are stopped by the police but not charged with crime, or charged with a crime but never prosecuted, or fired from government jobs, or attacked by prison inmates, § 1983 suits for damages will often provide the only realistic chance to secure a remedy. The effect of a rule that blocks the damages cause of action is that, in these contexts, the goals of vindicating constitutional rights and deterring constitutional violations are not advanced in any way, shape, or form.

The rules governing Fourth Amendment remedies in the criminal process illustrate a similar point. According to the Court, illegally obtained evidence must be excluded at trial despite the cost of allowing a guilty person to go free.[227] In that context, the cost is worth bearing in order to obtain the benefits of deterring violations of Fourth Amendment rights. When the context is whether to exclude the evidence in a grand jury proceeding,[228] or a later habeas corpus proceeding,[229] or when officers act in reasonable reliance on

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[225] *See* Fallon, *supra* note 21, at 941 (contemplating the availability of habeas actions).

[226] *See* Jeffries, *The Right-Remedy Gap*, *supra* note 146, at 110–14 (discussing the value of injunctive relief).

[227] *See* Mapp v. Ohio, 367 U.S. 643, 659 (1961) ("The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.").

[228] *See* United States v. Calandra, 414 U.S. 338, 347 (1974) (refusing to apply the exclusionary rule to grand jury proceedings).

[229] *See* Stone v. Powell, 428 U.S. 465, 494–95 (1976) (refusing to apply the exclusionary rule to habeas corpus proceedings).

a search warrant,[230] the deterrent benefits are lower, so much so that the remedy is not available. Similarly, the Fifth Amendment right against self-incrimination is adequately enforced by such techniques as the *Miranda* rule obliging the police to give warnings.[231] The marginal benefits of allowing constitutional tort suits for failure to give the warnings are, at least in the Court's view, not great enough to justify the § 1983 remedy.[232]

The Court has not articulated a stand-alone "low benefits of the constitutional tort suit" rationale for absolute immunity. But the cases do include references not only to history and social costs but also to "low benefit" considerations that support the award of absolute immunity within the Court's now-prevailing function-centered framework. For example, in *Imbler*, the Court said that the impact on rights-enforcement of absolute prosecutorial immunity is diminished by the availability of other means of keeping rogue prosecutors in check, including appellate review,[233] criminal prosecutions, and bar discipline.[234] In the process of justifying absolute presidential immunity, *Nixon v. Fitzgerald* flags "impeachment," and "[v]igilant oversight by Congress" as means of deterring misconduct,[235] and notes that "[t]he presence of alternative remedies has played an important role in our previous decisions in the area of official immunity."[236] The Court cites *Imbler*'s discussion of remedies for prosecutorial misconduct, as well as the potential impeachment of federal judges and the ability of Congress to remove members.[237] Legislative immunity is based in part on the availability of the "electoral process"[238] to check

[230] *See* United States v. Leon, 468 U.S. 897, 926 (1984) (refusing to apply the exclusionary rule where an officer reasonably relied upon a search warrant that is ultimately found to be invalid).

[231] *See* Miranda v. Arizona, 384 U.S. 436, 458–59 (1966) (explaining the contours of the privilege against self-incrimination).

[232] *See* Vega v. Tekoh, 142 S. Ct. 2095, 2099 (2022) (rejecting *Miranda* violations as a basis for § 1983 claims).

[233] *See* Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (discussing alternative means of regulating prosecutors).

[234] *Id.* at 431 n.34.

[235] 457 U.S. 731, 732 (1982).

[236] *Id.* at 757 n.38.

[237] *Id.* at 757 & nn. 36–38.

[238] *See* Bogan v. Scott-Harris, 523 U.S. 44, 52 (1998) ("And, of course, the ultimate check on legislative abuse-the electoral process-applies with equal force at the local level, where legislators are often more closely responsible to the electorate.").

improper conduct. Along the same lines, the Court has reasoned that absolute judicial immunity is justifiable in part because victims of trial-judges' constitutional wrongdoing can have "errors . . . corrected on appeal."[239] A witness who lies under oath can be prosecuted for perjury.[240]

In all of these contexts, the availability of other means of enforcing constitutional norms has helped justify the grant of absolute immunity despite arguments that a damages remedy would work better to vindicate rights and deter wrongdoing. In sum, the Court's formulation of the law of constitutional remedies has involved, over a long stretch of time, a pragmatic balancing of costs and benefits with decisions denying absolute immunity from money-damages suit hinging in no small part on the availability other means for enforcing the claimed constitutional protection, even if those other means do not make the injured plaintiff whole.[241]

This "low benefits" line of reasoning might in principle support awarding absolute immunity to some executive officers, apart from prosecutors, in at least some categories of cases.[242] In practice, however, its application is most likely to result in narrowing defendants' access to the absolute-immunity defense among the classes of government actors protected in an across-the-board fashion by the Court's now-prevailing function-based approach. From a "low benefits" perspective, the most salient consideration driving the Court's absolute-immunity jurisprudence concerns publicity, rather than role, even though role is accorded dispositive significance. This is the case because judges, prosecutors, and witnesses perform many of their acts in a high-visibility environment because of the public nature of judicial proceedings. As a result, the commission of constitutional violations by these actors will often be harder to hide than the constitutional violation by

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[239] Pierson v. Ray, 386 U.S. 547, 554 (1967).

[240] *See* Rehberg v. Paulk, 566 U.S. 356, 367 (2012) (discussing the deterrent effect of prosecution for perjury).

[241] *See* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1778–79 (1991) (discussing the principle of a system of constitutional remedies).

[242] *See* Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982) (suggesting that absolute immunity may protect some executive officials working "in such sensitive areas as national security or foreign policy").

others.[243] Thus, while the "low benefits" rationale aligns to some extent with current doctrine, there is reason to suspect that it does so only in a crude and incomplete way. In fact, as the ensuing section shows, a study of the case law reveals that that is the case.

B. ABSOLUTE IMMUNITY IN THE SUPREME COURT

Absolute immunity blocks, sometimes completely, the enforcement of constitutional guarantees. Still, the doctrine may be justified by the social costs of constitutional tort litigation, combined with the low benefits of tort suits against legislators, judges, prosecutors, and witnesses. There is, however, a fundamental difficulty with this explanation of the Court's past work in this field. The difficulty is that the Court itself has never explained its doctrinal choices regarding absolute immunity in anything even close to a complete way. More specifically, the opinions move too quickly from the proposition that absolute immunity is *sometimes* necessary to protect legislative, judicial, prosecutorial, and testimonial action to the conclusion that such action merits absolute protection in each and every instance. The Court has given too much weight to function. It has never stopped to ask whether the cost-benefit approach to remedies would be better served by an intermediate approach that shields some but not all legislative, judicial, prosecutorial, and testimonial acts.

Viewed from a "low benefits" perspective, the Court's function-based rules are not just "overinclusive," as many rules are,[244] but are highly overinclusive. That is, they cover far more types of conduct than the cost-benefit rationale for absolute immunity can support, even when one makes allowance for the benefits of formulating bright-line rules. The balance between effective enforcement of constitutional guarantees and sensitivity to the costs of constitutional tort litigation would be better served by weakening the absolute/qualified distinction, diminishing the role of function in the bestowal of absolute immunity, and taking account of the

[243] *See* Nixon v. Fitzgerald, 457 U.S. 731, 757 (1982) ("The President is subjected to constant scrutiny by the press.").

[244] *See* FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 32 (1991) (discussing that rules can be too generalized).

wide variations in the level of benefit provided by absolute immunity in different contexts.

With these guideposts in mind, this section discusses several strategies for limiting absolute immunity. Some of these ideas for reform have appeared in dissenting opinions and other critiques of the Court's rulings. Others have never been proposed before. And the suggestions offered here are by no means intended to comprise a comprehensive list of exceptions to the absolute immunity rules.[245] One purpose of laying out all of these ideas in this one place is that the whole is greater than the sum of the parts. Separately, each proposed inroad on current doctrine may be discounted as dealing with only a minor matter and accordingly not worthy of pursuit. When the all of the justifications for these reforms are considered in their entirety, however, one overarching point becomes clear: There is a powerful, if not overwhelming, case for reshaping absolute-immunity doctrine by significantly modifying the Court's function-based methodology.

These suggestions take social costs as a constant. As discussed in section III.C, the social costs of constitutional tort litigation do not vary significantly depending on function. On the other hand, as discussed in section IV.A, the benefits of constitutional tort do vary. The function-based approach is a good start because it helps to identify types of official conduct in which the benefits are, as a general rule, comparatively low. In these areas other types of remedies are often available because the conduct is highly publicized. But the current doctrine, which focuses exclusively on function, sweeps too broadly. It applies absolute immunity even when other remedies are not available and the benefit of constitutional tort is high. For example, constitutional tort is especially valuable when the constitutionally dubious conduct is hidden from public view.

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[245] For example, a radically different approach would deny official immunity so long as plaintiffs seek only nominal damages. This approach would minimize social costs while achieving some of the benefits of constitutional tort. *See generally* James E. Pfander, *Resolving the Qualified Immunity Dilemma, Constitutional Tort Claims for Nominal Damages*, 111 COLUM. L. REV. 1601 (2011) (proposing that constitutional tort claimants should be allowed to pursue nominal damages claims alone); Michael L. Wells, *Constitutional Remedies: Reconciling Official Immunity with the Vindication of Rights*, 88 ST. JOHN'S L. REV. 713 (2014) (arguing that vindication of a claimant's rights does not just consist of compensation). While these articles focus mainly on qualified immunity, the trade-off between vindication and social costs applies to absolute immunity as well.

Based on these cost-benefit considerations, this section of the Article proposes six changes in the current absolute immunity regime, each of which would narrow the scope of absolute official immunity: First, legislative immunity should be available only when the enactment is generally applicable, and not when it targets one or a few persons. Second, prosecutorial immunity should be available only for actions directly linked to prosecution and not for supervisory conduct within the prosecutor's office. Third, judicial immunity should not apply to ex parte irrevocable acts. Fourth, judicial immunity should be denied when the judge lacks sufficient independence from oversight by other officers. Fifth, officers who are not judges or prosecutors should not be accorded absolute immunity on the theory that they engage in judicial or prosecutorial functions. Sixth, the Court should overrule the current doctrine that legislators, and perhaps the U.S. President, are absolutely immune from *prospective* relief.

A downside of cost-benefit balancing is that an unconstrained version of it would "lead to unpredictable results and uncertain expectations."[246] Unpredictable results and uncertain expectations can be kept in check by well-defined rules that are formulated in a way that minimizes the need for a fact-intensive inquiry. In *Harlow*, for example, the Court abandoned the subjective prong of the qualified immunity test in order to minimize that need.[247] Each of the ideas discussed below attempts to meet this concern in the context of absolute immunity. Five of the six propose changes in the legal rules and would require few if any new factual inquiries. The first and second, on the triggers for legislative and prosecutorial immunity, are concerned with the legal definitions of "legislation" and "prosecution" for absolute immunity purposes. Similarly, the fourth exception focuses on the legal rules that control the question of whether a particular tribunal qualifies for judicial immunity, and the fifth involves the legal status of the "quasi-" doctrine, which allows defendants other than prosecutors and judges to benefit from

[246] Gertz v. Robert Welch, Inc., 418 U.S. 323, 343–44 (1974) (rejecting case-by-case balancing in the defamation context).

[247] *See* Harlow v. Fitzgerald, 457 U.S. 800, 816–17 (1982) (shielding government officials performing discretionary functions from liability for civil damages unless the conduct violates clearly established rights of which a reasonable person would know). Whether the Court's effort succeeded is not so clear. *See* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 60 (2017) (suggesting that "qualified immunity may actually increase the costs and delays associated with Section 1983 litigation").

absolute immunity. The sixth exception would simply eliminate the legal rule that legislators and the President may assert absolute immunity from prospective relief (as well as from damages). The third does hinge on facts. It would make an exception to judicial immunity for irrevocable ex parte acts, a category that should be easy to identify without extended factual investigation.

1. Bogan *and the Trigger for Legislative Immunity.* In *Bogan v. Scott-Harris*,[248] local legislators in Fall River, Massachusetts, had, in the course of enacting a budget ordinance, voted to eliminate a municipal department of which Scott-Harris was the only employee. A jury found the mayor and one council member liable for the dismissal, on the ground that the mayor's proposal to eliminate the department and the council members' vote were in retaliation for the speech protected by the first amendment.[249] A unanimous Court held that legislative immunity extends to local legislators and that proposing and voting on a budget were legislative functions, explaining that the "effective government" rationale for legislative immunity applies at least as strongly to municipal governments as to state governments.[250] Terminating a position, "unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office."[251]

On its facts, *Bogan* merely applies settled legislative immunity doctrine to a local legislative body. It is noteworthy, nonetheless, because the local government context raises an issue that the Court identified but left open.[252] Local legislative bodies, much more often than state legislatures and Congress, enact measures that affect only one or a few persons.[253] In *Bogan*, for example, the effect of the local legislature's action came to bear on only one person.[254] Should

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[248] 523 U.S. 44 (1998).

[249] *Id.* at 47.

[250] *Id.* at 54–55.

[251] *Id.* at 56.

[252] *See id.* at 54 (noting that the Court of Appeals held that petitioners' conduct was not legislative because it was specifically targeted at respondent).

[253] *See* JEFFRIES ET AL., CIVIL RIGHTS ACTIONS, *supra* note 14, at 57 (contrasting the low likelihood of legislation targeting an individual at the state and federal levels with the higher likelihood of legislation targeting an individual at the local level).

[254] *Bogan* itself might be viewed as such a case. As a practical matter, the elimination of the plaintiff's position only affected the plaintiff. *See* Jeffries, *The Liability Rule*, *supra* note 14, at 215 (indicating that functionally the position-elimination ordinance only affected the

legislative immunity apply in such a case just because the defendants used a formal legislative process? Consider *Kaahumanu v. County of Maui*.[255] There, a local legislature enacted an ordinance that did nothing more than deny a conditional use permit to a business seeking to conduct weddings on residential property.[256] The owner sued under § 1983, claiming a due process violation.[257] The Ninth Circuit panel refused to apply absolute legislative immunity.[258] According to the court, formal legislative process was not sufficient, standing alone, to trigger legislative immunity.[259] The court distinguished *Bogan*—however dubiously—as a case in which the act involved could have broader impact, while in *Kaahumana* the denial only applied to a single business.[260]

Kaahumanu does not stand alone,[261] And rightly so. As we have seen, the "low benefits of constitutional tort" rationale for absolute

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plaintiff). In form, however, the vote on the budget was "quintessentially legislative." *Bogan*, 523 U.S. at 55. An advantage of adhering to a formal approach on this topic is that it provides clarity in application of the rule and thus avoids the social costs generated by the need to examine local government actions one at a time in order to determine whether they are legislative in substance.

[255] 315 F.3d 1215 (9th Cir. 2003).

[256] *Id.* at 1218–19.

[257] *See id.* at 1219 ("The plaintiffs filed suit . . . under 42 U.S.C.A. § 1983 for violation of the First, Fifth, and Fourteenth Amendments . . . .").

[258] *See id.* at 1219–20 (stating that "[t]he question before us . . . is whether the actions of the Council members, when 'stripped of all considerations of intent and motive,' were legislative rather than administrative or executive" and utilizing a four factor test to determine whether the act at issue is legislative).

[259] *See id.* at 1223 ("While [the act of voting] weighs in favor of legislative immunity, it does not itself decide the issue.").

[260] *See id.* at 1223–24 (comparing the act in *Bogan* in which an employee was discharged through the elimination of the health department and where the Supreme Court held that such an elimination of a department may have implications beyond the consequences affecting the sole employee whose position was eliminated, to the act at issue in *Kaahumana*, which the court held "did not change Maui's comprehensive zoning ordinance or the policies underlying it," effectively stating that the act at issue only affected one party); Young v. Mercer Cnty. Comm'n, 849 F.3d 728, 734–35 (8th Cir. 2017) (terminating a lease, when done by a county commission empowered to do so, is a legislative act even if the termination involves no legislation); *cf.* Acierno v. Cloutier, 40 F.3d 597, 597 (3d Cir. 1994) ("[M]embers of a county counsel were entitled to legislative immunity for enactment of [an] ordinance which rezoned [a] single parcel of land to less intensive use . . . .").

[261] *See* Anders v. Cuevas, 984 F.3d 1166, 1181 (6th Cir. 2021) (following the view that, under *Bogan*, legislative immunity applies only when the act is "legislative in form" as well as "legislative in substance"). Thus, legislative immunity would not apply in a suit against a city mayor, if his veto of a towing contract "was nothing more than an attempt to stop the city

immunity depends on the availability of other safeguards against abuse.[262] When legislation affects many people, it is more likely to be publicized and productive of the sort of meaningful political pushback that provides a safeguard against abuse.[263] But legislators are unlikely to incur repudiation at the ballot box even for the most formally legislative acts if those acts are aimed at a single person. The comparatively high benefits of constitutional tort when the legislation has a narrow impact tilts the balance against absolute immunity, just as the Ninth Circuit concluded in *Kaahumanu*.

2. Van de Kamp *and Prosecutorial Immunity for Administrative Functions.* In *Van de Kamp v. Goldstein*,[264] the issue was whether prosecutorial immunity applied only to the acts involved in the actual prosecution of a case, and not to the failure of senior prosecutors to properly oversee the adjudication-related work of underlings.[265] In 1980, Goldstein had been wrongly convicted of crimes on the basis of false evidence obtained from a jailhouse informant.[266] In the past, the informant had received reduced sentences for providing information.[267] The low-level prosecutors in Goldstein's criminal case had not informed defense counsel of this fact,[268] however, even though Supreme Court precedent required them to do so.[269] Settled prosecutorial immunity doctrine precluded Goldstein from successfully suing these low-level prosecutors for

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from contracting with one specific entity," as his vote would not be legislative in substance in that event. *Id.* at 1182.

[262] *See supra* section IV.A.

[263] *See* O'Bannon v. Town Ct. Nursing Ctr., 447 U.S. 773, 799–801 (1980) (Blackmun, J., concurring) (discussing a similar idea in connection with procedural due process and stating that a person's "rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule").

[264] 555 U.S. 335 (2008).

[265] *See id.* at 338–39 ("We here consider the scope of a prosecutor's absolute immunity . . . . We ask whether that immunity extends to claims that the prosecution failed to disclose impeachment material . . . due to: (1) a failure to properly train prosecutors, (2) a failure to properly supervise prosecutors, or (3) a failure to establish an information system containing potential impeachment material about informants.").

[266] *Id.* at 339.

[267] *Id.*

[268] *Id.*

[269] *See* Giglio v. United States, 405 U.S. 150, 154 (1972) ("To the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to insure communication of all relevant information on each case to every lawyer who deals with it.").

damages because their failure to pass on the impeachment evidence fell within *Imbler*'s absolute immunity rule.[270] Goldstein, however, sued the supervising prosecutors (the district attorney and the chief deputy district attorney), on the theory that their failures of training and supervision involved administrative rather than prosecutorial functions, and thus did not come under *Imbler*'s protective umbrella.[271]

Writing for a unanimous Court, Justice Breyer rejected this gambit, reasoning that there existed no legally consequential difference between suing a low-level prosecutor and suing a supervisor.[272] Though the suit against the supervisor would impose liability on a different officer, "differences in the pattern of liability among a group of prosecutors in a single office" would not "alleviate *Imbler*'s basic fear, namely, that the threat of damages liability would affect the way in which prosecutors carried out their basic court-related tasks."[273] That is, the social costs of tort litigation are equally high, whether the suit is directed against a low-level prosecutor or the supervisor, and those costs do not vary much depending on whether the supervisor is sued for "actions related to an individual trial" or for more general failures of training and supervision.[274]

From a cost-benefit perspective, this analysis is incomplete. Even if the social costs of imposing liability are identical in both contexts, the vindication and deterrence benefits of suits against supervisors may be especially high. It might seem, at first blush, that authorizing any constitutional tort suit is of marginal value in this case because Goldstein ultimately vindicated his right against unconstitutional conviction in federal habeas corpus litigation.[275] But the only remedy in that litigation was release from

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[270] *See* Imbler v. Pachtman, 424 U.S. 409, 427–28 (1976) (extending absolute immunity to the conduct of prosecutors under § 1983 and holding that prosecutors may not be held civilly liable for their conduct in fulfilling their prosecutorial duties).

[271] *Van de Kamp*, 555 U.S. at 335.

[272] *See id.* at 345 ("The only difference . . . lies in the fact that . . . a prosecutorial supervisor or colleague might himself be liable for damages *instead* of the trial prosecutor. But we cannot find that difference . . . to be critical.").

[273] *Id.*

[274] *See id.* at 346 ("[A] suit charging that a supervisor made a mistake directly related to a particular trial, on the one hand, and a suit charging that a supervisor trained and supervised inadequately, on the other, would seem very much alike.").

[275] *Id.* at 339.

confinement, pending a new trial.[276] He was hardly made whole for his monetary expense, emotional distress, and deprivation of liberty for twenty-four years.[277] Under *Imbler*, Goldstein is obliged to go without a remedy for those harms—even if the prosecutor acted in bad faith, for the purpose of violating his constitutional rights, or for the purpose of personal gain.[278] Under absolute immunity doctrine, this sacrifice is deemed supposedly necessary so that we may avoid the social costs of suits brought against public officials involved in prosecuting criminal cases.[279]

The feature that distinguishes *Van de Kamp* from *Imbler* is that the defendants in *Van de Kamp* were not involved in prosecuting the case.[280] Instead, they were supervisors,[281] whose action or inaction does not take place in public view and thus is hard to detect unless it is exposed in a constitutional tort suit. But there exists an *additional* benefit that arises from adjudicating suits against state actors who act in supervisory roles. This benefit relates to the deterrence goal of constitutional tort. The deterrent impact of greenlighting a suit for damages against supervisors is far greater than providing an alternative remedy or even than authorizing a suit against the low-level prosecutor directly involved in handling the criminal defendant's case. Appellate review and habeas corpus may suffice to achieve deterrence when the violation is specific to the prosecution of a single case. Faulty supervision can have a broader impact, however, by producing recurring violations across multiple cases, oftentimes due to the actions of multiple trainees. This repeat-violation and system-wide impact renders the benefit forgone by sacrificing the tort remedy's deterrence value far greater in the context of suits based on improper prosecutorial supervision than the benefit forgone in one-shot-wrong lawsuits exemplified by *Imbler*. Nor—to repeat a key point—would denying absolute immunity in prosecutorial training suits impose an extreme burden on prosecutors whose work in the process of training underlings transgresses constitutional bounds. Even when they violate the

[276] *Id.*

[277] *See id.* (noting Goldstein's twenty-four years of wrongful incarceration and omitting discussion of his suffering and any remedy aside from release).

[278] *See id.* at 348 (noting that absolute immunity sometimes deprives deserving plaintiffs).

[279] *See id.* at 341–42 (describing these social costs).

[280] *Id.* at 340.

[281] *Id.*

Constitution, after all, supervisory personnel unable to assert the absolute immunity defense would still remain fully able to wrap themselves in sheltering cloak of qualified immunity.[282]

3. *Judicial Immunity for Irrevocable Ex Parte Acts.* In *Stump v. Sparkman*, the mother of Linda Spitler presented a document, captioned a "Petition To Have Tubal Ligation Performed On Minor and Indemnity Agreement," to Judge Harold Stump of the Circuit Court of DeKalb County, Indiana.[283] Stump, acting ex parte and without any explicit statutory authority, approved the petition.[284] A few days later Linda, a fifteen-year-old, was taken to a hospital and told that her appendix was to be removed.[285] In fact, she was sterilized.[286] She did not learn what actually had happened until two years later when her inability to have children led her to make inquiries.[287] She sued Judge Stump, among others, under § 1983.[288]

Relying on *Bradley v. Fisher*,[289] the Court held that Stump was protected by absolute judicial immunity.[290] *Bradley* had ruled that judicial immunity applies to all judicial rulings, unless the judge has acted in the "clear absence of all jurisdiction."[291] In applying *Bradley* to Stump's case, Justice White reasoned that the challenged order was a judicial act and that Judge Stump did not issue it in the "clear absence of all jurisdiction" in light of the recognized judicial

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[282] Prosecutors may engage in civil litigation on behalf of the government, and some lower courts have applied absolute prosecutorial immunity to such litigation. *See, e.g.*, Benavidez v. Howard, 931 F.3d 1225, 1230–32 (10th Cir. 2019) ("[A]bsolute immunity shields those acts undertaken by a government attorney in preparation for judicial proceedings *and* which occur in the course of his or her role as an advocate for the government."). From a cost-benefit perspective, the rationale for absolute immunity is weaker in such a case because the benefits of absolute immunity for acts of a prosecutor in a civil case are lower than in a criminal case. There, the benefit does not include the state's especially strong interest in fearless enforcement of its criminal law.

[283] 435 U.S. 349, 351 (1978).

[284] *Id.* at 352–53.

[285] *Id.* at 353.

[286] *Id.*

[287] *Id.*

[288] *Id.*

[289] 80 U.S. 335 (1871).

[290] *See Stump*, 435 U.S. at 356 (holding that the defendant judge is immune from suit if the judge's court possessed subject matter jurisdiction). The holding has been widely denounced. For a forceful critique, see Irene Merker Rosenberg, Stump v. Sparkman*: The Doctrine of Judicial Impunity*, 64 VA. L. REV. 833, 836 (1978).

[291] *Bradley*, 80 U.S. at 351.

power to issue emergency decrees.[292] In the principal dissent, Justice Stewart took aim at this rationale, insisting that "what Judge Stump did . . . was beyond the pale of anything that could sensibly be called a judicial act."[293]

Viewed as a matter of costs and benefits, the problem with Judge Stump's approval of the ex parte petition is not captured within the entirely function-based analytical methodology laid down in *Bradley*, nor in Justice Stewart's dissent. Absolute judicial immunity from suits for damages rests largely on "low benefits of constitutional tort," due to the availability of other remedies for judicial violations. The ability to argue one's side of a case and review by appellate courts help to limit the extent to which judges may abuse their power. When these dynamics are present, a vindication of constitutional rights and a deterrence of violations can often be achieved, at least in some measure, without compromising the "effective government" rationale on which the absolute-immunity rule for judicial actions rests.[294]

In *Stump*, however, the ex parte proceeding denied Linda Spitler the opportunity to present her side of the sterilization issue or to seek appellate review, and the irrevocable nature of the tubal ligation meant that no other remedy would be available to vindicate her rights.[295] These features of the litigation prompted Justice Powell to pen an additional dissenting opinion. He pointed out that this was not at all a "low benefits of constitutional tort" case. Instead, "Judge Stump's preclusion of any possibility for the vindication of [Linda Spitler's] rights elsewhere in the judicial system" was "the central feature of this case."[296] Justice Powell noted that *Bradley* had "accepted [the] costs to aggrieved individuals because the judicial system itself provided other means

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[292] *See Stump*, 435 U.S. at 357, 362 (disagreeing with respondent's contentions that the defendant judge acted with "clear absence of all jurisdiction" and that the defendant's actions did not constitute a judicial act).

[293] *Id.* at 365 (Stewart, J., dissenting).

[294] *See id.* at 370 (Powell, J., dissenting.) (explaining that private rights and causes of action can be sacrificed, to some degree, when alternative forums and methods for vindication of those rights, including appellate review, exist).

[295] *See id.* at 351–53 (describing how the petition for tubal ligation and subsequent procedure received approval and was carried out without a judicial hearing or knowledge of Linda Spitler).

[296] *Id.* at 369 (Powell, J., dissenting).

for protecting individual rights."[297] As he observed, however, the majority in *Stump* failed to appreciate this point—not surprisingly because of its preoccupation with assessing whether Judge Sparkman's act was properly characterized as a judicial act.[298] Unlike the Court, and unlike the principal dissent, Justice Powell grasped the central point of the cost-benefit approach: Even if the judge's act is a "judicial act," the "low benefit of constitutional tort" rationale for judicial immunity does not apply when the benefit is actually high, and the benefit is high when the judge act ex parte and orders something that cannot be corrected on appeal.

4. Judicial Immunity: Beyond the Function-Based Approach. In *Cleavinger v. Saxner*,[299] a prison's discipline committee had punished Saxner and another inmate for violations of prison rules.[300] On appeal to the warden and the Bureau of Prisons, the inmates obtained reversal of the findings against them.[301] They also asserted a *Bivens*-based constitutional tort claim against the members of the disciplinary committee, claiming that the committee had violated their constitutional rights.[302] The Supreme Court took the case to decide whether the officers who made up the discipline committee could successfully invoke absolute judicial immunity as a defense.[303] Although the committee's members were not judges, the Court concluded that this fact was not dispositive because prior cases—such as those involving hearing examiners, administrative law judges, prosecutors, and witnesses—had "extended absolute immunity to certain others who perform functions closely associated with the judicial process."[304] In addition, "[t]he committee members, in a sense, [did] perform an adjudicatory function in that they determine[d] whether the

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[297] *Id.*

[298] *See id.* (attempting to redefine the "central feature" of the case). For a similar objection to the application of absolute immunity to the "ex parte" aspects of the prosecutorial function, see Jeffries, *The Liability Rule*, *supra* note 14, at 230–31 (discussing prosecutorial absolute immunity for failure to turn over exculpatory evidence to the defense and concluding absolute immunity is "unwise" due to the lack of or inadequacy of other remedies).

[299] 474 U.S. 193 (1985).

[300] *See id.* at 194 (describing the citations issued and administrative segregations imposed on respondents).

[301] *See id.* at 197 (describing the Warden's order ending respondents' detention and refusal to expunge the incident from the respondents' inmate record).

[302] *See id.* at 198 (describing allegations within petitioner's complaint).

[303] *Id.* at 194.

[304] *Id.* at 200.

accused inmate [was] guilty" by evaluating evidence, making credibility determinations, and rendering decisions.[305] Turning to the matter of costs and benefits, the Court also worried about hamstringing the operations of prisons because, "if [persons like the defendants] are suable and unprotected, perhaps [they] would be disinclined to serve on a discipline committee."[306]

Nonetheless, the Court refused to extend absolute immunity to the committee members because—so the Court reasoned—affording such immunity required more than the defendant's engagement in an adjudicatory function.[307] Unlike judges, the committee members were not "independent" in the manner (for example) of administrative law judges; instead, they were ordinary prison officials "temporarily diverted from their usual duties."[308] They also were "the direct subordinates of the warden who reviews their decision[s]," and they "work[ed] with the fellow employee who lodges the charge against the inmate."[309] This lack of independence meant that these officials were "under obvious pressure to resolve a disciplinary dispute in favor of the institution and their fellow employee."[310] According to the Court, there was another reason not to treat committee members as the functional equivalent of judges: The prison disciplinary hearings lacked many basic components of ordinary courtroom proceedings, including the rights to cross-examine and compel the attendance of witnesses, the ability to engage in discovery, and the duty of the factfinder to apply a clearly established burden of proof.[311] For all these reasons, "the members had no identification with the judicial process of the kind and depth that has occasioned absolute immunity." [312]

Among Supreme Court absolute immunity rulings, *Cleavinger* steps away from a fixation on the decision-making function of the defendant and emphasizes instead considerations directly

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[305] *Id.* at 203.

[306] *Id.*

[307] *See id.* (suggesting that the relevant inquiry balances the performance of adjudicatory functions with the potential for constitutional violations).

[308] *Id.* at 203–04 (comparing the independence of judges to the lack thereof for disciplinary committee members).

[309] *Id.* at 204.

[310] *Id.*

[311] *See id.* at 206 (discussing the lack of procedural safeguards in prison disciplinary hearings that distinguish it from the guardrails afforded in the traditional judicial processes).

[312] *Id.*

connected with a sensitive cost-benefit analysis.[313] As the Court's reasoning underscores, the vindication and deterrence benefits of allowing constitutional-tort actions are high when the relevant decision-making process includes few guardrails against constitutional violations, as it does when an adjudicative officer lacks independence and an adjudicative process lacks due process safeguards. Though the Court seemed to limit its holding to the "quasi-judicial immunity" claim advanced by members of the disciplinary committee, the logic of *Cleavinger* is not limited to such officers. Of particular importance, many of the factors highlighted by the Court apply no less in some contexts to adjudicative decisions issued by state actors located within the judicial branch.

In Georgia, for example, the municipal court judge in a given locality is appointed by the local governing body, such as the city council or the county commission.[314] The appointment is for a term of years, with the salary and the term determined by the governing body.[315] A municipal judge may be removed by the governing body for a variety of reasons, including "[w]illful and persistent failure to perform duties," and "[c]onduct prejudicial to the administration of justice which brings the judicial office into disrepute."[316] These provisions raise the question of whether Georgia municipal court judges are sufficiently independent to warrant absolute immunity. To the extent the doctrine rests on the notion that judicial independence will suffice to safeguard rights, the type of control exercised by municipal governments over municipal court judges seems to undermine that rationale.

Cleavinger also lends aid to the conclusion that the Court took a wrong turn in *Stump*. After all, in that case, just as in *Cleavinger*, Linda Spitler was afforded no opportunity to call or cross-examine witnesses, to engage in discovery, or indeed to participate in any way at all in judicial proceedings that profoundly reshaped her life. In addition, the opportunity for cost-mitigating corrective review of

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[313] *See id.* (deciding that granting qualified, as opposed to absolute, immunity in this case was the proper balance between protection of decision-making bodies and constitutionality concerns).

[314] *See* O.C.G.A. § 36-32-2 ("[T]he governing authority of each municipal corporation . . . is authorized to appoint judge[s] of [their municipal] court.").

[315] *See id.* (fixing term limits of at least one year for municipal judges and explaining the power of the local governing body to set the judge's compensation).

[316] § 36-32-2.1(b)(1)(B), (D). The statute also provides that "[a] municipality may define in its charter further conduct that may lead to a judge's removal." § 36-32-2.1(b)(2).

the challenged decision was far greater in *Cleavinger* than in *Stump*. Indeed, as noted earlier, there was no opportunity for corrective review at all in the *Stump* case. By contrast, such review was available in *Cleavinger*. In fact, that review produced a reversal of the earlier and problematic judicial action. Viewed from a wide-angle, *Cleavinger* not only suggests that *Stump* was wrongly decided; it also illustrates how policy-sensitive cost-benefit analysis in absolute-immunity cases is more likely to lead to sound results than a woodenly formalistic inquiry into the nature of the function performed by the constitutional wrongdoer.

5. The "Quasi-" Doctrine. Cleavinger illustrates another ground for limiting absolute immunity. In *Shelly v. Johnson*,[317] a post-*Cleavinger* prison-discipline case, the members of the disciplinary committee were administrative law judges—as opposed to being prison employees answerable to the warden and colleagues of other prison officers involved in litigation.[318] Pointing to these facts, the Sixth Circuit panel distinguished *Cleavinger* and held that absolute immunity applied.[319] *Shelly* illustrates a doctrine, sometimes called "quasi-judicial" immunity, which hinges on analogizing certain executive branch officials to traditional judges. Courts have applied quasi-judicial immunity to members of parole boards,[320] zoning boards,[321] medical disciplinary committees,[322] and other non-judicial actors charged with conducting adjudicatory functions.[323] Social workers who bring enforcement actions against parents for mistreatment or neglect of children have received "quasi-

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[317] 849 F.2d 228 (6th Cir. 1988) (per curiam).

[318] *Id.* at 230.

[319] *Id.*

[320] *See, e.g.*, Fort v. Washington, 41 F.4th 1141, 1147 (9th Cir. 2022) (holding that a parole board is entitled to quasi-judicial immunity); Holmes v. Crosby, 418 F.3d 1256, 1258 (11th Cir. 2007) (per curiam) ("We repeatedly have held that individual members of the Parole Board are entitled to absolute quasi-judicial immunity from a suit for damages.").

[321] *See, e.g.*, Dotzel v. Ashbridge, 438 F.3d 320, 325 (3d Cir. 2006) (holding that a zoning board is entitled to quasi-judicial immunity); Omnipoint Corp. v. Zoning Hearing Bd., 181 F.3d 403, 409 (3d Cir. 1999) (finding that a zoning board acted in a quasi-judicial capacity).

[322] *See* Wang v. N.H. Bd. of Registration in Med., 55 F.3d 698, 702 (1st Cir. 1995) ("[T]he Board members . . . would be absolutely immune from suit, in their individual capacities, on section 1983 claims arising out of their respective judicial, quasi-judicial and/or prosecutorial functions, even though they acted 'maliciously and corruptly.'").

[323] SHELDON NAHMOD ET AL., CONSTITUTIONAL TORTS 474–75 (5th ed. 2020); *see* Jeffries, *The Liability Rule*, *supra* note 14, at 218–19 (noting that quasi-judicial immunity has been applied in suits against medical experts, guardians ad litem, and mediators.).

prosecutorial" immunity on a similar theory.[324] "Quasi-legislative" immunity is illustrated by *Supreme Court of Virginia v. Consumers Union of the U.S., Inc.*,[325] in which the Virginia Court—even though acting in a non-adjudicatory role—was deemed entitled to invoke absolute legislative immunity in the face of a challenge to its promulgation of bar disciplinary rules.[326]

These extensions of the absolute-immunity doctrine all have their roots in the Court's doctrinal adherence to a function-centered approach. An attentiveness to thoughtfully measuring real-world costs and benefits, however, suggests that the "quasi" version of absolute immunity pushes the governing doctrine too far. Absolute immunity protects officers who know they are violating constitutional rights and who do so maliciously or in bad faith. It wholly denies the plaintiff an opportunity to vindicate constitutional rights and deter violations. A premise of absolute immunity for judges and prosecutors is that the institutions and traditions of their profession impose constraints on them. We can afford to sacrifice tort liability, so the argument goes, because most judges and prosecutors come to their work with a commitment to legal norms and the traditions of the legal profession together with a susceptibility to professional discipline if they violate norm-and-tradition-based ethical constraints.[327]

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[324] *See, e.g.*, Milchtein v. Milwaukee Cnty., 42 F.4th 814, 825 (7th Cir. 2022) ("[A] social worker pursuing a child-custody case acts like a prosecutor and witness, both of whom are entitled to absolute immunity for their actions taken in court, including in ex parte proceedings."); J.T.H. v. Missouri Dep't of Soc. Servs. Children's Div., 39 F.4th 489, 492 (8th Cir. 2022) (holding that social workers performing purely investigatory functions are not entitled to absolute immunity); Pittman v. Cuyahoga Co. Dept. of Children & Fam. Servs., 640 F.3d 716, 726 (6th Cir. 2011) (explaining that family social workers are absolutely immune from liability due to their quasi-prosecutorial function); Miller v. Gammie, 335 F.3d 889, 898 (9th Cir. 2003) ("It also may be that some submissions to the court by social workers are functionally similar to the conduct recognized at common law to be protected by absolute prosecutorial immunity."); *see also* Cox v. Dept. of Soc. & Health Servs., 913 F.3d 831, 837 (9th Cir. 2019) (discussing the distinction between acts for which social services workers receive absolute or qualified immunity).

[325] 446 U.S. 719, 734 (1980).

[326] *Id.*; *see also* Jones v. Allison, 9 F.4th 1136, 1140–41 (9th Cir. 2021) (holding that the California Department of Corrections is entitled to legislative immunity with regard to regulations it adopted that excluded certain offenders from early parole consideration).

[327] *See* discussion *supra* section IV.A (discussing the rationale behind the absolute immunity doctrine).

This line of justification for applying absolute immunity, however, does not carry over, at least in most cases, to officers who can assert only quasi-judicial or quasi-prosecutorial immunity. In *Cleavinger*, the Court touched on this theme in its analysis of the discipline committee members' absolute immunity claim.[328] After discussing the structural features that distinguished these officers from judges, the Court added that "the members had no identification with the judicial process of the kind and depth that has occasioned absolute immunity."[329] Exactly the same objection might be raised to most, if not all, assertions of "quasi-judicial" and "quasi-prosecutorial" absolute immunity.[330] This is the case because officers that can claim no more than such a "quasi" status by definition do not have the "kind and depth" of connection to "the judicial process" that marks the status of true-blue judges and prosecutors.[331] Under a cost-benefit approach, there is strong reason to believe that qualified immunity would suffice to protect these quasi-actors, just as it surely does for other executive officers.[332] In addition, eliminating the "quasi" doctrine would carry with it the benefit of simplifying § 1983 litigation by removing courts from the business of deciding whether any particular executive-branch officer merits specialized treatment based on the performance of a quasi-judicial or quasi-prosecutorial role.[333]

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[328] *See* Cleavinger v. Saxner, 474 U.S. 193, 203 (1985) (weighing the adjudicatory functions of the committee against its lack of connection to the judicial process).

[329] *Id.* at 206.

[330] *See* Margaret Z. Johns, *A Black Robe Is Not a Big Tent: The Improper Expansion of Absolute Judicial Immunity to Non-Judges in Civil Rights Cases,* 59 S.M.U. L. REV. 265, 276–314 (2006) (discussing objections to quasi-judicial immunity across various contexts).

[331] *See Cleavinger*, 474 U.S. at 206 (distinguishing officers from judges and prosecutors).

[332] Whether the same is true in connection with quasi-legislative immunity is a separate question. On the one hand, that protection is typically extended to agencies and courts, not individuals, see discussion *supra* note 325, is a feature that may guard against abuse of power. On the other hand, the electoral process may not be a check on these entities.

[333] *See, e.g.*, Tobey v. Chibucos, 890 F.3d 634, 650–51 (7th Cir. 2018) (distinguishing between acts for which parole and probation officers receive absolute quasi-judicial immunity and those acts covered by qualified immunity); Patterson v. Van Arsdel, 883 F.3d 826, 830–32 (9th Cir. 2018) (denying absolute prosecutorial immunity to a county court pretrial release officer on the ground that his acts did not amount to "advocacy," over a dissent arguing that the court "should adhere to the long established rule that once we grant that the function in question is a prosecutorial function, it does not matter if the person performing that function lacks the title of 'prosecutor'" and noting that earlier cases had held similar acts *as* prosecutorial); *id.* at 832 (Fernandez, J., dissenting) ("[W]e should adhere to the long established rule that once we grant that the function in question is a prosecutorial function,

6. Prospective Relief. Most official immunity applies only to backward-looking relief, protecting officials from paying damages for past violations.[334] When the violation is ongoing or threatened, most officials have no immunity.[335] Plaintiffs can ordinarily sue for prospective relief in the form of an injunction or a declaratory judgment.[336] Judges are a special category. A § 1983 plaintiff may obtain injunctive relief against a judge, but only after first obtaining a declaratory judgment.[337] Viewed as a matter of costs and benefits, the availability of prospective relief ameliorates the cost of official immunity. Prospective relief helps to justify the limits on damages enforced by official immunity because the forward-looking remedy can, at least to some extent, provide an opportunity for vindication of constitutional rights and deterrence of violations.

In two specialized contexts, however, official immunity may block pursuit of not only damages actions, but also claims for prospective relief. First, in *Supreme Court of Virginia v. Consumers Union of the U.S., Inc.*,[338] the Court held that absolute legislative immunity applies to prospective relief. In this § 1983 case, Consumers Union sued the Supreme Court of Virginia after that court, acting in a legislative capacity, promulgated rules of professional responsibility for the Virginia State Bar.[339] Consumers Union challenged certain rules on First Amendment grounds and, in the lower court, it

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it does not matter if the person performing that function lacks the title of 'prosecutor.'"); *see also* Jeffries, *The Liability Rule*, *supra* note 14, at 222–23 ("The pull between absolute prosecutorial immunity and the need to treat prosecutors and police alike when they perform similar functions has led to some exceedingly fine distinctions.").

[334] *See* Wells, *supra* note 245, at 744 ("Under current official immunity doctrine, forward-looking constitutional remedies . . . are often more readily available than backward-looking relief . . . .").

[335] *See id.* at 745–46 (highlighting cases in which prospective relief was granted because the plaintiff could demonstrate with "sufficient likelihood" that the constitutional violation was ongoing).

[336] *See* Jeffries, *The Right-Remedy Gap*, *supra* note 146, at 110 (noting that "qualified immunity does not exist" for injunctions because "the reasons for curtailing money damages do not obtain for injunctive relief").

[337] For discussion of the background of this rule, see JEFFRIES ET AL., CIVIL RIGHTS ACTIONS, *supra* note 14, at 71.

[338] 446 U.S. 719, 731–34 (1980) (holding that case law allowing actions for damages under § 1983 is "equally applicable to § 1983 actions seeking [prospective] relief" because the Court "did not distinguish between actions for damages and those for prospective relief").

[339] *Id.* at 721–22 (1980) (discussing the Supreme Court of Virginia's promulgation of rules governing professional responsibility for the Virginia State Bar).

prevailed on the merits.[340] The U.S. Supreme Court, however, held that the Virginia Court acted in a legislative capacity in enacting the rules and that it could not be held liable for enacting them.[341] Unlike in other absolute immunity § 1983 cases, the Court made no reference to nineteenth-century doctrine. Instead, it cited *Eastland v. United States Servicemen's Fund*,[342] an earlier case brought against a U.S. Senator in which the target of a congressional subpoena unsuccessfully sought to enjoin its issuance.[343] In *Eastland*, the Court relied heavily on the Speech and Debate Clause of the U.S. Constitution, which applies only to Congress, not state and local legislatures.[344] *Consumers Union* borrowed directly from *Eastland*, declaring that "a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation."[345]

Second, in *Mississippi v. Johnson*,[346] a post-Civil War case, the Court rejected Mississippi's effort to sue the President for prospective relief.[347] The suit arose because Congress had enacted two statutes that set up the Reconstruction regime in Mississippi and other rebel states.[348] President Andrew Johnson opposed the project and vetoed both statutes, but they were enacted over his veto.[349] In this case, the state named Johnson as a defendant, challenged the Reconstruction statutes, and sought an injunction

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[340] *Id.* at 726–27.

[341] *See id.* at 734 (finding that the Supreme Court of Virginia could not be held liable for promulgating the rules of professional responsibility). However, the Supreme Court held that the Supreme Court of Virginia could be enjoined from enforcing the rules, as this was a prosecutorial function, not a legislative one. *Id.* at 736–37.

[342] *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 502–03 (1975) (discussing constitutional protections afforded to legislators).

[343] *See Consumers Union*, 446 U.S. at 731–33 (articulating the relevance of the U.S. Supreme Court's holding in *Eastland* to *Consumers Union*).

[344] *See Eastland*, 421 U.S. at 501–07 (discussing the reliance of the Court on the Speech and Debate Clause).

[345] *Consumers Union*, 446 U.S. at 733 (quoting *Eastland*, 421 U.S. at 503 (1975)).

[346] 71 U.S. 475 (1867).

[347] *See id.* at 501 (holding that the State of Mississippi could not sue President Johnson).

[348] *Id.* at 497.

[349] *Id.* at 475.

against their enforcement.[350] The Court rejected Mississippi's effort.[351]

Some of the Court's language pointed to its reliance on the broad absolute-immunity rule. For example, "Congress is the legislative department of the government; the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance."[352] Read in context, however, it is not clear that the Court intended to rule that the President may never be enjoined. In particular, the above-quoted passage was followed by a discussion of separation of powers and an expression of reluctance on the part of the Court to interfere in disputes between Congress and the President as a general matter.[353] Perhaps this was the prudent course. Several months later, Congress impeached Johnson and attempted to take away the Court's jurisdiction to hear challenges to the Reconstruction legislation.[354]

The bottom line is that neither *Mississippi v. Johnson* nor *Supreme Court of Virginia* is a strong precedent for absolute legislative immunity. Mississippi is not a § 1983 case, nor did it involve any historical analogue to § 1983. The litigation was between Mississippi and the U.S., the underlying dispute was politically-fraught, and the Court seemed bent on declining the invitation to put itself in the middle of a political conflict between the Congress and the President.[355] In any event, the modern

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[350] *Id.* at 497.

[351] *Id.* at 501

[352] *Id.* at 500.

[353] *See id.* at 500–01 ("If the President refuse[s] obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government?"). This passage is followed by a discussion of impeachment and of the Court's reluctance to become involved in that process. *Id.* at 501.

[354] For the Court's response to the effort to deprive it of jurisdiction, see *Ex parte* McCardle, 74 U.S. 506, 507–08 (1868) (expressing that Congress may take away the Court's jurisdiction to hear appeals of cases brought under an 1867 habeas corpus statute); *Ex parte* Yerger, 75 U.S. 85, 103–04 (1869) (explaining that Congress's partial repeal of the 1867 habeas statute did not affect the Court's jurisdiction over habeas cases arising under the 1789 Judiciary Act).

[355] *See* FALLON ET AL., *supra* note 34, at 1058–59 ("[T]he Court's analysis in *Johnson* subsumed the question of presidential immunity under concerns involving the scope of unreviewable executive discretion and the hazards of creating a direct conflict between

Supreme Court has largely ignored the case. For example, the Court barely mentioned *Mississippi v. Johnson* when it held in *Nixon v. Fitzgerald* that the U.S. President is absolutely immune from suits for damages,[356] and in *United States v. Nixon* it squarely held that—notwithstanding its handling of the Reconstruction-era dispute—the President is susceptible to at least some forms of judicial process.[357]

As for the Court's ruling in *Supreme Court of Virginia*, the *Eastland* precedent plainly was not on point, as that case involved the Speech and Debate Clause, a constitutional provision that by its terms did not apply to state and local legislatures.[358] The only policy argument for absolute immunity the Court could come up with was that the prospect of defending a suit for prospective relief would "divert [legislators'] time, energy, and attention from their legislative tasks."[359] This concern may be real, but it makes little sense to found an absolute-immunity rule on this single upside benefit without taking account of the countervailing downside costs of foreclosing altogether access to a judicial forum when constitutional violations occur.[360] In other words, applying official immunity to prospective relief transforms the far more limited "no damages" cost imposed by the absolute immunity rule into the cost of "no relief of any kind at all." On the other side of the ledger, the "avoidance of distraction" rationale seems weak, given that prospective relief is available against governors, cabinet secretaries, and other executive officers, as well as prosecutors and judges. *Supreme Court of Virginia* does not explain why legislators are more prone to distraction than other high-ranking officials. And that is not surprising because it is hard to see how such a case can be made.

Congress and the President—hazards that may have achieved a historical zenith in the face-off between President Johnson and a Republican-dominated Reconstruction Congress.").

[356] 457 U.S. 731, 753 n.34 (1982).

[357] 418 U.S. 683 (1974); *see also* Trump v. Vance, 140 S. Ct. 2412, 2431 (2020) (noting that the President has no absolute immunity from state court subpoenas in connection with a criminal investigation).

[358] *See* Sup. Ct. of Va. v. Consumers Union of the U.S., Inc., 446 U.S. 719, 731–33 (1980) (explaining that state and local immunity does not derive from the Speech and Debate clause but has similar common-law origins)

[359] *Id.* at 733.

[360] *See* Butz v. Economou, 438 U.S. 478, 523–24 (1978) (Rehnquist, J., concurring in part and dissenting in part) (noting that suits for prospective relief raise fewer overdeterrence concerns than suits for damages).

A more cogent argument for absolute immunity for legislators and the U.S. President is that the remedial benefits are often small because typically there will be someone else to sue, most commonly a municipal government, or the prosecutorial or agency officials or the street-level officers who directly enforce legislative acts or carry out presidential orders.[361] Other defendants, however, are not always available.[362] With respect to legislative immunity, for example, a legislature may defund the plaintiff's position in retaliation for the exercise of constitutional rights, thus involving no other government official in implementing the unlawful action. As for Presidential immunity, during the Trump Administration, several litigants found it helpful, if not indispensable, to name the President as a defendant in mounting challenges to his initiatives.[363] The weakness of the "avoiding distraction" rationale suggests that the effort to arrive at the optimal blend of rights and remedies would be better served by overturning *Supreme Court of Virginia* and by reading *Johnson* narrowly as a Civil War-era separation of powers case. At least in constitutional litigation under § 1983, absolute immunity should apply only to damages and never to prospective relief.

V. CONCLUSION

Constitutional tort litigation under 42 U.S.C. § 1983 is an indispensable tool for vindicating rights and deterring violations. It may also produce social costs, in particular, by inducing officers to be overly cautious. The Supreme Court's § 1983 official immunity doctrine attempts to take account of both the costs and benefits, on the theory that the overall goal should be "the best attainable accommodation of competing values."[364] Though heavily criticized,

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[361] *See* Jeffries, *The Liability Rule*, *supra* note 14, at 211 ("In most circumstances, absolute legislative immunity does not categorically preclude money damages; it merely redirects the litigation."). Even if qualified immunity shields executive officers from damages, they may be sued for prospective relief. Local governments have no immunity. *See* Owen v. City of Independence, 445 U.S. 622, 650 (1980) (rejecting the view that municipalities are given qualified immunity).

[362] *See* JEFFRIES ET AL., CIVIL RIGHTS ACTIONS, *supra* note 14, at 57 (discussing an instance where there was no executive officer to sue).

[363] *See, e.g.*, Trump v. New York, 141 S. Ct. 530 (2020) (naming President Trump as a defendant); Trump v. Hawaii, 138 S. Ct. 2392 (2018) (same).

[364] Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

the Court's "qualified immunity" doctrine attempts to implement that goal by imposing liability for executive and administrative acts when officials violate "clearly established" law.[365]

Absolute immunity is a horse of a different color. Because absolute immunity cuts off recovery no matter how egregious the wrongdoing, it may seem "nonsensical."[366] At the least, the harsh results it generates for victims of even the worst forms of constitutional wrongs dictates the need for a compelling justification. The Supreme Court's error has been to apply a "function-based approach" in determining whether immunity should be absolute or qualified.[367] Under this approach, defendants always win when their functions are legislative, judicial, prosecutorial, or testimonial. In many of these cases, however, there are distinctly powerful justifications based on the benefits of vindication and deterrence for allowing plaintiffs to have access to § 1983 monetary relief. For this reason, shifting from the Court's current and crude function-based approach to a more nuanced cost-benefit methodology would make good sense—and all the more so because it would align the Court's doctrine with the values it has identified as properly underlying official-immunity law. Of particular importance, such a reform would support the recognition of multiple exceptions to present-day absolute-immunity rules, thus better serving the overarching remedial goals of constitutional tort law.

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[365] *See id.* at 818 (stating that government officials are shielded from liability for civil damages as long as their conduct does not violate clearly established law).

[366] *See* Jeffries, *The Liability Rule*, *supra* note 14, at 209 ("On its face, absolute immunity seems nonsensical. To say that money damages are an appropriate remedy for constitutional violations but that the defendant is absolutely immune from having to pay them reduces constitutional tort to a nullity.").

[367] *See Harlow*, 457 U.S at 810 ("[I]n general our cases have followed a functional approach to immunity law.").