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# Judicial Immunity and Sovereignty

By ROBERT F. NAGEL\*

## Introduction

In a series of recent decisions, the Supreme Court has attempted to settle several important questions regarding the availability of "official immunity" as a defense to monetary liability in civil rights actions. Legislative immunity has been restricted to those acts integral to the "deliberative and communicative processes . . . with respect to the consideration . . . of proposed legislation or . . . other matters . . . within the jurisdiction of either House."<sup>1</sup> Executive immunity for most federal<sup>2</sup> and state<sup>3</sup> officers has been qualified by the requirements that the officers have a good faith belief in the constitutionality of their acts and that reasonable grounds for such a belief exist.<sup>4</sup> In contrast, absolute judicial immunity—immunity for knowing and malicious unconstitutional acts—has been retained for all judicial acts except those done in the clear absence of jurisdiction.<sup>5</sup>

These cases present the spectacle of the judiciary exposing virtually all other government officials to the threat of personal liability, while carefully maintaining immunity for judges.<sup>6</sup> The appearance of

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1. This language was first used in a criminal case, *Gravel v. United States*, 408 U.S. 606, 625 (1972), but was later applied to the question of civil liability in *Doe v. McMillan*, 412 U.S. 306, 314 (1973). See also *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); *United States v. Brewster*, 408 U.S. 501 (1972).

2. Claims against federal officers are based on the Constitution itself. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The scope of official immunity in such cases was restricted in *Butz v. Economou*, 98 S. Ct. 2894 (1978).

3. Claims against state officers are based on 42 U.S.C. § 1983 (1976). The Supreme Court has defined the scope of official immunity in such cases. *E.g.*, *Imbler v. Pachtman*, 424 U.S. 409 (1976); *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Wood v. Strickland*, 420 U.S. 308 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

4. See notes 2 & 3 *supra*.

5. *Stump v. Sparkman*, 435 U.S. 349 (1978).

6. Immunity for executives and judges is largely a judicially created doctrine, and the constitutional immunity of legislators has been restricted by judicial interpretation. See

institutional bias and self-protection is only heightened by the exception carved by the Court to the rule of qualified immunity for executive officers: absolute immunity has been preserved for those officers whose "special functions" require full protection from liability, and the touchstone for this determination appears to be the similarity or proximity of certain executive functions to traditional judicial functions.<sup>7</sup> The inference that the Justices have been influenced by unseemly self-interest has elicited cynical asides from both commentators and jurists.<sup>8</sup> The special treatment afforded judges who act intentionally to deprive individuals of their constitutional rights deserves fuller and more serious consideration.

Despite the decisive nature of the recent rulings, the law of official immunity might be subject to significant changes in the future. Some of the issues apparently settled authoritatively today have been decided differently in the past. For a number of years, it appeared that no state official could be absolutely immune from liability under section 1983 of the Civil Rights Act.<sup>9</sup> In another period, many executive officials enjoyed virtually the same absolute immunity as is now enjoyed by judges.<sup>10</sup> At each turn, the justifications have been as serious and as emphatically propounded as the reasons now given for the Court's present position.

The theme of the following discussion is that the weighty policies asserted by the Court in support of absolute judicial immunity do not justify the result, but that the alternative explanation of institutional self-interest does not fully explain the special status accorded the judicial function either. The significance of the Court's position on official immunity can be found if the case law is viewed, as Thurman Arnold

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Butz v. Economou, 98 S. Ct. 2894, 2909 (1978) and cases cited therein. See also Scheuer v. Rhodes, 416 U.S. 232, 238-41 (1974).

7. See Butz v. Economou, 98 S. Ct. at 2912-16; Imbler v. Pachtman, 424 U.S. 409 (1976).

8. Professor Gray described the judge as "the pampered child of the law" and then suggested that "[a] cynic might be forgiven for pointing out just who made this law." Gray, *Private Wrongs of Public Servants*, 47 CAL. L. REV. 303, 309 (1959). See also Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263, 272 (1937). Justice Rehnquist is one of the few judges to note the apparent partiality in the decisions. Butz v. Economou, 98 S. Ct. at 2917 n.\* (Rehnquist, J., concurring in part and dissenting in part).

9. The cases can be found in Davis, *Administrative Officers' Tort Liability*, 55 MICH. L. REV. 201, 228-29 (1956) [hereinafter cited as Davis]. For the modern law on state officials' immunity, see cases cited in note 3 *supra*.

10. The highpoint of executive immunity is represented by Judge Learned Hand's opinion in *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949). See also *Barr v. Matteo*, 360 U.S. 564 (1959) and cases cited therein at 572 n.9; *Spalding v. Vilas*, 161 U.S. 483 (1896). The modern approach to executive officials' immunity is illustrated by the cases cited in note 2 *supra*.

suggested, as an important set of social symbols whose function is "not so much to guide society, as to comfort it."<sup>11</sup> The case law illuminates less about the social policies asserted for judicial immunity or the self-protective instincts of judges than about the persistence and importance of the idea of sovereignty.

If the symbolic objectives underlying the special status of the judicial function are forthrightly examined, that status will be understood to be unnecessary and destructive. The next shift in the case law should be to qualify judicial immunity in civil rights cases.

## I. Asserted Justifications for the Special Status of the Judicial Function

### A. The Special Status

In *Stump v. Sparkman*,<sup>12</sup> the Supreme Court chose an extreme factual situation to reaffirm that judges are absolutely immune from liability for unconstitutional judicial acts committed under color of their jurisdiction. Judge Stump was alleged to have deprived a fifteen-year-old girl of her right to due process of law when he approved her mother's petition for permission to sterilize the girl. The petition stated in conclusory terms that the daughter was "somewhat retarded," that she had been associating with young men, and that sterilization would be in her best interests "to prevent unfortunate circumstances."<sup>13</sup> The petition was neither given a docket number nor filed with the clerk's office. It was approved in an *ex parte* proceeding of which the daughter was not notified, no guardian *ad litem* was appointed for the daughter, and no hearing was held.<sup>14</sup> The daughter did not discover the nature of the operation performed on her until two years later, after she had married and had attempted to have children.<sup>15</sup>

The Supreme Court treated these facts as essentially irrelevant to the issue of immunity. The opinion first summarized the existing law and found that a judge would not be liable unless his acts were clearly beyond his jurisdiction or were not judicial in nature.<sup>16</sup> It concluded

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11. T. ARNOLD, *THE SYMBOLS OF GOVERNMENT* 34 (1935) [hereinafter cited as ARNOLD].

12. 435 U.S. 349 (1978).

13. *Id.* at 351.

14. *Id.* at 360. The court of appeals summarized these actions by saying that the judge had not taken "the slightest steps to ensure that [the minor's] rights were protected." *Sparkman v. McFarlin*, 552 F.2d 172, 176 (7th Cir. 1977).

15. 435 U.S. at 353.

16. *Id.* at 356-57.

that Judge Stump's acts were not clearly beyond his jurisdiction because by statute he had "original exclusive jurisdiction in all cases at law and equity whatsoever," and because no statute or decision prohibited such a court of general jurisdiction "from considering a petition of the type presented to Judge Stump."<sup>17</sup> The fact that the order may have been illegal under state law did not deprive the judge of jurisdiction,<sup>18</sup> nor did the fact that the method by which he reached his decision may have been unconstitutional.<sup>19</sup> Finally, the Court rejected the claim that the judge's actions were non-judicial. The acts were judicial because the judge's function was one "normally performed by a judge" and because the mother had dealt with Judge Stump with the expectation that he was acting in his judicial capacity.<sup>20</sup> Accordingly, Judge Stump was held to be immune no matter how malicious his motive for

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17. *Id.* at 357-58. No statute specifically authorized a court to order a sterilization, but Indiana statutes did authorize parents to "consent to . . . medical or hospital care or treatment of [the minor] including surgery." *Id.* at 358. The Court reasoned that the general jurisdictional grant and the absence of any specific withdrawal of jurisdiction over sterilization decisions amounted to sufficient subject matter jurisdiction to permit the court to consider whether to approve the parental decision. *Id.* The Court noted that Indiana courts had been specifically authorized to order sterilization of institutionalized individuals under certain circumstances, but did not find this narrow authorization to constitute an implied limitation on the court's general jurisdiction. *Id.* It is at least questionable whether the Court would have altered its conclusion even had there existed a specific statute withdrawing jurisdiction over sterilization orders of non-institutionalized minors. *Cf.* *United States v. United Mine Workers*, 330 U.S. 258 (1947) (federal courts have jurisdiction to consider whether they have jurisdiction over certain labor disputes despite a statute removing jurisdiction concerning issuance of restraining orders in cases arising out of labor disputes). See Dobbs, *The Validation of Void Judgments: The Bootstrap Principle*, 53 VA. L. REV. 1003, 1020 (1967).

18. *Stump v. Sparkman*, 435 U.S. at 358-59. The Indiana Court of Appeals had previously held that a parent did not have a common law right to have a minor child sterilized in *A.L. v. G.R.H.*, 325 N.E.2d 501 (1975), *cert. denied*, 425 U.S. 936 (1976). But the Supreme Court distinguished between the absence of jurisdiction and an illegal decision on the merits concerning an issue over which a court does have jurisdiction. This distinction has a long but not uncontradicted history. Compare *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351-53 (1871) (distinguishing an act in excess of jurisdiction from an act in the clear absence of jurisdiction) with *Cooper v. Reynolds*, 77 U.S. (10 Wall.) 308, 316-17 (1870) (jurisdiction defined in part by "the authority of the court to render the judgment or decree which it assumes to make"). See also *Duba v. McIntyre*, 501 F.2d 590, 592 (8th Cir. 1974) (jurisdiction requires inquiry into "whether the defendant's action is authorized by any set of conditions or circumstances"). The question whether this distinction is at all relevant to the issue of civil rights liability is discussed *infra*. See notes 76-84 and accompanying text *infra*.

19. *Stump v. Sparkman*, 435 U.S. at 358-59.

20. *Id.* at 362-63. The use of the term "normal" was certainly strained inasmuch as it suggests that normal judicial functions include the use of unconstitutional procedures and the issuance of illegal orders. By "normal," the Court was actually referring to the business of entertaining petitions relating to the affairs of minors, where there is at least colorable jurisdiction. See text accompanying notes 25-27 *infra*.

the sterilization order might have been and regardless of how obvious the illegality of his acts should have been to him. The Court justified this broad rule of immunity with a reference to the need for a judge to act "upon his own convictions, without apprehension of personal consequences," and with a remark about the difficulty of the judge's duties and his "painful sense of responsibility."<sup>21</sup>

In contrast to its approach to judicial immunity, and without regard for the difficulty of their decisions or the painfulness of their senses of responsibility, the Court has recently and emphatically declined to provide similarly broad immunity to most executive officers.<sup>22</sup> Such officers can be liable even if their acts were colorably within their statutory authorization and clearly "executive" in nature.<sup>23</sup> For executive functions, immunity is triggered not by jurisdictional or generic concepts but by the existence of a reasonably-based, good faith belief that the action was constitutional.<sup>24</sup>

Less obvious, perhaps, is the fact that absolute judicial immunity also appears to be broader than the "absolute" immunity granted to legislators. Both judges and legislators are absolutely immune only for acts done within the judicial or legislative spheres, respectively. But the scope of this immunity is, in fact, broader for judges because the method of defining the judicial function has been less restrictive. In *Stump*, the Court explicitly defined the judicial function largely according to what is "normally" done by a judge.<sup>25</sup> Judge Stump's actions were described as "normal" because he had at least colorable jurisdiction and because "judges normally entertain petitions with respect to the affairs of minors."<sup>26</sup> The Court expressly denied that any

21. *Id.* at 363-64 (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347, 348 (1871)).

22. See cases cited in notes 3 & 7 *supra*.

23. See cases cited in notes 3 & 7 *supra*. The fact that a decision is "executive" in the sense of being highly discretionary can be a factor in determining whether a reasonable, good-faith belief of legality existed, but it does not necessarily bar liability. See note 24 *infra*.

24. "These considerations suggest that, in varying scope, a qualified immunity is available to officers of the executive branch of government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action . . . . It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers . . . ." *Scheuer v. Rhodes*, 416 U.S. 232, 247-48 (1974). For discussions of what this standard means, see *Wood v. Strickland*, 420 U.S. 308, 330-31 (1975) (Powell, J., dissenting); Yudoff, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. CAL. L. REV. 1322 (1976), [hereinafter cited as Yudoff]; *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1204 *passim* (1977).

25. 435 U.S. at 362-63.

26. *Id.* at 362 n.11.

illegality in the judge's procedures vitiated the judicial nature of his acts.<sup>27</sup> The Court thus defined "judicial" by a formalistic inquiry into whether a normal "case" was presented, not according to the normalcy or legality of the methods used to resolve the case.

A different approach to defining the legislative function was taken in *Gravel v. United States*,<sup>28</sup> in which the Court held that legislative immunity does not extend to the private publication of classified materials used by a Senate subcommittee. Although senators "normally" communicate with their constituents about governmental affairs, and although this informing function is important to their duties as representatives,<sup>29</sup> the Court explained: "That Senators generally perform certain acts in their official capacity . . . does not necessarily make all such acts legislative in nature."<sup>30</sup> In addition to the informing function, the Court has identified traditional legislative efforts to lobby the executive branch and the deliberative process leading up to a vote as functions normally performed by a legislator that are not necessarily "legislative."<sup>31</sup> Such acts are defined as outside the legislative sphere when they are unnecessary to the "due functioning" of the legislative branch or are inconsistent with the integrity of that process.<sup>32</sup> Of course, the illegality of the act is a prime determinant of whether it is necessary to the due functioning of the legislature. Bribes, for example, "gravely undermine legislative integrity and defeat the right of the public to honest representation," thus endangering the integrity of the legislative process that legislative immunity is designed to protect.<sup>33</sup>

The Court's method of defining the legislative function is plainly inconsistent with the method used in *Stump* to define the judicial function.<sup>34</sup> If *Stump* had been analyzed consistently with the legislative im-

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27. *Id.* at 359-61.

28. 408 U.S. 606 (1972).

29. *Id.* at 636 (Douglas, J., dissenting).

30. *Id.* at 625.

31. See *United States v. Brewster*, 408 U.S. 501 (1972) (accepting money prior to a vote); *United States v. Johnson*, 383 U.S. 169 (1966) (lobbying the executive branch). These cases represent a departure from the highly formalistic method used to define "legislative act" in *Tenney v. Brandhove*, 341 U.S. 367 (1951). In *Tenney*, the Court held that investigative committees were within the sphere of protected legislative activity because such investigations were an "established part" of the legislative process. The Court also held that such committees exceeded the legislative sphere only when usurping the powers of one of the other branches of government. *Id.* at 377-78.

32. *Gravel v. United States*, 408 U.S. 606, 625 (1972); *United States v. Brewster*, 408 U.S. 501, 524-25 (1972).

33. *United States v. Brewster*, 408 U.S. at 524-25.

34. Some of the more recent cases narrowing the "legislative sphere" have involved criminal liability, rather than civil damages. It might be conjectured that considerations

munity cases, the Court would not have stopped at describing the matter before Judge Stump as a case "normally" handled by a judge. It would have further inquired whether the procedures used in handling the "case" were necessary to the "due functioning" of the judicial branch. Two factors relevant to this determination would have been whether the procedures were illegal and whether they undermined the integrity of the judge's deliberative process.<sup>35</sup> A bribe undermines the integrity of the legislative process by exposing the legislator to improper, irrelevant influences; such exposure is not a part of the legislative process despite its close connection to the core of the legislative process, the act of voting.<sup>36</sup> If so, it is at least worth inquiry whether an *ex parte* proceeding involving the decision to sterilize an unnotified and unrepresented minor undermines the integrity of the judicial process to the extent that such procedures cannot fairly be called judicial acts despite their close connection to judging a case.<sup>37</sup>

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unique to the criminal context justify narrowing immunity; this possibility is consistent with the criminal liability of judges under 18 U.S.C. § 242 (1976). However, the Court has used identical language in defining "legislative sphere" in both criminal and civil cases. See note 1 *supra*. The implication is strong, therefore, that a legislator could be found civilly liable for his personal acts, *e.g.*, communicating with his constituents about an issue of public importance, despite the fact that formally the acts were a normal part of the legislator's duties. Cf. *Doe v. McMillan*, 412 U.S. 306 (1973) (liability for invasion of privacy may be imposed on distributors of information even if they were acting under congressional authorization); *Gravel v. United States*, 408 U.S. 606 (1972) (no legislative immunity from testifying before a grand jury regarding possible criminal conduct involving the actual distribution of information).

35. See notes 32 & 33 and accompanying text *supra*.

36. In *United States v. Brewster*, 408 U.S. 501 (1972), the Court asserted that a bribe could be prosecuted without inquiry into any legislative act or the motivation for such act. *Id.* at 526. Nevertheless, the close connection between the bribe and the vote, as well as between the bribe and other more legitimate influences, is apparent. See *id.* at 556-60 (White, J., dissenting).

37. Thus a possible reform of the law of judicial immunity might retain "absolute" immunity, yet restrict it by defining "judicial act" in the same way that "legislative act" has been defined. The analogy to legislative immunity suggests that a judicial order or judgment on the merits would be as immune as a legislative vote. In *Stump*, liability might flow from the judge's motives or procedures (if, for example, he had taken a bribe or flipped a coin in order to decide the case), but not from the issuance of the sterilization order (regardless of its illegality). Cf. *Doe v. McMillan*, 412 U.S. 306 (1973) (immunity provided for the legislative vote to distribute private information, but not for the distribution itself); *United States v. Brewster*, 408 U.S. 501 (1972) (immunity provided for the actual vote, but not for the bribe preceeding it). Measuring damages for acts other than the order itself would raise difficult problems of a nature already being dealt with in cases where executives are alleged to have committed procedural errors. See *Carey v. Phipps*, 435 U.S. 247 (1978); *Codd v. Velger*, 429 U.S. 624 (1977).

Although analogizing judicial immunity to legislative immunity would be preferable to retaining the present law of judicial immunity, the better reform would be to analogize judicial immunity to executive immunity, where the executive nature of the act does not immu-



The Court has narrowed legislative immunity by injecting a normative factor into the definition of the legislative function. Notions of both jurisdiction and generic function have been made largely irrelevant to the issue of immunity for malicious acts of those exercising the executive function. In defining the immunity of judges, however, the Court has been entirely formalistic. The next section explores the reasons the Court has given for the special status it has thus created for the immunity of those exercising the judicial function.

## B. The Justifications

The Court has insisted that the extent of absolute immunity afforded those exercising the judicial function does not result from judges' status or their location within the government, but from "the special nature of their responsibilities."<sup>38</sup> The Court's analysis has been determinedly functional; inquiry has focused on "the immunity historically accorded the relevant official at common law and the interests behind it."<sup>39</sup> However, the justifications asserted for the judiciary's special protection do not persuasively distinguish the judicial function from the executive and legislative functions; indeed, many of these justifications point persuasively to the special appropriateness of *qualifying* the immunity of judges. The Court's analysis of the special needs of the judicial function is so unsatisfactory that it is necessary to look to entirely different reasons for an understanding of the basis for judicial immunity.

### 1. *As contrasted to the legislative function*

Because legislative immunity is narrower than judicial immunity only in the unobvious sense that the Court has injected normative factors into the definition of "legislative function,"<sup>40</sup> the Court has neither openly acknowledged nor explained the differences between the scope

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nize the executive for knowingly unconstitutional behavior. See notes 38-85 and accompanying text *infra*. Under this analogy, if Judge Stump's judgment and order were knowingly unconstitutional, he would not be immune despite the formally judicial nature of these acts. At any rate, the point here is merely that even if the appropriate analogy were between legislative and judicial immunity, the present law of judicial immunity would still not be justified because the Court has used a more formalistic method for defining judicial acts than for defining legislative acts.

38. *Butz v. Economou*, 98 S. Ct. at 2913. Cf. *Stump v. Sparkman*, 435 U.S. 349 (1978). The emphasis on function is apparent in all of the recent immunity cases. As to the legislative function, see cases cited in note 1 *supra*. With respect to the executive function, see *Imbler v. Pachtman*, 424 U.S. 409 (1976); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

39. *Imbler v. Pachtman*, 424 U.S. at 421.

40. See notes 28-33 and accompanying text *supra*.

of legislative and judicial immunity. The bases for judicial immunity are quite different from those of legislative immunity; these differences justify broader, more careful protection for legislators than for judges.

At the federal level, legislative immunity is founded on constitutional text.<sup>41</sup> At the state level, legislative immunity is also constitutionally based to the extent that at least the rudiments of separation of powers principles must be protected from federal interference.<sup>42</sup> Even if not technically based on constitutional text, legislative immunity at the state level serves the same policies that are of constitutional magnitude at the federal level. In contrast, judicial immunity, whether at the federal or state level, is court-made law of somewhat mysterious origins.<sup>43</sup> Accordingly, the legal issues involved in determining the proper scope of immunity in civil rights actions are entirely different as between the two types of immunity. With legislative immunity, two policies of constitutional importance—legislative independence and the individual's substantive rights—must be accommodated. With judicial immunity, the protection of the individual's constitutional rights is limited only by common law principles designed to protect the smooth functioning of a governmental institution.

The constitutional policies that underlie legislative immunity relate to the most fundamental principles of republican government.<sup>44</sup>

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41. U.S. CONST. art. I, § 6 provides, in part, that Senators and Representatives "shall in all cases, except treason, felony and breach of 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."

42. See Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 667-68 (1978). See also note 60 *infra*.

43. It is conceivable that a statute might expose judges to a risk of liability in such a way as to interfere with the article III judicial power as a constitutional matter. However, such a claim would seem to be especially inappropriate with regard to qualified civil rights liability. See note 49 and text accompanying notes 46-53 and 87-116 *infra*. Cf. *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47 (1871) (article III power infringed by a jurisdictional statute that "prescribed a rule for the decision of a cause in a particular way"). At any rate, the Court has not suggested that judicial immunity is derived from article III. For judicial explanations of the origins of judicial immunity, see cases cited in note 6 *supra*. For academic discussions of the derivation of official immunity from sovereign immunity, see material cited in note 65 *infra*. The reference in the text to "mystery" is from Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963). Among the mysteries are: How did judges become clothed with the immunity of the crown when some other officers of the crown did not? Why did a doctrine rooted in monarchy survive the American Revolution? How has such a doctrine survived the general decline in the idea of sovereignty? How has judicial immunity survived the inclusive language of the Civil Rights Act of 1871? In addition to the material referred to above, see LASKI, *FOUNDATIONS OF SOVEREIGNTY* 137 *passim* (1921) and material cited in note 66 *infra*.

44. For a discussion of the significance that the framers attached to the idea of separa-

As the Court has acknowledged:

[Legislative immunity] was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature.<sup>45</sup>

The Court has consistently stated that judicial immunity also protects independence and integrity,<sup>46</sup> but the purposes of legislative and judicial immunity are not coordinate. Legislative immunity is embodied in constitutional text in order to protect the independence of the legislature from the excesses of *the other branches of government*. Whether the intimidation arises from criminal actions initiated by the executive branch or from civil actions harnessing the "potentially hostile" power of the judicial branch, the protections are against incursions by the other branches of government.<sup>47</sup> Legislative immunity protects the basic constitutional structure of separation of powers. It reflects the framers' pessimistic assumption that "power is of an encroaching nature and . . . ought to be effectively restrained from passing the limits assigned to it."<sup>48</sup> In contrast, judicial immunity protects against the threat posed by individual citizens who can injure the judicial function only if the courts are unable or unwilling to protect *themselves*.<sup>49</sup>

The Court has minimized the external dangers to the legislature that the framers took seriously enough to guard against in the Constitution. Thus, the classic threat of unjustified criminal prosecutions by the executive against legislators has been described by the Court as "re-

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tion of powers, see J. MADISON, THE FEDERALIST No. 47, 48 (C. Beard ed. 1959); M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 119-75 (1967); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 (1969).

45. *United States v. Johnson*, 383 U.S. 169, 178 (1966), *quoted in* *United States v. Brewster*, 408 U.S. 501, 507-08 (1972).

46. The need for independent judicial judgment is emphasized in *Stump v. Sparkman*, 435 U.S. 349, 354-56 (1978), and in *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871).

47. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502-03 (1975).

48. J. MADISON, THE FEDERALIST No. 48, at 217 (C. Beard ed. 1959). *See also* material cited in note 37 *supra*.

49. In a more remote sense, a liability statute, like a jurisdictional statute, might be thought to present a legislative threat to judicial power. But section 1983 is a liability statute with general applicability that is capable of being interpreted as imposing only limited liability on judges, and that is ameliorated by the power of judges to rule on the pleadings and evidence in particular cases. Therefore, any "threat" inherent in such a statute is surely different from the kinds of specific intimidations and interferences against which legislative immunity and separation of powers were intended to protect. *See* note 43 *supra*.

mote," although not "discounted entirely."<sup>50</sup> In fact, the Court has turned the framers' assumptions upside down by pointing to the protections afforded by the judiciary as one reason for *minimizing* the possibility of interference with the legislative process.<sup>51</sup> The Court has pointed to such judicial protections despite the fact that the legislative process can be and has been interrupted and frustrated for years by citizens' use of the judicial process.<sup>52</sup> At the same time, the Court has taken seriously the "danger" that the judiciary, somehow adequately able and motivated to protect Congress from the executive, is unable to protect itself from suits by individual citizens. The possibility that the judiciary might be sufficiently "alert to the possibilities of artful pleading" to protect itself by terminating "insubstantial lawsuits" has never been found a sufficient reason to open judges to the threat of suits for their malicious acts.<sup>53</sup>

The constitutional status of legislative immunity not only undermines the Court's apparent assessment of the relative importance of the interests involved in cases of legislative and judicial immunity, but also casts substantial doubt on its construction of the Civil Rights Act of 1871.<sup>54</sup> In *Tenney v. Brandhove*,<sup>55</sup> the Court held that the framers of section 1983 could not have intended by their general language to impinge on legislative immunity because that doctrine was "so well grounded in history and reason" at the time the statute was drafted.<sup>56</sup> Later, in *Pierson v. Ray*,<sup>57</sup> the Court purported to rely on the same reasoning in carving out judicial immunity from the reach of the Civil Rights Act:

The legislative record gives no clear indication that Congress intended to abolish wholesale all *common law immunities*. Accordingly, this Court held in *Tenney v. Brandhove*, that the im-

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50. *United States v. Brewster*, 408 U.S. 501, 524 (1972).

51. *Id.* at 522 n.16. *Cf.* text accompanying note 47 *supra*.

52. During the litigation culminating in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975), courts enjoined the enforcement of a subpoena of the Senate Subcommittee on Internal Security for five years, despite the fact that the subpoena was ultimately found to be valid. *Id.* at 511 n.17. The subpoena was directed at bank records of an organization that provided various services to members of the armed forces; thus, the delay affected an inquiry into a subject of at least potential national importance.

53. *Butz v. Economou*, 98 S. Ct. at 2911. The prohibitive factor cannot be the impossibility of identifying an insubstantial suit on the basis of the pleadings, since the Court has said that the judiciary is capable of such discriminations with regard to suits against executives. *Id.*

54. 42 U.S.C. § 1983 (1976).

55. 341 U.S. 367 (1951).

56. *Id.* at 376.

57. 386 U.S. 547 (1967).

munity of legislators for acts within the legislative role was not abolished. The immunity of judges for acts within the judicial role is equally well established . . . .<sup>58</sup>

Despite this language, it was not a mere common law immunity which the *Tenney* Court had presumed to be unaffected by congressional action. It was, as the opinion explained at length, a tradition "carefully preserved in the formation of the State and National Governments."<sup>59</sup> Clearly, it is appropriate to require affirmative and persuasive proof that Congress intended to limit a principle, such as legislative immunity, thought to have constitutional significance. The avoidance of difficult constitutional questions and the presumption that legislation is constitutional are accepted canons.<sup>60</sup> The same requirement is not at all appropriate when "Congress enacts a statute to remedy the inadequacies of the pre-existing law, including the common law,"<sup>61</sup> and common law is the basis for judicial immunity.

The broader protection afforded by the Court to judicial immunity, compared to legislative immunity, is thus inconsistent with the constitutional status of the policies underlying legislative immunity and with normal principles of statutory construction. Nor can the relative narrowing of legislative immunity be justified on the basis that inquiries into judicial conduct are more difficult than those relating to legislative action. It would seem more feasible to examine and evaluate the knowledge and behavior of a single judge than to attempt a similar inquiry into the behavior of perhaps hundreds of legislators.<sup>62</sup> Judges normally act on the basis of information provided in a record and with respect to a single, identified case. Legislators act on the basis of knowledge gained on public streets and in private cloakrooms; they act not to decide a single case but to accommodate competing, on-going interests. Such practical considerations favor a broader rule of immunity for legislators than for judges.

The narrower area of legislative immunity might be thought to be harmless, since—under the Court's formulation—legislators can be liable only for acts that do not promote the proper functioning of the legislature.<sup>63</sup> Even assuming that there are only minimal dangers in

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58. *Id.* at 554 (emphasis added).

59. 341 U.S. at 376.

60. The Court assumed that the abolition of even state legislative immunity would present a difficult constitutional question. *Id.*

61. *Pierson v. Ray*, 386 U.S. at 561 (Douglas, J., dissenting).

62. *See Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1200 (1977).

63. *See* note 32 and accompanying text *supra*.

entrusting to courts the determination as to what is necessary for proper legislating,<sup>64</sup> the broader, formalistic conception of the "judicial function" is not justified. Courts are better qualified to decide at what point procedures become so unfair and so illegal as not to promote the due functioning of the judiciary than they are qualified to determine, for example, what influences are proper for a legislative vote or how a legislator should communicate with his constituents. To the extent that the normative definition of "legislative function" is harmless or even beneficial, the Court should utilize normative factors even more liberally in defining "judicial function".

2. *As contrasted to the executive function.*

Both judicial and executive immunity are common law doctrines with a similar origin in the monarchical concept of sovereign immunity.<sup>65</sup> Despite the Court's unwillingness to presume that the framers of section 1983 intended to alter the common law so as to expose judges to liability, there is persuasive evidence that the legislative intent was to expose both executives *and* judges to liability.<sup>66</sup> More importantly, the same reasons given for judicial immunity have long been used to justify executive immunity.<sup>67</sup> It might have been expected, therefore, that as the modern Court determined that the policies behind official immunity did not require that executives be immune for their knowingly unconstitutional acts, the same conclusion would soon have followed with respect to judicial immunity. If exposure to limited liability would not lead to unacceptably timid executive decisions, why should it be thought to threaten independent judicial decisions? If limited executive liability is not grossly unfair in penalizing an officer for making the difficult decisions he was hired to make, why would limited judicial liability be unfair? If able executive officers would not be deterred

64. This is a dubious assumption. See, e.g., *United States v. Brewster*, 408 U.S. 501, 551 (1972) (White, J., dissenting). Decisions restricting communications between legislator and constituent especially interject the judiciary into the heart of the democratic process. See *Bond v. Floyd*, 385 U.S. 116, 136 (1966) (legislators' functions include controversial communications "so that their constituents can be fully informed."); W. WILSON, *CONGRESSIONAL GOVERNMENT* 303 (1885).

65. See Gray, *Private Wrongs of Public Servants*, 47 CAL. L. REV. 303 (1959); Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963); Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937); Note *Quasi-Judicial Immunity: Its Scope and Limitations in Section 1983 Actions*, 1976 DUKE L. J. 95 (1976).

66. Kates, *Immunity of State Judges under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered*, 65 NW. L. REV. 615 (1970); Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L. J. 322 (1969).

67. See, e.g., *Spalding v. Vilas*, 161 U.S. 483 (1895).

from entering public service by the threat of liability, why would potential judges be deterred? The Court, however, has continued to describe absolute immunity as essential to the judicial function, while rejecting this conclusion as to the executive function. The difference has been justified on the grounds that absolute executive immunity was not as firmly established in the common law, and that the judicial function has special attributes making even limited liability incompatible with its proper functioning.

#### a. The Common Law.

In *Butz v. Economou*,<sup>68</sup> the Court examined the major executive immunity cases and found that none of the American cases presented the issue of immunity for acts "manifestly beyond [the] line of duty," or for acts that "exceeded constitutional limits."<sup>69</sup> In contrast, the Court has repeatedly described absolute judicial immunity as firmly established at common law.<sup>70</sup> This reliance on the common law is inadequate to justify the special status of the judicial function for a number of reasons. First, the place of absolute judicial immunity in the common law is not as unambiguous as the Court has indicated. When section 1983 was enacted, the major Supreme Court decision on judicial immunity had suggested that judges might be liable for acts done maliciously and in excess of jurisdiction.<sup>71</sup> State law in a significant number of jurisdictions either was uncertain or favored qualified judicial immunity.<sup>72</sup> Even the English common law qualified the immunity of magistrates and other courts of limited jurisdiction.<sup>73</sup> Secondly, even assuming that absolute judicial immunity was unambiguously established at common law, the appropriate objective is not merely to perpetuate historical distinctions, but to assess and implement the interests behind those distinctions.<sup>74</sup> The executive immunity cases ex-

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68. 98 S. Ct. 2894 (1978).

69. *Id.* at 2905.

70. See *Butz v. Economou*, 98 S. Ct. at 2910-12; *Stump v. Sparkman*, 435 U.S. 349, 355 (1978); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871).

71. *Randall v. Brigham*, 74 U.S. 523 (1868). *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871), the decision establishing absolute judicial immunity, was decided a year after the enactment of section 1983. See Note, *Liability of Judicial Officers under Section 1983*, 79 YALE L. J. 322, 325 (1969).

72. Note, *Liability of Judicial Officers under Section 1983*, 79 YALE L. J. 322, 326 & n.29, 327 & nn.30-32 (1969).

73. *Id.* at 325 & n.25. See also Brazier, *Judicial Immunity and the Independence of the Judiciary*, 1976 PUB. L. 397.

74. In general, the Court has attempted to do so. See *Butz v. Economou*, 98 S. Ct. at 2910-12. See also cases cited in notes 1 & 38 *supra*.

amined in *Butz* plainly were efforts to apply to executive functions the same policy considerations that were thought to justify judicial immunity.<sup>75</sup> Therefore, to the extent that these cases did not establish absolute *executive* immunity, they should direct inquiry to the question of whether the common law identified special attributes of the judicial function that would persuasively support perpetuating absolute *judicial* immunity. Without such an explanation, the executive immunity cases—to the extent that they do not establish that absolute executive immunity was thought to be necessary at common law—undercut the significance of the existence in the common law of absolute judicial immunity.

The final problem with the Court's reliance on the common law is that the rationales underlying the older cases establishing absolute judicial immunity are not entirely inconsistent with modern standards that qualify executive immunity. In the main case relied on to establish absolute judicial immunity, *Bradley v. Fisher*,<sup>76</sup> the Court held that a judge would not be immune for an illegal act if the act were in the "clear absence of all jurisdiction."<sup>77</sup> The *Bradley* Court distinguished such acts from acts done merely "in excess of jurisdiction" and from challenges to the "manner in which . . . jurisdiction was exercised."<sup>78</sup> For example, if a probate court were to sentence a felon, its act would be in the clear absence of jurisdiction; if a criminal court were to sentence a felon to an excessive term, its act would be in excess of jurisdiction; and if a criminal court were to violate principles of due process in trying a felon, its act would involve the manner in which jurisdiction was exercised.<sup>79</sup> The Court limited potential liability to the first of these three categories because, "where jurisdiction over the subject-matter is invested by law in the judge . . . the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case

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75. *E.g.*, *Barr v. Matteo*, 360 U.S. 564, 569-74 (1959); *Spalding v. Vilas*, 161 U.S. 483 (1896) (after summarizing cases dealing with judicial immunity, the Court stated, "We are of opinion [sic] that the same general considerations of public policy and convenience which demand for judges . . . immunity from civil suits . . ., apply to a large extent to . . . heads of Executive Departments . . ."). *Id.* at 498.

76. 80 U.S. (13 Wall.) 335 (1871).

77. *Id.* at 351-52.

78. *Id.* at 351-53, 357 (Davis, J., dissenting).

79. *Id.* at 352. The Court did not specifically state that violations of due process involved only the manner in which jurisdiction was exercised. The Court did, however, clearly treat the procedural irregularities as illegal, ascribing this to "natural justice" rather than to the Constitution. *Id.* at 354.



. . . .”<sup>80</sup> The difficulty is, of course, that subject-matter jurisdiction normally is as much a question of law for the court as are the manner and extent of the exercise of that jurisdiction.<sup>81</sup> A court must decide whether it has the authority to try a felon just as it must decide what procedures it must follow and what sentence it may impose. Obviously, the three categories all identify illegal use of authority, the differences pointing largely to the degree of error.<sup>82</sup>

The *Bradley* Court’s terminology was an effort to identify the kind or degree of illegality for which judges should not be immune. To categorize an act as being in the “clear absence of jurisdiction” does not explain why this type of misuse of authority should expose a judge to liability while the other unauthorized acts do not, except to suggest that liability should depend in part on the obviousness of the mistake of law. Indeed, the *Bradley* Court made quite explicit its reasons for exposing judges to liability for acts done in the clear absence of jurisdiction: “Where there is clearly no jurisdiction . . . any authority exercised is a usurped authority, and for the exercise of such authority, *when the want of jurisdiction is known to the judge*, no excuse is permissible.”<sup>83</sup> The Court added that if a probate court were to try a criminal case, the judge would not be immune, the usurpation of authority “*being necessarily known to [the] judge*.”<sup>84</sup> The Court made no effort to explain why a clear violation of due process might not be as necessarily known to a judge as a mistake relating to subject matter jurisdiction. The utilization of the common law rules in *Bradley* was therefore an effort to identify those judicial mistakes that must have been knowingly made. The fact that the categories employed for this purpose were inadequate should not obscure the premise: there should be no immunity for errors that must have been knowing.

Thus, the rationale underlying the common law exception to judicial immunity can readily be accommodated to the modern standard of qualified immunity. Executives are not immune for acts that they knew or should have known violated clear constitutional standards.<sup>85</sup> The

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80. *Id.* at 352.

81. *Cf. Dobbs, The Validation of Void Judgements: The Bootstrap Principle*, 53 VA. L. REV. 1003 (1967) (analyzing the rule that, once a court has determined it has jurisdiction, that decision is *res judicata* and is not subject to collateral attack).

82. With regard to executive actions, the Court has treated as unauthorized acts that were unconstitutional but within statutory authority. *See Butz v. Economou*, 98 S. Ct. at 2902-04. Analogously, a judicial act that is within a court’s subject matter jurisdiction should not be considered authorized if it is unconstitutional.

83. 80 U.S. (13 Wall.) 335, 351-52 (1871) (emphasis added).

84. *Id.* at 352 (emphasis added).

85. *See* notes 2-4 and accompanying text *supra*.

common law held judges liable for a subclass of similarly unreasonable mistakes of law by labeling them in the "clear absence of jurisdiction." The appropriate task for the Court today is not a mechanical application of the categories used in *Bradley* to identify such mistakes, but a reasoned examination of the apparent inadequacy of those categories for achieving their purpose. The place of judicial immunity in the common law merely emphasizes the importance of a careful analysis of the judicial function to determine whether it has any special attributes incompatible with broader liability rules.

#### b. Special Attributes of the Judicial Function.

Two judicial attributes have been asserted as justifications for a broad rule of immunity. The first, relating generally to the "dignity" of a court, was used frequently in the past but is not relied on in modern opinions and is discussed in the second section of this article.<sup>86</sup> The second, to be discussed in this section, relates to the special purposes and procedures of the judiciary and is heavily relied on today. Upon examination, however, these attributes more persuasively support qualified than absolute judicial immunity.

The major reasons given today for judicial immunity are: that judicial decisions are particularly difficult decisions, so that it would be especially unfair to expose a judge to liability for making precisely the kinds of hard judgments that it is his legal obligation to make;<sup>87</sup> that judicial decisions must be made entirely independently of personal considerations, including the fear of personal liability;<sup>88</sup> and that deterrence of illegal conduct, the major purpose of civil rights liability, is implicated less by judicial functions because judges are relatively unlikely, due to their training, traditions and the self-correcting characteristics of the adversary process, to act unconstitutionally.<sup>89</sup> Buttreasing each of these arguments is the claim that because judicial decisions nec-

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86. See notes 119-30 and accompanying text *infra*.

87. *Stump v. Sparkman*, 435 U.S. at 364 (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871) to the effect that difficult cases impose on judges "the severest labor"). Justice Douglas's characterization of the judicial decision is typical: "The judicial function involves an informed exercise of judgment. It is often necessary to choose between differing versions of fact, to reconcile opposing interests, and to decide closely contested issues. Decisions must often be made in the heat of trial. A vigorous and independent mind is needed to perform such delicate tasks." *Pierson v. Ray*, 386 U.S. 547, 566 (1967) (Douglas, J., dissenting).

88. *Stump v. Sparkman*, 435 U.S. at 363 (quoting *Bradley* for the proposition that "[the] judicial officer, in exercising the authority vested in him, [must be] free to act upon his own convictions, without apprehension of personal consequences to himself").

89. *Butz v. Economou*, 98 S. Ct. at 2913-16.

essarily involve matters that excite antagonism, and because lawsuits end with one party losing, the threat of numerous suits is great.<sup>90</sup> Thus, even the possibility of liability only for unreasonable or knowing deprivations of constitutional rights would undermine the functions performed by judges.

Despite the real consternation that legal disputes cause judges, and despite the highly focused intellectual attention that their decisions receive in law schools, there is no obvious reason to believe that the decisions of judges are more difficult than those of many executive officers. The policeman on the street must "[decide questions] that may later divide an appellate court."<sup>91</sup> The same can be said of governors who must decide whether to call out the militia, and of superintendents of mental hospitals who must decide whether to release a patient.<sup>92</sup> Even a cursory view of the difficulty of executive decision-making supports Justice Rehnquist's suggestion that the special status of judicial immunity is based on the judiciary's special sensitivity to its own problems.<sup>93</sup>

In fact, it is probably far *more* realistic to expect a judge to avoid an unreasonable or knowing violation of constitutional rights than an executive officer. Civil rights liability standards for executives turn essentially on knowledge of the law.<sup>94</sup> Executives are not necessarily trained to understand the law or to apply it to specific factual situations; as lawyers, judges have had precisely this training. Executives, despite their potential for liability, often do not have access to legal counsel before making their decisions; there simply are not enough lawyers in government to advise every executive on every decision that might involve liability.<sup>95</sup> In contrast, judges can rely not only on their own legal knowledge, but almost always also have access to the knowledge offered by lawyers for the parties through briefs and oral arguments. Executives often must act on the basis of hurried and informal consultation with an agency lawyer, when a lawyer is available at all, and events often pressure immediate decisions. The great bulk of judicial work is notorious for postponement.<sup>96</sup>

90. *Id.* at 2912. See *Stump v. Sparkman*, 435 U.S. at 363-64; *Bradley v. Fisher*, 80 U.S. (13 Wall.) at 347-48.

91. Davis, *supra* note 9, at 214.

92. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975); *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

93. *Butz v. Economou*, 98 S. Ct. at 2922 n.\*.

94. See notes 2-4 and accompanying text *supra*.

95. See, e.g., Bershad, *The Law and Corrections: A Management Perspective*, 4 N. ENG. J. ON PRISON L. 49, 65 *passim* (1977) [hereinafter cited as Bershad]; Davis, *supra* note 9, at 217.

96. Of course, judges—like executives—are often rushed in their work. See Alschuler,

Moreover, even if all executives had the training and the access to legal advice available to judges, the typical judicial decision would in many ways still be more compatible with the rationales for qualifying executive immunity. According to the traditional paradigm,<sup>97</sup> a judicial decision directly involves just two interests, only one of which will prevail; the factual issues to be decided concern past events; the decision depends upon a reasoned application of largely pre-existing legal standards supplied by earlier courts or by statute; each case is self-contained in the sense that the facts, law and remedy for a case are isolated from the on-going activities of the parties and others; and the judge's responsibility is limited to passive receipt and consideration of the facts and arguments supplied by the parties. This description is, no doubt, inaccurate for much of modern public law litigation and is simplified even as to traditional litigation, but it is still a fair description for generally distinguishing the stereotypical judicial process from the executive process.

In the paradigm of the executive decision,<sup>98</sup> one of two parties does not simply "win" or "lose". Especially with elected executives, decisions require the accommodation of many interests. The normal executive decision involves an array of possible outcomes because the problem is often to identify which of several methods should be used to satisfy the competing interests. Such decisions require predictive judgments as to how organizations can be controlled and how policies can be achieved: about the probable effects of different systems of deterrents and inducements, and of different methods of supervision, inspection and training.<sup>99</sup> Thus, although restricted by notions of legal authority, the executive's attention must be directed at a number of nonlegal considerations as well. Moreover, an executive decision is not a discrete event but is a part of an on-going process. Responsibility for decisionmaking is delegated throughout an organization.<sup>100</sup> Different aspects of a decision can be made sequentially—in a "stream of synthe-

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*Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 677-85 (1972). But judges are more likely to have the option of slowing their decision-making processes for occasional reflection.

97. See generally Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1282-83 (1976).

98. See generally, HART & SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958). A classic analysis of the nature of executive responsibilities can be found in C. BARNARD, *THE FUNCTIONS OF THE EXECUTIVE* (1938) [hereinafter cited as BARNARD].

99. BARNARD, *supra* note 98, at 231 *passim*.

100. *Id.* at 233.

ses"<sup>101</sup>—and decisions in any single matter are complicated by their potential impact on matters unrelated to the immediate dispute at hand. Finally, the executive, while dependent on others for much of his information, actively shapes that information by structuring the administrative mechanisms that gather and evaluate information.<sup>102</sup> Thus, the stereotypical descriptions of executive and judicial decisions indicate that executive decisions must accommodate a broader range of interests, require more complicated judgments, and are less guided.

It is extremely hazardous to evaluate an executive decision. Not only may the underlying explanation be difficult to assess because the decision is vague or complex, but also because the executive often must act in the absence of any preserved record. This is not to argue that executives should be immune for acts which they knew or should have known were unconstitutional. Rather, it is to suggest that *if* executives are subject to such liability, judges should *a fortiori* be subject to the same liability. To the extent that the stereotypes of the judicial and executive process no longer (or never did) conform to actual practices because the act of judging is more "executive" than mythology admits, the appropriate conclusion is merely that equivalent unfairness would attend qualified judicial immunity as now attends qualified executive immunity.

Independence, however, is thought to be centrally important to the judicial process. Concern with personal matters, including personal liability, is thought to be incompatible with impartial attention to the legal issues. This argument assumes that concern for personal liability does not encourage careful attention to the merits of the dispute. But precisely this assumption is rejected by the cases establishing qualified executive immunity.<sup>103</sup> These cases reflect a belief that potential liability for unreasonable or knowingly unconstitutional acts will provide an effective incentive for officials to give greater attention to constitutional requirements.<sup>104</sup> Exposure to liability has thus been designed precisely to encourage attention to legal issues. Since this concern is the central responsibility of a judge, the major assumption underlying qualified executive immunity indicates that imposition of limited liability on judges would be highly compatible with their function.

Effects other than attention to constitutional requirements, however, can be expected to follow from qualifying judicial immunity. The

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101. *Id.* at 231.

102. *Id.* at 217-27.

103. See note 2 & 3 *supra* and cases cited therein.

104. See Yudof, *supra* note 24, at 1335.

additional pressures created by exposure to liability have led to changes in executive decisionmaking that might be expected to affect judicial decisions as well. The increase in prisoners' rights lawsuits, for example, has greatly increased the prison administrator's reliance on the advice of his agency's attorney.<sup>105</sup> Corrections officials now devote more attention to developing and revising explicit rules for their own operation.<sup>106</sup> And, predictably, the "increased risk of being held individually liable . . . has made complete recordkeeping vital if the defenses of 'good-faith' or 'lack of knowledge' are to be successfully proven."<sup>107</sup> Similarly, the potential liability of public school officials is said to be leading to increased reliance on documentation and elaborate, legalistic procedures.<sup>108</sup> Exposure to liability can also be expected to encourage timid, noncontroversial decisions, since decisive actions, like expelling a student, seem fraught with uncertainties and risks.<sup>109</sup>

The noticeable characteristic of these side effects of qualifying executive immunity is their similarity to normal *judicial* methods. It is not surprising that those who are required to make judge-like decisions about the law resort to a judge's procedures.<sup>110</sup> The judicial process has always been dominated by attorneys' argument and judgment; by careful attention to procedure intended to assure all parties that the decision will be fair and deliberative; by precise recordkeeping and written explanation that create at least apparent clarity as to the bases of any decision; and even by caution, for the tradition of adjudication—despite dramatic examples to the contrary—is of small changes elaborately justified and carefully chosen. This is not to suggest that all these characteristics are necessarily destructive of the executive function, nor to argue that they are all necessarily useful in the judicial function. Rather, the point is simply that even if such effects are beneficial, or at least worth their costs, they are more compatible with the normal judicial proceeding than with the normal executive action. If these effects did not justify shielding executive decisions with absolute immunity, they certainly are not sufficient to give this additional protection to judicial decisions.

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105. Bershad, *supra* note 95, at 65.

106. *Id.* at 60.

107. *Id.* at 58-59.

108. Yudof, *supra* note 24, at 1395-99.

109. *Id.*

110. Indeed, "judicializing" executive decisionmaking is a way of describing one of the objectives of qualified executive immunity. Directly requiring that executives use judicial methods has long been proposed as an alternative to imposing liability. See Jennings, *Tort Liability of Administrative Officers*, 21 MINN. L. REV. 263 (1937).

The final major argument in support of absolute judicial immunity is that additional burdens on the judge are unnecessary or even dysfunctional because the judicial process contains safeguards providing adequate assurance that constitutional rights will not be knowingly violated. This argument undercuts the occasional suggestion that because adjudications involve hostile confrontations, a large number of lawsuits against judges could be expected. The judicial process, more than the executive, is surrounded by procedures, traditions and rituals designed to elicit acceptance of the court's decision.<sup>111</sup> The opportunity to argue and cross-examine, the elaborate precision of the procedures, the courtesy and respect openly extended to judge and opposing counsel, the clothing, positioning and education of the judge, the use of juries, the reliance on precedent, the written record, the opinion written to justify the outcome, and the opportunity for appeal—all do at least as much to assure consent to the outcome as to assure constitutional conduct. These characteristics, as well as the improbability of unconstitutional conduct itself, reduce the likelihood of an excessive number of lawsuits against judges. The formality of the proceedings would also make it feasible to dismiss insubstantial claims before trial.

Even if there are already sufficient assurances that the judicial function will be exercised within constitutional limits, one of the purposes of civil rights liability is to compensate the victim.<sup>112</sup> The fact that only a small number of abuses occur is no reason to deny compensation for those that do occur. Moreover, the use of procedural protections does not assure constitutional conduct when the claim is precisely that unconstitutional procedures have been used by a judge. Any right of appeal in *Stump*, for example, was an empty promise since the sterilized woman never knew she was the subject of litigation nor that she was to be sterilized.

The relative improbability of unconstitutional judicial conduct actually suggests that the deterrent function of qualified liability would be more effective when applied to judges than when applied to executives. As Professor Davis has argued, the potentially enormous number of legal abuses by some executives, especially the police, may be largely

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111. See ARNOLD, *supra* note 11, *passim* and especially ch. VIII. For a discussion of the sources of judicial legitimacy, see Casey, *The Supreme Court and Myth*, 8 L. & Soc'y REV. 385 (1974) and materials cited therein; Engstrom & Giles, *Expectations and Images: A Note on Diffuse Support for Legal Institutions*, 6 L. & Soc'y REV. 631 (1972). Judges' misconduct can undermine public acceptance of the process. See Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 680-85 (1972).

112. See *Carey v. Phipps*, 435 U.S. 247, 253-57 (1978).

impervious to the threat of liability.<sup>113</sup> The mere fact that only a fraction of the violations can possibly lead to lawsuits impedes the deterrent function. Since a larger proportion of the small number of judicial violations might lead to lawsuits, deterrence might be more effective. In addition, because deterrence of illegal executive conduct is diluted by indemnification, the operative deterrent is largely nonmonetary—the disgrace or embarrassment of a finding of illegal conduct, the interruption of regular activities due to the litigation and other career consequences.<sup>114</sup> Many of these nonmonetary deterrents would be especially effective if applied to judges for the same reasons that violations are unlikely in the first place. Judges are likely to care about the high traditions of their office, to aspire to do an effective job, and to desire the respect of their colleagues. The education, training and acculturation of judges all point to the potential effectiveness of qualified liability as a deterrent. Finally, the effectiveness of potential liability as a deterrent to executive misconduct is reduced in many cases because the malfactor does not alone have the capability of altering his conduct.<sup>115</sup> The policeman on the street may lack the knowledge or time consistently to alter his search and seizure practices; the institutional administrator may be dependent on others for funding or the promulgation of necessary standards. Unconstitutional acts by judges, however, would much more likely be within their own power to prevent or correct. A judge is not dependent on others to see that a minor is represented, a hearing provided, or a clear constitutional standard understood and followed in his decision.

The generic attributes of the judicial function do not justify a broad rule of absolute immunity.<sup>116</sup> In fact, if those attributes are compared to the characteristics of the executive function, liability for unreasonable or knowing violations of constitutional rights is considerably more appropriate for the improper exercise of the judicial function than for the executive. Nevertheless, the branch of govern-

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113. Davis, *supra* note 9 at 216-17. See also Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcer's Misconduct*, 87 YALE L.J. 447 (1978); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1206 (1977).

114. Yudof, *supra* note 24, at 1390.

115. See cases in articles cited in note 113 *supra*.

116. There may be, of course, specific judicial responsibilities that—like some specific executive responsibilities—require absolute immunity. Such claims should be evaluated on an individual basis. Cf. Butz v. Economou, 98 S. Ct. at 2910-18. Specific evaluations of function have been done—for example, with the claim that liability for a prosecutor's decision to introduce evidence at trial would be inconsistent with the adversary system. See Imbler v. Pachtman, 424 U.S. 409, 440 (1976) (White, J., concurring).



ment with the main capacity and responsibility for understanding and applying the law is held immune even for knowing failures to apply the fundamental law. Assessed by the kind of functional analysis insisted upon by the modern Court, this is not a paradox, but an absurdity or an evasion. The next section examines whether those reasons relied on by the older courts, but no longer openly acknowledged, reveal more about the underpinnings of judicial immunity.

## II. Omitted Justifications for Absolute Judicial Immunity

Only briefly, at the end of a dissenting opinion, was there any allusion in *Stump v. Sparkman* to a justification which had figured prominently in the history of judicial immunity. Justice Stewart noted that the petitioner's brief referred to the "aura of deism which surrounds the bench . . . essential to the maintenance of respect for the judicial institution."<sup>117</sup> The modern opinions insist that official immunity must be justified by realistic functional analysis, not by attributes of status. The arguments based on status sound curious to the modern ear, outmoded and even embarrassing. But they are worth examining partly because they were relied on historically, partly because the functional arguments are so unconvincing, and partly because a moment's introspection reveals their importance. Courts have been surrounded with special responsibilities and with special prerogatives, and they do have special psychological significance for lawyers and citizens. Myths, superstitions and emotive symbols are commonly studied as elements of governance;<sup>118</sup> the stolid efforts of courts and commentators to justify immunity doctrines only in realistic terms may be submerging the more important issues at stake.

*Dignity* has always been an important attribute of judicial authority. The English courts traced their ancestry to the authority of the crown itself,<sup>119</sup> and courts still utilize regal symbolism. Religious allusions are not uncommon when judges and commentators discuss judicial responsibilities.<sup>120</sup> It is doubtful that any other officials in the

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117. 435 U.S. 349, 369 (1978) (Stewart, J., dissenting).

118. See H. TUDOR, *POLITICAL MYTH* (1972) and materials cited therein; Casey, *The Supreme Court and Myth*, 8 L. & Soc'y REV. 385 (1974) and materials cited therein.

119. Even in the United States, this has been relied on as a reason for immunity. See *Randall v. Brigham*, 74 U.S. (7 Wall.) 523, 536 (1869). See also materials cited in note 65 *supra*.

120. For instance, Learned Hand described Justice Brandeis' "almost mystic reverence for that court whose tradition seemed to him not only to consecrate its own members, but to impress its sacred mission upon all who shared in any measure in its work." L. HAND, *THE SPIRIT OF LIBERTY* 168 (3d ed. 1960) [hereinafter cited as HAND]. Thurman Arnold referred

United States are as accustomed as judges to the exercise of peremptory authority or to such constant shows of deference. The early American cases concerning judicial immunity overtly linked immunity to the judiciary's special need for dignity. In *Randall v. Brigham*,<sup>121</sup> the Court described the possibility of personal liability as necessarily leading to the "degradation of the judicial authority."<sup>122</sup> The *Randall* opinion quoted at length from British decisions that suggested liability would render judges "slaves . . . to every sheriff, juror, attorney, and plaintiff"; it asserted, "If you once break down the barrier of their dignity, and subject them to an action, you . . . establish its weakness in a degrading responsibility."<sup>123</sup> References to "servility" and "degradation" recur in *Randall* and also appear in the other early major judicial immunity case, *Bradley v. Fisher*.<sup>124</sup>

It is noteworthy that both *Randall* and *Bradley* involved claims by attorneys of illegal, summary disbarment by a judge. In *Bradley*, the Court assumed that summary action was improper, but found it to be a "judicial" act because the attorney had "threatened the presiding justice . . . with personal chastisement."<sup>125</sup> The Court noted that "[a] greater indignity could hardly be offered to a judge" and that without firm reaction the judge "would soon find himself a subject of pity rather than of respect."<sup>126</sup> Thus in the early judicial immunity cases, the need to maintain the dignity of the court was relevant to establishing the "judicial" nature of the act, but the illegality of the judge's action was not so treated. Protection of the court's authority, more than protection of the rule of law, was seen as the defining characteristic of a "judicial" action.

One key to judicial dignity has always been impersonality. Judicial opinions, as well as academic comment on them,<sup>127</sup> strive to elimi-

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to the courts' "priestly power." ARNOLD, *supra* note 11, at 186. See also Casey, *The Supreme Court and Myth*, 8 L. & SOC'Y REV. 385 (1974).

121. 74 U.S. (7 Wall.) 523 (1869).

122. *Id.* at 536.

123. *Id.* at 537-38.

124. 80 U.S. (13 Wall.) 335, 347-49 (1872).

125. *Id.* at 356.

126. *Id.*

127. The efforts by legal scholars to deal objectively with the reasons given by courts for their decisions need no citation since the great bulk of legal literature, even critical literature, is impersonal. No doubt, this approach is constructive, and the point here is merely to note how deeply impersonality is imbedded in legal traditions and norms. The most famous illustration is probably Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

nate the judge's personality as a factor in the outcome. As Learned Hand observed:

[The judge's] authority . . . depend[s] upon the assumption that he speaks with the mouth of others: the momentum of his utterances must be greater than any which his personal reputation and character can command, if . . . it is to stand against the passionate resentments arising out of the interests he must frustrate. He must pose as a kind of oracle, voicing the dictates of vague divinity—a communion which reaches far beyond the memory of any now living, and has gathered up a prestige beyond that of any single man.<sup>128</sup>

Qualified immunity would especially threaten the impersonality and, therefore, the dignity of the judge. Inquiries into what the judge knew or should have known examine the judge as a person. His knowledge and motives must be exposed. This stands in sharp contrast to the challenges to judicial authority that are now permitted. In an appeal, a lower court is alleged to have erred, but normally the error is not examined from the perspective of what the judge below should have known or whether his mistake was justifiable; rather, the issue is the law, not the judge. Similarly, a judge can be liable if he acts in the clear absence of jurisdiction or in a nonjudicial capacity.<sup>129</sup> In such cases, the judge is examined as a person but, by definition, only after he has been removed from the domain of judicial authority. Even arguments that the scope of judicial liability should be expanded sometimes rely on the sleight-of-hand that makes a fallible judge not a judge. The intention to deprive a person of his civil rights is said to be "wholly incompatible with the judicial function," and a judge who has acted with this intention is described as acting not "as a judge, but as a 'minister' of his own prejudices."<sup>130</sup> Absolute judicial immunity, then, like many judicial practices, serves to preserve the impersonality and dignity of the judge's authority.

*Essentialness* has been a second important aspect of judicial authority. From the earliest Supreme Court decisions, the judicial power has been equated with the existence of the constitutional order itself.<sup>131</sup>

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128. HAND, *supra* note 120, at 130.

129. Stump v. Sparkman, 435 U.S. at 355-57.

130. Pierson v. Ray, 386 U.S. 547, 567 n.6 (1967) (Douglas, J., dissenting).

131. If courts were required to give effect to legislation that, in their opinion, was unconstitutional, the Constitution, established "in theory," would be overthrown "in fact." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803). The Court has even equated the judicial process with the constitutional order in a case requiring obedience to an injunction that probably violated the First Amendment: "But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom." Walker v. City of Birmingham, 388 U.S. 307, 321 (1967).

Judicial authority is often described as fragile and threats to judicial authority are couched in catastrophic terms. For example, words that threaten or demean a judge—a daily fact of life for many executives and legislators—have been described as incompatible with “the judicial independence so indispensable to the administration of justice.”<sup>132</sup> Although the threat to authority was an isolated incident, the danger was cast in systemic terms:

[A]n enormity of the sort, practiced but on a single judge, would be an offence as much against the court, which is bound to protect all its members, as if it had been repeated on the person of each of them, because the consequences to suitors and the public would be the same . . . .<sup>133</sup>

Similarly, grand themes were elicited by the possibility that a state court might try a federal marshal for a murder allegedly committed while protecting a federal judge from assassination: “The general government must cease to exist whenever it loses the power of protecting itself . . . .”<sup>134</sup> No doubt, the courts have sometimes exaggerated the danger inherent in challenges to the other branches of government. But the persistent tone of catastrophe associated with threats to judicial authority can be contrasted with detached assessments of dangers involving the authority of the executive and legislative branches. For example, with the scope of the executive power in question, the Court calmly found “the administration of justice” not to be endangered by disorders created during the Civil War<sup>135</sup> and the power of the general government to protect itself not to be implicated by a nation-wide steel strike during the Korean War.<sup>136</sup>

Predictably, disaster has been found in the possibility of qualified judicial immunity. The Court has resisted qualifying judicial immunity by suggesting that it would expose judges to lawsuits from “*every one* who might feel himself aggrieved.”<sup>137</sup> In contrast, despite a huge increase in the actual number of challenges to executive authority, the Court has remained detached enough to see the countervailing benefits, and has expanded the range of executives who might be subject to civil rights liability.<sup>138</sup> In addition, judicial immunity for knowingly uncon-

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132. *Bradley v. Fisher*, 80 U.S. (13 Wall.) at 356.

133. *Id.*

134. *In re Neagle*, 135 U.S. 1, 61 (1890) (quoting *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 363 (1816)).

135. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1867).

136. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

137. *Bradley v. Fisher*, 80 U.S. (13 Wall.) at 347 (emphasis added). *See also* cases cited in note 90 *supra*.

138. *See* cases cited in note 3 *supra*. *See also* *Butz v. Economou*, 98 S. Ct. at 2910-12

stitutional acts continues to be linked to grave considerations such as "the proper administration of justice."<sup>139</sup> The judicial decision is still pictured as delicate and painful, easily undermined by the faintest trace of personal consideration.<sup>140</sup>

*Finality* has been a third attribute of judicial authority. Since *Marbury v. Madison*,<sup>141</sup> the Supreme Court has aggressively extended its role as the final arbiter of almost all constitutional questions.<sup>142</sup> Partly because a judicial decision is the final recourse for defining the law, defiance of the judiciary has been viewed as less tolerable than defiance of other authority. For example, a statute or administrative ruling can be challenged by disobedience and the legality of the defiance can be finally determined in a court; however, if an injunction is disobeyed, the defiant party normally is subject to punishment even if he can demonstrate that the order was illegal.<sup>143</sup> The psychological impulse that rejects any possibility of legitimate challenge to authority that is temporally final is reflected, perhaps, also in the extraordinary powers that federal courts have employed while enforcing their decrees against unresponsive governments or populations.<sup>144</sup> The impulse is understandable. If "final" authority can be challenged, then it is not final; surely, society cannot operate on the basis of an infinite regress of challenges. Moreover, because the decisions of the courts are effectively the law no matter how patently inconsistent with the written constitution,

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(threat of numerous lawsuits against executives is dismissed on the grounds that "insubstantial lawsuits can be quickly terminated by federal courts").

139. *Stump v. Sparkman*, 435 U.S. at 363 (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871)).

140. *Id.* See also note 87 *supra*.

141. 5 U.S. (1 Cranch) 137 (1803).

142. See, e.g., cases cited in note 1 *supra*; *United States v. Nixon*, 418 U.S. 683 (1974); *Powell v. McCormack*, 395 U.S. 486 (1969).

143. This is true even if the defiance precedes a successful appeal, *Worden v. Searls*, 121 U.S. 14 (1887), and even if the injunction was issued pursuant to an unconstitutional statute, *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947); *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922). As to whether defiance is punishable if the issuing court lacked subject matter jurisdiction, compare *United States v. United Mine Workers*, 330 U.S. 258, 293 (1947) and *Walker v. City of Birmingham*, 388 U.S. 307, 315 (1967) (both suggesting that subject matter jurisdiction might be a prerequisite) with *Dobbs, The Validation of Void Judgments: The Bootstrap Principle*, 53 VA. L. REV. 1003, 1020 (1967) (suggesting that there was no subject matter jurisdiction, in the normal sense, in *United Mine Workers*). As to instances where defiance might not be punishable, see *Walker v. City of Birmingham*, 388 U.S. at 315-19.

144. For descriptions of such powers, see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 661 n.2 (1978); Comment, *Community Resistance to School Desegregation: Enjoining the Undefinable Class*, 44 U. CHI. L. REV. 111 (1976).

there is a strong incentive to believe the decisions are correct.<sup>145</sup> Psychologically, judicial opinions are not final because infallible but infallible because final.<sup>146</sup>

The attribute of finality has also been reflected in the judicial immunity cases. Both English and American courts have relied on the argument that "if the judicial matters of record should be drawn in question . . . there never will be an end of causes but controversies will be infinite."<sup>147</sup> Immunity not only cuts off challenges to judicial authority but also serves the psychological correlates of finality. Absolute judicial immunity treats judges as if they were infallible, in the sense that their errors are treated as legally insignificant. More importantly, the urge to believe that the final authority is infallible is served by preventing inquiries into motive and knowledge. A finding that a judge was not only wrong but also venal would painfully emphasize the eventual unavoidability of imperfect, even unjust authority. In this sense, the action of a court cannot be considered corrupt or foolish "without seeming to endanger the very fabric of the state."<sup>148</sup>

These justifications for absolute judicial immunity omitted by the modern Court are, of course, a description of the classical idea of sovereignty. The long history of attempting to embody sovereignty by investing rulers with extraordinary dignity through the use of various symbols of power is well known. The pomp, ritual and religious overtones of Roman emperors and British kings find a faded reflection in some of the customs and rhetoric that surround the modern judiciary.<sup>149</sup> Theories of sovereignty were developed against the background of political disorder in sixteenth century France, and a major objective

145. Many scholars come only reluctantly to the conclusion that the Court has acted unconstitutionally, or strive to justify other ways of describing departures from the written document. See L. LUSKY, *BY WHAT RIGHT?* (1975); Compare Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L. J. 920 (1973) and Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975) with R. BERGER, *GOVERNMENT BY JUDICIARY* (1977).

146. The reference, of course, is to Justice Jackson's famous line in *Brown v. Allen*, 344 U.S. 443, 540 (1953) (concurring opinion). Cf. L. FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957).

147. *Floyd v. Barker*, 77 Eng. Rep. 1305, 1306 (1608); see *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 349 (1871).

148. ARNOLD, *supra* note 11, at 129.

149. See generally I THE GREAT POLITICAL THEORIES FROM PLATO AND ARISTOTLE TO LOCKE AND MONTESQUIEU 117, 270 (M. Curtis ed. 1961). Hobbes argued: "And as the power, so also the honour of the sovereign, ought to be greater, than that of any, or all the subjects. For in the sovereignty is the fountain of honour. The dignities of lord, earl, duke, and prince are his creatures. As in the presence of the master, the servants are equal, and without any honour at all; so are the subjects, in the presence of the sovereign." *Id.* at 311.

of the theorists was to justify a degree of power and loyalty thought essential to order and the rule of law.<sup>150</sup> Hobbes, for example, described the sovereign as "the soul of the commonwealth; which failing, the commonwealth is dissolved into a civil war, no one man so much as cohering to another, for want of a common dependence on a known sovereign."<sup>151</sup> Anarchy is the blunt word for the more muted intimations of catastrophe that the courts so often suggest when their authority is threatened. Finally, the tautology that the final authority must be beyond challenge was the crucial argument of early theorists of sovereignty.<sup>152</sup> The consequent paradox that the embodiment of the highest legal authority must be above the law is echoed in the freedom of modern judges from personal liability for knowingly unconstitutional acts. Modern commentators do not insist, as Blackstone did with respect to the king, that a judge is "incapable of doing wrong . . . even of thinking wrong . . . ; in him is no folly or weakness."<sup>153</sup> Yet a lawsuit that would make an issue of a judge's folly or weakness is nevertheless foreclosed by the doctrine of absolute judicial immunity.

No matter how psychologically compelling, the omitted justifications themselves do not necessarily support the doctrine of absolute judicial immunity. Dignity and respect can be achieved in a number of ways, and one of the most appropriate would be visibly to subordinate judges' behavior to the Constitution by qualifying judicial immunity. Surely, dignity is not unambiguously achieved by a doctrine, like absolute immunity, apparently prompted by self-interest. The essential role of the courts in maintaining a system of law is undermined, not promoted, by putting judges above the fundamental law. Qualifying im-

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150. *Id.* at 269.

151. *Id.* at 315.

152. Bodin argued: "[I]t is the distinguishing mark of the sovereign that he cannot in any way be subject to the commands of another, for it is he who makes law . . . . No one who is subject . . . to the law . . . can do this. That is why it is laid down in the civil law that the prince is above the law . . . . If the prince is not bound by the laws of his predecessors, still less can he be bound by his own laws. One may be subject to laws made by another, but it is impossible to bind oneself in any matter which is the subject of one's own free exercise of will . . . ." *Id.* at 274. *See also id.* at 272-81. Hobbes, too, argued that the final source of law could not be subject to law: "[The sovereign's] power cannot, without his consent, be transferred to another: he cannot forfeit it: he cannot be accused by any of his subjects, of injury: he cannot be punished by them: he is . . . judge of doctrines: he is sole legislator: and supreme judge of controversies . . . .

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The sovereign of a commonwealth, be it an assembly, or one man, is not subject to the civil laws. For having power to make, and repeal laws, he may when he pleaseth, free himself from that subjection . . . ." *Id.* at 312-13.

153. H. LASKI, FOUNDATIONS OF SOVEREIGNTY 103 (1931).

munity would be consistent with careful attention to the law; it would help deter the occasional excess. The temporal finality of judges' decisions is a further reason for qualifying judicial immunity. Irresponsible legislative acts can often be tempered by wise executive implementation and judicial interpretation; executive excesses can often be corrected by new legislation or judicial oversight. But to the extent that judicial decisions are not subject to revision outside the judicial system, it is important that a judge have effective incentives to act responsibly. The omitted justifications are inconsistent with qualified judicial immunity only to the extent that the judiciary embodies "sovereignty" in its fullest sense: to the extent that the sovereign must be above the law.

### Conclusion

Although sovereignty can be described as an abstract attribute of a legal system,<sup>154</sup> pressure always exists to locate the "final power in the community . . . at some point within the institutional structure."<sup>155</sup> In its history and its justifications, official immunity has always been a means of creating "some visible wielder of sovereignty."<sup>156</sup> The special status of judges with respect to civil rights liability suggests that the judiciary, more than the other branches of government, now serves this function in American society.

The Court's omission of any reference to the idea of sovereignty in its recent decisions concerning judicial immunity is not surprising in light of the general decline in the acceptability of the idea itself. As Harold Laski argued:

If our King fails to suit us we behead or replace him; if our ministry loses its hold, the result is registered in the ballot boxes. But the categories of law have obstinately and needlessly resisted such transformation . . . . [The classic theory of sovereignty] is legally unnecessary and morally inadequate. It is legally unnecessary because, in fact, no sovereignty . . . is weakened by living the life of the law. It is morally inadequate because it exalts authority over justice.<sup>157</sup>

Such arguments have prevailed, and the Supreme Court's decisions on executive and legislative immunity have contributed to the general decline of the idea of sovereignty. As the Court has itself emphasized: "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All officers of

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154. See, e.g., Pennock, *Law and Sovereignty*, 31 AM. POL. SCI. REV. 617 (1937).

155. H. LASKI, FOUNDATIONS OF SOVEREIGNTY 12 (1931).

156. *Id.*

157. *Id.* at 136-37.



the government, from the highest to the least, are creatures of the law, and are bound to obey it."<sup>158</sup> Given the extent to which the judiciary has come to expound and even to represent the rule of law, it would be surprising indeed if the Court were explicitly to justify its immunity on the basis of a doctrine tied so closely to the desirability of some ruler being above the law.<sup>159</sup>

The special status of the judicial function is perversely and somewhat disturbingly understandable in light of the decline of the idea of sovereignty. The psychological promises of sovereignty are cohesion, finality and infallibility. The comfort that these can provide becomes increasingly irresistible as challenges to authority become more pervasive. In the United States, it has often been the judiciary that has responded to, justified, and therefore elicited such challenges. The implication of the modern Court's insistent retention of the doctrine of absolute judicial immunity, then, is that while the judiciary attempts to prevent lawlessness in other institutions, it creates pressures for tolerating lawlessness in itself.

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158. *Butz v. Economou*, 98 S. Ct. at 2910-12. *See generally* cases cited in note 3 *supra*.

159. *See* note 152 *supra*.