The Illusion of Absolute Prosecutorial Immunity: The Supreme Court's Legislative Magic Trick

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INTRODUCTION

> He's going to show you the bricks. He'll show you they got straight sides. He'll show you how they got the right shape. He'll show them to you in a very special way, so that they appear to have everything a brick should have. But there's one thing he's not gonna show you. When you look at the bricks from the right angle, they're as thin as this playing card. His whole case is an illusion, a magic trick.[1]

In 1871, the Forty-Second Congress, on the heels of sociopolitical Reconstruction-era upheaval, passed the Civil Rights Act.[2] Oft referred to as the Ku Klux Klan Act of 1871 or the Enforcement Act of 1871, this statute, purported to do exactly that: enforce the Fourteenth Amendment, defeat the Ku Klux Klan, and expand civil rights in the South, protecting both recently enslaved Blacks and white Republican voters who were being disenfranchised.[3] Section 1 of this Act lives on today as the highly litigated 42 U.S.C. § 1983. In 1994, one in ten civil district court filings were section 1983 claims.[4] More recently, from 2023 to 2024, over 17,000 "other civil rights cases" were filed, of which section 1983 presumably constituted a significant portion.[5] Section 1983, today, states, in relevant part:

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1. MY COUSIN VINNY (Twentieth Century Fox 1992).

2. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983).

3. *See* Zamir Ben-Dan & Rigodis Appling, *Breaking the Backbone of Unlimited Power: The Case for Abolishing Absolute Immunity for Prosecutors in Civil Rights Lawsuits*, 73 RUTGERS U. L. REV. 1373, 1387–92 (2021).

4. ROGER A. HANSON & HENRY W. K. DALEY, BUREAU OF JUST. STAT., DOJ, PUB. NO. 92-BJ-CX-K026, CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 2 (1994).

5. ADMIN. OFF. OF THE U.S. CTS., MAR. 2024 CIVIL JUSTICE REFORM ACT REPORT, tbl. C-2 (2024). https://www.uscourts.gov/statistics-reports/september-2023-civil-justice-reform-act [https://perma.cc/SQZ9-Y3X3].

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

This statute is so popular, especially amongst incarcerated persons, because it provides one of the only avenues to seek redress against state officials for alleged violations of Constitutional rights.[6] Whilst the language of "[e]very person" appears to clearly encompass all state officials, the Supreme Court has increasingly narrowly tailored this language over the years: (1) *Tenney v. Brandhove*[7] in 1951 which granted absolute immunity for state legislative officials; (2) *Pierson v. Ray*[8] in 1967 which granted qualified immunity for state police officers and absolute immunity for state judges; (3) *Scheuer v. Rhodes*[9] in 1974 which granted qualified immunity for some state executive officials; (4) *Wood v. Strickland*[10] in 1975 which granted qualified immunity for school officials; (5) and *Imbler v. Pachtman*[11] in 1976 which granted absolute immunity for state prosecutors.

This grant of absolute immunity for state prosecutors was a usurpation of legislative powers. This was in direct contradiction with the text and intent of the Civil Rights Act of 1871. It assumed that Congress should have explicitly derogated the common law—with derogation in this context being unheard of—and that Congress should have derogated a common law that simply *did not* exist. The Supreme Court demonstrated impartiality by upending Congress's check on state officials—not because it was unconstitutional—but because it did not comply with their policy views, resulting in a lack of accountability for prosecutors.

Part I will analyze how the Supreme Court effectively legislated absolute prosecutorial immunity by (A) looking at the Court's decision in *Imbler* to use (B) the derogation canon to ignore (C) Congress's textual intent of overruling the common law, (D) the sociopolitical climate evident in the legislative history, (E) and the legal framework at the time. This allowed (F) the Court to supplant their version of the common law aligned with their policy goals. Next, in Part II, this paper will denounce the separation of powers issues inherent in (A) removing an important check placed by Congress on state officials that (B) aligned with the late

6. *See* MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION 1 (Kris Markarian ed., 3d ed. 2014).
7. 341 U.S. 367 (1951).
8. 386 U.S. 547 (1967).
9. 416 U.S. 232 (1974).
10. 420 U.S. 308 (1975).
11. 424 U.S. 409 (1976).

1800s populist movement and (C) resulted in modern-day rampant prosecutorial misconduct.

I. INVENTING ABSOLUTE PROSECUTORIAL IMMUNITY

A. Examining the Court's Decision in Imbler

1. The Facts

Paul Imbler was no stranger to litigation when in April of 1972, he filed a section 1983 suit against Deputy District Attorney Richard Pachtman, the prosecutor in his 1961 first-degree murder conviction.[12] Imbler alleged that Pachtman had '"with intent and on other occasions with negligence' allowed [a witness] to give false testimony and suppressed prosecution evidence which would have exonerated" him, including withholding "the results of a lie detector test and a fingerprint expert's evidence" and altering "a police artist's sketch which was used at trial."[13]

Imbler's legal battles began in sunny Pomona, California, when, after his accomplice died in an armed robbery gone wrong, Imbler turned himself in to the police.[14] The police believed Imbler to be responsible for another armed robbery, days earlier in Los Angeles where the storeowner was shot and killed.[15] Imbler was charged with first-degree felony murder.[16] Despite Imbler's alibi of barhopping with friends, he was convicted by a jury and sentenced to death, largely because of eyewitness testimony.[17] Later, in a turn of events, the prosecutor, Pachtman, wrote to the Governor of California with evidence both corroborating Imbler's alibi and impeaching the credibility of the main eyewitness's identification.[18] Based on this letter, Imbler filed a state habeas corpus petition that was unanimously denied by the Supreme Court of California and later, a federal habeas corpus petition that was granted by the Central District Court of California and affirmed by the Ninth Circuit in 1970.[19] Imbler was finally released and subsequently brought suit against Pachtman and other state officials for their role in an alleged conspiracy "to charge and convict him."[20]

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12. *Id.* at 411, 415.

13. Patrick R. Griffin, Recent Decision, *Constitutional Law: Federal Civil Rights Act: Absolute Immunity Extended to Prosecuting Attorney*, 60 MARQ. L. REV. 152, 154 & n.14 (1976).

14. *Imbler*, 424 U.S. at 411.

15. *Id.*

16. *Id.*

17. *Id.* at 411–12.

18. *Id.* at 412–13. Pachtman stated, "a prosecuting attorney ha[d] a duty to be fair and see that all true facts, whether helpful to the case or not, should be presented." *Id.* at 413.

19. *Id.* at 413–15.

20. *Id.* at 415–16.

2. The Court's Analysis

After the district court and the Ninth Circuit dismissed the complaint, the Supreme Court took up, for the first time, whether a public, state prosecutor could be liable under section 1983.[21]

a. The Court's Opinion

In a unanimous decision, with Justice Lewis F. Powell Jr. writing for the 8-0 court,[22] the Supreme Court affirmed the Ninth Circuit's dismissal and created absolute immunity for state prosecutors.[23] Their reasoning can be broken down into three main parts: (1) the reasoning of the lower courts; (2) the common law; and (3) public policy justifications.

First, the Court asserted that the federal Courts of Appeals were "virtually unanimous that a prosecutor enjoys absolute immunity from section 1983 suits for damages when he acts within the scope of his prosecutorial duties."[24] Further, the Court acknowledged "prosecutor's immunity as a form of 'quasi-judicial' immunity."[25]

Next, the Court, instead of consulting legislative intent or conducting a statutory analysis, looked to the common law.[26] This tradition began twenty years prior in *Tenney v. Brandhove* and states that section 1983 does not derogate the "general principles of tort immunities and defenses" because the immunities were "well grounded in history and reason" and "had not been abrogated by 'covert inclusion in the general language' of section 1983."[27]

Finally, after concluding that the "common-law rule of immunity is thus well settled,"[28] the Court weighed in on the policy considerations and found that the "ultimate fairness of the operation of the system itself could be weakened by subjecting prosecutors to section 1983 liability."[29]

b. The Concurrence

Justices Byron White, William J. Brennan Jr., and Thurgood Marshall concurred in the judgment. While they agreed that a prosecutor should be absolutely immune from suit for false testimony, they disagreed that a prosecutor should be absolutely immune from suit for suppressing evidence.[30] Significantly, the

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21. Griffin, *supra* note 13, at 155.
22. Justice Stevens took no part in the consideration or decision of *Imbler v. Pachtman*.
23. *See Imbler*, 424 U.S. at 411.
24. *Id.* at 420. Virtually was likely too strong an epithet. As the Court noted, the Sixth Circuit held that a state prosecutor *was* liable under section 1983 for withholding evidence. *See* Hilliard v. Williams, 516 F.2d 1344, 1350 (6th Cir. 1975), *vacated*, 424 U.S. 409 (1976).
25. *Imbler*, 424 U.S. at 420.
26. *Id.* at 421 ("[E]ach [decision] was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.").
27. *Id.* at 418 (quoting Tenney v. Brandhove, 341 U.S. 367, 379 (1951)).
28. *Id.* at 424.
29. *Id.* at 427.
30. *Id.* at 432 (White, J., concurring in the judgment).

concurring justices stated that this would "threaten to *injure* the judicial process and to interfere with Congress's purpose in enacting 42 U.S.C. § 1983, without any support in statutory language or history."[31]

What the concurrence touches on—and the full opinion overlooks—is that by creating from whole cloth an absolute immunity for state prosecutors where there was none previously, the Supreme Court overstepped its boundaries and legislated a significant exception to one of the most commonly used federal civil rights statutes.[32] The Supreme Court violated the separation of powers doctrine in five key missteps in *Imbler*: (1) choosing to rely on the much-derided derogation canon; (2) avoiding textual analysis; (3) ignoring legislative intent and historical context; (4) forgetting the legal framework in 1871; and (5) cherry-picking and misinterpreting the common law.

B. Usage of the Derogation Canon

The Supreme Court, in its analyses of absolute and qualified immunity for state officials, starting in *Tenney v. Brandhove*, began with the premise that they can properly consider the common law because of the "derogation canon."[33] This canon of statutory construction assumes that if Congress wanted to "overrule" or "abrogate" the usage of common law, they would have "done so explicitly."[34] The assumption that the Court could overrule the plain meaning of a statute ("every person" or "any person"),[35] by holding that Congress needed to have been more clear to overrule judge-made common law, creates a presumed judicial supremacy.[36] This has long been derided as "one of judicial decision than of popular action."[37] Given the "[j]udicial malevolence"[38] towards section 1983, it is not surprising that the Supreme Court turned to the derogation canon in overruling Congress's intent.

It would have been difficult for the Forty-Second Congress to have anticipated a need to explicitly derogate the common law. As Justice Antonin Scalia and Bryan Garner stated, the derogation canon was "a relic of the courts' historical

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31. *Id*. at 433 (White, J., concurring in the judgment).

32. Heck v. Humphrey, 512 U.S. 477, 480 (1994) (stating that section 1983 is one of the most "fertile sources of federal-court prisoner litigation"). To be sure, the popularity of section 1983 derives from the Supreme Court and their 1961 decision in *Monroe v. Pape*. *See* Schwartz, *supra* note 6, at 2. The *Monroe* Court interpreted "under color of law" to include "actions taken by state governmental officials in carrying out their official responsibilities, even if contrary to state law." *Id*.

33. *See* 341 U.S. 367, 376 (1951) ("We cannot 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.").

34. Alexander A. Reinert, *Qualified Immunity's Flawed Foundation*, 110 CALIF. L. REV. 201, 205 (2023).

35. "On its face [section] 1983 admits no immunities." Tower v. Glover, 467 U.S. 914, 920 (1984).

36. *See* Jefferson B. Fordham & Russell J. Leach, *Interpretation of Statutes in Derogation*, 3 VAND. L. REV. 438, 441 (1950) ("There is the contention that the common law is the perfection of human reason and is definitely superior to statute law.").

37. *Id*. at 442.

38. Griffin, *supra* note 13, at 157.

hostility to the emergence of statutory law."[39] It was considered dead by the mid-1800s[40] and was not revived until the late nineteenth century as "resistance to legislative innovation."[41] Its historical use by the Supreme Court "betrayed no suggestion that it would incorporate common law defenses into new statutory causes of action."[42] Thus, it is unlikely the Forty-Second Congress was even aware of how it would be applied almost a century later, especially given the explicit text of the original section 1 of the Civil Rights Act of 1871.

C. Analyzing the Text of Section 1

Upon closer inspection of the Civil Rights Act of 1871, it is apparent that the Forty-Second Congress was explicitly derogating the common law. The original text of section 1983 read as follows:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, ***any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding***, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress."[43]

Professor Alexander Reinert coined the emphasized language as the "notwithstanding clause" and posited that its inclusion indicated an explicit intent to derogate the common law,[44] especially as "custom or usage" was understood to refer to State common law, including immunities.[45] However, in 1874, the Revised Statutes, which were created to "consolidate"[46] federal law, omitted the emphasized language, and read as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the

39. READING LAW: THE INTERPRETATION OF LEGAL TEXTS 318 (2012).

40. Reinert, *supra* note 34, at 219.

41. *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 911 (1982).

42. Reinert, *supra* note 34, at 228.

43. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983).

44. Reinert, *supra* note 34, at 235 ("[T]he 1871 Congress created liability for state actors who violate federal law, *notwithstanding* any state law to the contrary.").

45. *Id.* Senator Thurman (D – Ohio), during the 1871 debates, established that "custom or usage" referred to common law. CONG. GLOBE, 42nd Cong., 1st Sess. App. 217 (1871).

46. *See* Margaret Wood, *The Revised Statutes of the United States: Predecessor to the U.S. Code*, LIBR. OF CONG. (July 2, 2015), https://blogs.loc.gov/law/2015/07/the-revised-statutes-of-the-united-states-predecessor-to-the-u-s-code/ [https://perma.cc/3XTD-D8BT] (discussing the creation of the Revised Statutes).

> deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[47]

The Supreme Court has previously acknowledged the "missing" language. It noted in the *Civil Rights Cases* that the "omitted" notwithstanding clause was a "very important clause," but significantly that the "reference to State laws . . . preserv[ed] the corrective character of the legislation."[48] *Hague v. Committee for Industrial Organization* stated that the changes to the clauses were "not intended to alter the scope of the provision."[49] Additionally, this same language was omitted from section 1982 and was referenced in *Jones v. Alfred H. Mayer Co.*, as "emphasizing the supremacy . . . over inconsistent state or local laws" and thus "surplusage."[50]

Because this clause was omitted, it is not good law, and can only speak to Congress's intent.[51] However, this language shows Congress's desire to explicitly overrule the common law,[52] especially if the language was removed, as has been argued, for redundancy and thus obvious in its intent to supersede the common law.[53] To be sure, the notwithstanding clause is a powerful tonic against the derogation canon, which begs the question of whether Congress was aware of the possibility that this statutory construction canon could shuffle back from the mortal coil. But by failing to consider what this language meant when analyzing section 1983, and neither engaging in a textual analysis nor considering the context of the Reconstruction Era, the Supreme Court was able to overstep and create absolute prosecutorial immunity.

D. Examining the Forty-Second Congress's Debates

On March 28, 1871, Representative Samuel Shellabarger (R – Ohio) introduced H.R. 320, developed as part of his work on a Congressional committee looking into the "Southern outrages" of the Ku Klux Klan.[54] The goal of the bill was to enforce the Fourteenth Amendment, crack down on the Ku Klux Klan and Democrat-led governments that hindered their arrest and prosecution, and

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47. *See* XXIV Rev. Stat. § 1979, at 348 (1874).

48. 109 U.S. 3, 16 (1883).

49. 307 U.S. 496, 510 (1939).

50. 392 U.S. 409, 422 n. 29 (1968). *See* Note, *Limiting the Section 1983 Action in the Wake of* Monroe v. Pape, 82 HARV. L. REV. 1486, 1489 n. 16 (1969) (theorizing that the removal of the notwithstanding clause from section 1982 could be applied to section 1983).

51. *See* Reinert, *supra* note 34, at 238.

52. *See id.*

53. William Baude, *Jaicomo and Nelson Respond to Codifiers' Errors*, VOLOKH CONSPIRACY (July 24, 2023, 8:27 AM), https://reason.com/volokh/2023/07/24/jaicomo-and-nelson-respond-to-codifiers-errors/ [https://perma.cc/66DU-Q4J9] (arguing that the "notwithstanding clause" was removed from section 1983 because it would have been "obvious" that the point of the statute was to "supersede the discriminatory state law"); *see also Jones*, 392 U.S. at 422 n. 29. It has also been suggested that this was simply an error. *See* Reinert, *supra* note 34, at 236–37 & n. 238–39.

54. CONG. GLOBE, *supra* note 45, at 317.

protect Southern citizens, especially Republican voters from violence and disenfranchisement.[55] Post-Civil War America, known as the Reconstruction Era, was a dangerous time.[56] The South "was in a state of complete lawlessness," because of violent white supremacist groups, as well as the complicity of local and state governments.[57] From the Black Codes that "reinstituted" slavery via abuse of the criminal justice system to the prosecution of federal officers who sought to enforce the law against white supremacists and the "sham judicial proceedings" of those arrested for violence,[58] it is no wonder that Representative William L. Stoughton (R – Michigan) referred to the "whole South . . . [as] rapidly drifting into a state of anarchy and bloodshed, which renders the worst Government on the face of the earth respectable by way of comparison."[59] The solution for such overwhelming and unyielding violence was a swift response to hold *all* state officials civilly responsible in federal court.

To be sure, there was a significant geopolitical divide over the true state of the South. Democrats, largely from the South, critiqued Republican portrayals of the South.[60] They claimed that the South was peaceful, prosperous, and disinterested in violence.[61] They simultaneously urged that any violence at the hands of the Ku Klux Klan was exaggerated[62] or simply false[63] but also the natural outcome of Reconstruction Era poverty and political disabilities enacted by the Republicans.[64] Republicans, largely from the North, urged that the Act was necessary to protect Republican voters in the South, both white and Black.[65] They mocked Democrat views of the South[66] by drawing from Congressional hearing testimony accounts[67] of Southerners that the Ku Klux Klan did exist,

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55. *See* Ben-Dan & Appling, *supra* note 3.

56. EQUAL JUST. INITIATIVE, RECONSTRUCTION IN AMERICA: RACIAL VIOLENCE AFTER THE CIVIL WAR, 1865–1876 7 (2020), https://eji.org/report/reconstruction-in-america/ [https://perma.cc/QE8H-69JC] ("[D]uring the 12-year period of Reconstruction at least 2,000 Black women, men, and children were victims of racial terror lynchings."). There were an estimated thirty-four mass lynchings from 1865 to 1876. *Id.* at 48.

57. *See* Ben-Dan & Appling, *supra* note 3, at 1388.

58. *See id.* at 1388–89.

59. CONG. GLOBE, *supra* note 45, at 321.

60. *See, e.g.*, *id.* at 371 ("The southern people only require the Republican party to speak kindly to them.").

61. *See, e.g.*, *id.* at 336.

62. *See, e.g.*, *id.* at 330 ("But the number and character of offenses are willfully exaggerated.").

63. *See, e.g.*, *id.* at 364 ("Why are the ultra-Republican leaders absorbing every hour and day of this Congress in agitating with the false clamor of Ku Klux?").

64. *See, e.g.*, *id.* at 336 ("Think for a moment of the condition of your American white brother, disarmed, lorded over by the ignorant, thriftless black, who, the slave and tool of miserable tricksters and plunderers, yet flaunts his freedom in that brother's face. Can you wonder that his blood will occasionally outrun his judgment?").

65. *See, e.g.*, *id.* at 319–22.

66. *See, e.g.*, *id.* at 427 ("The Prince of Peace has surely come to reign among the sweet Ku Klux lambs of Tennessee!").

67. *See, e.g.*, *id.* at 320–22, 437–39.

was fueled by Democrats, and was intent on lashing out in drastic and marked violence against Republicans.[68]

1. Application to All State Officials

Even amongst this clear partisan divide, all argued that section 1 would apply to all state officials. To be sure, no one explicitly mentioned state prosecutors, likely because public prosecutors had scarcely existed for less than fifty years in some areas of the country.[69] However, from the numerous references in the debates, Congress thought "any person" quite literally meant "any person." Senator Allen G. Thurman (D – Ohio) provided one of the most in-depth oppositions to section 1. First, he contended that hoteliers and other business owners of public-facing establishments could be liable for providing separate but equal dining areas for white and Black patrons.[70] Second, he argued that the statutory language encompassed state legislators and judges, and referenced, with horror, cases where state judges were brought to court over their decisions.[71]

He was not the only member of Congress to draw such colorful examples. Representative Washington Whitthorne (D – Tennessee) stated that section 1 could be applied to a city police officer who arrests an intoxicated individual brandishing a gun because it was violative of the Second Amendment.[72] Representative Joseph Hawley (R – Connecticut) argued that a state judge would be liable under section 1.[73] Representative William Arthur (D – Kentucky) concluded that state legislators, sheriffs, state judges, and even a governor would be liable under section 1, and most interestingly, "every judge in the State court and *every other officer thereof,* great or small."[74] At no point was the allegedly well-established common law relied upon in *Tenney v. Brandhove* and *Pierson v. Ray* referenced that would protect said legislators and judges. Congress thought "any person, who under color of any law, statute, ordinance, regulation, custom, or usage of any State" included state officials, even those protected under common law, and private individuals operating under State law.[75] By allowing victims of the Southern criminal justice system to sue state officials in federal court, the Forty-Second Congress was emphasizing the importance of accountability.

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68. *See, e.g.*, *id.* at 437 ("[E]very victim of Ku Klux outrage has been a Republican. Every apologist of the Ku Klux has been a Democrat.").

69. Michael J. Ellis, Note, *The Origins of the Elected Prosecutor*, 121 YALE L.J. 1528, 1530 (2012).

70. CONG. GLOBE, *supra* note 45, at 216–17.

71. *Id.*

72. *Id.* at 337.

73. *Id.* at 385.

74. *Id.* at 365–66 (emphasis added). Notably, at the time, state prosecutors were viewed as "functionaries of the judicial branch." Ellis, *supra* note 69, at 1535.

75. 42 U.S.C. § 1983.

2. Desire for Accountability

This desire for accountability is evident in the jurisdictional aspect of section 1. Part of the allure of section 1 was the need to provide a remedy, removed from the state courts, in federal courts. There were significant legislative debates on the inefficacy of the Southern judicial systems. Representative Stoughton asserted that "[Southern] State authorities and local courts are unable or unwilling to check the evil or punish the criminals."[76] He went on to state, "thousands of murders and outrages have been committed in the southern States and not a single offender brought to justice" and "the State courts are notoriously powerless to protect life, person, and property."[77] Senator Thomas W. Osborn (R – Florida) argued that the "State courts had proven themselves [in]competent to suppress the local disorders, or to maintain law and order," and that they had failed to provide "the full and complete administration of justice in the courts."[78] Representative Austin Blair (R – Michigan) stated, "In many instances [the Klan] *are* the State authorities."[79]

These debates reflected real-world concerns of violence going unchecked in the South. "[Southern] [j]udges and other state courts officials largely sat on their hands and did nothing, allowing [] murderers to go unpunished."[80] For example, in North Carolina, the "Democratic-controlled legislature impeached and removed the sitting governor from office for forcibly arresting dozens of Klan members responsible for racial violence."[81] In Meridian, Mississippi, a magistrate judge was murdered by the Klan.[82] A North Carolina Supreme Court Justice stated to Congress as part of their investigation into the South, "[I]t is impossible for the civil authorities, however vigilant they may be, to punish those who perpetrate these outrages."[83]

a. Federal Jurisdiction

In reaction to such overwhelming and unrestricted violence, Congress specifically granted federal jurisdiction regardless of diversity or amount in controversy over section 1983 suits[84] to "redress wrongs by those who wore black robes during the day and white robes at night."[85] Representative Shellabarger stated that it was "plainly and grossly absurd" to argue that Congress should "leave all the

76. CONG. GLOBE, *supra* note 45, at 321.
77. *Id*. at 322.
78. *Id*. at 653.
79. *Id*. at App. 72 (emphasis added).
80. Ben-Dan & Appling, *supra* note 3, at 1388.
81. *Id*. at 1392.
82. CONG. GLOBE, *supra* note 45, at 321.
83. *Id*. at 320.
84. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983) (explaining that "such proceeding[s] to be prosecuted in the several district or circuit courts of the United States").
85. A. Allise Burris, Note, *Qualifying Immunity in Section 1983 and* Bivens *Actions*, 71 TEX. L. REV. 123, 132 (1992).

protection and law-making to the very States which are denying the protection."[86] Congressman Joseph Rainey (R – South Carolina), the first African-American to serve in the House of Representatives, argued: "What benefit would result from appeal to tribunals whose officers are secretly in sympathy with the very evil against which we are striving?"[87] This sort of strong language makes it difficult to assume that Congress sought to protect state officials from suit.

The utter failing of the Southern judiciary to do its job provides persuasive context as to the adamancy for a civil remedy for its victims—especially against State officials. Representative John Wilson (R – Ohio) stated that there could be no more appropriate legislation than giving an injured party a civil remedy.[88] Significantly, the civil remedy involved[89] both legal remedies *and* equitable remedies, but today, while prosecutors are absolutely immune from claims for monetary damages, they are not immune from claims for injunctive relief.[90]

b. Broadness of Scope

Further evidence of the desire for accountability becomes apparent based on the broadness of the scope of the statute. Representative Shellabarger stated that because the Civil Rights Act of 1871 was "remedial" it would be "liberally and beneficently construed."[91] He stated:

> As has been again and again decided by [the Supreme Court], and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such [remedial] statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people.[92]

Representative Shellabarger quoted both Justice Joseph Story and Chief Justice John Marshall on the liberal construction of remedial statutes,[93] and argued that it would be "monstrous were this not the rule of interpretation."[94] The fact that "[t]he limits of [section 1] of the 1871 statute . . . were not spelled out in

86. CONG. GLOBE, *supra* note 45, at App. 68.

87. *Id*. at 394.

88. *See id*. at 482.

89. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983) (". . . be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress[.]").

90. Erwin Chemerinsky, *Prosecutorial Immunity*, 15 TOURO L. REV. 1643, 1645 (1999).

91. CONG. GLOBE, *supra* note 45, at App. 68.

92. *Id*.

93. *See id*. Representative Shellabarger quoted Justice Story as saying, "Where a power is remedial in its nature, there is much reason to contend that it ought to be construed liberally," and, "it is generally adopted in the interpretation of laws." 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 412 (Hillard, Gray & Co. ed., 1st ed. 1833). He went on to also paraphrase Chief Justice Marshall's *Gibbons v. Ogden* quote, "[N]or is there one sentence in the [C]onstitution . . .that prescribes this rule [of strict statutory construction]. We do not, therefore, think ourselves justified in adopting it." 22 U.S. 1, 187–88 (1824).

94. CONG. GLOBE, *supra* note 45, at App. 68.

debate,"[95] only adds credence to an instinctual historical understanding of broadly applying statutes of this nature.

This view on remedial statutes was not unique to Representative Shellabarger. Representative Thomas Swann (D – Maryland) referred to the Act as allowing for the "widest latitude to those who may be called on to execute it."[96] Representative Henry L. Dawes (R – Massachusetts) spoke with broad brush-strokes about section 1, stating:

> Whatever they be, he, sir, who invades, trenches upon, or impairs one iota or tittle of the least of them, to that extent trenches upon the Constitution and laws of the United States, and this Constitution authorizes us to bring him before the court to answer therefor.[97]

Courts in the mid-1800s also adopted the view that remedial statutes were to be viewed broadly to protect liberty interests.[98] An 1874 treatise stated that "the doctrine that statutes in derogation of the common law are to be strictly construed, has now truly no solid foundation in our jurisprudence."[99] Congressional intent was to *not* limit the plain text of section 1983.

This was also clear from speeches by Democrats and Republicans on the House and Senate floors. Any assumption that common law would still reign was betrayed by the drastic nature of the debates. Put another way, if the intention were to cabin the plain language of section 1983 with common law principles, not only would this have arisen in the debates, but fewer debates would have been had. In the eyes of the Democrats, the entire fate of democracy was at stake,[100] and in the eyes of the Republicans, the entire purpose of democracy was at risk.[101] Representative George W. Morgan (D – Ohio) said that there was never a "graver bill or a more momentous subject" to become before *any* legislature.[102] Representative James Beck (D – Kentucky) said that if at another time a lawmaker had put forth a bill of this nature they would have been "Ku Kluxed."[103]

E. Underlying Context of Swift v. Tyson

An oft-overlooked aspect of the historical backdrop of the Civil Rights Act of 1871 was the Supreme Court precedent at the time. The legislators throughout the

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95. Tenney v. Brandhove, 341 U.S. 367, 376 (1951).

96. CONG. GLOBE, *supra* note 45, at 361.

97. *Id.* at 476.

98. Reinert, *supra* note 34, at 219.

99. THEODORE SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND CONSTRUCTION OF STATUTORY AND CONSTITUTIONAL LAW 274 (2d ed. 1874).

100. *See, e.g.*, CONG. GLOBE, *supra* note 45, at 371 ("[S]o great and obvious are [the statute's] encroachments on the Constitution and so utterly subversive of all the principles which lie at the foundation of a republican government").

101. *See, e.g.*, *id.* at 425 ("This is the Democratic *ultimatum*. It is a Ku Klux threat. It is the language of the highwayman: 'Give me your money peaceably, or I blow your brains out.'").

102. *Id.* at 332.

103. *Id.* at 352.

debate frequently called on Supreme Court cases to buttress their points and to articulate the constitutionality or presumed unconstitutionality of their actions.[104] Congress was likely operating under a different legal assumption than today. The Forty-Second Congress drafted section 1983 under the framework that *Swift v. Tyson* was the applicable law of the land. Thus, the concept that federal courts could supersede state common law when sitting in diversity jurisdiction was a well-settled, almost thirty-year-old doctrine.[105]

As stated in *Erie Railroad Co. v. Tompkins*, *Swift* "rests upon the assumption that . . . federal courts have the power to use their judgment as to what the rules of common law are; and that in federal courts, 'the parties are entitled to an independent judgment on matters of general law.'"[106] This is referred to by Professor Thomas W. Merrill as *Swift* "[dis]regard[ing] [] the decisions of state courts."[107] Further, "[u]nder *Swift*, courts sitting in diversity acknowledged the necessity of the evolution of the common law."[108] Given the aforementioned historical context of the Reconstruction Era, the complicity of state officials, including judges, in racial discrimination, and the express provision of the Civil Rights Act of 1871 vesting the federal judiciary with jurisdiction over what are now today section 1983 claims,[109] this *is* what Congress expressly intended. It would have been impossible for the Forty-Second Congress to presume that over a hundred years in the future, the Supreme Court would chastise the plain text of their statute for not being explicit enough in derogating state common law when state common law was not viewed as sacrosanct.

F. Reviewing the Not "Well Settled" Common Law

To compound these issues, *Imbler* incorrectly simplified the analysis of the common law concerning prosecutorial immunity, demonstrating the Court's desire to implement their policy goals. In conclusory language, the Supreme Court held that the common law precedent regarding absolute immunity for prosecutors was "well settled."[110] It was not. As Justice Scalia stated in his

104. *See, e.g.*, *id.* at 485–86.

105. *See* 41 U.S. 1, 19 (1842).

106. 304 U.S. 64, 79 (1938) (quoting Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 533 (1928) (Holmes, J., dissenting)).

107. Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 14 (1985).

108. Seth F. Kreimer, *The Source of Law in Civil Rights Cases; Some Old Light on Section 1988*, 133 U. PA. L. REV. 601, 619 (1984).

109. Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983).

110. Imbler v. Pachtman, 424 U.S. 409, 424 (1976).

Kalina v. Fletcher concurrence "[t]here was, of course, no such thing as absolute prosecutorial immunity when [section] 1983 was enacted."[111]

1. History of State Prosecutors at Common Law

The very nature of how state prosecutors were viewed in common law is difficult to assess because state prosecutors as they are known today are a relatively new phenomenon. While there have been public prosecutors in the United States since the colonial era, they were viewed with "relative insignificance."[112] In fact, in criminal prosecutions, "each aggrieved party retained his own counsel to prosecute his private interest."[113] By 1871, this "private prosecution of crimes remained a significant feature of the American criminal justice system."[114] State-level prosecution as is thought of today did not exist historically until the late 1800s.[115] In the second half of the nineteenth century, prosecution shifted from private to public, with the first condemnation of private prosecution from the courts coming in 1849.[116] The emphasis on law enforcement at the time also fueled this shift. Instead of parties racing to court to right wrongs, as the "problem of public order" increased, the police's role was expanded and they began bringing people to court without a private complainant.[117] In turn, this created a need for public prosecution and transformed the few public prosecutors who did previously exist, from a nondiscretionary role to a largely discretionary role.[118]

The few public prosecutors that did exist at common law lacked the overarching discretion that they have today.[119] They performed non-prosecutorial administrative tasks, and their only discretionary task was "the decision to end, rather than to initiate or conduct, prosecutions."[120] In fact, "many state constitutions

111. 522 U.S. 118, 132 (1997). *See also* Scott A. Keller, *Qualified and Absolute Immunity at Common Law*, 73 STAN. L. REV. 1337, 1360 (2021) ("The common law in 1871, though, had not recognized absolute immunity for prosecutors, and courts split on that issue into the early twentieth century.").

112. Stephanie A.J. Dangel, Note, *Is Prosecution a Core Executive Function?* Morrison v. Olson *and the Framers' Intent*, 99 YALE L.J. 1069, 1072 (1990).

113. John A.J. Ward, Note, *Private Prosecution—The Entrenched Anomaly*, 50 N.C. L. REV. 1171, 1171 (1972).

114. Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 106 (2005).

115. Ellis, *supra* note 69, at 1530.

116. *See* Dangel, *supra* note 112 (citing Commonwealth v. Williams, 56 Mass. (2 Cush.) 582 (1849)).

117. Allen Steinberg, *From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History*, 30 CRIM. & DELINQ. 568, 579–80 (1984) (explaining that in Philadelphia, the same year that the police force was increased, the prosecuting attorney became an elected position and developed a discretionary role).

118. *See id.* at 577 (describing that the role of a public prosecutor in the private prosecution era was to "exercise as little discretion as possible."); *see also* Ellis, *supra* note 69, at 1538.

119. Robert H. Jackson, *The Federal Prosecutor*, 31 J. CRIM. L. & CRIMINOLOGY 3 (1940) ("The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous.").

120. Dangel, *supra* note 112, at 1073.

classified district attorneys as functionaries of the *judicial* branch"—demonstrating their evolving role.[121] It is thus unsurprising that they were not explicitly mentioned during the Forty-Second Congress's debates. However, one useful analog—private prosecutors, even those who were lawyers—were not immune to liability from the tort of malicious prosecution.[122] *Parker v. Huntington*, from 1854, even stated that a defendant district attorney *could* be held liable for malicious prosecution.[123] This aligns with how those with discretionary powers, albeit limited ones, were viewed at common law.

2. Quasi-Judicial Nature of Public Prosecutors at Common Law

At common law, officers who made "discretionary policy decisions"[124] were considered quasi-judicial. Officers whose acts were "quasi-judicial," did not have absolute immunity but rather qualified immunity.[125] As understood in the late nineteenth century, a quasi-judicial officer, such as a prosecutor, was immune from suits regarding "'the honest exercise of his judgment, however erroneous or misguided that judgment may be,' but there was no provision for absolute immunity for a quasi-judicial officer who performed his duties dishonestly or maliciously."[126] Thus, qualified immunity or "quasi-judicial immunity applied to 'powers very *nearly* akin to those of judges in the courts.'"[127] However, the *Imbler* Court in referring to prosecutors as quasi-judicial officials[128] did so by equating them to state court judges, which *Pierson v. Ray* held to have absolute immunity.[129] By using "quasi-judicial" as shorthand parlance for "judge-like," this avoided the issue that quasi-judicial officers at common law were *not* absolutely immune.

Furthermore, quasi-judicial immunity was applied in the late nineteenth century to several officials and their powers, not just prosecutors—who were not at all "judge-like." For example, Professor William Baude points to the "defective

121. Ellis, *supra* note 69, at 1530 (emphasis added).

122. Johns, *supra* note 114, at 108–09.

123. 2 Gray 124, 128 (Mass. 1854) (finding that the plaintiff could "maintain his case by proof of a malicious prosecution by both or either of the defendants").

124. Keller, *supra* note 111, at 1346. William Baude critiques Keller's definition as "too broad" and instead distinguishes quasi-judicial as the power "to make determinations that were authoritative even if they were wrong." William Baude, *Is Quasi-Judicial Immunity Qualified Immunity?*, 74 STAN. L. REV. 115, 118 (2022).

125. Keller, *supra* note 111, at 1357. Baude also argues that this version of qualified immunity was "much narrower in both theory and in practice than today's." Baude, *supra* note 124.

126. *See* Jeffery J. McKenna, *Prosecutorial Immunity:* Imbler, Burns, *and Now* Buckley v. Fitzsimmons—*The Supreme Court's Attempt to Provide Guidance in a Difficult Area* 1994 BYU L. REV. 663, 668 n.36 (1994) (quoting MARTIN L. NEWELL, MALICIOUS PROSECUTION, FALSE IMPRISONMENT AND THE ABUSE OF LEGAL PROCESS 166 (1892)).

127. *See* Baude, *supra* note 124, at 116 (emphasis added) (quoting FLOYD R. MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 636 (1890)).

128. *Imbler*, 424 U.S. at 420 ("These courts sometimes have described the prosecutor's immunity as a form of 'quasi-judicial' immunity and referred to it as derivative of the immunity of judges recognized in *Pierson v. Ray*.").

129. 386 U.S. 547 (1967).

certification of a notary" or "the oversight of an election" as types of quasi-judicial acts.[130] This application is apparent in *Griffith v. Slinkard*—the main case *Imbler* looks to as evidence of the common law view of prosecutors as the Forty-Second Congress would have understood it, despite being decided in 1896.[131] *Griffith* relied largely on a quote from an 1877 treatise:

> Whenever duties of a judicial nature are imposed upon a public officer, the due execution of which depends upon his own judgment . . . . he cannot be prosecuted by an individual to obtain redress for the wrong which may have been done.[132]

The cases the treatise cites for this quote involve tax assessors being viewed as the equivalent of judicial officers because, by their very nature, they would judge the tax value of a property.[133] Thus saying that prosecutors, despite having a narrowed quasi-judicial immunity at the common law, should have absolute immunity because they are "judge-like" is entirely at odds with what it meant to be a quasi-judicial officer.

3. Quasi-Judicial Officers Today

Prosecutors, as previously discussed, were not of particular consequence because the gravity of their position had not yet come to fruition. Assuming that they would have the same immunity as judges overstates their historical importance. This overstatement has a profound impact when looking at cases in the *Imbler* line of jurisprudence. Today, prosecutorial immunity is not attached to the office as it is colloquially referred to, but rather the task.[134] Thus, absolute immunity is attached to prosecutorial acts, while qualified immunity is attached to investigative acts.[135]

Because of this focus on tasks, rather than the contours of the office, the Supreme Court was able to expand *Imbler*'s absolute immunity for prosecutorial acts by state prosecutors to "judicial officers employed by the executive branch,"[136] such as executive agency attorneys and administrative law judges,[137]

130. *See* Baude, *supra* note 124, at 116.

131. *See Imbler*, 424 U.S. at 421. *See* Burris, *supra* note 85, at 139 & n.119 ("Several Justices have since noted the unreasonable clairvoyance demanded of the Forty-second Congress. . . .") (collecting cases).

132. 44 N.E. 1001, 1002 (Ind. 1896) (quoting JOHN TOWNSHEND, A TREATISE ON THE WRONGS CALLED SLANDER AND LIBEL: AND ON THE REMEDY BY CIVIL ACTION FOR THOSE WRONGS § 227 (3d Ed. 1877)).

133. *See, e.g.*, Weaver v. Devendorf, 3 Denio 117 (N.Y. Sup. Ct. 1846).

134. Chemerinsky, *supra* note 90, at 1643.

135. *Id.* at 1643–44.

136. Burris, *supra* note 85, at 126.

137. *Id.* at 152.

as well as federal prosecutors.[138] It did so by utilizing its *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[139] line of jurisprudence, an entirely judicially-created counterpart to section 1983 for suing federal officials.[140] This, as Professor Katherine Mims Crocker discusses, "increased the insulation afforded federal officials to a higher level than that of their state counterparts and then increased the insulation afforded state officials to a corresponding degree."[141] The confluence of *Bivens* and *Imbler* and the resulting cases *Butz v. Economou*[142] and *Harlow v. Fitzgerald*[143] has placed federal prosecutors under the same absolute prosecutorial immunity umbrella as state prosecutors.[144] While this was a wholly uncontemplated class for the Forty-Second Congress, and outside the scope of this Note, it demonstrates that by using "quasi-judicial" to loosely mean "judge-like" and thus granting tasks—and by extension—positions absolute, judge-like immunity, the meaning of quasi-judicial has been distorted beyond recognition by the Court.

II. HOW USURPING A LEGISLATIVE POWER REMOVES A CHECK ON PROSECUTORS

A. Removal of a Check by Congress

By allowing state officials to be sued, the Forty-Second Congress created a significant check on executive, legislative, and judicial branch officials. *Imbler* not only violates the separation of powers by legislating an absolute immunity to section 1983 suits for prosecutors but by stripping a check placed by Congress.

True, Congress could act now and remove these judicially-created immunities,[145] but the fact that they have not done so does not make the Supreme Court's *Imbler* line of jurisprudence any less of a violation of the separation of powers. Congress may very well agree with the Supreme Court's policy arguments[146] that prosecutors need absolute immunity to function. However, that is up to Congress—not the Court—to determine and the Forty-Second Congress made its decision, both

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138. *See id.* at 140; *see also* Butz v. Economou, 438 U.S. 478, 504 (1978) ("[W]e deem it untenable to draw a distinction for purposes of immunity law between suits brought against state officials under [section] 1983 and suits brought directly under the Constitution against federal officials.").

139. 403 U.S. 388 (1971).

140. *See* Burris, *supra* note 85, at 140.

141. *See Qualified Immunity and Constitutional Structure*, 117 MICH. L. REV. 1405, 1434 (2019).

142. 438 U.S. at 504 ("To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head.").

143. 457 U.S. 800 (1982); *see* Crocker, *supra* note 141 ("[S]ome scholars see the original sin against *Economou* as *Harlow*'s election to strengthen the protection available to federal officials beyond that previously available to state officials.").

144. *See* Burris, *supra* note 85, at 125.

145. John Kruzel, *Five Times Congress Overrode the Supreme Court*, THE HILL (May 11, 2022, 5:22 AM), https://thehill.com/regulation/court-battles/3483694-five-times-congress-overrode-the-supreme-court/ [https://perma.cc/P4JS-NAC3].

146. A. Allise Burris categorizes the Supreme Court's policy arguments into five buckets: (1) "separation of powers"; (2) "alternate remedies"; (3) "fearless officials"; (4) "diversion from duties"; and (5) "civil rights litigation explosion." *See generally* Burris, *supra* note 85, at 170–180.

implicitly and explicitly, that other policy reasons, given the sociopolitical context of the Reconstruction Era, held sway. If the modern Congress wishes to repudiate these reasons, that is their prerogative—not the Court's.

For example, in 1996, Congress legislated absolute judicial immunity.[147] While this was in reaction to the Supreme Court's actions in *Pulliam v. Allen*,[148] this demonstrates that not only was Congress capable of creating and removing immunities, but also that judicial immunity was not lingering in the contours of the Civil Rights Act of 1871. It needed to be added via further amendment.

Additionally, if Congress were to independently create immunity for prosecutors as an amendment to section 1983, its approach likely would have been more straightforward than the Supreme Court's. Absolute immunity for some acts and qualified for others and using the *Harlow*, *Economou*, and *Bivens* trifecta to conflate section 1983 causes of actions and immunities for state prosecutors with those for federal prosecutors have made prosecutorial immunity complex and meandering.[149] At the bare minimum, Congress could have parsed out especially egregious or widespread prosecutorial misconduct, such as hiding material evidence from the defense, which is subject to a stricter standard of scrutiny under *Maryland v. Brady* and is a veritable epidemic.[150] Even the concurring justices in *Imbler* did not believe that prosecutors should be absolutely immune from "allegations that exculpatory evidence and evidence relating to the witness' credibility had been suppressed."[151] By creating artificial and shifting goalposts of prosecutorial versus non-prosecutorial acts, Congress's imagination has been stunted. For example, in reaction to *Pulliam*, Congress restricted injunctive relief granted against judges to narrow and specific circumstances, to return, in its eyes, to the status quo: the status quo invented by the Supreme Court.[152]

Furthermore, history itself demonstrates an interest, at both the state and federal level, in prosecutors being accountable to the people—politically and in court. This history of accountability for prosecutors goes hand in hand with a legislative check on this office.

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147. Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309, 110 Stat. 3847, 3853 (1996).

148. S. Rep. No. 104-366, at 36 (1996) ("This section restores the doctrine of judicial immunity to the status it occupied prior to the Supreme Court's decision in *Pulliam v. Allen*" which "weakened judicial immunity protections."); *see also* 466 U.S. 522 (1984) (holding that a state judicial officer can be liable in their official capacity for injunctive relief).

149. Kate McClelland, Note, *Somebody Help Me Understand This: The Supreme Court's Interpretation of Prosecutorial Immunity and Liability under § 1983*, 102 J. CRIM. L. & CRIMINOLOGY 1323, 1324 (2012) ("[P]ractitioners and judges hardly have any clearer idea of when prosecutors can be punished for their misconduct. The Court's current approach to prosecutorial liability under [section] 1983 is a mess.").

150. *See* Ben-Dan & Appling, *supra* note 3, at 1381.

151. 424 U.S. at 445.

152. *See* S. Rep. No. 104-366, at 36 (1996).

B. Legislative Intent Comported with State-led Populist Movement

Debates from different constitutional conventions and state legislatures demonstrated that while public prosecutors were seen as an afterthought, a large populist push at the same time as the birth of modern "law and order," meant that state prosecutors were created as elected positions.[153] From 1832 to 1860, "nearly three-quarters of the states in the Union" made the public prosecutor an elected position.[154] As a Kentucky delegate complained at that state's constitutional convention in 1850, "[W]e have provided for the popular election of every public officer save the dog catcher, and if the dogs could vote, we should have that as well."[155]

While there was little debate about public prosecutors specifically being elected, this push towards electing state officials who were traditionally appointed demonstrated an increased interest in political accountability.[156] It is posited that the private prosecution system was easily abused and ill-equipped to handle the shift from the agrarian, colonial society to a larger industrialized society,[157] and Jacksonian era political patronage systems were also corrupt.[158]

As Justice Robert H. Jackson stated, "[w]hile the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst."[159] Today, the public prosecution system is also rife with abuse and the inability to hold prosecutors accountable civilly for their actions has significant real-world consequences. It is theorized that the increase in convictions being used as a "benchmark" for prosecutorial success, the rise of the twenty-four-hour news cycle, and the significant and expanding power of prosecutors have led to an increase in complaints against prosecutors.[160] Estimates show that governmental misconduct is "present in 54% of wrongful conviction cases and was present in 79% of homicide exonerations."[161] "69% of death-row exonerations have included official misconduct."[162] Furthermore, prosecutors specifically, committed misconduct in 30% of the first 2,400 exonerations

153. Ellis, *supra* note 69, at 1533.

154. *Id.* at 1530.

155. *Id.* at 1531 (quoting Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary*, 1846–1860, 45 HISTORIAN 337, 340–41 (1983)).

156. *Id.* at 1568.

157. Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 450–51 (2001).

158. Ellis, *supra* note 69, at 1547–50.

159. Jackson, *supra* note 119.

160. *See* Ben-Dan & Appling, *supra* note 3, at 1378–79 ("By deciding whether, what, and when to charge, the prosecutor defines the possibilities and limitations within a criminal case.").

161. Jennifer N. Weintraub, *Obstructing Justice: The Association Between Prosecutorial Misconduct and the Identification of True Perpetrators*, 66 CRIME & DELINQ. 1195, 1196–97 (citations omitted).

162. *DPIC Analysis Finds Prosecutorial Misconduct Implicated in More than 550 Death Penalty Reversals or Exonerations*, DEATH PENALTY INFO. CTR., (June 30, 2022), https://deathpenaltyinfo.org/news/dpic-analysis-finds-prosecutorial-misconduct-implicated-in-more-than-550-death-penalty-reversals-or-exonerations [https://perma.cc/FKL4-B2HF].

in the National Registry of Exonerations.[163] This significant misconduct within the criminal justice system degrades the public's faith in the institution, has lifelong lasting impacts on the wrongfully convicted and accused, even if charges are dropped, and allows true perpetrators of violent crimes to go free, "pos[ing] a substantial threat to the public."[164]

C. Resulting Lack of Accountability

By removing the civil accountability Congress explicitly intended for state officials, especially considering the staggering statistics of government misconduct, the Supreme Court has created a perception that they are partial towards prosecutors and that state officials are above the harm caused by their actions.

1. Indicates a Lack of Impartiality in the Judiciary

If an individual state prosecutor was granted absolute immunity by a state court judge in whatever cases she brought, calls for her firing or the impeachment of the judge would ring out from the defense bar in indignant rage. And for good reason. This would point to bias in the judiciary. However, when expanded to state (and federal) prosecutors across the country, it transforms into a sound policy. As noted in *Mistretta v. United States*, "[N]o such mechanism can overcome the appearance of institutional partiality that may arise from judiciary involvement in the making of policy."[165] Not only is one-half of each state criminal proceeding the state, an executive power, it is an executive power shielded by absolute immunity for any constitutional violations it commits in the course of its duties.

This same shield, pointedly, does not apply to public defenders. Despite public defenders being state employees like public prosecutors and even being elected officials in some states,[166] they are not state officials acting "under the color of State law" because of the adversarial nature of their role.[167] Further, the Court in *Tower v. Glover* held that they were not eligible for judicially created immunity because (1) they did not exist at the common law (unlike state prosecutors who also did not exist at the common law); (2) their common law counterpart, a privately retained attorney did not have absolute immunity (unlike private prosecutors who also did not have absolute immunity); and (3) it is not for the Supreme Court to say if it is sound policy for public defense attorneys to have absolute immunity (unlike for state prosecutors).

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163. SAMUEL R. GROSS ET AL., GOVERNMENT MISCONDUCT AND CONVICTING THE INNOCENT: THE ROLE OF PROSECUTORS, POLICE AND OTHER LAW ENFORCEMENT iii–iv (2020).

164. Weintraub, *supra* note 161, at 1212.

165. 488 U.S. 361, 407 (1989) ("[T]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality.").

166. Andrew Howard, Note, *The Public's Defender: Analyzing the Impact of Electing Public Defenders*, 4.2 COLUM. HUM. RTS. L. REV. ONLINE 173, 180 (2020) (Chief Public Defenders are elected, not appointed, in San Francisco, Florida, Tennessee, and Nebraska).

167. Polk County v. Dodson, 454 U.S. 312, 320 (1981).

Not only does this read like a dissent to *Imbler*, but it demonstrates an unconscious favorable bias in the judiciary towards the executive.[168] Studies have demonstrated that judges with prosecutorial backgrounds were 15% more likely to rule in favor of the prosecution, while Supreme Court justices with prosecutorial backgrounds were more likely to rule in favor of the prosecution in civil rights cases.[169] This is furthered by the fact that one-third of federal judges are former prosecutors.[170] *Tower*'s white glove approach towards common law and a restraint on imputing its own public policy views on Congress shows a restraint missing in *Imbler* in stark contrast.

2. Creates a Power Dichotomy

Furthermore, on a fundamental level within the criminal justice system, the exemption of prosecutors and judges from section 1983 suits[171] but not public defenders, creates a dichotomy, in which arguably, the only "player" with skin in the game is the one defending the accused and the defendant. While there is a concern that the work of prosecutors could be impeded by frivolous lawsuits from frustrated individuals,[172] the fear of abuse of a check on power and government misconduct is no reason to forgo a check on power.[173] Congress is also capable of legislating a more tailored immunity for prosecutors that could allow for claims for more objective and egregious forms of misconduct, such as manipulating or hiding evidence from the defense[174] while protecting against claims more prone to frivolousness.

CONCLUSION

[T]hat is a lucid, well thought-out, intelligent objection.
Thank you.
Overruled.[175]

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168. Colleen M. Berryessa et al., *Prosecuting from the Bench? Examining Sources of Pro-Prosecution Bias in Judges*, LEGAL & CRIMINOLOGICAL PSYCH., Sept. 12, 2022, at 2–3 ("[J]udges with prosecutorial backgrounds might exhibit pro-prosecution bias in their legal approaches.").

169. *See id.* at 2.

170. Kenichi Serino, *How Having a Former Public Defender on the Supreme Court Could Be 'Revolutionary,'* PBS (Mar. 21, 2022, 10:22 AM), https://www.pbs.org/newshour/politics/few-public-defenders-become-federal-judges-ketanji-brown-jackson-would-be-the-supreme-courts-first [https://perma.cc/KMD2-3SZP].

171. *See* Burris, *supra* note 85, at 158 ("If the police witnesses, the prosecutor, and the judge are all absolutely immune for their participation in probable cause hearings, there is no redress").

172. *See id.* at 179–80.

173. *See id.; see also* Ben-Dan & Appling, *supra* note 3, at 1378 ("Unchecked prosecutorial power is inconsistent with the American tradition of government."); *see also* Weintraub, *supra* note 161, at 1196 ("The nearly unlimited discretion afforded to prosecutors' decisions at the investigative and trial stages of a case, married with psychological and institutional pressures of their job, can incentivize acts of prosecutorial misconduct.").

174. DEATH PENALTY INFO. CTR., *supra* note 162 ("DPIC found [one of] the most common types of misconduct [was] withholding favorable evidence.").

175. MY COUSIN VINNY, *supra* note 1.

The Supreme Court is assuredly aware of the critiques regarding its views on immunity under section 1983.[176] And it is understandable, for the Supreme Court to seek to institute its own policies—fearful of an uptick in prosecution against state officials[177] and of the broad, sweeping terms of section 1983, especially in light of *Monroe v. Pape* which opened the floodgates of litigation.[178] But, that is not and was not the Supreme Court's role. As stated in *Tower v. Glover*, they lack the "license to establish immunities from section 1983 actions in the interests of what we judge to be sound public policy."[179] Their "role is to interpret the intent of Congress in enacting section 1983, not to make a freewheeling policy choice."[180]

When Chief Justice John Marshall said, "[i]t is emphatically the province and duty of the judicial department to say what the law is,"[181] assuredly, he did not intend the Supreme Court to *write* the law. In sum, the Supreme Court usurped Congress's legislative powers by ruling that Congress would have expressly abrogated common law immunities for prosecutors if it wanted to, despite statutory language, legislative intent, common law, and history indicating otherwise.

176. Reinert, *supra* note 34, at 203 n.1.

177. Griffin, *supra* note 13, at 157 & n.31 ("[T]he number of actions under section 1983 filed in the federal courts had increased from approximately 300 in 1960 to approximately 8,000 in 1971.") (citing Wayne McCormack, *Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 VA. L. REV. 1 (1974)).

178. Schwartz, *supra* note 6, at 2.

179. 467 U.S. at 922–23.

180. Malley v. Briggs, 475 U.S. 335, 342 (1986).

181. Marbury v. Madison, 5 U.S. 137, 177 (1803).