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PATTERNS OF OFFICIAL IMMUNITY AND ACCOUNTABILITY

Ann Woolhandler*

Officials of each of the government’s three branches enjoy varying levels of immunity for their official actions. The Supreme Court and lower federal courts continue to struggle with the proper scope of these immunities. The “functional” approach to immunities, currently in vogue, was born of the merger between an approach based on the legality of the challenged action and an approach based on deference to the official’s discretion. This Article traces the development of those models and their relation to the current good faith immunity standard applicable to most executive officials.

Professor Woolhandler also explores how the judicial system has accommodated suits by citizens to address official wrongdoing, and how that accommodation has affected pleadings, the relationship between the Constitution and the common law as a source of officer liability, and the Court’s approach to implied rights of action under the Constitution. The discussion of implied rights of action in the nineteenth century calls into question the common assumption that implied constitutional damages actions were an innovation of comparatively recent times.

Lastly, the author challenges the efficacy of good faith immunity in addressing and redressing executive official’s misbehavior. The proper function of their liability, she concludes, is not punishment but enforcement of constitutional and statutory limits on government.

INTRODUCTION

THE SUPREME COURT in recent years has endorsed a “functional” approach to immunities claimed by public officers sued for their allegedly wrongful acts. Nevertheless, members of the Court, all purporting to apply a functional analysis, disagree as to the results.1 Under a functional approach, the Court may evaluate

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1. Compare, e.g., Cleavinger v. Saxner, 106 S. Ct. 496, 502-03 (1985) (members of federal prison’s institution discipline committee entitled only to qualified, not absolute, immunity) with id. at 506-07 (Rehnquist, J., dissenting) (members should be entitled to absolute immunity); Mitchell v. Forsyth, 105 S. Ct. 2806, 2812-14 (1985) (Attorney General is entitled to qualified, not absolute, immunity) with id. at 2821 (Burger, C.J., concurring) (President’s aides should be granted absolute immunity for actions in the area of national security) and id. at 2823 (Stevens, J., concurring) (same); Nixon v. Fitzgerald, 457 U.S. 731, 749-53 (1982)
an officer’s claim for immunity in light of the particular activity which gave rise to the litigation. This evaluation may focus, on the one hand, upon the harms that performance of that function may inflict upon the citizen, and, on the other, upon the perceived need to insulate the officer from litigation and interference by a coordinate branch. Because of differences in immunity claims posed by officials of the different branches, and consequent variations in the level of immunity accorded each, prevalent functional analysis categorizes activities as legislative, judicial, or executive.

A relatively constant feature of nineteenth and twentieth century cases, although not always beyond dispute, was the immunity enjoyed by legislators and judges while acting within the outer perimeters of their official capacities. No such consistency, however, characterizes claims for executive immunity. This differing treatment of executives has frequently been cited as anomalous, thereby prompting calls for either extended executive immunity,\(^2\) or, alternatively, expanded legislative and judicial liability.\(^3\)

This Article explores two historical models for evaluating government officials’ claims for immunity from civil liability, and the relation of those models to the qualified immunity currently applicable to most executive officers. Part I of this Article shows how differing levels of immunity for executive, legislative, and judicial officers comport with a functional analysis focusing on the ability of

(President is entitled to absolute immunity from damages liability predicated on his official acts) with id. at 764-70, 785-92, 797 (White, J., dissenting) (President should enjoy only qualified immunity for unlawful dismissal of government employee); Harlow v. Fitzgerald, 457 U.S. 800, 807-13 (1982) (qualified immunity for Presidential aides) with id. at 822-29 (Burger, C.J., dissenting) (President’s aides should be granted the same absolute immunity as that of congressional aides). See also Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 COLUM. L. REV. 573, 628 (1984) (“all the justices appear to have agreed [in Nixon] that any immunity must be justified on functional grounds and that the appropriate criterion is the prospect of significant interference with official function”).

2. See, e.g., Spalding v. Vilas, 161 U.S. 483, 498 (1896) (executive department heads enjoy the same immunity from civil suits as judges, when performing duties imposed by law); Barr v. Matteo, 360 U.S. 564, 571 (1959) (Acting Director of the federal Office of Rent Stabilization may use absolute immunity in defense to civil suit); Nixon v. Fitzgerald, 457 U.S. at 749-53; Mitchell v. Forsyth, 105 S. Ct. at 2821 (Rehnquist, J., dissenting); Butz v. Economou, 438 U.S. 478, 528 (1978) (Rehnquist, J., dissenting); cf. Schuck, Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages, 1980 SUP. CT. REV. 281, 323 (comparing hindrance of suits on executive’s decisionmaking with judges’); Strauss, supra note 1, at 629 (criticizing Harlow for not extending absolute immunity to presidential aides similar to that extended to legislative aides in Gravel v. United States, 408 U.S. 606 (1972)).

officials to deprive citizens of liberty or property without intervening processes. Thus considered, executive accountability is logically consistent with, and may even be a logical necessity of, legislative and judicial immunity. Part II describes two arguably "functional" models that the Court has used to evaluate immunity claims of executive officials: a legality model focusing on harms to the citizen, and a discretion model focusing on harms to the decisionmaking processes of the official. Various forms of qualified immunity that the Court has applied to executive officers represent relatively recent compromises between the two models, rather than a separate model having independent historical significance. These two models help explain why current advocates of a functional approach to immunities may reach quite different results. Part III traces the predominance of the legality model in the Marshall Court, the predominance of the discretion model in the Taney Court, and the subsequent interplay of these two models which ultimately resulted in the ascendance of the legality model for injunctive relief and the emergence of the colorable legality model for damages. This discussion sheds light on why proponents of either model may claim the blessing of history.

Part III also shows the coherence of theories for the grant of, or immunity from, monetary and coercive relief against executive officials in the nineteenth century, and their divergence in the twentieth. Understanding this coherence may avoid mischaracterization of precedent as only supporting a remedy in equity or in law. In fact, the so-called fiction of individual officer accountability for injunctive relief was less a fiction in the nineteenth century, since parallel damages actions were available against officers enforcing unconstitutional laws. Indeed, frequently overlooked amidst the general perception that *Bell v. Hood* and *Bivens* did for damages

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4. Compare *Butz v. Economou*, 438 U.S. at 490-93 with id. at 518-19, 522-24 (Rehnquist, J., dissenting); see also Note, *Scope of Immunity Available to Federal Executive Officials*, 1979 Wis. L. Rev. 604, 618 ("it appears an unconstrained reading of the common law, as set forth in *Barr v. Matteo* [360 U.S. 564, 571 (1959)], would have permitted granting absolute immunity [in *Butz*] from claims based on discretionary activities").


actions what *Ex parte Young* did for injunctions is the fact that the doctrine of implied federal rights of action in damages arose concurrently with implied federal equity actions in the late nineteenth century.

Immunities are the flip side of what is actionable, and what is actionable is reflected in pleading styles. Part III therefore outlines changes in the way people have sued government officials. The predominant method of suing officers in the early nineteenth century was an allegation of common law harm, particularly a physical trespass. The issue of whether the action was authorized by existing statutory or constitutional law was introduced by way of defense and reply when the officer pleaded justification. Even in the early nineteenth century, however, actions existed in which the violation of law was part of the plaintiff’s case in chief. Particularly in actions for coercive relief such as mandamus, violation of a legal duty was part of the plaintiff’s complaint. Breach of this duty could also be the basis for damages actions. Such actions, moreover, did not require an allegation of physical trespass. After the 1875 general grant of federal question jurisdiction, plaintiffs had greater incentive to plead the violation of federal law in their complaints. The 1871 Civil Rights Act also encouraged pleading of a violation of law as part of plaintiff’s case, although the substantive limits that the Court initially imposed on its use made implied rights of action the more significant reflection of changed pleading styles. The migration of the question of violation of statutory or constitutional law from defendant’s responsive pleading and plaintiff’s reply to plaintiff’s complaint increasingly separated actionability from the allegation of a physical trespass. Ultimately, violation of statutory and constitutional norms became the predominant form of claim against government officials, and the common law physical trespass claim was relegated officially but ahistorically to second class status in *Larson v. Domestic and Foreign Commerce Corp.* and *Butz v.*

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Economou.  

Part IV suggests directions in which the current case law may lead, as well as the prevalent functional approach's limitations in addressing immunities for officials who exercise functions that do not neatly fit into the categories of executive, legislative, or judicial.

I. FUNCTIONALISM AND SEPARATION OF POWERS

A. The More and the Less Dangerous Branches

Modern functionalism divides along the major strands of separation of powers: judicial, legislative, and executive. Judicial and "quasijudicial" actions,12 even if legally erroneous, are immune from damage liability13 but not exempt from coercive relief.14 Legislative actions enjoy immunity from both injunctive and monetary relief. Executive actions are subject to both coercive and monetary relief, although the President enjoys immunity from damages.15

Functional divisions along separation of powers lines in the analysis of official immunities is a sensible approach.16 The government may legitimately deprive persons of liberty and property according to the dictates of due process. The "rule of law" in its narrow sense means the liability of public officials for common law torts committed without legal justification,17 and it limits government to those deprivations that comport with due process. The ability to effect directly such deprivations without mediating processes is the province of the executive.18 If government is to be

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12. "Quasijudicial" here is used to mean actions directly connected with prosecuting government enforcement actions.
16. For a discussion of prosecutorial immunity see, e.g., Note, Quasi-Judicial Immunity: Its Scope and Limitations in Section 1983 Actions, 1976 DUKE L. J. 95 (recommending that courts not grant absolute immunity to prosecutors because prosecutors do not impose liability, and exercise of "discretion" does not warrant absolute immunity after Sheuer v. Rhodes, 416 U.S. 232 (1974)).
18. See D. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888, at 272 (1985) ("[C]onsiderable historical evidence supports the position that 'due process of law' was a separation-of-powers concept designed as a safeguard against unlicensed executive action, forbidding only deprivations not authorized by legislation or common law.")
accountable, the executive must be.

1. Legislative Immunity

Supreme Court recognition of legislative immunity from injunctive and damages remedies has been relatively constant.\textsuperscript{19} The textual authorization for congressional immunities in the Speech or Debate Clause\textsuperscript{20} is one reason for this stability. The consistent recognition of even state legislative immunity contrasts with changing fashions of judicial review of executive action and is perhaps explicable by the relatively narrow scope of legislative behavior that affects citizens' interests without the intermediary of nonimmune actors.

Immune legislative activities that may inflict otherwise actionable harms include:

(1) speech and debate, including statements in committees, which may damage reputation and privacy;\textsuperscript{21}

(2) enactment of unconstitutional legislation, which may inflict reputational harms by its mere enactment, but whose main effect on the citizen may be the direction of illegal executive deprivations of liberty or property;\textsuperscript{22}

(3) pursuant to investigative powers,\textsuperscript{23} the issuance of compulsory process enforced by: (a) using legislative employees, such as the sergeant-at-arms, to arrest and punish persons found in contempt of the legislature,\textsuperscript{24} or (b) wrongfully invoking judicial process under statutes enforcing legislative compulsory process;\textsuperscript{25}

(4) under power to prevent and punish obstructions of legislative processes: (a) the wrongful direction to its own employees to arrest and punish,\textsuperscript{26} or (b) the wrongful invocation of judicial pro-

\textsuperscript{19} See Reinstein & Silverglate, Legislative Privilege and Separation of Powers, 86 HARV. L. REV. 1113, 1114 (1973) (relatively few Speech & Debate Clause cases prior to 1966).

\textsuperscript{20} U.S. CONST. art. I, § 6, cl. 1.


\textsuperscript{22} See, e.g., New Orleans Waterworks Co. v. New Orleans, 164 U.S. 471 (1896).

\textsuperscript{23} See Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 HARV. L. REV. 153 (1926).

\textsuperscript{24} E.g., Kilbourn v. Thompson, 103 U.S. 168 (1881); McGrain v. Daugherty, 273 U.S. 135 (1927).

\textsuperscript{25} Cf. McGrain, 273 U.S. at 167-168; L. Tribe, AMERICAN CONSTITUTIONAL LAW 297 (1978). Professor Tribe expresses doubt as to whether Congress still has the power to punish contempts without judicial process. Id. at 297 n.3.

\textsuperscript{26} E.g., Marshall v. Gordon, 243 U.S. 521 (1917); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821).
cess under contempt statutes;\textsuperscript{27}

(5) the wrongful direction to its own employees to punish or expel its own members.\textsuperscript{28}

Apart from harms that are inflicted pursuant to judicial due process, these categories fall into two major divisions of injuries that could be actionable at common law in the absence of legislative immunity. The first category includes speech harms to reputation, privacy, and association (principally categories (1) and (2) above). Private analogues of these harms would be actionable as defamation or invasion of privacy, but injuries inflicted by legislative speech are generally irremediable.\textsuperscript{29} The second category includes directing trespasses by officials who do not enjoy absolute immunity\textsuperscript{30} (categories (2), (3), (4), and (5), above). Legislative immunity insulates legislators from the common law liability of those who direct tres-

\textsuperscript{27} Cf. \textit{In re} Chapman, 166 U.S. 661 (1897) (no improper delegation in allowing courts to punish for contempt of Congress).

\textsuperscript{28} U.S. Const. art. I, \$ 5, cl. 2 ("Each House may...punish its members for disorderly behavior, and with the concurrence of two thirds, expel a member"); Powell v. McCormack, 395 U.S. 486 (1969). Impeachment is another means by which legislators may affect officers, but is not discussed herein. It could perhaps be better analyzed as involving judicial and quasijudicial rather than legislative immunity. There is no case law establishing limits on impeachment. \textit{See} L. Tribe, supra note 25, at 215-23. The reach of harms that Congress may inflict by impeachment is constitutionally limited to removal from office. U.S. Const. art. I, \$ 3, cl. 7. Excesses of this allowable punishment, and clear excesses of jurisdiction, as distinguished from mere legal error, would presumably be subject to judicial review.

\textsuperscript{29} Speech and Debate immunity even extends to some criminal actions. \textit{See}, e.g., United States v. Johnson, 383 U.S. 169 (1966); \textit{Gravel}, 408 U.S. at 616. Attempts to influence executive action, however, are not protected from prosecution. Burton v. United States, 202 U.S. 344 (1906) (conviction for violating statute forbidding Congressperson's representation of parties in matters in which the United States has an interest); Johnson, 383 U.S. at 172 (Speech and Debate clause would not insulate attempt to influence executive department outside of making speech).

Spear and Debate has been construed to include matters published by a subcommittee, even if those matters are only marginally related to the subcommittee's work. \textit{Gravel}, 408 U.S. at 610 n.6. Preparation for such speech is protected, as is inquiry into the motive for such speech. \textit{Id.} at 628-29; \textit{Johnson}, 383 U.S. at 169 (conviction for violating conflict of interest statute could not be based on speech and motives for it). Republication outside the walls of the legislature, however, is not similarly protected. Hutchinson v. Proxmire, 443 U.S. 111 (1979); \textit{see also Gravel}, 408 U.S. at 622 (Senator's publishing arrangements with private press not protected by Speech and Debate Clause); \textit{cf.} Doe v. MacMillan, 412 U.S. 306, 314 (1973) (member of Congress would be liable for reading libelous material from committee report in home district).

\textit{Gravel} indicates that the scope of protected speech may be greater when it is the executive, rather than a citizen, who complains. 408 U.S. at 649; \textit{see also Doe}, 412 U.S. at 316 n.11 (noting that case did not involve an attempt by executive to restrain republication); Reinstein & Silverglate, supra note 19, at 1172 (court should distinguish between actions brought by an executive and actions brought by private individuals against legislators).

\textsuperscript{30} \textit{See Gravel}, 408 U.S. at 619.
passes, when the legislators' direction is colorably pursuant to legislative, contempt, or disciplinary powers.

The legislator, while immune for directing certain trespasses, is not immune if he or she actually commits the trespass. Because the immunity covers the legislator in ordering, but not executing, one could conceptualize the legislative privilege to direct trespasses, like the legislative privilege to inflict reputational harms, as speech, and legislative immunity generally as insulating speaking and ordering, but not acting physically on the citizen. The direction of trespasses may, however, result in actual physical seizures, while speech harms do not. Trespassory harms are generally remediable by actions against the enforcing official, while speech harms, inflicted within the walls of the legislature, are generally irremediable.

The paradigmatic form for remedying legislative trespassory harms is review of legislation. Statutes may illegally direct executive officers to deprive persons of liberty and property, yet legislators are immune for legislating. Effective judicial restraints are available, however, against those who execute the law.31 If a legislator enforced such legislation, he would be acting as an executive and would not be entitled to legislative immunity.32

The legislative power to direct arrest and punishment for contempts (both pursuant to its investigative and self-protective powers) is similar, although those whom the legislature directs to trespass in such cases are generally employed by the legislative, rather than the executive, branch. The Court established judicially enforceable limits on these powers in actions for both coercive relief33 and damages against the official who physically trespassed, as

31. See New Orleans Waterworks Co. v. New Orleans, 164 U.S. 471, 481 (1896) (denying injunction against city council's passage of ordinances contrary to water works' franchise, noting: "If an ordinance be passed and is invalid, the jurisdiction of the courts may then be invoked for the protection of private rights that may be violated by its enforcement."); McChord v. Louisville & Nashville R.R., 183 U.S. 483 (1902) (Commission's rate-setting not enjoinable, but enforcement could be); see also Engdahl, Immunity & Accountability for Positive Government Wrongs, 44 U. COLO. L. REV. 1, 42-43 (1972).

32. See, e.g., Supreme Court v. Consumers Union, 446 U.S. 719 (1980) (legislative immunity available for judges' promulgation of disciplinary rules, but judges would not be absolutely immune in enforcement functions).

33. The Court has long recognized habeas actions by persons imprisoned at congressional direction. See, e.g., Marshall v. Gordon, 243 U.S. 521 (1917) (habeas action; Congress had no authority to penalize for contempt based on letter criticizing Congress); Kilbourn v. Thompson, 103 U.S. 168, 177 (1880) (statement of facts reciting Kilbourn's release pursuant to habeas writ issued by Chief Justice of Supreme Court of District of Columbia); McGrain v. Daugherty, 273 U.S. 135, 182 (1927) (reversing on merits grant of habeas for person held in contempt of Senate).
opposed to the legislator who ordered the trespass.\textsuperscript{34} Thus, the Court defined the scope of legislative investigative powers\textsuperscript{35} and limited the reach of congressional self-protective contempt power.\textsuperscript{36} Punishments which Congress could inflict through its own employees, even for allowable exercises of the contempt power, were similarly restricted.\textsuperscript{37} Through declaratory and mandamus actions against legislative subordinates, the Court has limited even Congress' power to punish its own members (power (5) above).\textsuperscript{38}

Like immunity for enacting but not executing the laws, legislative immunity for colorable exercises of contempt and member-discipline powers extends only to the direction of a trespass, and not to the trespass itself. If a legislator in fact seized property or person in pursuance of the powers of compulsory process, the legislator would be performing duties of a sergeant-at-arms or other legislative subordinate, and would not be immune.\textsuperscript{39} The legislator is thus privileged to inflict harms by speech, and to direct a limited set of

\textsuperscript{34} See Kilbourn, 103 U.S. at 168 (1880); Dombrowski v. Eastland, 387 U.S. 82, 84-85 (1967) (chief counsel to Senate committee could be liable if he conspired to seize documents illegally); cf. Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821) (affirming dismissal of tort action against sergeant-at-arms who arrested plaintiff pursuant to valid exercise of House of Representatives' contempt power).

\textsuperscript{35} The scope of Congress' investigative powers was interpreted in Kilbourn, 103 U.S. at 195, more narrowly than in later cases. See, e.g., McGrain, 273 U.S. at 160-61, 173-76. Given the current acknowledgement that a broad variety of investigations could be relevant to a legitimate congressional purpose, see, e.g., Tenney v. Brandhove, 341 U.S. 367, 378 (1951), it may be difficult to prove that investigations are beyond the proper scope of congressional investigative power, while claims of privilege or violations of procedural rights are more readily recognized. See generally Landis, supra note 23 (history of legislative investigative power); L. Tribe, supra note 25, at 299.

\textsuperscript{36} Marshall, 243 U.S. at 536, 542 (no inherent contempt power to punish criticism of Congress).

\textsuperscript{37} See Anderson, 19 U.S. (6 Wheat.) at 230-31 (implied contempt power of Congress consists of "the least possible power adequate to the end proposed", limiting imprisonment power of House to periods while in session) (emphasis in original); cf. Marshall, 243 U.S. at 541-42 (repeating least power necessary formula).

\textsuperscript{38} Powell v. McCormack, 395 U.S. 486 (1969); see also Kilbourn v. Thompson, 103 U.S. 168, 189-90 (1880) (noting limits on congressional punishments of own members).

\textsuperscript{39} See, e.g., Kilbourn, 103 U.S. at 200 (recognizing immunity of congressmen from damages suit, noting that they "did not make the actual assault on the plaintiff, nor personally assist in arresting or confining him"); Gravel v. United States, 408 U.S. 606, 621 (1972) ("[N]o prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances."); Powell, 395 U.S. at 506 n.26 (leaving open question of maintainability of action against members of Congress "where no agents participated in the challenged action and no other remedy was available"). See generally D. Currie, Federal Courts 607-10 (3d ed. 1982) (general discussion of congressional immunities).
trespasses, but not physically to commit any, and the legislator is not privileged to direct trespasses that fall outside of the outer perimeters of legislative, contempt, or disciplinary powers.\textsuperscript{40}

This definition of legislative immunity does not necessarily undermine its extension to legislative aides. The harms which they would be privileged to inflict, however, would be assistance\textsuperscript{41} in preparation for speech and voting, and assistance to congresspersons in directing trespasses within the scope of the contempt and discipline powers.\textsuperscript{42}

2. Judicial Immunity

Judicial officials are more closely involved in direct deprivations than are legislators. At common law, judicial enforcement officials like marshals\textsuperscript{43} were more easily found liable than today; even judicial immunity was limited in its effect by the liability of those who enforced judicial orders when the tribunal lacked jurisdiction. Habeas relief against the individual enforcement officer continues to provide a striking example of a limitation on the scope of judicial immunity. Important limits on judicial ability to inflict wrongful deprivations lie, moreover, in judicial process.\textsuperscript{44} The requirements

\begin{itemize}
\item[-] \textsuperscript{40} See Dombrowski v. Eastland, 387 U.S. 82 (1967) (no evidence that Senator Eastland directed an illegal seizure of records which was conducted by state officials under the authority of a search warrant rather than legislative subpoena). Gravel described Kilbourn, Dombrowski, and Powell as reflecting a "jaundiced view towards extending the [Speech or Debate] Clause so as to privilege illegal or unconstitutional conduct beyond that essential to foreclose executive control of legislative speech or debate and associated matters such as voting and committee reports and proceedings." 408 U.S. at 620.
\item[-] \textsuperscript{41} See Note, The Speech or Debate Clause Protection of Congressional Aides, 91 YALE L.J. 961, 962, 972 (1982) (proposing that aides should only be entitled to immunity when the congressional member's independence is at issue, rather than that of the aide; immunity would be available only where a member of Congress invokes the privilege and affirms that the aide was acting for the member).
\item[-] \textsuperscript{42} Dombrowski, 387 U.S. at 83, 85 (chief counsel to Senate Judiciary Committee could be liable if he conspired to seize records illegally through use of search warrant under Louisiana law); see also Note, supra note 21, at 376-78 (discussing facts of Dombrowski); Gravel, 408 U.S. at 626, 627; see also In re Chapman, 166 U.S. 661, 672 (1897) (no improper delegation in allowing courts to try contempt of Congress). The use of judicial process to punish for contempt may be seen as a partial antidote to the frequent unavailability of a compensatory remedy against subordinate officials because of good faith immunity.
\item[-] \textsuperscript{43} See, e.g., Wise v. Withers, 7 U.S. (3 Cranch) 331, 337 (1806) (collector of military fines liable as trespasser for seizure of goods pursuant to order of court martial lacking jurisdiction); cf. Ex parte Watkins, 28 U.S. (3 Pett.) 193, 203 (1830) (dicta that officer is liable for false imprisonment for obeying a null judgment).
\item[-] \textsuperscript{44} L. JAFFE, supra note 17, at 242; Gray, Private Wrongs of Public Servants, 47 CALIF. L. REV. 303, 340-41 (1959); Jennings, Tort Liability of Administrative Officers, 21 MINN. L. REV. 263, 275 (1937); Block, Stump v. Sparkman and the History of Judicial Immunity, 1980 DUKE L.J. 879, 917; Note, supra note 16, at 115.
\end{itemize}
of cases and controversies, notice and hearing, decision on the evidence, a neutral decisionmaker, and stare decisis curb judicial action in ways that executive behavior was not historically limited. Because of the context of judicial process, an immunity limited to "judicial acts" is much more discrete than would be immunity for "executive acts"; no historically defined and intuitively obvious "executive process" distinguishes it from private actions. The self-correction of appellate and collateral relief is also absent from executive, as opposed to judicial, process. Executive action, and through it, legislative action, are corrected by judicial process; correction of judicial wrongs does not generally require resort to a coordinate branch. Injunctive relief against judicial officials safeguards against interlocutory irreparable harms.

B. Immunities as Protection of Expression by the Coordinate Branches

Functionalism in immunity doctrine thus comports roughly with the ability of a particular branch of government to effect deprivations of common law or other recognized rights without intervening or mediating processes. Yet a great many arguably illegal deprivations exist under the framework of current functionalism.


47. See, e.g., Pierson v. Ray, 386 U.S. 547, 554 (1967) (errors of judgment may be remedied on appeal); Stump v. Sparkman, 435 U.S. 349 (1978); Handler & Klein, The Defense of Privilege in Defamation Suits Against Government Executive Officials, 74 Harv. L. Rev. 44, 53-56 (1960); Block, supra note 44, at 884-85, 924 (judicial immunity was integral part of development of a "hierarchical appellate system" in England, and gave finality and authoritativeness to King's courts; access to appellate review as a correction mechanism implicit in judicial immunity); Jennings, supra note 44, at 271-72 (listing reasons commonly used to support judicial immunity); Kattan, supra note 9, at 959 (on appeal, judicial errors may be corrected); Note, Federal Executive Immunity from Civil Liability in Damages: A Reevaluation of Barr v. Matteo, 77 Colum. L. Rev. 625, 647 (1977). But cf. Note, supra note 3, at 329-34 (questioning sufficiency of appealability and other rationales for judicial immunity).


49. Cf. Katz, supra note 46, at 53-54 ("The conclusion is inescapable that coercive governmental activity not preceded by either administrative or judicial determination of its constitutionality, and for which there is no subsequent procedure readily available and adequate to the task, is not consistent with due process.") (footnote omitted).

50. See L. Jaffe, supra note 17, at 247-60 (describing types of harms for which citizens historically have received compensation); Jaffe, Suits Against Governments and Officers:
One category of common law harms more systematically uncompensated under immunity law is injury caused by governmental speech.\(^1\) The Framers obviously contemplated that federal legislators should not be held liable for libels published in the course of debate.\(^2\) The harm to reputational interests from legislative speech, including legislative findings and the content of legislation itself, as distinguished from its enforcement, are generally irremediable.\(^3\) Similarly, immunity for judges has long protected them from libel actions.\(^4\) Finally, the most expansive Supreme Court interpretations of executive immunity were occasioned by actions in which the plaintiffs claimed reputational harms from informal governmental accusations.\(^5\)

The immunity of governmental speech preceded similarly expansive protections for individuals who criticized government. The roots of such immunity are not only in the favored place of free speech generally, but also in the critical role of speech by government in separation of powers,\(^6\) particularly in a system that accepts

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\(^1\) Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (leaving unclear when target of investigation could get judicial review of third party subpoena).

\(^2\) U.S. CONST. art. I, § 6, cl. 1. Even here the amenability of publishers to suit gave the defamed person a partial remedy. See, e.g., Gravel v. United States, 408 U.S. 606, 623 n.14 (1972) (noting liability for republication of debate); Doe v. McMillan, 412 U.S. 306 (1973) (government Printer and Superintendent of Documents not immune under Speech and Debate Clause nor absolutely immune under Barr v. Matteo, 360 U.S. 564 (1959)). Even with privileges for publishers, see, e.g., RESTATEMENT (SECOND) OF TORTS § 611 (1977), the liability of legislators for statements made outside of Congress continues to limit the extent of noncompensable speech harms a legislator may inflict. Hutchinson v. Proxmire, 443 U.S. 111 (1979); see also Gravel, 408 U.S. at 622 (Senator's arrangements with private press to publish not protected by Speech and Debate Clause); cf. Doe, 412 U.S. at 314 (member of Congress would be liable for printing libelous material from an official committee report in his home district). There is probably general agreement, however, that a great irremediable abuse of the modern legislature is the ruin of reputation by informal accusations. Id. at 329 (Douglas, J., concurring) ("potentially devastating effects of congressional accusations").

\(^3\) See, e.g., United States v. Los Angeles & Salt Lake R.R. Co., 273 U.S. 299 (1927) (railroad not entitled to void the valuation of its property made by the Interstate Commerce Commission, but railroad can contest findings when introduced as prima facie evidence in ratemaking).

\(^4\) Block, supra note 44, at 898 n.6 (citing Thompson, Judicial Immunity and the Protection of Justices, 21 MOD. L. REV. 517, 518-20 (1958)).


\(^6\) See Yudof, When Governments Speak: Toward a Theory of Government Expression and the First Amendment, 57 TEX. L. REV. 863, 868 n.18 (1979) (separation of powers or federalism approach to restriction of speech between branches more appropriate than rights approach to government speech).
extensive judicial review. Immunity doctrine has not precluded judicial review, but merely delayed it so as to allow the expression of the will of a coordinate branch before the judiciary has the last word.\textsuperscript{57} Judicial review of legislative action thus occurs only at the enforcement stage, for the courts will not enjoin the legislature from enacting a particular piece of legislation.\textsuperscript{58} The judiciary cannot suppress its disagreement with a coordinate branch by compelling that branch to decide a particular way in advance. Similarly, many nineteenth century decisions, rendered on the basis of "discretionary immunity" of the executive, were timing decisions that did not preclude judicial review, but instead delayed it to allow the executive to express its final decision of law or fact before judicial review.\textsuperscript{59} Intermittent bans on affirmative injunctions against the executive purported to serve a similar function of permitting expression of the executive opinion of law, fact, or policy.\textsuperscript{60}

Most restraints on coercive relief against judicial officers,\textsuperscript{57} See Los Angeles & Salt Lake R.R., 273 U.S. at 314-15 ("[The ICC's] conclusions, if erroneous in law, may be disregarded. But neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction."). See generally The Supreme Court 1978 Term, 93 HARV. L. REV. 1, 161-71 (1979) (discussing Hutchinson v. Proxmire, 443 U.S. 111 (1979)).

\textsuperscript{58} New Orleans Waterworks Co. v. New Orleans, 164 U.S. 471 (1896).

\textsuperscript{59} See infra text accompanying notes 202-05.

\textsuperscript{60} The Court had long recognized that denials of rights could occur by government inaction, and ordered affirmative relief. Cf. Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 737 (1824). Mandamus actions commanded affirmative relief, although the Court frequently required a fairly specific legal duty to grant mandamus. See infra text accompanying notes 128-48, 217-51. The Court frequently granted mandamus to enforce judgments on local government debt. See, e.g., Board of Commissioners v. Aspinwall, 65 U.S. (24 How.) 376 (1860) (federal court should issue mandamus in aid of its jurisdiction to compel county commissioners to levy tax to pay judgment for interest on coupons); Supervisors v. United States, 71 U.S. (4 Wall.) 435 (1866) (mandamus to compel county supervisors to levy taxes to pay judgment on debts); Mobile v. Watson, 116 U.S. 289 (1886) (mandamus against successor municipality to enforce judgment on debt); Mt. Pleasant v. Beckwith, 100 U.S. 514 (1879) (municipal corporation held liable to pay bonded debt of municipal corporation whose territory it annexed).

The Court took care in modern cases ordering structural affirmative relief that the governmental entity had ample opportunity to express its policies, persist in them, and participate in the fashioning of a remedy. See, e.g., Reynolds v. Sims, 377 U.S. 533, 586 (1964) (district court "correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so"). The doctrine of ripeness and defendant participation in proposals for decrees may have supplanted the frequently useless formality of allowing the government defendant the opportunity of compliance under an essentially declaratory decree before the court fashions affirmative relief. Cf. Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 233-34 (1964) (injunctions to levy taxes and open schools would be appropriate to remedy denials of plaintiffs' rights).
although not involving separation of powers concerns, permit the expression of the initial judgment of a lower court before the judgment of the higher court. Appellate review of judicial action is based on the premise that a correct decision is more likely to result from two or three opinions on the same issue. Similar ends are served by allowing a final decision by a coordinate branch to crystallize prior to initial judicial review. In all instances in which another decisionmaker must make a final decision before a court does, the allowance of the initial decision implies not only collegiality, but also some degree of deference to the prior decisionmaker's determination of fact or law. Allowing expression by another decisionmaker in the first instance indeed compels some deference, because the burden of going forward and of persuasion will generally lie with the party against whom the prior decisionmaker decided, and the court must at least articulate its reasons for its difference of opinion with the prior decision.

II. LEGALITY AND DISCRETION: TWO MODELS FOR EXECUTIVE IMMUNITY

Because executive officials characteristically act upon the person or property without mediating processes, immunity for executive officials has deviated from the consistent recognition of immunity for judges and legislators.61 Two models for analyzing claims of executive immunity or justification—the legality model and the discretion model—have been in vogue from time to time.62 In their original incarnations, the models applied whether a citizen's claims were for monetary or coercive relief.63 Early in the twentieth century, however, the legality model came substantially to dominate

61. This is not to imply that there was unanimity in state and lower federal court decisions. See Block, supra note 44, at 904-07 (Third Circuit precedent against recognition of judicial immunity under section 1983 before 1966); Note, supra note 3, at 326-27 (judicial immunity not consistently recognized in states).

62. Legal justification protects only an official who has acted legally, while an immunity may be defined as protection for illegal acts. See Casto, Innovations in the Defense of Official Immunity Under Section 1983, 47 TENN. L. REV. 47, 51 (1979). Thus, the legality model can be interpreted as one of legal justification, and the discretion model as one of immunity. But cf. id. at 75-76 (characterizing discretion as a form of justification). Since legal justification originally protected officials from liability for actions that would otherwise be actionable at common law, however, it can be viewed as a form of immunity, and this Article will frequently refer to legal justification as "immunity."

63. Some consistency in the theories for availability of damages and coercive relief is predictable, since both have been awarded, at least where a state or federal official's actions are at issue, on a theory of individual liability. Relief against the government is barred by sovereign immunity, absent a waiver.
the field of coercive relief, while both the legality and discretion models continued to struggle for predominance in actions for damages.

The two models begin with different focuses. The legality model looks to harms to the citizen's liberty or property interests, while the discretion model looks to harms to the official's processes of judgment. The legality model probably originates from the common law trespass action, although its application generally was not limited to tortious behavior. When an official invaded the person or property of a citizen, he could be sued in trespass. In response, the official pleaded as justification that his actions were authorized by law. If the court determined that the deprivation was illegal, the official was held liable. Because officials of all ranks could act to deprive persons of liberty or property, characteristically no distinction existed between high and low officials. The legality model is grounded in the recognition that executive officials may effect deprivations without a prior judicial determination of the legality of their action, and the requirement that the government deprive the citizen of liberty or property only according to law. Judicial provision of a postdeprivation compensatory remedy preserves this latter requirement.

The discretion model, on the other hand, focuses upon the need to protect the governmental actor rather than the citizen, and is particularly concerned with safeguarding the decisionmaking process of the official. Discretionary immunity for executive officials apparently arose from an analogy to judicial immunity, which had long been recognized at common law. The reasoning was that executive officials make judgments of fact and law, as do judges. The justifications for the discretion model generally are elaborations of the need to protect "judgment." Most frequently cited is the

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64. See, e.g., Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

65. Cf. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 HARV. L. REV. 1, 14 (1963) (Noting in discussion of 1702 English case for denial of right to vote, that "[e]arlier actions against officers were typically in trespass for taking of goods, interference with land, or laying hands on the person.").

66. See, e.g., Marbury, 5 U.S. (1 Cranch) at 164 (cabinet official could be subject to mandamus). In re Ayers, 123 U.S. 443 (1887), was characteristic of attempts late in the nineteenth century to define sovereign immunity by limiting relief against state officers to tort damages. See infra text accompanying notes 217-43.

67. See Jennings, supra note 44, at 276-277; Gray, supra note 44, at 336.

68. See K. DAVIS, ADMINISTRATIVE LAW TREATISE § 26.01 (1958); Jennings, supra note 44, at 270-71; Note, supra note 16, at 112-115.
danger that lawsuits would chill fearless decisionmaking, because the official would worry more about his possible liability than about the public weal.\(^6^9\) The distractions of trial would also detract from public duties. Competent decisionmakers would avoid public office for fear of liability, particularly because the results of trial are unpredictable and not necessarily correct, and the expenses of even a successful defense may be extraordinary.\(^7^0\)

The discretion model, once introduced, adopts a life of its own. The immunity tends to expand intraoffice—to the outer perimeter of a particular official’s duties—and interoffice—to the subordinates of the high level official initially granted immunity. This expansion occurs because the concept of immunity for judgment, once divorced from the judicial processes in which it had its roots, has no logical limits. Almost every government official, from the President to the police officer, continuously makes judgments of fact or law.\(^7^1\) Indeed, a police officer and a judge make similar assessments of the legality of arrests. Immunity for judgments of fact and law is one thing for judges who act within the confines of judicial process, which includes mechanisms for self-correction. It is quite another, however, when applied to executive officials who characteristically act outside of the confines of judicial due process and through procedures that are not self-correcting.\(^7^2\) A discretion model applied to executive officials countenances a much broader range of uncorrectable illegal harms to the citizen than does recognition of a comparable immunity for judges.

Courts using a discretionary model avoid total abandonment of the rule of law by drawing murky and often illogical\(^7^3\) distinctions between discretionary and ministerial behavior, i.e., areas where judgment is legitimately exercised and where it is not. The court applying a discretion model might actually grant relief for illegal

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\(^7^1\) See, e.g., L. JAFFE, supra note 17, at 240-41; P. SCHUCK, SUING GOVERNMENT 66-67 (1983); Jaffe, supra note 65, at 36; Nagel, supra note 3, at 254; Note, supra note 16, at 107.

\(^7^2\) See, e.g., Gray, supra note 44, at 340-41.

\(^7^3\) See, e.g., Jennings, supra note 44, at 287 (criticizing jurisdictional demarcation of immunity); K. DAVIS, supra note 68, at 531 (same).
behavior by finding that an official acted beyond his discretion or jurisdiction,\textsuperscript{74} or by characterizing the acts of a low-ranking official as categorically ministerial.\textsuperscript{75} Based on such distinctions, the discretionary model tended to provide broader immunities to high level officials than to low level ones.\textsuperscript{76} This result is not dissimilar from judicial immunities, from which the discretionary model arose, which originally granted greater immunity to superior than to inferior court judges.\textsuperscript{77} The logical inconsistency and consequent unpredictability of a theory of immunity for executive judgment led to frequent scholarly comment that the distinctions were unworkable,\textsuperscript{78} whether applied to damages or injunctive actions.\textsuperscript{79}

The critical standard for the legality model is whether the off-
cial's behavior is legal, and hence could be described as no immunity at all. The basic standard for judging a claim under a discretion model is whether the official acted within the outer perimeters of his duties. In application, however, the two models incorporated elements of each other. For example, an arrest with probable cause, even if the arrestee turned out to be innocent, could not subject an official to damages under the legality model. In this instance, the relevant legal standard itself left some room for error. The discretion model, although frequently avoiding the legal merits, sometimes reached them; when an officer acted in ways that were clearly illegal, the court could find that he acted ministerially or beyond his jurisdiction or discretion. Particularly for lower level officials, a decision might be reached on the merits through these expedients even without gross illegality. Application of either standard, therefore, could lead to a similar result, although given the differing standards used, the results would not be reached in a consistent manner, except perhaps for the grossest illegality.

The current doctrine of executive immunity for damages, which generally allows immunity based on good faith or colorable legality, represents a compromise of the two models rather than a separate model with a long historical pedigree. On the one hand, the standard partakes of the legality model in that the relation of the actions to a legal rule is the critical factor. On the other hand, a discretion model often yielded a remedy for clear illegality, which is what good faith immunity now exclusively provides. The justifications for the current colorable legality model tend to be a combination of the rationales for the legality and the discretionary: the need to protect victims of illegal behavior and preserve legal control of official behavior, while protecting the decisionmaking processes of officials from the chilling effects of potential litigation.


81. See Weinberg, The New Judicial Federalism, 29 STAN. L. REV. 1191, 1232 (1977) (arguing that strict burdens of proof of discriminatory intent are the functional equivalent of a qualified good faith defense in injunctive actions); L. JAFFE, supra note 17, at 240 (by immunizing reasonable judgments of officers, the law recognizes discretionary element of police decisions).

82. Both standards purport to serve the public interest. The legality model vindicates the public interest in the rule of law, see The Supreme Court 1977 Term, 92 HARV. L. REV. 1, 265-76 (1978), while the discretion model is thought to vindicate the public interest in good decisionmaking. See P. SCHUCK, supra note 71, at 16-25 (identifying the five primary goals of public tort law as (1) deterrence, (2) encouraging vigorous decisionmaking by officials, (3) compensation, (4) exemplifying societal principles, and (5) advancing institutional competence and legitimacy).
III. THE EMERGENCE OF THE COMPETING APPROACHES

A. The Legality Model and the Marshall Court

The Marshall Court rendered a number of individual officer immunity or justification decisions, and developed a largely consistent theory of individual officer accountability which differed markedly from the Court's later efforts. The Nonintercourse Acts of 1789 and 1800, suspending trade with France and its dependencies, and the Embargo Act of 1808, empowering the President to bar all exports, led to actions against customs collectors and against ship captains who made seizures of ships and cargoes under color of federal statutory authority. Actions were also initiated against collectors of military fines that had been imposed on individuals for failure to respond to militia call-ups. Customs collection also led to actions to recover allegedly illegal exactions by collectors. In these suits, a plaintiff typically alleged a common law trespassory harm. Less frequently, a plaintiff brought an action in assumpsit. The officer pleaded federal authority in justification of the al-

84. Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806) (action for forceful trespass against collector of military fines for seizing goods under order of court martial); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827) (replevin action against deputy United States marshal for seizing goods to collect military fine imposed by court martial).
86. See, e.g., Sands v. Knox, 7 U.S. (3 Cranch) 499 (1806) (action for trespass by force and arms against customs collector for seizure of vessel and cargo); Otis v. Bacon, 11 U.S. (7 Cranch) 589, 593 (1813) ("trover and conversion action" against customs officers for cargo stolen by unknown parties after seizure); Crowell v. McFadon, 12 U.S. (8 Cranch) 94 (1814) (trover against customs officials for cargo seizure under Embargo Act); see also Hill, supra note 79, at 1128-29.
87. See, e.g., Elliott v. Swartwout, 35 U.S. (10 Pet.) 137 (1836) (assumpsit would lie against customs collector for excess duties paid under protest). This decision was made after Chief Justice Marshall's death on July 6, 1835. The Senate confirmed Andrew Jackson's nomination of Roger Taney as Chief Justice in March, 1836. He first presided over the Supreme Court in January, 1837. See Swisher, The Taney Period, 1836-64, in HISTORY OF THE SUPREME COURT OF THE UNITED STATES 28-39 (P. Freund ed. 1974); see also Osborn v. United States Bank, 22 U.S. (9 Wheat.) 738, 843 (1824) (noting that state agents could be sued not only for trespass in collecting illegal tax, but also in "an action on the case, for money had and received to plaintiff's use"); Bend v. Hoyt, 38 U.S. (13 Pet.) 263, 269 (1839) (assumpsit against customs collector unsuccessful because of "culpable negligence" of plaintiff in failing to discover mistake of fact); Hardy v. Hoyt, 38 U.S. (13 Pet.) 292, 293 (1839) (assumpsit against collector where silk stockings held exempt from duty by statute); Philadelphia v. Collector, 72 U.S. (5 Wall.) 720, 730-33 (1866) (assumpsit against internal revenue collector); Erskine v. Van Arsdale, 82 U.S. (15 Wall.) 75 (1872) (allowing recovery against collector of internal revenue for taxes illegally assessed, which were paid under protest); Atchison, Topeka & Santa Fe Ry. Co. v. O'Connor, 223 U.S. 280 (1912) (similar action
legedly wrongful act. The structure of the lawsuit could be reversed in admiralty when an official libeled a vessel that he had seized, and the vessel owner claimed damages in response.88

Officers in these cases frequently claimed that their good faith error should relieve them of liability for compensatory damages.89 Absent a statute that explicitly provided broader justification,90 however, the Court consistently found a plea in justification inadequate if the seizure was illegal under substantive law. The officer's bona fides was not irrelevant in these cases, though, because it would defeat a claim for exemplary damages. In *The Charming*


88. *See*, e.g., Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (vessel owner claimed damages); Little v. Barreme, 6 U.S. (2 Cranch) 170 (1804) (same). A trespass action for seizure of a ship could also be brought in a separate suit, but only after the initial libel action terminated. *See* Gelston v. Hoyt, 16 U.S. (3 Wheat.) 246 (1818) (defendant could not relitigate probable cause for seizure where ship had been acquitted in libel action, and admiralty court had not issued certificate of probable cause).

Ejectment actions could also be brought against federal officials. *See* Meigs v. M'Cling's Lessee, 13 U.S. (9 Cranch) 11 (1815); *see also* Wilcox v. Jackson, 38 U.S. (13 Pet.) 496 (1839) (ejectment action against commander of military post); Brown v. Huger, 62 U.S. (21 How.) 305 (1858) (ejectment action against United States officer); Grisar v. McDowell, 73 U.S. (6 Wall.) 363 (1867) (action to eject military officer); United States v. Lee, 106 U.S. 196 (1882) (action to eject officers of United States from land). Many of the actions were brought in state court and reviewed by the Supreme Court under section 25 of the 1789 Judiciary Act after the officer's plea in justification was found wanting. The Act provided for review of final judgments of the highest state court "where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity." Act of Sept. 24, 1789, ch. 20, § 25, 1 Stat. 85. Actions against customs collectors brought in state court could be removed under intermittent legislation beginning in 1815. A later statute, Act of Mar. 2, 1833, ch. 27, § 3, 4 Stat. 633, authorized removal of suits against federal officers who acted under a revenue laws. F. Frankfurter & J. Landis, *The BUSINESS OF THE SUPREME COURT* 11 n.22 (1927); *see* Elliott v. Swartwout, 35 U.S. (10 Pet.) 137 (1836); Tracy v. Swartwout, 35 U.S. (10 Pet.) 80 (1836); *see also* Philadelphia v. Collector, 72 U.S. (5 Wall.) 720 (1866) (discussing various removal acts). Original federal jurisdiction could be in diversity, Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, or in admiralty. *Id.* ch. 20, § 9; *see*, e.g., Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804). Although many of these cases presented the issue of the scope of the official's authority, general federal question jurisdiction was unavailable under the 1789 Act. In Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824), jurisdiction was based on legislation giving the Bank the power to sue and be sued "in any Circuit Court of the United States."

89. *See*, e.g., Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804); *see also* Tracy v. Swartwout, 35 U.S. (10 Pet.) 80, 95 (1836).

90. *See infra* text accompanying notes 118-22.
Betsy, for example, the good faith of an officer who had seized a vessel without probable cause\textsuperscript{91} did not defeat the claim for compensatory damages, but did exempt him from "vindicative or speculative damages."\textsuperscript{92} Liability for compensatory relief could thus be imposed if an arrest or seizure were made without probable cause. Liability could also be imposed without reference to the probable cause standard where actions were taken beyond the scope of the statute, as determined by the Court.\textsuperscript{93}

The modern perception that imposition of individual liability based on the illegality of official behavior is unfair to the officer has spurred creation of various doctrines of executive immunity where the officer has acted in subjective or objective good faith. Most of the executive actions against persons or property that were subject

\textsuperscript{91} The statute under which the captain made the seizure provided in part: SEC. 8 \textit{And be it further enacted}, That it shall be lawful for the President of the United States, to give instructions to the public armed vessels of the United States, to stop and examine any ship or vessel of the United States on the high sea, which there may be reason to suspect to be engaged in any traffic or commerce contrary to this act, and if upon examination, it shall appear that such ship or vessel is bound or sailing to, or from any port or place, contrary to the true intent and meaning of this act, it shall be the duty of the commander of such public armed vessel, to seize every ship or vessel engaged in such illicit commerce, and send the same to the nearest convenient port of the United States, to be there prosecuted in due course of law, and held liable to the penalties and forfeitures provided by this act.

Act of Feb. 27, 1800, ch. 10, § 8, 2 Stat. 10 (expired).

\textsuperscript{92} \textit{Charming Betsy}, 6 U.S. (2 Cranch) at 124. The Court vacated the award of exemplary damages even though the captain had not objected to the amount. \textit{Id.} at 124-25. The captain was eventually reimbursed by an act of Congress. \textit{Id.} at 126; see also \textit{Gelston v. Hoyt}, 16 U.S. (3 Wheat.) 246 (1818) (good faith irrelevant where plaintiff sought no exemplary damages); \textit{Tracy v. Swartwout}, 35 U.S. (10 Pet.) 80 (1836) (good faith no defense in action for trover arising from deterioration of plaintiff's goods held under instruction from Secretary of Treasury but contrary to law as interpreted by Court; good faith would be defense only to exemplary damages). For an attempt to read \textit{The Charming Betsy} as supporting a good faith exception to the exclusionary rule, see \textit{Ball, Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule}, 69 J. CRIM. L. & CRIMINOLOGY 635, 640 (1978). But cf. \textit{Mertens & Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law}, 70 GEO. L.J. 365, 443-44 (1981) (criticizing Ball's use of admiralty cases to support good faith exception to exclusionary rule, inter alia, because good faith was defense only to punitive damages).

\textsuperscript{93} \textit{See, e.g.}, \textit{Little v. Barreme}, 6 U.S. (2 Cranch) 170, 175-76 (1804) (instructions from Secretary of Navy to seize vessels bound to or from French ports when Nonintercourse Act only authorized seizures of vessels sailing to French ports, could not excuse captain's seizure of ship sailing from French port); \textit{Otis v. Bacon}, 11 U.S. (7 Cranch) 589, 595 (1813) (deputy customs collector liable in trover for cargo purloined by unknown parties after he seized vessel not ostensibly on its way to another port); \textit{Wise v. Withers}, 7 U.S. (3 Cranch) 331, 337 (1806) (collector of military fines liable for seizure because he erred in excluding justice of peace from exemption for federal officers); cf. \textit{Sands v. Knox}, 7 U.S. (3 Cranch) 499, 501-02 (1806) (since no grounds for custom collector's belief that sale of ship to Danish citizen was not bona fide, seizure under Nonintercourse Act was illegal, and collector was liable in trespass).
to litigation in the Marshall era, however, occurred without the predeprivation determination of legality which has become commonplace since the revolution in procedural due process.\(^94\) Damage actions in which liability was imposed if the contested behavior was illegal thus provided the Court with a means of testing the legality of an executive action, albeit after the fact. By contrast, justification based on good faith, whether conceived of as subjective or objective, does not consistently provide a declaration of what legal behavior is, nor a remedy in its absence. Thus, in the Marshall years, civil due process characteristically was accorded post-deprivation, but such process included compensation if the deprivation was in fact illegal.

In actions for injunctions or mandamus, as in actions for damages, the line between immune and actionable behavior was legality. The Court in *Marbury v. Madison*, finding that mandamus could have issued against the Secretary of State had jurisdiction existed, contended with the distinction between discretionary behavior, which mandamus traditionally could not control, and ministerial behavior, which it could.\(^95\) For Marshall, "discretionary acts" were synonymous with "political acts";\(^96\) political acts were those "that respect the nation, not individual rights,"\(^97\) and particularly those constitutionally conferred exclusively on the executive. Marshall's examples of discretionary activities were the "power of nominating to the Senate, and the power of appointments," as well as the right to remove officers if "by law, the officer [may] be remov[ed] at the will of the president."\(^98\) In contrast to discretionary acts were acts

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94. The actions, however, often had been approved by highly placed officials who were arguably politically accountable. *See e.g.*, Little v. Barreme, 6 U.S. (2 Cranch) 170, 178 (1804) (instructions from Secretary of Navy); Tracy v. Swartwout, 35 U.S. (10 Pet.) 80 (1836) (instructions from Secretary of Treasury).


96. *Id.* at 166, 170.

97. *Id.* at 165. *But cf.* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 20 (1831) (after finding no jurisdiction to hear the Cherokee claim against Georgia, Chief Justice Marshall stated in dicta, with reference to the Indians' prayer for aid in protecting their possession, "The mere question of right might perhaps be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the legislature of Georgia, and to restrain the exertion of its physical force. . . . It savours too much of the exercise of political power to be within the proper province of the judicial department.").

As Professor Currie notes, "It does seem, however, that Marshall did not mean the question of Georgia's legislative jurisdiction over the reservation was inherently non-justiciable, for the next year the Court was to resolve that very question in *Worcester v. Georgia* [31 U.S. (6 Pet.) 515 (1832)]." D. CURRIE, supra note 18, at 124 n.228; *see also* K. DAVIS, supra note 68, § 23.8, at 156 (interpreting *Marbury* as authorizing very limited judicial review).

98. *Marbury*, 5 U.S. (1 Cranch) at 166, 167. Another example involved acts of officers
controlled by law, particularly duties imposed by legislation. If an official interpreted the law reasonably, but incorrectly (according to the Court), he could be subjected to coercive relief. Hence, Marshall's concept of discretionary acts comported with the modern grant of prospective coercive relief or administrative review: only when an official acted within the bounds of legality and there was no law to apply would remedies be systematically unavailable. Discretionary acts were nonreviewable, but only in those cases in which the executive "possesses a constitutional or legal discretion.”

Thus, Marbury established that executive officers have a nondiscretionary duty to follow the law as declared by the Court, enforceable (when jurisdiction exists) through coercive relief in addition to the more common damages action. While the Court characterized Marbury's entitlement to the commission as a "vested" right, such judicially protectable rights were not limited to physical liberty and tangible property interests, and included government benefits granted by statute, and rights that were not generally monetizable. Mandamus was described as a flexible writ, one that "ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.” Mandamus would be available against Madison even though "the mandamus, now moved for, is not for

99. Id. at 165-66.
100. Id. at 161-62.
102. Marbury, 5 U.S. (1 Cranch) at 166; see also Henkin, Is There a "Political Question" Doctrine?, 85 Yale L.J. 597, 600 (1976) ("Thanks to Marbury v. Madison, constitutional issues generally are not 'political' but justiciable . . . ." (footnotes omitted)); Monaghan, Marbury and the Administrative State, 83 Colum. L. Rev. 1, 6 (1983) (courts must specify boundaries of lawmaking authority delegated to agencies). But cf. K. Davis, supra note 68, § 23.8, at 156 (Marbury authorized only limited judicial review).
103. Marbury, 5 U.S. (1 Cranch) at 167.
104. Compare In re Ayers, 123 U.S. 443 (1887).
105. Marbury, 5 U.S. (1 Cranch) at 164-65 (citing acts concerning individuals with disabilities and statutes authorizing sale of lands as instances where remedies would be available). See Jaffe, supra note 65, at 16 (discussing English mandamus: "It is used where government has simply refused to take action in the individual's favor, whether that action involves conferring a positive benefit or an indirect threat, as where a refusal to license to practice a trade threatens sanctions against one who practices without a license.").
the performance of an act expressly enjoined by statute."\textsuperscript{107}

Osborn v. Bank of the United States reaffirmed the availability of coercive remedies based on a legality model\textsuperscript{108} when the Court found that the acts of the state auditor in enforcing state law were "ministerial"\textsuperscript{109} and subject to injunction. In the 1838 decision Kendall v. United States ex rel. Stokes,\textsuperscript{110} after Marshall's death, the Court, in granting mandamus compelling the Postmaster General to credit the plaintiff's accounts as directed by Congress, continued to identify discretionary duties not subject to court review with "political" duties, as distinguished from those "subject of control of law."\textsuperscript{111}

Unlike the modern Court's distinctions respecting the availability of damages and coercive relief, the early Court used a legality model for the grant of either. The consistency between theories of availability of damages and injunctions was almost inevitable. Damages were available if the official had committed a harm for which he could be held individually liable under common law principles. Injunctions and mandamus, at least against federal and state officers, similarly depended on a theory of individual liability to avoid collision with sovereign immunity doctrine.\textsuperscript{112} If the Court found an action to be effectively against the state rather than an individual officer, the result was an eleventh amendment or sovereign immunity bar.\textsuperscript{113} Thus, in contrast to modern doctrine which may find a damages remedy unavailable or dilutable because pro-

\textsuperscript{107} Id. at 172.


\textsuperscript{109} Osborn, 22 U.S. (9 Wheat.) at 839.

\textsuperscript{110} 37 U.S. (12 Pet.) 524 (1838) [hereinafter Kendall I].

\textsuperscript{111} Id. at 610. But cf. L. JAFFE, supra note 17, at 178-79 (Court in Kendall took more guarded approach to mandamus than it had in Marbury). See also Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 511 (1839) (court could inquire whether Registers and Receivers of land office exceeded their jurisdiction in suit by private party against government officer for ejectment).

\textsuperscript{112} See Osborn, 22 U.S. (9 Wheat.) at 853-54; Currie, Sovereign Immunity and Suits Against Government Officers, 1984 Sup. Ct. Rev. 149, 151; cf. Scalia, supra note 87, at 888 (mandamus actions were "in principle, actions by the sovereign, on the relation of a private individual, to compel the sovereign's agent to perform his assigned function.").

\textsuperscript{113} See generally Sundry African Slaves v. Madrazo, 26 U.S. (1 Pet.) 110 (1828) (Governor seized illegally imported slaves; suit against Governor in official capacity is against state and is barred); Osborn, 22 U.S. (9 Wheat.) at 842; C. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY 104-05 (1972) (no allegation in Madrazo that state's possession of slaves or money in general revenues were acquired in violation of federal law); Currie, supra note 112, at 151 (Madrazo failed for lack of actionable wrong against individual); cf. Hodgson v. Dexter, 5 U.S. (1 Cranch) 345, 364 (1803) (Secretary of War not personally liable in action of covenant for not keeping leased premises in good repair; "[w]hatever the claims
pective injunctions are generally available based on a legality standard, the theoretical availability of damages against the individual officer tended to support the availability of coercive relief where damages were inadequate. Either remedy had to be supported, as it is today, by the theory that the action was against the individual. In Osborn, the plaintiff’s theoretical ability to sue state officials for damages in trespass or “for money had and received” supported Marshall’s finding that the officials could, as individuals, also be subject to coercive relief. Similarly, in Marbury, the Court premised the availability of a coercive remedy on the general proposition that officials can be sued in ordinary proceedings for illegal acts that injure individuals.

To be sure, there was no perfect symmetry between the availability of damages and coercive relief. The early Court denied coercive remedies against federal officials based on lack of jurisdiction. These rulings, nevertheless, left intact the theoretical consistency of the availability of coercive and monetary remedies for individual illegality. And of course, monetary relief also had to be inadequate for mandamus or injunctions to be avail-
able.\textsuperscript{120} The early Court, however, unlike its successors, looked to the practical adequacy of alternative remedies. The \textit{Marbury} Court surmised that the common law claim of detinue would not supply an adequate remedy to the plaintiff because the value of a public office, even though sufficiently great that its deprivation was a remediable injury, remained unascertainable.\textsuperscript{121} The \textit{Osborn} and \textit{Kendall I} courts found a damage remedy, although technically available, inadequate due to the inability of the agent to pay the amount at issue.\textsuperscript{122}

One could argue that the Supreme Court deviated from the legality model for officer liability, but on close examination such diversions were not inconsistent with that model. The 1808 Embargo Act provided for seizures upon the official's opinion that a violation of law had occurred.\textsuperscript{123} The Court found no infirmity with the statute and thus allowed Congress, at least under certain circumstances, to vary the definition of a legal seizure. Similarly, the Court refused to review the President's decision to call out the militia pursuant to a statute authorizing the President to do so whenever there was an imminent danger of invasion.\textsuperscript{124} In both cases, the executive acts were authorized by statute, so the actions were not "illegal" absent constitutional infirmity, which the Court did

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\item \textsuperscript{120} \textit{See}, e.g., \textit{Marbury}, 5 U.S. (1 Cranch) at 168-69.
\item \textsuperscript{121} 5 U.S. (1 Cranch) at 173 ("It was at first doubted whether the action of detinue was not a specific legal remedy for the commission . . . . But this doubt has yielded to the consideration that the judgment in detinue is for the thing itself, or its value. The value of public office not to be sold is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing.")
\item \textsuperscript{122} \textit{Osborn}, 22 U.S. (9 Wheat.) at 844; \textit{Kendall}, 37 U.S. (12 Pet.) at 615. The Marshall Court, however, tolerated rights without remedies through its rulings denying mandamus jurisdiction to various courts. \textit{See supra} note 118. The Court's ruling in \textit{Kendall} that the circuit court for the District of Columbia had jurisdiction to issue mandamus to federal officers was in part based on the opposite conclusion presenting "a case which has often been said to involve a monstrous absurdity in a well organized government, that there should be no remedy, although a clear and undeniable right should be known to exist." \textit{Id.} at 624. \textit{See generally} D. Currie, \textit{supra} note 39, at 509-11 (discussing history of federal mandamus jurisdiction); Byse & Fiocca, \textit{supra} note 78, at 310-18 (same).
\item \textsuperscript{123} \textit{See} Crowell v. McFadon, 12 U.S. (8 Cranch) 94, 98 (1814) (no determination of reasonable suspicion necessary to absolve collector of liability for seizure made under \textit{Embargo Act}, where he had honest belief of legality); Otis v. Watkins, 13 U.S. (9 Cranch) 339 (1815) (disapproving \textit{jury instruction} that collector had to use reasonable care in forming opinion); \textit{cf.} Otis v. Walter, 15 U.S. (2 Wheat.) 18 (1817) (unnecessary for defendant collector to show probable cause, but collector could nevertheless be held liable in trover if ship actually terminated voyage).
\item \textsuperscript{124} Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827) (plaintiff sued the deputy marshal for seizure of goods after plaintiff failed to respond to the militia call-up).
\end{itemize}
not find, and hence met the legality model's standard. The executive decisions in those cases involved "a constitutional or legal discretion"; calling out the militia might also have been a "political" question. The Marshall Court's application of a legality model hardly meant that the scope of legal behavior for the federal legislature or the executive was narrowly circumscribed. But it did mean that once government crossed the wide boundaries of legal behavior, the Court would grant remedies.

B. The Taney Court and the Rise of the Discretion Model

1. Immunity for "Judgment"

A break in the consistent equation of legality and immunity appeared shortly after Marshall left the Court. Immunity was applied not merely to a small group of decisions that could be tagged discretionary because "political," but to acts generally involving the exercise of "judgment." The discretionary model first appeared in Decatur v. Paulding, wherein Stephen Decatur's widow sought mandamus to compel the Secretary of the Navy to pay her two pensions—one under a general statute and another under a special resolution that Congress passed the same day. The Secretary of the Navy and his predecessor had interpreted the two laws to allow

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125. Compare id. with Wise v. Withers, 7 U.S. (3 Cranch) 331 (1806) (successful action against collector of military fines for seizure pursuant to order of invalid court martial).
128. See supra notes 96-97, 111 and accompanying text.
129. 39 U.S. (14 Pet.) 497 (1840); see Jaffe, supra note 65, at 36 n.118 (1963) (noting Taney's begrudging attitude toward mandamus in Decatur). But cf. Casto, supra note 62, at 75-76 (characterizing discretionary exemption from suit in nineteenth century as merely meaning that the officer acted legally, and hence as an aspect of legal justification). Casto's characterization would seem to be more correct for the Marshall Court than for the Taney Court.
130. The resolution provided a pension for Mrs. Decatur for five years. The general statute provided pensions for widows of officers who died in naval service, until their death or remarriage. Decatur, 39 U.S. (14 Pet.) at 513.
Mrs. Decatur to collect only one pension.131 Rather than affirming the interpretation of the two statutes,132 the Court held that it lacked jurisdiction to issue mandamus because the Secretary's "judgment"133 of law was "discretionary."134

Chief Justice Taney's reasoning in Decatur signaled a new approach to official claims for immunity. The Marshall Court had distinguished discretionary acts from those controlled by law or duties imposed by legislation. Under Taney's reasoning, a department head's compliance with legislative duties was discretionary:

The duty required by the resolution [to pay a special pension to Mrs. Decatur] was to be performed by him as the head of one of the executive departments of government, in the ordinary discharge of his official duties. In general, such duties, whether imposed by act of Congress or by resolution, are not mere ministerial duties.135

Where a claim to an entitlement under legislation existed and where there was law to interpret and apply, the Marbury Court found the subject appropriate for a coercive action against the government official.136 Law to interpret or apply signaled a different result after Decatur: a department head's interpretation of a statute involved his exercise judgment or discretion, and that process would be insulated from suit.137

Justices Baldwin and McLean, joined by Justice Story in concurrences, reached the merits of Mrs. Decatur's claim and found that she was not entitled to both pensions. These three justices indicated that had she been entitled to both pensions according to the Court's construction of the statutes, she would have been entitled to mandamus.138 Justice Baldwin noted that interpretation of the laws was appropriately a matter for the judiciary:

If the right of the relator was in all other respects clear, except so far as they depended on the construction of the acts of Congress, the case was of judicial cognizance only; the duty of the Secretary is not judicial; it is not his province to construe laws, which enjoin on him performance of definite acts, differently from what the Courts have done or may do.139

131. Id. at 514. Mrs. Decatur elected to receive her pension under the general legislation.
132. Id. at 517.
133. Id.
134. Id. at 515.
135. Id.
138. Id. at 517 (McLean, J., concurring).
139. Id. at 606 (Baldwin J., concurring).
The majority decision in *Decatur* defined the actions of a department head "in the ordinary discharge of his official duties" as discretionary;\textsuperscript{140} the immunity thus covered just about everything done by a department head. The Court reaffirmed office-wide immunity for cabinet officials in later cases wherein claimants sought to compel cabinet members to enter credits for debts claimed by the plaintiffs.\textsuperscript{141} It indicated that even the ascertainment of the rate paid to a military officer was a discretionary act,\textsuperscript{142} as were the "general doings of a head of a department."\textsuperscript{143}

The Court's expansive view of "discretion," and particularly its determination that the keeping of government accounts was discretionary,\textsuperscript{144} partly resulted from its concern that mandamus actions would effectively allow actions on government debt without consent, in contravention of its view of sovereign immunity.\textsuperscript{145} In one mandamus case, the Court noted that if the plaintiff prevailed, "any creditor of the government would be enabled to enforce his claim against it."\textsuperscript{146} The concern that there was no legislative consent or appropriation\textsuperscript{147} would seem less appropriate, however, in the *Decatur* case. Had the Court reached the merits of Mrs. Decatur's claim to find her entitled to two pensions, presumably it would have found that Congress specifically approved the expenditure.\textsuperscript{148}

\textsuperscript{140} Id. at 515.

\textsuperscript{141} Reeside v. Walker, 52 U.S. (11 How.) 272 (1850); Brashear v. Mason, 47 U.S. (6 How.) 92 (1848). The *Brashear* Court appeared at first to reject the plaintiff's claim on the merits. *Id.* at 100.

\textsuperscript{142} *Brashear*, 47 U.S. (6 How.) at 102.

\textsuperscript{143} *Reeside*, 52 U.S. (11 How.) at 290.

\textsuperscript{144} *Brashear*, 47 U.S. (6 How.) at 102; *Reeside*, 52 U.S. (11 How.) at 290.

\textsuperscript{145} See *Reeside*, 52 U.S. (11 How.) at 289 ("[T]hough this application is in form against the person who was Secretary of the Treasury... yet it is to affect the interests and liabilities alleged by the plaintiff herself to exist on the part of the United States."); cf. Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257, 321 (1837) (dictum indicating that state could not be sued on notes without consent); Cary v. Curtis, 44 U.S. (3 How.) 236, 245 (1845) (noting in unsuccessful assumpsit action against individual officer "that the government, as a general rule, claims an exemption from being sued in its own courts"); Byse & Fiocca, supra note 78, at 337 (sovereign immunity most entrenched in property and money cases).

The Court, however, sometimes granted mandamus to compel payment of appropriated funds. See Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838); Roberts v. United States, 176 U.S. 221 (1900); cf. Miguel v. McCarl, 291 U.S. 442 (1934) (mandatory injunction in nature of mandamus to Chief of Finance to dispose of application for pay unaffected by Comptroller General's legally erroneous decision); Jaffe, supra note 65, at 17 ("In the nineteenth century the judges would on occasion mandamus Lords of the Treasury to make payments out of the Treasury").

\textsuperscript{146} *Brashear*, 47 U.S. (6 How.) at 102.

\textsuperscript{147} See *Reeside*, 52 U.S. (11 How.) at 290.

\textsuperscript{148} Indeed, in distinguishing *Kendall* in *Reeside*, the Court noted the existence of a special law in the former. 52 U.S. (11 How.) at 290. Justice Catron, concurring separately in
The discretionary exemption was more than a means to disallow suits against the government for debt, for the Taney Court also applied it in suits against individual officers for damages. As was true in the Marshall years, the theories for availability of damages and coercive remedies were consistent.149 Relying upon this consist-

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149. See, e.g., Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 129 (1849) (noting that neither damages nor mandamus are available where officer has discretion over the subject matter).

There were differences in the remedies available in different courts. Neither state courts, M'Clung v. Silliman, 19 U.S. (6 Wheat.) 598 (1821), nor most federal courts, M'Intire v.
tency, the plaintiffs in *Kendall I* later sued the Postmaster for consequential damages.\(^{150}\) They argued that the Postmaster's failure to perform the ministerial act that had subjected him to mandamus in *Kendall I* could also subject him to damages in *Kendall II*.\(^ {151}\)

The Court did not disagree with the theory that failure to perform a ministerial act could subject an official to damages liability.\(^ {152}\) It found, however, against the Stokes firm by altering the *Kendall I* definition of "ministerial." As in Mrs. Decatur's unsuccessful suit for mandamus, the Court defined the actions of the Postmaster as generally discretionary ones for which he could not be liable, and it did not, as the Court had done earlier, distinguish discretionary or political acts from those controlled by law.\(^ {153}\) Indeed, as in *Decatur*, the Postmaster's construction of the law, albeit erroneous, indicated that the matter was "one in relation to which it is his duty to exercise judgment and discretion."\(^ {154}\)

The Court's definition of a ministerial duty was inconsistent with that used in *Kendall I*. The Court, however, avoided direct contradiction of *Kendall I* by reasoning that damages for failure to restore the revoked credits (which *Kendall I* found to be a ministerial duty) were barred by the plaintiffs' prior election to pursue the mandamus remedy.\(^ {155}\) The plaintiffs thus could seek damages only for the Postmaster's initial revocation of their credits, rather than for the Postmaster's later refusal to credit the amounts awarded by the solicitor. The initial revocation of the credits, however, was deemed discretionary and hence could not subject the Postmaster to damages.\(^ {156}\)

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151. See *id.* at 99-100 (gist of fifth count was breach of duty as in prior mandamus action); see also *id.* at 795 (McClean, J., dissenting) (noting that the Postmaster's amenability to mandamus in *Kendall I* "sustains the position, that a public officer is liable to an action for damages sustained, for refusing or neglecting to do a mere ministerial act . . . .").

152. *Id.* at 98.

153. *Id.* at 97 ("The acts complained of were not what the law terms ministerial, but were official acts done by the defendant in his character of postmaster-general.").

154. *Id.* at 98.

155. *Id.* at 99-100. Count five of the complaint sought damages for refusal to enter the credits after the solicitor's award. Cf. Borchard, *Government Responsibility in Tort* (pt. 1), 34 YALE L.J. 1, 19 n.71 (1924) ("same act was held sufficiently ministerial to warrant mandamus, but sufficiently discretionary to deny liability for damages" in *Kendall I* and *II*).

156. *Kendall v. Stokes*, 44 U.S. (3 How.) 87, 97 (1845). The Court also reasoned that damages for the initial revocation of credits were within the scope of the reference to the solicitor. The revocation of credits was the first count of the complaint in *Kendall II*. *Id.*
By using the *Decatur* definition of discretion to deny damages, the *Kendall II* Court failed fully to embrace an alternative theory urged by the defendants. The Postmaster had argued, relying on Justice Story's agency law treatise, that agents of known principals were individually liable for torts but could not be individually liable for matters of contract or account.\(^{157}\) Under this theory, government officer liability, and hence the scope of judicial review of executive action, depended upon whether the agent could be held individually liable under general agency law.\(^{158}\) Relying on this agency theory, some scholars have described officer accountability during this era as depending on a characterization of a suit as in tort rather than contract.\(^{159}\)

In *Kendall II*, however, the Court did not rest its decision on a strict division of tort and contract, although it adverted to the novelty of actions on account against government agents.\(^{160}\) To rest the holding on a per se rule that officers could not be personally liable on matters of account would have been inconsistent with prior cases allowing actions in assumpsit against officers under certain circumstances\(^{161}\) and would, moreover, have undermined the basis for granting the mandamus in *Kendall I*, which depended on a theory of individual accountability based on breach of legal duty.\(^{162}\) Indeed, in *Kendall II*, in support of its finding that damages were barred by election of remedies, the Court recalled *Kendall I*'s holding that

> although... the plaintiffs in the court below might have brought their action against the defendant for damages on account of his refusal to give the credit directed by the act of Congress, yet as that remedy might not be adequate to afford redress, they were, as a matter of right, entitled to pursue the remedy by mandamus."\(^{163}\)

The Court thus apparently acknowledged that an action would lie in damages, as it would in mandamus, for breach of a legal duty.\(^{164}\)

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157. *Id.* at 93, 91.
160. 44 U.S. (3 How.) at 97-98.
161. *See supra* note 87.
162. *See Kendall I*, 37 U.S. (12 Pet.) 524, 609, 614 (1838). The Postmaster argued in *Kendall I* that the plaintiffs could not seek mandamus because they had a damages remedy against him. *Id.* at 614. The *Kendall I* Court found that the damages would be beyond the capacity of a party to pay, thus making coercive relief appropriate. *Id.* at 615.
163. 44 U.S. (3 How.) at 99.
164. *Id.*
and this action was not dependent on characterizing the action as one sounding in tort rather than in contract.\textsuperscript{165}

To describe the line between official liability and nonliability as the difference between tort and contract\textsuperscript{166} is, therefore, an oversimplification. Certainly, the amenability of officers to suit depended on a theory that the official had committed some wrong for which he could be held individually liable, and it was easier to find such individual liability in actions sounding in tort rather than in contract.\textsuperscript{167} Assumpsit actions, however, had been successfully pursued against customs officials to whom citizens had paid duties under protest.\textsuperscript{168} The Taney Court, even in interpreting a congressional statute to bar such actions against customs collectors, indicated that the action would have been available absent the statute.\textsuperscript{169} In Osborn, Marshall had noted in support of Osborn's amenability to injunction that he could have been sued individually either in trespass or for money had and received.\textsuperscript{170} In these cases, the illegal and arguably coercive nature of the officer's exaction provided a basis for individual liability under agency law,\textsuperscript{171} but the cause of action did not sound strictly in tort.

It also appears that breach of a ministerial duty, even absent a coercive transfer, could lead to individual liability, both for coercive relief and damages.\textsuperscript{172} The grant of mandamus in Kendall I demon-

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\item[165.] See id. at 102 (noting that although the action was brought in tort, it was in fact one for nonpayment of money); see also Amy v. Supervisors, 78 U.S. (11 Wall.) 136, 138-39 (1870) (county supervisors individually liable for damages for violating ministerial duty in disobeying federal court mandamus ordering levy of taxes to pay federal judgment; "[t]he rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct").
\item[166.] Engdahl, supra note 31, at 16-17, 33.
\item[167.] See D. Currie, supra note 18, at 420; Engdahl, supra note 31, at 20; see also Hodgson v. Dexter, 5 U.S. (1 Cranch) 345, 363 (1803) (officer contracting for government not individually liable in breach of contract action).
\item[168.] See supra note 87.
\item[169.] Cary v. Curtis, 44 U.S. (3 How.) 236, 243 (1845); see also Bend v. Hoyt, 38 U.S. (13 Pet.) 263, 269 (1839) (assumpsit against customs collector lies for mistake of fact, but plaintiff culpably negligent in not discovering mistake); Hardy v. Hoyt, 38 U.S. (13 Pet.) 292 (1839) (assumpsit against collector for payment under protest).
\item[170.] 22 U.S. (9 Wheat.) at 842-43.
\item[171.] See Cary v. Curtis, 44 U.S. (3 How.) at 262 (McLean, J., dissenting); id. at 254 (Story, J., dissenting). In Bend v. Hoyt, 38 U.S. (13 Pet.) 263 (1839), the Court noted that an action in assumpsit lay against the collector not only when payment was made under protest, but also "where the excess of duties has been paid under a mistake of fact, and notice thereof has been given to the collector before he has paid over the money to the government." Id. at 267. The latter circumstance does not appear to involve a coercive transfer. See id. at 269.
\item[172.] See supra notes 150-52; D. Currie, supra note 18, at 422 n.137; see also U.S. v. Boutwell, 84 U.S. (17 Wall.) 604, 607 (1873) ("But no matter out of what facts or relations
\end{enumerate}
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strated the amenability of officers to coercive suits based on breach of a ministerial duty that was not strictly tortious.\textsuperscript{173} \textit{Kendall II} reaffirmed, at least in theory, that damages were available for breaches of ministerial duties that could give rise to coercive suits.\textsuperscript{174} Potential liability for breach of ministerial duties, however, for either coercive relief or damages could be broad or narrow, depending on what definition of "ministerial" the Court used. After \textit{Kendall I}, the Court defined ministerial duty quite differently than it had in the past. \textit{Decatur} and \textit{Kendall II} showed that error of law had ceased to be the prevailing standard for high level officials' amenability to both coercive relief and damages. Indeed, characterizing an action by a government official as a mistake of law suggested the officer's nonliability by implying that his duties encompassed judgment or discretion.\textsuperscript{175} Thus, when a marine sued his commanding officer for false imprisonment and battery, the Court did not make the primary consideration the legality of the commander's actions judged by probable cause.\textsuperscript{176} Rather, the Court stated that the officer could not be held liable for errors of law in the exercise of his discretionary or "quasijudicial" functions.\textsuperscript{177}
2. Officers, But Not Gentlemen

The immunity-for-judgment model of the Taney Court for both coercive and damages relief, while originally applied in actions against cabinet level officials, naturally expanded to somewhat lower level officials, since they too exercised "judgment." The Taney Court, however, granted less expansive immunity to officials below cabinet level, and generally characterized low-ranking officials, particularly sheriffs and collectors, as ministerial. This relegation of sheriffs and deputies to a category of ministerial officers for most acts was inconsistent with the immunity for judgment of law applied to higher level officials, because the Court's decisions implied that even such low-ranking officials err in interpreting the law. The Court also indicated that it had the powers to determine whether officials acted outside of their jurisdiction.


179. See Mitchell v. Harmony, 54 U.S. (13 How.) 115, 137 (1851). The Court noted in Mitchell that the lieutenant colonel held liable had, in executing the order of seizure, performed a duty more properly belonging to a lower-grade officer. Id.

180. In Wilkes v. Dinsman, the Court indicated that sheriffs and collectors might not be covered by discretionary immunity, because they frequently acted as volunteers. 48 U.S. (7 How.) 89, 129 (1849). In Rogers v. Marshal, 68 U.S. (1 Wall.) 644, 650 (1863), the Court assumed that the federal marshal and his deputy could be liable for the deputy's error in altering a bond so as to relieve a surety of his obligations. There was, however, a common law tradition of sheriff liability which could explain the differing treatment. See, e.g., Jaffe, supra note 65, at 14 (medieval English precedent making sheriffs and other officers indemni-
tors of their deputies). In South v. Maryland, 59 U.S. (18 How.) 396 (1855), the Court distinguished a sheriff's ministerial duties of executing process, for which sheriffs could be held liable, from duties in keeping the peace, which could not support liability. Id. at 402-03.

181. See Rogers v. Marshal, 68 U.S. (1 Wall.) at 650-51 ("The officers of the law, in the execution of process, are obliged to know the requirements of the law, and if they mistake them, whether through ignorance or design, and any one is harmed by their error, they must respond in damages."); cf. Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857) (in cases where court lacked subject matter jurisdiction or disregards rules of proceeding enjoined by law [T]he law is, that an officer executing the process of a court which has acted without jurisdiction over the subject-matter becomes a trespasser, it being better for the peace of society, and its interests of every kind, that the responsibility of determining whether the Court has or has not jurisdiction should be upon the officer, than that a void writ should be executed.

Id. at 80.

182. Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857) (in finding no liability of marshal for executing sentence of valid court martial, Court noted that officers participating in enforcement of orders of court lacking subject matter jurisdiction could be held liable for trespass); Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 511 (1839) (although decision of Register and Receiver of land office could not be reviewed when within his jurisdiction, court could review whether matter was outside jurisdiction). In Wilcox, the Court's decision that the register acted outside his jurisdiction in allowing a private party to preempt certain lands allowed the government to retain lands on which it maintained a military post. Id. at 514; see also Brown v. Huger, 62 U.S. (21 How.) 305 (1855) (ejectment action in which plaintiff lost on merits);
thermore, the Taney Court was less inclined to invoke discretionary immunity as a bar to actions against state and local officials, as opposed to federal officials.\(^{183}\)

The expanded scope of immunity for legal error under the discretionary model implies tolerance for rights without remedies, and rights whose remedies were ineffective or nonjudicial. These sentiments manifested themselves in other decisions. The same term as *Kendall II* was decided, the Court interpreted a statute directing customs collectors to forward duties paid under protest to the treasury as abrogating the previously recognized assumpsit action against the collector.\(^{184}\) The Court also broadly articulated the political question doctrine,\(^{185}\) and decided that the federal government lacked power to require a state official to turn over an extradited criminal.\(^{186}\)

The Marshall Court, in evaluating claims for coercive remedies, looked at the practical efficacy of alternative remedies.\(^{187}\) By contrast, the Taney Court appeared unconcerned about the actual availability of other remedies when it denied relief. In abrogating the assumpsit remedy against customs collectors, the Court suggested that the party who previously could have paid under protest and sued in assumpsit, could now obtain review by suffering seizure.

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\(^{183}\) *Dinsman v. Wilkes*, 53 U.S. (12 How.) 390, at 404 (if punishment were forbidden by law or beyond power granted, defendant commander would be liable regardless of motives).

\(^{184}\) *See Woodruff v. Trapnall*, 51 U.S. (10 How.) 190 (1850) (state court erred in not issuing mandamus, which it had power to issue, to compel state's attorney to accept payment in notes issued by state bank); Board of Commissioners v. Aspinwall, 65 U.S. (24 How.) 376 (1860) (federal court should issue mandamus in aid of its jurisdiction to compel county commissioners to levy tax to pay judgment for interest on coupons); *cf.* *Dodge v. Woolsey*, 59 U.S. (18 How.) 331, 336 (1855) (diversity suit by shareholder against county collector of state taxes, directors of bank, and bank to enjoin collection of tax violating contract clause; also implying that illegal federal tax collection could be enjoined, *id.* at 352); *Jefferson Branch Bank v. Skelly*, 66 U.S. (1 Black) 436 (1861) (state court trespass action against county treasurer for seizing gold coin to collect state tax violating contract clause). *Compare United States v. McLemore*, 45 U.S. (4 How.) 286, 288 (1846) (United States could not be liable for court costs). *But cf.* *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107-08 (1820) (although turning over extradited fugitive was ministerial, federal government lacked power to compel governor to do so).

\(^{185}\) *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845).

\(^{186}\) *Luther v. Borden*, 48 U.S. (7 How.) 1, 46 (1849); *see also* Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 752-55 (1838) (Taney, C.J., dissenting) (border dispute between states should be non-justiciable); *see generally* Henkin, *supra* note 102, at 607-08 (interpreting *Luther* as a case in which the Court found that the actions of Congress and the President were within their constitutional authority).

\(^{187}\) *Kentucky v. Dennison*, 65 U.S. (24 How.) 66, 107-08 (1860). The Court held that the federal government lacked such power, even though it found the duty to turn over an extradited fugitive to be ministerial.

\(^{187}\) *See supra* text accompanying notes 120-22.
of his goods, then suing under such common law counts as replevin, detinue, or trover—remedies the dissents found ineffective. In finding itself without jurisdiction to review by mandamus the exclusion of an attorney from the bar of the Supreme Court of the Territory of Minnesota, the Court noted, "It is not necessary to inquire whether this decision of the Territorial court can be reviewed here in any other form of proceeding." And in Decatur v. Paule, in refusing to reach the merits of Mrs. Decatur's claims, the Court noted that it would not be bound by the executive's construction of the law if the matter came before the Court in a proper case. Just how Mrs. Decatur could bring a proper case, however, was not clear, particularly since the "discretionary" exception to the mandamus claim would also have blocked any damage action.

Perhaps the proper case in which the Court might not feel bound by the judgment of the coordinate branch was in a suit between citizens as distinguished from a suit by a citizen against government officials, even if brought under a theory of individual liability. Professor Jaffe has noted a trace of the theory that coordinate branches could not control each other in Taney's philosophy, as opposed to that of Marshall.

C. Competing Models

By the time of Chief Justice Taney's death in 1864, the Court employed two different models of immunity. The Marshall Court had identified immunity with legality: illegal acts could subject an official, whether of high or low station, to damages and coercive

188. Cary v. Curtis, 44 U.S. (3 How.) 236, 250 (1845). Justice Story argued in dissent that the Court's interpretation of the law deprived the payor of all effective remedy. Id. at 256 (Story, J., dissenting). Justice McLean noted that the decision made the executive the final arbiter of the law. Id. at 263 (McLean, J., dissenting). Later, in Philadelphia v. Collector, 72 U.S. (5 Wall.) 720 (1866), the Court held that statutory requirements that internal revenue collectors pay over collections to the treasury did not abrogate the assumpsit action, id. at 730-31, particularly since the statute at issue contemplated that the commission pay the judgments. Id. at 732.


191. See Kendall II, 44 U.S. (13 How.) 87 (1845); see also Gaines v. Thompson, 74 U.S. (7 Wall.) 347, 351 (1868) (noting that it was clear that Mrs. Decatur "had no other legal remedy").


193. L. JAFFE, supra note 17, at 178.
relief. The Taney Court used a discretionary model under which actions involving executive judgment, including the "general doings of a head of a department," were immune from damages or coercive relief. Immunity for judgment, however, did not apply to all officials. The Taney Court held low level federal officials and state and local officers liable for illegal acts without reference to whether they made judgments of fact and law. During the remainder of the nineteenth century, the Court employed both models from time to time, but the legality model dominated, with some noteworthy exceptions. At the turn of the century, the theories for recovery began to diverge, depending on whether the relief sought was damages or injunction. This divergence frequently characterizes modern analysis. The legality model predominated in actions for coercive relief, particularly for negative injunctions, while the discretionary model regained a footing in actions for damages, particularly against federal officials.


Challenges to Reconstruction prompted the Court's most expansive expression of the discretion model in Mississippi v. Johnson, which held that "the general principles which forbid judicial interference with the exercise of Executive discretion" barred an injunction against enforcement of an allegedly unconstitutional law. Osborn had held that an injunction could restrain a state official's enforcement of an unconstitutional state statute because his actions in enforcing state law were ministerial. Implicitly, the injunction did not interfere with executive discretion. Mississippi v. Johnson, by contrast, held that a negative injunction against enforcement of an illegal statute did interfere with executive discretion. Moreover, the Court appeared to reinforce this holding in an 1868 case which denied an injunction against the Secretaries of the Interior and of the Land Office. In Gaines v. Thompson, the Court used Taney-style reasoning to conclude that it would not interfere with executive discretion in matters of statutory interpreta-

194. See supra notes 178-83 and accompanying text.
198. 74 U.S. (7 Wall.) 347 (1868).
The Court reinvoked such reasoning in actions against federal officials throughout the remainder of the century.

Neither Mississippi v. Johnson nor the federal agency cases, however, truly signaled a continuance of the discretion model. In Georgia v. Stanton, the Court receded from the reasoning, although not the result, of Mississippi v. Johnson by characterizing its refusal to decide the constitutionality of Reconstruction as a political question rather than deference to executive discretion. The cases reiterating a discretionary exception for relief against federal agencies generally merely required a final agency determination prior to judicial review. Many of these cases were land claims in which the Court noted that it could consider questions of the title to the land once title passed from the government. In cases in which the United States continued to hold property for its own use, making litigation

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199. Id. at 351. In Gaines, Justice Miller criticized the Marbury decision for allowing for the possibility of mandamus compelling the Secretary of State to deliver a commission; this was a principle that "was new and embarrassing" and that had "since been laid down with greater precision." Id. at 349. The opinion quoted extensively from Decatur v. Paulding, 39 U.S. (14 Pet.) 497 (1840).

200. See, e.g., Secretary v. McGarrah, 76 U.S. (9 Wall.) 298 (1869); Litchfield v. Register, 76 U.S. (9 Wall.) 575 (1869); French v. Fyan, 93 U.S. 169 (1876); Marquez v. Frisbie, 101 U.S. 473 (1879).

201. Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867). See D. Currie, supra note 18, at 302. Given congressional determination to proceed with Reconstruction no matter what the Court said, the political question doctrine, when defined as "something of prudence, not construction and not principle," Bickel, The Supreme Court 1960 Term—Foreward: The Passive Virtues, 75 Harv. L. Rev. 40, 46 (1961), may more accurately capture the Court's rationale. See Henkin, supra note 102, at 597; A. Bickel, The Least Dangerous Branch 125-26, 186-87 (1978).


202. See, e.g., Gaines v. Thompson, 74 U.S. (7 Wall.) 347 (1868) (case could be decided between private parties); Craig v. Leitensdorfer, 123 U.S. 189, 206 (1887) (once executive has exercised discretion in land claims, "what it has done or failed to do may be drawn in question, when necessary to the determination of conflicting rights between private parties in a judicial proceeding"); Marquez v. Frisbie, 101 U.S. 473, 475 (1879) (equity court could consider validity of land patent once title passed to private individuals, but patent will be deemed valid absent mistake of law on undisputed facts); Litchfield v. Register, 76 U.S. (9 Wall.) 575 (1869) (land case could be decided between private parties); Commissioner of Patents v. Whiteley, 71 U.S. (4 Wall.) 522, 533 (1866) (mandamus would not issue to order Commissioner of Patents to examine application where commissioner had determined assignee was not entitled to reissue; statutory appeal was proper means to obtain review of legal issue); Secretary v. McGarrahan, 76 U.S. (9 Wall.) 298, 310-11 (1869) (finding land claims unmeritorious before finding case inappropriate for mandamus because the matter involved "judicial judgment and discretion" by the Department of the Interior); C. Jacobs, supra note 113, at 72 (early Court adjudicated contract and property claims not by acting directly on the
between private parties an improbable avenue of relief, the Court generally considered the merits of the claim based on a plaintiff’s allegation that title had passed from the government, and that an individual officer was breaching a clear legal duty such as withholding a patent, or was trespassing by his or her possession of the land. Thus, discretionary immunity when used to deny coercive relief in federal agency cases delayed judicial review, allowing complete crystallization of a decision by the department to which the legislature had conferred the initial decision. Awaiting a final determination accorded deference, particularly as to questions of fact. The discretionary exemption from coercive relief thus was an imprecise synonym for modern doctrines of finality and deference to agency determinations of fact and law.

states, but by suits between private parties) (citing I. C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 65-67 (1922)).


In Davis v. Gray, 83 U.S. (16 Wall.) 203 (1872), the Court enjoined state officers from alienating land to numerous parties when the state had legal title, and the claim made on behalf of the railroads was based on equitable title. See Scalia, supra note 87, at 896-97 & n.130 ("passage of title" test not consistently followed); see also Payne v. Central Pacific Ry. Co., 255 U.S. 228, 237 (1921) ("a person who complies with all the requisites necessary to entitle him to a patent for a particular lot or tract is to be regarded as the equitable owner thereof" (citations omitted); injunction directing Secretary of Interior's disposal of indemnity lands unaffected by Secretary's withdrawal of lands for use as power-site, because Secretary departed from official duty); Work v. Louisiana, 269 U.S. 250, 254 (1925) (even though the United States retained legal title to land, Secretary of Interior could be enjoined from exceeding his authority). Scalia’s article discusses the tradition of judicial review in public lands cases, and concludes that public land cases should be seen as a distinct existential group for sovereign immunity purposes. Scalia, supra note 87, at 919-20. See also Byse & Fiocca, supra note 78, at 318 (body of law developed in District of Columbia Circuit in land patent cases that focused on merits rather than formalities of mandamus).

204. Johnson v. Towsley, 80 U.S. (13 Wall.) 72, 86 (1871) (absent fraud or mistake, determinations of fact made by land department are conclusive).

205. The imprecision of "discretionary" immunity, however, may have provided the basis for later courts invoking sovereign immunity as a bar to judicial review when government property was at issue, on the ground that the government was the real party in interest. E.g., Morrison v. Work, 266 U.S. 481 (1925) (United States was trustee of lands for Indians; action to enjoin Secretary of Interior and others from executing statutes was barred). For criticism of the real-party-in-interest strand of sovereign immunity analysis, see D. CURRIE, supra note 18, at 426-27; HART & WECHSLER, supra note 201, at 1368, 1370; Engdahl, supra note 31, at 28-32; cf. Jaffe, supra note 65, at 28 (false to ask abstract analytic question of whether a proceeding is really against the state); Block, SUITS AGAINST GOVERNMENT OFFICERS AND THE SOVER-
2. The Predominance of the Legality Model and the Emergence of the Eleventh Amendment

Later cases invoking discretionary immunity to protect federal officials therefore did not truly indicate a continuation of a Taney-style discretionary immunity, but rather were expressions of political question and finality doctrines. In litigation against state and local officials, moreover, legality remained the predominant model, even though defendants attempted to secure discretionary immunity. Of course, the Taney Court, too, did not hesitate to hold state and local officials liable based on the illegality of their actions. The same term that Mississippi v. Johnson cited Taney’s decision in Decatur v. Paulding to hold that negative injunctions against unconstitutional laws interfered with executive discretion, the Court nevertheless held that mandamus would issue, compelling county supervisors to levy taxes to pay a judgment on its debts, under a state law providing that county supervisors “may, if deemed advisable” raise taxes to pay debts. The Court’s statement that “whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory,” was reminiscent of Marshall’s reasoning in Marbury that mandamus could issue even though “the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute.”

Because cities and counties were not protected by the eleventh amendment or other sovereign immunity doctrines, remedies

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206. See, e.g., In re Tyler, 149 U.S. 164, 177 (1893) (unsuccessful argument that sheriff exercised official discretion by seizing property that was in custody of federal receiver, for payment of state taxes); Board of Liquidation v. McComb, 92 U.S. 531, 541 (1875) (unsuccessful argument of interference with official discretion and for sovereign immunity bar).


208. Id. at 446-47. See also Van Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535 (1866) (Circuit Court should have issued mandamus to enforce judgment on city's bonds); Riggs v. Johnson County, 73 U.S. (6 Wall.) 166 (1867) (Circuit Court could issue mandamus, in aid of jurisdiction, compelling county supervisors to collect tax to pay judgment on debts despite intervening state court judgment enjoining collection); Wolff v. New Orleans, 103 U.S. 358, 365 (1880) (rejecting city's argument that tax levy to pay judgment was in discretion of city council; lower federal court should have issued mandamus to execute prior judgment on city bonds); cf. Litchfield v. County of Webster, 101 U.S. 773 (1879) (enjoining county and its treasurer from collecting taxes and penalties for certain years); City of Charleston v. Branch, 82 U.S. (15 Wall.) 470 (1872) (remanding suit against city council to determine appropriateness of injunction against taxes); Loan Association v. Topeka, 87 U.S. (20 Wall.) (1874) (suit against city in federal court on coupons; bonds held to be illegally issued).

against them are distinguishable from those against state and federal officials. The Court, however, granted relief under a legality model against officials of states who violated their contractual obligations.

As in earlier cases, the Court allowed relief against state and federal officials not only where the action sounded in tort, but also occasionally in assumpsit, and moreover, for breach of legal duty. In the 1876 case Board of Liquidation v. McComb, the state argued that an injunction against dilution of bonds interfered with a discretionary function and violated sovereign immunity. The Court responded that neither discretionary nor sovereign immunity shielded illegal behavior:

But it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it. In such cases, the writs of mandamus and injunction are somewhat correlative to each other. In

210. While the Court did not explicitly decide that cities and counties were not eleventh amendment entities until Lincoln County v. Luning, 133 U.S. 529 (1890), the Court had previously allowed numerous suits against cities and counties without reference to the eleventh amendment. Id. at 530; see C. Jacobs, supra note 113, at 108-09.

211. See, e.g., Board of Liquidation v. McComb, 92 U.S. 531 (1875) (enjoining state officials from diluting plaintiff's security through issuance of bonds); Davis v. Gray, 83 U.S. (16 Wall.) 203 (1872) (restraining Texas Governor and Commissioner of Land from executing state laws allowing them to alienate lands in which state held legal title); Tomlinson v. Branch, 82 U.S. (15 Wall.) 460 (1872) (state auditor and county collectors enjoined from collecting taxes on portion of railroad in violation of contract clause).

212. Cf. Cammeyer v. Newton, 94 U.S. 225, 234 (1876) (Although deciding against claimants on merits in suit for injunction and accounting against government officials for patent violation, Court did note that "[p]ublic employment is no defence to the employee for having converted the private property of another to the public use without his consent and without just compensation").

213. Philadelphia v. Collector, 72 U.S. (5 Wall.) 720, 730-33 (1866) (traditional assumpsit action against collector, apparently contemplated by statute); Erskine v. Van Arsdale, 82 U.S. (15 Wall.) 75, 77 (1872) (taxes paid under protest could be recovered from federal collector); cf. Atchison, Topeka & Santa Fe Ry. v. O'Connor, 223 U.S. 280 (1912) (similar action against state tax collector); Louisiana v. McAdoo, 234 U.S. 627, 632 (1914) ("There have always been remedies by which an importer may recover an excess rate of duty exacted from him by a customs collector, either by common law action against the collector, as in Elliott v. Swartwout, . . . or by statute . . . ."); cf. Gibbons v. United States, 75 U.S. (8 Wall.) 269, 274 (1868) (no implied assumpsit action against the United States in Court of Claims).


either case, if the officer pleads the authority of an unconstitu-
tional law for the non-performance or violation of his duty, it
will not prevent the issuing of the writ. An unconstitutional law
will be treated by the courts as null and void.216

The merger of sovereign and discretionary immunity questions
was the result of the continuing recognition of individual liability
based on breach of ministerial duties. If the officer were individu-
ally liable because of a breach of such a duty, the action was not
directed against the state.

Beginning in the 1880's, state sovereign immunity played a more
explicit part in the Court's decisions, and took on a force independ-
ent of the discretionary immunity with which it had largely been
merged in prior years.217 A majority of the Court continued to ac-
knowledge the availability of remedies against officers as individuals
not only when they committed or threatened torts, but also when
they breached legal duties. Indeed, the Court frequently reiterated
McComb's language that mandamus and injunction were correla-
tive and available based on failure of the officials to perform their
plain duties.218 Some members of the Court, however, began to be-
lieve that sovereign immunity categorically barred civil remedies
against state officials arising from breach of contract, whether the
officer's actions could be characterized as tortious or as a breach of
legal duty.219 These members, however, more often collected a ma-

216. McComb, 92 U.S. at 541 (citing Osborn); see also Davis v. Gray, 83 U.S. (16 Wall.)
203, 220, 232 (1872) (citing Osborn, and stating that "[w]hen a state becomes a party to a
contract, as in the case before us, the same rules of law are applied to her as to private persons
under like circumstances. When she or her representatives are properly brought into the
forum of litigation, neither she nor they can assert any right or immunity as incident to her
political sovereignty."). Theoretically, the Davis plaintiffs could have attempted to litigate
their claims once title passed to the private parties. See Gaines v. Thompson, 74 U.S. (7
Wall.) 347, 349 (1868) (court could decree title between private parties once title passed from
government). It is typical of the legality model that the Court looked not only to the availa-
bility of other means of judicial review, but also to the effectiveness of the remedy. See supra
notes 121-22 and accompanying text. The Court determined that equity was appropriate
because of the multiplicity of private parties against whom the plaintiffs would have to liti-
164 U.S. 471, 477, 482 (1896) (multiplicity of private parties against whom plaintiff would have
to bring litigation to protect its franchise did not warrant injunction against city coun-
cil's legislative acts in granting new franchises). See generally C. Jacobs, supra note 113, at
111-18 (discussing McComb, Gray, and United States v. Lee, 106 U.S. 196, 226 (1882) as
nominal party rule cases).

217. See, e.g., supra note 148.

218. See, e.g., Cunningham v. Macon & Brunswick R.R., 109 U.S. 446, 456 (1883); Allen
v. Baltimore & Ohio R.R., 114 U.S. 311 (1884); In re Ayers, 123 U.S. 443, 506 (1887); see
also In re Tyler, 149 U.S. 164, 190 (1893).

219. See The Virginia Coupon Cases, 114 U.S. 269, 330-31 (1884) (Bradley, J., dissenting,
jority in cases that might have prevailed under the legal duty strand;\textsuperscript{220} they were less successful where the officer's actions were tortious.\textsuperscript{221} Breach of legal duty was an easier target than tort; one could acknowledge the precedents for individual liability based on breach of legal duty but merely move the line dividing ministerial from discretionary duties to deny relief. Thus, many of the cases holding that the eleventh amendment barred relief for government debt also concluded that the plaintiff was impermissibly attempting to control the state executive in a discretionary or executive function.\textsuperscript{222} A variation on this reasoning was that the defendant did not have a specific enough legal duty for the court to grant mandamus or injunction.\textsuperscript{223}

For example, in \textit{Louisiana v. Jumel},\textsuperscript{224} the Court refused to issue either an injunction or mandamus to state officials who had fairly specific duties under the same funding law whose repeal had occasioned an injunction against dilution of bonds in \textit{McComb}.\textsuperscript{225} Some scholars have characterized \textit{Jumel} as a case the plaintiff previously would have lost because of the lack of an individual tortious wrong by the defendant; the difference was that the Court now deemed "jurisdictional" a defect that in actuality went to the merits.\textsuperscript{226} True, this was one possibility;\textsuperscript{227} suits for specific performance of contract or on debt had always been areas where the Court

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\bibitem{cite} (1882) (Gray, J., dissenting, joined by Waite, C.J., and Bradley and Woods, J.J.) (there should be no action to recover possession of property held by agents of sovereign); \textit{id.} at 239-40 (discussing contract claims litigable in Court of Claims). Justice Bradley authored the Court's opinion in \textit{McComb}. See Orth, supra note 215, at 760; see also \textit{id.} at 758, 763 (eleventh amendment cases resulted from Court's unwillingness to interfere with post-Reconstruction readjustment of Reconstruction state debt following the change in balance of power between the South and the national government resulting from the Hayes-Tilden election contest); Orth, \textit{The Interpretation of the Eleventh Amendment, 1798-1908: A Case Study of Judicial Power}, 1983 U. ILL. L. REV. 423, 449 (Court was concerned that the federal government would not enforce decrees for payment of Southern debt); Gibbons, supra note 87, at 1982; C. Jacobs, supra note 113, at 124 (some justices believed officers could not be held accountable for official acts taken pursuant to state direction).


\textit{Eg.}, The Virginia Coupon Cases, 114 U.S. 269 (1884).

\textit{Eg.}, \textit{Louisiana v. Jumel}, 107 U.S. 711, 727 (1882); \textit{Marye v. Parsons}, 114 U.S. 325 (1884); \textit{In re Ayers}, 123 U.S. 443, 499, 503 (1887); \textit{cf. In re Tyler}, 149 U.S. 164, 177 (1893) (unsuccesful argument that sheriff exercised official discretion in seizing property that was in custody of federal receiver, for payment of state taxes).


\textit{107 U.S. 711} (1882).

\textit{Id.} at 713, 725. \textit{See generally} Jaffe, supra note 65, at 25.

\textit{Engdahl, supra} note 31, at 23-24. For criticism of the jurisdictional ruling, see D. Currie, supra note 18, at 426; Currie, supra note 112, at 154.
\end{thebibliography}
might deny plaintiffs' claims against the federal government, and the eleventh amendment may have been enacted to avoid suits on state debt. On the other hand, the Jumel plaintiffs could easily have prevailed under the existing doctrines that an officer engaged neither "discretion" nor "sovereignty" when acting illegally. Indeed, Harlan and Field dissented on these grounds.

After Jumel, plaintiffs in actions against state officials generally obtained review on the merits in claims of violations of the contract clause, interstate commerce clause, and the fourteenth amendment where state officials committed tangible torts to property. Where there was no tangible property tort, relief was less predictable. Yet the legal duty strand of relief against individual officers survived not only in frequent pronouncements of the Court even when it denied relief, and in the dissents of Harlan and Field, but also in a large number of cases in which the Court granted injunc-


228. See, e.g., supra note 148.

229. See C. JACOBS, supra note 113, at 41-74; Jaffe, supra note 65, at 19-20.

230. See McComb, 92 U.S. at 541.

231. Jumel, 107 U.S. at 728 (Field, J., dissenting); id. at 753-54 (Harlan, J., dissenting).

232. E.g., The Virginia Coupon Cases, 114 U.S. 269 (1884) (contract clause); Scott v. Donald, 165 U.S. 107 (1896) (interstate commerce clause); Rolston v. Missouri Fund Comm'rs, 120 U.S. 390 (1886) (injunction against state officials' sale of railroad pursuant to state statutory lien that trustees of railroad claimed was satisfied); In re Tyler, 149 U.S. 164, 181, 188, 190 (1892) (upholding contempt conviction of sheriff who seized property in custody of federal receiver in violation of court order, stating in dicta that the eleventh amendment would not bar the suit "even if it were regarded as a plenary bill in equity properly brought for the purpose of testing the legality of the tax.")

233. See generally C. JACOBS, supra note 113, at 125-38; Fitts v. McGhee, 172 U.S. 516 (1898) (vacating injunction forbidding state officials from prosecuting actions to enforce allegedly confiscatory bridge toll, and distinguishing the McComb line of cases as instances where officials had specific enforcement duties); In re Ayers, 123 U.S. 443, 499, 503 (1887) (federal court lacked jurisdiction to enter injunction against Virginia officials, restraining them from bringing legal actions against taxpayers who tendered coupons; distinguishing actions where state officials directly invade person or property); cf. Cunningham v. Macon & Brunswick R.R. Co., 109 U.S. 446 (1883) (no injunction to invalidate state sale of railroad to itself since state was real party in interest); cf. Belknap v. Schild, 161 U.S. 10, 25 (1895) (no injunction against patent violation where the United States had title to property).

234. See generally supra note 218.

235. See, e.g., Antoni v. Greenhow, 107 U.S. 769, 809 (1882) (Harlan, J., dissenting); Moore v. Greenhow, 114 U.S. 338, 340 (1884) (Harlan and Field, JJ, adhering to views expressed in Antoni); In re Ayers, 123 U.S. 443, 510 (1887) (Harlan, J., dissenting); Cunningham v. Macon & Brunswick R.R. Co., 109 U.S. 446, 458 (1883) (Harlan, J., dissenting, joined by Field, J.); cf. Belknap v. Schild, 161 U.S. 10, 27 (1895) (Harlan and Field, JJ, dissenting) (injunction should issue to restrain patent violation by government); C. JACOBS, supra note 113, at 124-25 (Field and Harlan willing to grant relief against officers acting pursuant to unconstitutional statutes, even absent allegation of tort).
tions absent invasions of tangible property.\textsuperscript{236}

Thus, the decisions of the 1880's and 1890's did not so much signal an abandonment of the legality model in cases involving state officials\textsuperscript{237} as they did a narrowing of it (on an inconsistent basis) to cases sounding in tort, in an attempt to give definition to the eleventh amendment. \textit{Ex parte Young},\textsuperscript{238} in following prior cases that had enjoined state enforcement proceedings, rather than the cases that refused such injunctions, strengthened the legal duty strand as a ground for negative injunctions.\textsuperscript{239} In \textit{Osborn}, Chief Justice Marshall characterized a state official's duty to enforce state law as "ministerial," thereby implying that a negative injunction to restrain such enforcement did not interfere with executive discretion. The cases during the 1880's and 1890's that denied relief and disavowed control over discretionary functions while continuing to recognize the legal duty strand of individual liability, distinguished

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\item[(236)] See, e.g., Pennoyer v. McConnaughy, 140 U.S. 1 (1891) (injunction against Oregon land commission members to restrain them from alienating land claimed by plaintiff under contract with state); Noble v. Union River Logging R.R., 147 U.S. 165 (1893) (injunction against Secretary of Interior and Commissioner of General Land Office to restrain from executing order revoking approval of plaintiffs' maps for right of way); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362 (1894) (injunction against the Attorney General and railroad commission's enforcement of unreasonable rates); Smyth v. Ames, 169 U.S. 466 (1898) (injunction against Attorney General and members of state department of transportation for entertaining complaints and bringing actions to enforce confiscatory rates); Prout v. Starr, 188 U.S. 537 (1903) (injunction against Attorney General's pursuit of criminal action to enforce unconstitutional rate); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902) (injunction against Postmaster General's withholding mail where Court found allegations legally insufficient to support Postmaster's fraud determination); cf. Roberts v. United States, 176 U.S. 221 (1900) (mandamus against Secretary of Treasury to pay amounts owed under special legislation); Rolston v. Missouri Fund Comm'rs, 120 U.S. 390 (1887) (injunction against state officials' sale of railroad pursuant to state statutory lien that trustees claimed was satisfied).
\item[(237)] Suits on county and municipal debt continued to be decided on their merits. See, e.g., Mobile v. Watson, 116 U.S. 289 (1886) (mandamus against successor municipality to enforce judgment on debt).
\item[(238)] 209 U.S. 123 (1908).
\item[(239)] \textit{Ex parte Young} resolved the conflict among previous cases as to whether the bringing of state proceedings under an illegal law could be enjoined as an individual harm. See supra notes 233, 236 and accompanying text; see also HART & WECHSLER, supra note 201, at 966; Currie, supra note 112, at 155. Professor Jaffe agreed with the result in \textit{Ex parte Young}, because enforcement of the state program would ultimately lead to a trespass. L. JAFFE, supra note 17, at 221. \textit{Ex parte Young} also put to rest the argument that the eleventh amendment forbade the federal courts from ordering a state officer to act contrary to the positive commands of state law. C. JACOBS, supra note 113, at 125 n.49, 158. This reasoning would have indicated that enforcement under state law made the officer immune. In fact, however, enforcement duties, whether specific as required by \textit{Fitts v. McGhee}, or general, as sufficed in \textit{Ex parte Young}, were what rendered the officer a proper party and individually suable. See Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 769 (1824) (officer's ministerial duty to enforce state law made him subject to injunction as an individual).
\end{enumerate}
\end{footnotesize}
the decisions granting relief by characterizing them as ones in which the official had a specific legal duty, a "special relation to the particular statute alleged to be unconstitutional." 240 Ex parte Young discarded any requirement, to the extent that one existed, 241 of a special relationship to the particular statute, in order to secure a remedy against the "individual" official. This was particularly true in situations where the plaintiff sought a negative injunction. 242

Whether an official had a legal duty that could subject him to an equity action largely became a question of the individual’s proper party status. The essential inquiry was whether this was a person against whom an effective decree could be rendered, either because the person had enforcement duties under an unconstitutional statute, or because the person acted outside of constitutional or statutory authority. 243

While Ex parte Young integrated the tort and legal duty threads of the legality model, it did not mean that a plaintiff inevitably obtained relief upon an allegation of illegality and a showing of a proper party defendant. Claims for specific performance of a government contract or for payment from the state treasury could be barred by sovereign immunity. 244 In cases to adjudicate interests in property “which ha[d] come unsullied by tort into the bosom of the government” 245, the Court might deny relief on the ground that the sovereign was the real party in interest. 246 Defendants might also

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240. Fitts v. McGhee, 172 U.S. 516, 530 (1899); see Borchard, supra note 155, at 21-22 (criticizing distinction based on special versus general enforcement duties under unconstitutional statute).
242. 209 U.S. at 159 (negative injunction against enforcement of an unconstitutional statute does not interfere with the discretion of the Attorney General in enforcing laws).
243. Id. at 157.
244. E.g., Murray v. Wilson Distilling Co., 213 U.S. 151, 168 (1909) (suit by creditors of state liquor dispensary barred as a suit for specific performance); Wells v. Roper, 246 U.S. 335 (1918) (action for specific performance of a contract by Postmaster General, barred); cf. Lankford v. Platte Iron Works Co., 235 U.S. 461 (1915) (state is a necessary party in an action by depositor in a failed bank to compel the Oklahoma State Banking Board to pay from bank-financed depositor's insurance fund). See generally C. Jacobs, supra note 113, at 153-57 (describing eleventh amendment doctrine after Ex parte Young); Jaffe, supra note 65, at 29 (sovereign immunity issues must be resolved with reference to our legal tradition; enforcement of contracts, treasury liability for tort, “and the adjudication of interests in property which has come unsullied by tort into the bosom of the government” are sensitive areas); Engdahl, supra note 31, at 9 (in ratifying the eleventh amendment, the states were primarily concerned with suits on their debts based on state law, but brought in federal courts).
245. Jaffe, supra note 65, at 29.
246. See supra note 205; cf. Belknap v. Schild, 161 U.S. 10, 25 (1896) (Court would not issue an injunction to restrain the use of a caisson gate in violation of the patent where the United States held title to the gate); Hopkins v. Clemson Agricultural College, 221 U.S. 636,
raise successful objections of interference with executive discretion or with sovereign immunity when the plaintiff sought mandamus or affirmative injunctions, although these remedies became more freely available against state and federal officers. The Court, however, regularly granted negative injunctions to restrain the enforcement of unconstitutional laws and abuses of power.

648 (1911) (court could not decree removal of an embankment on land held by the state, but the college could be held liable for damages and could be ordered not to maintain the dike); United States ex rel. Goldberg v. Daniels, 231 U.S. 218 (1913) (no mandamus to the Secretary of War to deliver a cruiser to the highest bidder; the United States as owner in possession "cannot be interfered with behind its back"); International Postal Supply Co. v. Bruce, 194 U.S. 601 (1904) (no injunction to restrain the United States from using leased machines in violation of complainant's patent rights); Minnesota v. United States, 305 U.S. 382 (1939) (suit to condemn property in which the United States has an interest is against the sovereign). But cf. South Carolina v. Wesley, 155 U.S. 542, 544 (1895) (mere suggestion that property held by state for public use would not arrest proceedings).


Before 1962, the problems with affirmative coercive relief were compounded by the lack of general mandamus jurisdiction outside the District of Columbia federal courts. See Bye & Fiocca, supra note 78, at 309; Currie, supra note 112, at 158-59. The Court, nevertheless, seemed to invoke executive or discretionary immunity principally in cases where it concluded that the officer was acting within the bounds of legality. E.g., Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 221 (1930). The most expansive pronouncements of executive discretion appeared in matters involving complex accountings. In those cases the Court either assumed that the executive was acting legally, or was reluctant to attempt the mathematical operations that would be required to reach the merits. Adams v. Nagle, 303 U.S. 532 (1938) (comptroller's assessment of shareholders upon determining that the bank was insolvent); see also Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309 (1958) (Comptroller General's accounting procedures for tolls).

248. Payne v. Central Pac. Ry., 255 U.S. 228 (1921) (injunction directing the Secretary of Interior to dispose of indemnity lands unaffected by the Secretary's withdrawal of certain lands); Work v. Louisiana, 269 U.S. 250 (1925) (enjoining the Secretary of Interior from requiring the state to show the non-mineral character of lands claimed under Swamp Land Acts); Jaffe, supra note 65, at 32 nn.106-07. See generally K. DAVIS, supra note 68, § 23.10 at 336-48; K. DAVIS, supra note 78, § 23.8.

249. E.g., Herndon v. Chicago, Rock Island & Pac. Ry. Co., 218 U.S. 135 (1910) (affirming an injunction against state officials for acts violating the commerce clause and penalizing the use of federal courts); Western Union Telegraph Co. v. Andrews, 216 U.S. 165 (1910) (in light of Ex parte Young, the Court reinstated a suit to enjoin district attorneys in seventeen judicial districts from recovering penalties for nonpayment of license fees violative of due process); Truax v. Raich, 239 U.S. 33 (1915) (no eleventh amendment bar to enjoining enforcement of criminal laws making it illegal to employ less than 80% electors or native-born Americans). See generally K. DAVIS, supra note 68, § 27.05, at 571-76.

250. E.g., Philadelphia Co. v. Stimson, 223 U.S. 605, 620 (1912) ("The Complainant did not ask the court to interfere with the official discretion of the Secretary of War... [so] the suit rests upon the charge of abuse of power"); Greene v. Louisville & Interurban R.R. Co., 244 U.S. 499, 506-07 (1917) (injunction was granted against certification and enforcement of franchise tax on ground of discriminatory valuation; the principle of Ex parte Young "is not confined to the maintenance of suits for restraining the enforcement of statutes which as enacted by the state legislature are in themselves unconstitutional"); Sterling v. Constantin,
Thus, despite the exceptions, legality became the model for coercive relief. Limitation of the availability of injunctions to restraint of invasions of tangible property in an age in which intangible property became increasingly important would have made the availability of coercive relief exceptional.251

Some scholars believe that the tort/contract distinction of the Virginia Coupon Cases and their progeny made sense.252 When the action sounded in tort, the agent could be held personally liable for his or her own torts just as he or she would be held under private agency law. In contract, no action existed against an agent who contracted for a known principal. Allowing actions against government officers in tort preserved the rule of law; disallowing such actions in contract preserved the eleventh amendment.

One problem with this reasoning is that the Court consistently recognized breach of legal duty apart from tort as a ground for liability against the officer as an individual.253 While at different times the Court broadened or narrowed the concept of a nondiscretionary legal duty, it consistently recognized the legal duty strand throughout the nineteenth century.

Moreover, due to the flexibility of the common law, the legal duty strand easily merges with the tort strand. If a plaintiff may allege all torts, for example conversion,254 malicious prosecution,255

251. See C. Jacobs, supra note 113, at 142.

252. See Currie, supra note 112, at 167-68 ("Once Osborn was decided . . . the distinctions drawn in early Contract Clause cases made eminent sense, for the decision to pretend the action was not against the state did not justify holding an officer liable when he had committed no actionable wrong."); Engdahl, supra note 31, at 23, 37-38 (although criticizing the substantial party rule, the author finds results prior to the mid-twentieth century consistent with earlier nineteenth century cases. These earlier cases allowed actions against an officer only when he could be personally liable in tort under agency law. Id. at 15-16).

253. See, e.g., D. Currie, supra note 18, at 422 n.137; Amy v. Supervisors, 78 U.S. (11 Wall.) 136, 138-39 (1870) (county supervisors were individually liable for damages for violating plain ministerial duty in disobeying federal court mandamus to levy taxes to pay federal court judgment; "[t]he rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct.").

254. See Cammeyer v. Newton, 94 U.S. 225, 234 (1876) (although deciding against claimants on merits in suit for injunction and accounting against government officials for patent
and third party interference with contract or business relations, the tort model begins to look like a legal duty model. In addition, the common law and particularly tort law easily incorporated statutory and constitutional duties. Contemporary commentary on torts referred to actions arising from a breach of legal duty owed to the plaintiff, including duties imposed by statute. The implication of constitutionally based common law actions against officials was consistent with common law principles implying actions between private parties based on breach of statutory or constitutional duty. In any event, the Civil Rights Acts could have and eventually did provide an explicit statutory basis for suit against the official as an individual.

violation, the Court noted that "[p]ublic employment is no defence to the employee for having converted the private property of another to the public use without his consent and without just compensation"; Teal v. Felton, 53 U.S. (12 How.) 284, 292 (1851) (when addressee tenders postage, he has right to immediate possession of mail; if the mail is unlawfully "withheld for a charge of unlawful postage, it is a conversion for which suit may be brought"); cf. L. JAFFE, supra note 17, at 216 (referring to Governor of Georgia v. Madrazo, 26 U.S. (1 Pet.) 110 (1828), questioning why wrongful detention would not be as wrong as trespassory taking).

255. See D. CURRIE, supra note 18, at 428 & n.169 ("[A]lthough Ayers looks today like a textbook instance of malicious prosecution in light of Poindexter's holding that the state had no right to reject the coupons, it seems that the extension of that tort to the filing of civil cases had not yet been accomplished at the time of that decision." (footnote omitted)); Hill, supra note 79, at 1126 (malicious prosecution might have been ground for Ex parte Young, but no malice apparently alleged).

256. See Currie, supra note 112, at 156.

257. See generally Hill, supra note 79, at 1119-20; Katz, supra note 46, at 18-33 (1968) (discussing tort "actions on the statute").

258. See F. BOHLEN, STUDIES IN THE LAW OF TORTS 33, 45 n.26 (1926) (reprinting 1905 article) ("It is submitted that while everyone is bound to refrain from action probably injurious to others, no duty to take affirmative precautions for the protection of those voluntarily placing themselves in contact with him is cast upon anyone save as the price of some benefit to him. Note: Such duties may also be directly imposed by statute and a duty of affirmative action is imposed as the price of assumption of public office." (citation omitted)); id. at 300-01 (reprinting 1908 article) (obligations imposed by statute are among the few categories of obligations to act, as distinguished from obligations to merely refrain from injurious conduct; legislative intent central to determining such duties).

259. Texas & Pacific Ry. v. Rigsby, 241 U.S. 33, 39-40 (1916) ("A disregard of the command of the [Federal Safety Appliance Act] is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to the doctrine of the common law . . . [t]his is but an application of the maxim, Ubi jus ibi remedium."); see infra text accompanying notes 272-83.

260. E.g., New Orleans Water-Works Co. v. Rivers, 115 U.S. 674, 675 (1885) (equity action by Louisiana corporation holding exclusive waterworks franchise against Louisiana citizen to enjoin defendant's construction of waterworks as authorized by New Orleans city council ordinance; plaintiff rested claims upon its contract with city and upon ground "that the obligation of that contract was protected by the Constitution of the United States against impairment by any enactment of the State").
3. The Continued Symmetry of Damages and Coercive Actions

In the latter half of the nineteenth century, a legality model prevailed in actions for coercive relief, although its application was limited for a time and in an unpredictable fashion to torts against tangible property in cases where the claims were against officials of a sovereign entity. With the important exception of *Spalding v. Vilas*, discussed more fully below, the legality model also prevailed in damages actions against executive officials. While most such actions were based on tort principles, the Court recognized an action in assumpsit against tax collectors for payment under protest. Despite the officers' pleading the official character of their action as a defense, the Court generally did not discuss immunity for discretion. The officers' good faith was relevant only in determinations of liability.

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261. The Court used a discretionary model for judicial officials, as discussed more fully infra text accompanying notes 304-14. Randall v. Brigham, 74 U.S. (7 Wall.) 523, 538-40 (1868); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 336 (1871). In Kilbourn v. Thompson, 103 U.S. 168, 199 (1880), the Court recognized immunity for members of Congress who ordered the sergeant-at-arms to arrest and imprison a witness, who refused to answer questions that the Court held were beyond the investigatory powers of Congress. In New Orleans Waterworks Co. v. New Orleans, 164 U.S. 471, 481-82 (1896), the Court held that equity would not enjoin the city council from passing ordinances that violated the contracts clause. The Court stated further that the execution of the ordinances could be enjoined.

262. Erskine v. Van Arsdale, 82 U.S. (15 Wall.) 75, 77 (1872) ("Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal and that suit will be instituted to compel the refunding of them."); see also Philadelphia v. Collector, 72 U.S. (5 Wall.) 720, 730-33 (1866) (assumpsit against internal revenue collector; statute apparently contemplated continuation of common law action); Sage v. United States, 250 U.S. 33, 36-37 (1919) (characterizing an action for refund as action against the collector personally that did not bar a suit for the unpaid remainder in Court of Claims, despite the fact "that the statutes modify the common-law liability for money wrongfully collected by duress so far as to require a preliminary appeal to the Commissioner of Internal Revenue before bringing a suit" and provided for payment of judgment by the United States). But cf. Erskine v. Hohnbach, 81 U.S. (14 Wall.) 613, 616 (1871) (affirming a judgment against a collector of internal revenue in trespass for seizure of goods; an appeal to the Commissioner of Internal Revenue was required only in suit to recover taxes paid; also stating that collector was not liable in trespass for enforcing assessment that was regular on its face; ministerial officers obeying facially regular process of tribunals with jurisdiction over subject matter are not subject to liability); Stutsman County v. Wallace, 142 U.S. 293, 307-09 (1892) (interpreting North Dakota law; treasurer acted ministerially in conducting sale pursuant to assessment and could not be held liable because he acted within his authority under the statute).

263. See Bates v. Clark, 95 U.S. 204, 205 (1877).

264. Id. at 204 (captain liable for seizing liquors, under orders from commandant, outside Indian territory because he acted outside his jurisdiction); Beckwith v. Bean, 98 U.S. 266 (1878) (potential liability of provost-marshal and assistant provost-marshal (army captains) for holding a civilian without bringing him before a magistrate); White v. Greenhow, 114 U.S. 307, 307-08 (1884) (allowing damages action against the Treasurer of Richmond for seizure of property for taxes after coupons had been tendered); Scott v. Donald, 165 U.S. 58, 101 (1897) (damages against state constables who seized liquor under statute that violated...
mining whether to grant exemplary damages, and was not a defense
to compensatory damage claims. In addition, probable cause
could not insulate an official from compensatory damages if the ac-
tions were outside of his jurisdiction or taken under an unconstitu-
tional statute.

The Court retained the theory that damages and coercive relief
were available to remedy similar types of harms,

that where a suit is brought against defendants who claim to act
as officers of a State and, under color of an unconstitutional stat-
ute, commit acts of wrong and injury to the property of the
plaintiff, to recover money or property in their hands unlawfully
taken by them in behalf of the State; or, for compensation for
damages; or, in a proper case, for an injunction to prevent such
wrong and injury; or, for a mandamus in a like case to enforce
the performance of a plain legal duty, purely ministerial; such
suit is not, within the meaning of the amendment, an action
against the State.

The Virginia Coupon Cases illustrate this symmetry in the avail-
ability of damages and coercive relief. In these cases, the trespass-
ary acts of the state officials in seizing property for payment of
taxes supported a damages action, a detinue action for recovery

commerce clause); cf. Cammeyer v. Newton, 94 U.S. 225, 234 (1876) (Although deciding
against claimants on the merits in suit for injunction and accounting against government
officials, the Court noted that "[p]ublic employment is no defence to the employee for having
converted the private property of another to the public use without his consent and without
just compensation").

265. Bates v. Clark, 95 U.S. 204, 209 (1877) (since captain made seizure outside his juris-
diction, good faith and probable cause only relevant to punitive damages); Beckwith v. Bean,
98 U.S. at 276-77 (evidence showing captain's bona fides in holding suspect without bringing
before magistrate admissible as to exemplary damages); Amy v. Supervisors, 78 U.S. (11
Wall.) 136, 138 (1870) (supervisors who disobeyed ministerial duty were liable for damages;
"A mistake as to his duty and honest intentions will not excuse the offender.").

266. Bates v. Clark, 95 U.S. at 209 (outside jurisdiction); cf. White v. Greenhow, 114 U.S.
307 (1884) (seizure under unconstitutional statute); Scott v. Donald, 165 U.S. 58 (1897)
same).

U.S. 1, 10 (1890)); Reagan v. Farmers' Loan & Trust Co., 154 U.S. 362, 389 (1894); see also
Scott v. Donald, 165 U.S. 58, 68-70 (1897); Philadelphia Co. v. Stimson, 223 U.S. 605, 619-20
(1912) ("The exemption of the United States from suit does not protect its officers from
personal liability to persons whose rights of property they have wrongfully invaded.... And
in case of an injury threatened by his illegal action, the officer cannot claim immunity from
injunction process.").

(1884) (dismissing action for failure to meet amount in controversy for jurisdiction); Chaffin
v. Taylor, 114 U.S. 309 (1884) (state court trespass action lies against collector for seizing
property after plaintiff tendered coupons despite state's attempt to abrogate action).

Another example of symmetrical damages and coercive remedies is Amy v. Supervisors,
78 U.S. (11 Wall.) 136 (1870), wherein county supervisors disobeyed a writ of mandamus
issued by a federal court. The supervisors had been ordered to levy taxes to pay a judgment.
of property, and an equity action to restrain further seizures. Similarly, the Court awarded damages and issued an injunction in companion cases in which the plaintiff sued in law for seizure of his liquor under a state statute that interfered with interstate commerce, and in equity to enjoin further seizure.

The most interesting aspect of these cases is their simultaneous recognition of implied federal question actions in both law and equity for violation of the Constitution. White v. Greenhow, a Virginia Coupon Case, recognized federal question jurisdiction for a damages action for seizure of property under Virginia statutes which violated the Constitution by impairing the obligation of contracts. In another Virginia Coupon Case, the Court dismissed an equity action brought by a citizen of Virginia against the Treasurer of Richmond under federal question jurisdiction, but for want of the amount in controversy rather than failure to state a claim under general federal question jurisdiction. In Scott v. Donald, the Court allowed a damages action by a citizen of South Carolina against constables of the same state for seizures of liquor under a state statute interfering with interstate commerce. In the companion case, the Court approved without discussion an equity action between the same parties to restrain further seizures. Again,

When they failed to levy the tax the judgment creditor sued the county supervisors for damages. The Court held that Iowa's repeal of a statute that would have made the supervisors personally liable in such circumstances was irrelevant, as there was common law liability: "The rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct. There is an unbroken current of authorities to this effect. A mistake as to his duty and honest intentions will not excuse the offender." Id. at 138.

272. 114 U.S. 307 (1884).
273. 114 U.S. at 317. Carter v. Greenhow, 114 U.S. (1885), another Virginia Coupon Case brought in federal court, failed only for want of the requisite amount in controversy. The Court also held this case could not be brought under what are now § 1983 and 28 U.S.C. § 1343. See also Hucless v. Childrey, 135 U.S. 709 (1889) (action for trespass on the case by Virginia citizen against Treasurer of Richmond in federal court; plaintiff lost on merits rather than for want of jurisdiction).
275. 165 U.S. 58 (1897).
276. See id. at 59.
277. Id. at 78-86.
the action was under general federal question jurisdiction.\textsuperscript{279} Thus, the Court, without much fanfare, recognized implied rights of action in both equity and law long before \textit{Ex parte Young} and \textit{Bivens}.\textsuperscript{280}

The Court was not overly punctilious about specifying the source of law that created the cause of action,\textsuperscript{281} although the source of the legal duty was explicitly federal.\textsuperscript{282} Such concerns

\textsuperscript{279} Id. at 113-15.

\textsuperscript{280} See also \textit{Hans v. Louisiana}, 134 U.S. 1, 9-10 (1890) (sovereign immunity barred suit on coupons by Louisiana citizen against Louisiana, noting that in \textit{Louisiana v. Jumel}, 107 U.S. 711 (1882), Hagar v. Southern, 117 U.S. 52 (1886), and \textit{In re Ayers}, 123 U.S. 443 (1887), it “was not denied that they presented cases arising under the Constitution; but, notwithstanding that, they were held to be prohibited by the [eleventh] [a]mendment.” \textit{id.} at 10; \textit{Smyth v. Ames}, 169 U.S. 466, 518 (1898) (suits to enjoin state officers from entertaining complaints and instituting civil and criminal actions under confiscatory rate statute were not only in diversity but in federal question); \textit{cf. Fitts v. McGhee}, 172 U.S. 516, 527-30 (1899) (suit, in which parties were from the same state, dismissed on eleventh amendment grounds, but not for want of federal question jurisdiction); \textit{Wiley v. Sinkler}, 179 U.S. 58 (1900) (damages action alleging more than $2000 in controversy for deprivation of right to vote for a member of Congress was properly brought as federal question); \textit{Swafford v. Templeton}, 185 U.S. 487 (1902) (federal question damages action for denial of voting rights). For a discussion of \textit{Wiley} and \textit{Swafford} see \textit{Hill, supra} note 79, at 1125.

Despite noting \textit{Wiley} and \textit{Swafford}, Hill later suggests that implied federal rights of action were pleaded in equity before they were pleaded in law because of the necessity of telling a more complete story to justify the intervention of equity. \textit{Id.} at 1129. “Thus,” states Hill, “assuming a constitutional ground for the claim against the wrongdoing officer, in the usual case this federal issue would have been excluded from the face of the declaration at law, but would have appeared on the face of the bill in equity.” \textit{Id.} at 1130. Hill states further that despite the many instances, of which \textit{Ex parte Young} is such a conspicuous example, in which officers have been the subject of equitable relief in connection with the administration of unconstitutional regulatory statutes, it does not seem to have been seriously suggested that, absent malice, such officers were personally liable for the damages that must often have been suffered by reason of their official conduct.

\textit{Id.} at 1137. The \textit{Virginia Coupon Cases} and \textit{Scott v. Donald} would suggest otherwise. Hill, however, did not favor a dichotomy between legal and equitable actions for purposes of federal jurisdiction, and saw the Constitution as forming part of the common law in both legal and equitable actions against officials. \textit{Id.} at 1131, 1133, 1138-39, 1149, 1158-59.

Professor Nowak has suggested that the Framers intended that implied injunctive relief, but not damages actions, absent congressional action, be available under the fourteenth amendment. He cites as evidence, inter alia, the presence of legislative discussion of injunctive actions and the absence of discussion of damages in the debates. Nowak, \textit{supra} note 5, at 1455-60. Nowak's conclusion, however, would seem to rest on modern views that dichotomize injunctive and damages actions. The Framers' contemplation of equity actions would imply, to the nineteenth century mind, that damages were also available.

\textsuperscript{281} \textit{See generally} \textit{Hill}, \textit{supra} note 79, at 1131-38 (discussing question of source of law when a statutory standard is incorporated into tort law); Katz, \textit{supra} note 46, at 10 (arguing that the “common law nature of the Magna Charta ... refutes the notion that laws that place limits on governmental activity are somehow different from private law.”); Collins, \textit{The Unhappy History of Federal Question Removal}, 71 Iowa L. Rev. 717, 726-29 (1986). My ideas about implied constitutional actions owe much to discussions with Professor Collins.

would have been out of character in the innocent pre-\textit{Erie} days, long before Hart & Wechsler told us that federal law was interstitial.\textsuperscript{283} The general common law provided forms of action into which developing constitutional law and new statutory norms were incorporated.

The Court's continued acknowledgement of the symmetry of damages and coercive actions,\textsuperscript{284} even in equity actions protecting intangible property rights,\textsuperscript{285} implied that damages too could be available to compensate for deprivations of intangible rights. A handful of cases for deprivation of voting rights, brought under federal question jurisdiction or under the ancestors of sections 1983 and 1343, in fact awarded damages for infringement of "political rights."\textsuperscript{286}

The hue and cry accompanying the Court's implication of a federal damages action for fourth amendment violations in \textit{Bivens}\textsuperscript{287} shows the degree to which damages and injunctive relief lost, during the twentieth century, the symmetry that they had enjoyed through the nineteenth century. While the federal question equity action raising constitutional issues became commonplace, plaintiffs rarely brought the correlative damages action and by 1962 its existence appeared questionable.

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\textsuperscript{283} HART \& WECHSLER, \textit{supra} note 201, at 470.
\textsuperscript{284} See \textit{supra} note 267 and accompanying text.
\textsuperscript{285} \textit{E.g.}, Reagan \textit{v.} Farmers' Loan \& Trust Co., 154\textsuperscript{th} U.S. 362, 389, 399 (1894).
\textsuperscript{286} See, \textit{e.g.}, \textsuperscript{267} supra note 267 and accompanying text.
\textsuperscript{287} \textsuperscript{267} See \textit{Hill}, \textit{supra} note 79, at 1157; \textit{Gressman}, \textit{The Unhappy History of Civil Rights Legislation}, 50\textsuperscript{th} MICH. L. REV. 1323 (1952).
This atrophy of the implied action for damages may have resulted from the nature of the rights for which the Court was willing to grant relief. The increased importance of violation of a legal duty that did not necessarily involve a direct physical trespass had the primary effect of allowing injunctions against state regulation of economic activity. The shallow pockets of suable officials gave little incentive to sue for damages in such cases; damages were in fact an inadequate remedy for violation of rights through continuing government regulation. An anticipatory equitable remedy was likely to be the most effective action to obviate the plaintiff's loss.\textsuperscript{288}

Even if courts viewed the damages action against the official as a conduit to the treasury,\textsuperscript{289} they would remain disinclined to award damages for unconstitutional economic regulation.\textsuperscript{290} Direct invasions of person and tangible property are more traditionally actionable. Presumably, physical property received protection from the common law not only because much development of the common law occurred when such property was the predominant form of wealth, but also because the inviolability of the person and effects from invasion are central to personal autonomy.\textsuperscript{291} Liability for harms to intangible economic interests, or economic expectations, traditionally was of less concern,\textsuperscript{292} as reflected in use of sovereign immunity to bar actions on government debt when no physical property invasions were alleged.

Equity, however, had no trouble overcoming any obsession the common law was presumed to have with tangibility, as \textit{Ex parte Young}\textsuperscript{293} demonstrates. In voting rights cases of the same era, moreover, the Court allowed damages for invasions of intangible

\textsuperscript{288} The divorcement of liability from physical tort may have contributed to the modern perception that the action against the official is fictional, and hence less appropriate for a damage remedy.

\textsuperscript{289} L. \textsc{Jaffe}, \textit{supra} note 17, at 235, 245, 249, 253, 256.

\textsuperscript{290} Cf. \textit{id} at 259-60 (discussing proper scope for discretionary immunity: "Is the loss one that the citizen should be asked to take upon himself as his share of the costs incidental to organized governmental life, or \textit{per contra}, is it one that loads upon him for the benefit of others an undue and disproportionate burden?"); Epstein, \textit{Private Law Models for Official Immunities}, \textsc{42} \textsc{Law} \& \textsc{Contemp. Probs.} 53, 59 (1978) (some room for a governmental/proprietary or ministerial/discretionary distinction); Baxter, \textit{Enterprise Liability, Public and Private}, \textsc{42} \textsc{Law} \& \textsc{Contemp. Probs.} 45, 51 (1978) (appropriateness of immunity for policymaking).

\textsuperscript{291} Liability for extended detention, as distinguished from arrest, however, has generally not been compensated. See \textsc{L. Jaffe, supra} note 17, at 251-53.

\textsuperscript{292} \textit{Id}. at 248 (loss of profit generally uncompensated, but loss of salary upon loss of employment generally is compensated).

\textsuperscript{293} 209 \textsc{U.S.} 123 (1908).
political rights. If there was a failure in the development of damages actions to protect interests in intangible property that were impaired by illegal government action, it may be because such liability was perceived as too expensive, not only for the individual officer formally held liable, but also for government. Government produces public goods, the value of which it cannot internalize within the treasury, even if such benefits were measurable. A perception may exist that government is not capable of recompensing all harms it causes, even though the benefits it produces are greater than the harms. Intangible property allowed greater accumulations of wealth, and government regulation of it presumably could lead to economic harms from unconstitutional legislation of an economic magnitude greater than usually associated with government trespasses on tangible property. Thus, the change in the type of property that increasingly became the subject of government regulation may have been partly responsible for the modern dichotomy between damages and injunctive relief.

While equity became the remedy of choice for economic due process rights, the Court channeled "political" rights, to the extent they were recognized at all, into actions at law. Despite the

294. See supra note 286.
296. Cf id. at 75 ("[F]unctions of public goods are systematically less well known than those of private goods.")
297. Nonliability may be based, in part, on an exemption for policymaking, or at least negligent policymaking, see L. Jaffe, supra note 17, at 257-58; K. Davis, supra note 68, § 25.15, although actions against officers for trespasses under unconstitutional statutes used to be a fairly normal occurrence. E.g., Scott v. Donald, 165 U.S. 58 (1897). "Policymaking," once thought the proper scope for government nonliability, is now deemed a prerequisite for political subdivision liability under 42 U.S.C. § 1983. See Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985); Pembaur v. Cincinnati, 106 S. Ct. 1292 (1986).

A sense that damages might be too large frequently may have led litigants not to seek them in class suits for political rights that would support damage liability when brought by an individual under a similar theory. For example, an individual black child excluded from school for racially discriminatory reasons may seek damages, Runyon v. McCrary, 427 U.S. 160 (1976) (exclusion from commercially operated private schools), but plaintiffs do not seek damages awards for school children in desegregation cases. Similarly, an individual denial of the right to vote may be the subject of a damages action, but class actions to vindicate voting rights do not seek such damages. Jaffe points out that liability is more frequently imposed for arrest than for extended detention. L. Jaffe, supra note 17, at 251-53. Jaffe reasons that this was because extended detentions were usually only imposed after judicial process. Id. at 252. Perhaps, however, great magnitude of harm, often a reason for a government to compensate, at some point becomes a reason that a government does not compensate. This is particularly true for intangible interests.

298. For a discussion of congressional limitations on federal court injunctions, see Hart & Wechsler, supra note 201, at 975-79.
express language of the Civil Rights Act providing for actions in law and equity, the Court for some time took the position that equity would protect property rights but not “political” rights.\textsuperscript{299}

4. The Reappearance of the Discretion Model inDamages Actions

Another source of division between theories of availability of coercive relief and damages arose from the renaissance of a “discretionary” immunity for damage actions in \textit{Spalding v. Vilas}.\textsuperscript{300} In the Taney years, discretionary immunity had been used to deny recovery in both coercive and damages cases. By contrast, the rebirth of discretionary immunity in \textit{Spalding} occurred when judicial review was in vogue, and a legality model was gaining ascendance in equity.

In \textit{Spalding}, an attorney who had represented local postmasters in claims against the post office sued the Postmaster General for communications to postmasters encouraging them not to pay their attorneys’ fees.\textsuperscript{301} The Court found the Postmaster’s communications to be either true or expressions of opinion;\textsuperscript{302} the same case today might be decided on first amendment grounds. Moreover, as noted in Part I, an individual’s interest in protection of reputation from government invasion may be less systematically protected

\textsuperscript{299} Giles v. Harris, 189 U.S. 475 (1903); see generally Comment, \textit{supra} note 286; Gressman, \textit{supra} note 286.

The real-party-in-interest line of sovereign immunity cases that arose late in the nineteenth century, and culminated in Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), also divided theories for recovery against government agents in equity and law. \textit{See}, \textit{eg.}, Belknap v. Schild, 161 U.S. 10, 18, 25-26 (1896) (no injunction issued to restrain use of gate violating plaintiff’s patent where the United States held title to gate; federal officers might be held liable for own infringements, but these defendants made no profits); International Postal Supply Co. v. Bruce, 194 U.S. 601 (1904) (no injunction against use by the United States of leased machines violating complainant’s patents, citing \textit{Belknap}); Hopkins v. Clemson Agricultural College, 221 U.S. 636, 648 (1911) (where title to land belonged to the state, the court could not decree removal of embankment therefrom, but college could be liable for damages for flooding plaintiff’s land and could be ordered not to maintain dike).

\textit{Larson} stated

that if the actions of an officer do not conflict with the terms of his valid statutory authority, then they are the actions of the sovereign, whether or not they are tortious under general law, if they would be regarded as the actions of a private principal under the normal rules of agency. A Government officer is not thereby necessarily immune from liability, if his action is such that a liability would be imposed by the general law of torts. But the action itself cannot be enjoined or directed, since it is also the action of the sovereign.

\textsuperscript{300} 161 U.S. 483 (1896).

\textsuperscript{301} \textit{Id.} at 484-89.

\textsuperscript{302} \textit{Id.} at 491.
than other common law liberty or property rights. The Court, however, used a discretionary model for executive immunity, imported from suits against judges, that extended beyond speech cases.

The Spalding court relied on the two principal Supreme Court decisions on judicial immunity, Randall v. Brigham and Bradley v. Fisher. In Randall an attorney sued a superior court judge for damages arising from his allegedly wrongful exclusion from practice before the bar of the court. The Court noted that while inferior court judges could be accountable in damages for acts outside of their jurisdiction, superior court judges could not be liable for their judicial acts "unless perhaps where the acts are palpably in excess of the jurisdiction of the judges, and are done maliciously or corruptly." Bradley v. Fisher also involved a damages action by an attorney against a judge for excluding him from the bar. In this case, the Court maintained Randall's distinction between superior and inferior court judges, but held that damages should not be imposed on a superior court judge even though he exceeded his jurisdiction and acted with malice. A superior court judge could only be liable for judicial acts in "the clear absence of all jurisdiction over the subject-matter" such that he would inescapably have known that he acted beyond his authority.

In neither Randall nor Bradley did the Court emphasize the protections of judicial process and appellate review as justifications for immunity. In both cases, however, the complainant had been accorded appellate review of his exclusion from the bar in prior proceedings. In Randall, the Massachusetts Supreme Judicial Court reviewed the attorney's exclusion in a mandamus action, and found no due process violation. Furthermore, the Supreme Court, in the attorney's subsequent damages action, appeared to agree that exclusion was proper. In Ex parte Bradley, the prelude to Bradley v. Fisher,
the Supreme Court decided that it had mandamus jurisdiction to review Bradley’s exclusion from the bar of the Supreme Court of the District of Columbia, and found that the lower court had exceeded its jurisdiction in disbarring Bradley. The Court’s decision in *Bradley v. Fisher* to disallow damages based on the same illegal disbarment for which it had three years earlier granted extraordinary relief was thus not the product of review avoidance. The availability of effective non-collateral remedies formed a backdrop for the grant of judicial immunity commensurate with the outer bounds of judicial action. Superior courts, moreover, for whose judges the Court recognized broad immunity, were generally courts of record that were part of a judicial structure that included procedural formalities and appellate review.

Despite the background of appellate review against which *Randall* and *Bradley* were decided, the Court in both cases focused on the need to protect the decisionmaking process rather than on the protections afforded by judicial and appellate processes. The Court reasoned that decisions about jurisdiction required judgment just as did other questions of law, judges should be uninfluenced by personal considerations, plaintiffs could too easily allege malice and subject the judge to the vagaries of trial to allow a malice allegation to negate immunity, judges would be degraded by having to answer before other tribunals, and political processes such as impeachment would protect against abuses.

Such justifications in terms of judgment rather than judicial process could easily support immunity for executive officials as they had in *Kendall II*. The *Spalding* Court applied judicial models to executive immunity based on “the same general considerations of

312. 74 U.S. (7 Wall.) 364 (1868).
313. Id. at 375-79.
314. See Block, supra note 44, at 884-85. In *Ex parte Secombe*, 60 U.S. (19 How.) 9 (1856), Chief Justice Taney, by contrast, held that mandamus would not lie to review the exclusion of an attorney from the bar of the Supreme Court of the Territory of Minnesota, without resolving whether the attorney had other means to obtain judicial review. Id. at 15. The Court in *Secombe* relied in part upon an unpublished 1829 decision finding no jurisdiction in similar circumstances. Id. at 13.
321. See L. JAFFE, supra note 17, at 241 (justifications for judicial immunity “prove too much”).
public policy and convenience which demand for judges of courts of
superior jurisdiction immunity from civil suits for damages arising
from acts done by them in the course of the performance of their
judicial functions." As was true for judges, immunity extended
beyond the officials' actual jurisdiction, the Court recognizing "a
distinction between action taken by the head of a Department in
reference to matters which are manifestly or palpably beyond his
authority, and action having more or less connection with the gen-
eral matters committed by law to his control or supervision." Thus, the judicial model for executive immunity reappeared, but
now in an era of increasing availability of injunction.

The immunity for judgment strand had few logical limits when
divorced from judicial due process. As was true in the Taney years,
the discretionary exception began to expand to immunize a variety
of lower level officials. This expansion was particularly apparent
in District of Columbia decisions with its concentration of suits
against federal officers. The Supreme Court denied certiorari in
many of these cases, and gave its explicit imprimatur to broad
discretionary immunity for federal executive officials in Barr v. Matteo, which granted immunity from a libel action to the Acting
Director of the Office of Rent Stabilization. As in Spalding, the

322. 161 U.S. at 498; see K. DAVIS, supra note 68, § 26.01, at 509 (1958); Schuck, supra
note 2, at 323.
323. 161 U.S. at 498.
324. As previously noted, however, the Court cited discretionary immunity occasionally
to bar coercive actions against federal officials. See supra notes 195-205 and accompanying
text.
325. See Jaffe, supra note 50, at 220-21; K. DAVIS, supra note 68, § 26.01, at 509-11;
Freed, supra note 305, at 530-31.
326. Gray, supra note 44, at 337.
327. See, e.g., Lang v. Wood, 92 F.2d 211 (D.C. Cir. 1937) (affirming dismissal of damage
action against Attorney General, parole board members, parole executive, warden, and director
of prisons for alleged illegal parole revocation as within the officials' jurisdiction), cert.
denied, 302 U.S. 686 (1937); Standard Nut Margarine Co. of Florida v. Mellon, 72 F.2d 557
(D.C. Cir. 1934) (dismissing, under Spalding, suit against Secretary of Treasury and assistant
for assessing taxes previously found to be unauthorized by statute), cert. denied, 293 U.S. 605
(1934); Glass v. Ickes, 117 F.2d 273 (D.C. Cir. 1940) (affirming dismissal under Spalding
of libel suit against Secretary of Interior), cert. denied, 311 U.S. 718 (1941); Gregoire v. Biddle,
177 F.2d 579 (2d Cir. 1949) (dismissing suit against Attorneys General, Directors of Enemy
Alien Control Unit of the Department of Justice, and the District Director of Immigration
for imprisonment of plaintiff as a German after found in administrative hearing to be a
Frenchman); see also Butz v. Economou, 438 U.S. 478, 494 n.21 (1978) (discussing expansion
of Spalding line); Gray, supra note 44, at 337-38; Handler & Klein, supra note 47, at 51.
328. 360 U.S. 564 (1959); see also Doe v. McMillan, 412 U.S. 306, 324 n.15 (1973) (leaving
undisturbed Court of Appeals decision holding District of Columbia officials immune
under Barr for actions leading to publication of names of children said to be disciplinary
problems).
Court could easily have limited Barr to protection of expression,\textsuperscript{329} but it did not. The opinion, like Spalding, relied on the need for fearless judgment.\textsuperscript{330}

To state categorically that, at the turn of the century, the legality model prevailed in actions for coercive relief, while the discretion model prevailed in damages actions, would ignore numerous exceptions. Coercive relief could be denied under a number of categories that the Court found inherent in sovereign immunity, and affirmative relief could still be denied as interfering with the semijudicial discretion of officials.\textsuperscript{331} Similarly, a generalization that the discretion model thoroughly permeated the realm of damages would be incorrect. As in the Taney years, state and local officials and lower level federal officials were not yet so expansively protected. The year after Spalding, the Court affirmed an award of damages against two constables who seized plaintiff's liquor pursuant to a statute which the court found to violate the Interstate Commerce Clause,\textsuperscript{332} and it continued to recognize an action against the collector of an unconstitutional tax for payments under protest.\textsuperscript{333} Nor did the Court mention immunities in a 1915 action under section 1979 (now codified as section 1983). In Myers v. Anderson,\textsuperscript{334} three black citizens sued members of the Annapolis board of registration who refused to register the plaintiffs to vote pursuant to a city grandfather clause. The defendants argued that they were not liable for their official conduct,\textsuperscript{335} and in the absence of allegations of malice.\textsuperscript{336} The Supreme Court did not seriously consider these defenses.

\textsuperscript{329} See text accompanying note 302; cf. Gray, \textit{supra} note 44, at 338 (plaintiff's claims in \textit{Spalding} and in many cases invoking administrative immunity lacked apparent merit).

\textsuperscript{330} 360 U.S. at 571. The opinion quoted from Learned Hands' opinion in Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949).

\textsuperscript{331} See \textit{supra} notes 244-51 and accompanying text.

\textsuperscript{332} Scott v. Donald, 165 U.S. 58 (1897); cf. Hopkins v. Clemson Agricultural College, 221 U.S. 636, 648 (1911) (public college could be liable in trespass for building dike that caused plaintiff's land to flood).


\textsuperscript{334} 238 U.S. 368 (1915); \textit{see also} Lane v. Wilson, 307 U.S. 268 (1939) (reinstating damages action against three city election officials who denied plaintiff registration under Oklahoma's latest version of grandfather clause); Nixon v. Herndon, 273 U.S. 536 (1927) (reinstating damages action for denying plaintiff right to vote pursuant to state statute excluding blacks from Democratic primary); Nixon v. Condon, 286 U.S. 73 (1932) (reinstating damages actions against Texas election judges for refusal to permit blacks to vote pursuant to party rule).

\textsuperscript{335} 238 U.S. at 378.

\textsuperscript{336} \textit{Id.} at 371 (argument of counsel).
D. Merging Models

1. Legal Duty Displaces Physical Trespass

The legality model continued its predominance for coercive relief, and ultimately prevailed even for affirmative injunctions. Attempts to define the proper scope of the eleventh amendment led to various anomalies, particularly in the often and justly criticized Larson v. Domestic and Foreign Commerce Corp. In Larson, a corporation sought to enjoin the War Assets Administrator from selling surplus coal to which plaintiff claimed title under contract with the agency. Were plaintiff correct that title had passed, the government officer's continued possession of the coal would have been trespassory. Numerous precedents existed for coercive relief against officers as individuals where plaintiff had title to the property that the officer held for the government. On the other hand, cases using "real party in interest" analysis had sometimes denied coercive relief in cases in which government property was at issue, particularly where the government had not wrongfully acquired the property. Larson represents a counterpoint to In re Ayers. The latter had narrowed the legality model by indicating that coercive relief would be available primarily for tortious behavior but not for breaches of constitutional or statutory duties outside of physical tort; Larson held that coercive relief would restrain breaches of constitutional and statutory law, but would not neces-

337. See, e.g., Griffin v. County School Board, 377 U.S. 218, 232-34 (1964) (injunctions to levy taxes and open schools would be appropriate to stop denials of plaintiffs' rights); Reynolds v. Sims, 377 U.S. 553, 586 (1964) (judicial relief appropriate where legislature failed to reapportion according to federal constitutional requisites in timely fashion after adequate opportunity to do so); Vitarelli v. Seaton, 359 U.S. 535 (1959) (ordering reinstatement of federal employee; discussed in Davis, Suing the Government by Falsely Pretending to Sue An Officer, 29 U. CHI. L. REV. 435, 435-36, 455-56 (1962)).

338. See, e.g., L. JAFFE, supra note 17, at 226-28; Curtie, supra note 112, at 149; Davis, supra note 338; Jaffe, The Right to Judicial Review I, 71 HARV. L. REV. 401, 434 (1958); Orth, supra note 215, at 748-35 (reciting "standard version" of eleventh amendment history).


340. Id. at 684-85.

341. See supra note 203.

342. See supra note 246; see also Louisiana v. Garfield, 211 U.S. 70 (1908) (no jurisdiction over bill in equity against Secretary of Interior to establish title to swamplands and enjoin other dispositions of land; United States is necessary party). But cf. Ickes v. Fox, 300 U.S. 82 (1937) (United States is not indispensable in suit by property owners to enjoin Secretary of Interior from enforcing order that would interfere with vested water rights); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912) (suit allowed to restrain Secretary of War from causing institution of criminal proceedings for plaintiff's reclaiming of land in which plaintiff claimed title; plaintiff lost on merits); Cramton, supra note 148, at 405.
sarily remedy merely tortious or wrongful behavior.\textsuperscript{343} Since the \textit{Larson} Court recognized that the officer might nevertheless be held liable for damages for torts as an individual in cases where coercive relief was unavailable,\textsuperscript{344} the Court furthered the dichotomy, nascent in early real party in interest cases as well as in the development of implied equity actions and in the discretionary immunity from damages at the turn of the century, between the once symmetrical remedies of coercive relief and damages based on an individual wrong.\textsuperscript{345} Almost twenty years later, \textit{Butz v. Economou}\textsuperscript{346} held that federal executive officials were immune from damages for their merely wrongful acts within the outer perimeter of their duties, but only enjoyed good faith immunity for violations of federal constitutional and statutory law.\textsuperscript{347} Thus, the legal duty strand replaced the tort strand in primary importance in defining an area where officers were individually liable for their actions under color of office.\textsuperscript{348}

In the most common form of action against officials in the early nineteenth century, tort, the constitutional or statutory violation was not an essential ingredient of the complaint; the issue arose in the answer or reply. One could argue that it was the common law tort that allowed the litigation of the constitutional and statutory issues against the official, rather than the reverse as under \textit{Butz} and

\textsuperscript{343} 337 U.S. at 701-02. \textit{Larson} could be viewed as establishing a kind of discretionary immunity, because it recognizes an area of irremediable wrongful behavior by officials within the limits of their discretion. \textit{Id.} at 690, 693-95; see Jaffe, \textit{supra} note 65, at 36 ("The most unfortunate aspect of Vinson's opinion is a return to the difficult and unworkable distinction between refusals to act which are 'ultra vires,' 'beyond statutory power,' and as such subject to mandamus, and those that are 'merely erroneous.' "); Block, \textit{supra} note 205, at 1075 (recommending an approach similar to that adopted in \textit{Larson}); Engdahl, \textit{supra} note 31, at 38-41 (\textit{Larson}'s distinction of merely wrongful acts not too intelligible).

\textsuperscript{344} 337 U.S. at 695, 687. \textit{See generally The Supreme Court, 1977 Term, supra} note 82, at 272-75.

\textsuperscript{345} \textit{See supra} text accompanying notes 288-97. This result was not entirely new under the real party in interest line. \textit{See} Belknap v. Schild, 161 U.S. 10 (1896); Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911); \textit{see also} Field, \textit{The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One}, 126 U. Pa. L. Rev. 515, 521 (1977) (differentiation "for sovereign immunity purposes, between damage actions and those for specific relief has antecedents dating back to the nineteenth century").

Given the availability of statutory remedies for contract claims and the recent enactment of the Federal Tort Claims Act, the disallowance of coercive remedies for merely wrongful acts under \textit{Larson} had the effect of channeling such actions into statutory damage actions, rather than carving out huge areas of government nonaccountability. In 1976, Congress abolished the sovereign immunity defense in actions against the United States for relief other than money damages. 5 U.S.C. § 702 (1982).

\textsuperscript{346} 438 U.S. 478 (1978).

\textsuperscript{347} \textit{Id.} at 495.

\textsuperscript{348} \textit{See infra} text accompanying notes 389-91.
Nevertheless, a constitutional or statutory duty could form the basis for complaints for coercive relief or for damages for breach of ministerial duty. Moreover, the general common law easily incorporated statutory and constitutional norms into prima facie torts or implied rights of action. Thus, a plaintiff could plead a variety of possible harms as was done with mandamus; the violation of statutory or constitutional law could become part of the plaintiff’s case in chief. Plaintiffs began to so plead their cases when, with Congress’ general grant of federal question jurisdiction, such pleading would get them into federal court. The Supreme Court did not seem to find such actions problematic. Nor, apparently, did Congress, which in enacting the 1871 Civil Rights Act must have contemplated that statutory and constitutional violations would be part of the plaintiff’s case in chief. Thus, even for tort actions, the violation of law migrated from a matter of answer and reply to a matter of complaint. The mistaken perception of the modern court in Larson and Butz that torts were less important than legal duties in actions against officers resulted at least in part from such changes in pleading following the grant of general federal question jurisdiction, and, later, the expansion of the scope of section 1983.

2. Damages Actions and the New Hybrid Model

Spalding v. Vilas launched a discretionary model that expanded to cover many federal officials. For state and local officials, however, the Court continued to follow a legality model, particularly when such officials acted pursuant to unconstitutional legislation. The Court’s recognition of legislative immunity for state and local legislators comparable to that for members of Congress,

349. See L. JAFFE, supra note 17, at 152 (describing the derivation of judicial remedies as being from two main sources: (1) statutes which provide for the review of agency actions, and (2) those which have developed through a combination of the common law and statutes which reform or simplify the common law remedies); In re Ayers, 123 U.S. 443, 488-89 (1887). While Chief Justice Marshall’s decision in Madrazo, see supra note 113, could support an argument that a constitutional or statutory violation might be necessary to evade sovereign immunity, a more plausible reading is that the plaintiff must allege an individual wrong by the officer sued. See Currie, supra note 112, at 151.

350. See supra notes 257-60 and accompanying text.

351. See supra notes 268-83 and accompanying text.

352. Id.


354. 161 U.S. 483 (1896).

355. See, e.g., Lane v. Wilson, 307 U.S. 268 (1939) (reinstating damages actions against three county election officials who, pursuant to an Oklahoma statute, refused to register plaintiff to vote); Smith v. Allwright, 321 U.S. 649 (1944) (reinstating damages action against
both in actions directly under the Constitution\textsuperscript{356} and in actions under the 1871 Civil Rights Act,\textsuperscript{357} did not necessarily bode ill for the legality model as applied to executive officials. In recognizing immunity for local legislators at the turn of the century for implied constitutional actions, the Court had reasoned that remedies against the executive made legislative liability unnecessary.\textsuperscript{358} Justice Frankfurter, the author of \textit{Tenney v. Brandhove}, in which the Court recognized legislative immunity for civil rights actions, moreover, agreed elsewhere with the Court that there was no requirement of a showing of "willfulness" for liability of nonimmune officials under section 1983.\textsuperscript{359}

The move toward the current colorable legality model in damages actions against both state and federal officials occurred first through dilution of the legality model for state officials, and then through application of the diluted legality model to federal officers who had previously enjoyed discretionary immunity. The forces behind the compromise were the existence of the two models and their conflicting rationales, including their various manifestations: (1) the conflict between the legality model for damages actions against state officials and the discretion model against federal officials;\textsuperscript{360} (2) the conflict created by having two levels of immunity for federal officials in damages actions; (3) the conflict between allowing coercive relief against all levels of officials based on a legality model, while at the same time denying damages remedies against some officials based on a discretion model;\textsuperscript{361} and (4) a contrary pressure, precinct election judges who refused to permit plaintiff to cast ballot in all-white democratic primary); \textit{see also} Gressman, \textit{supra} note 286, at 1355.


\textsuperscript{358} The Court stated in \textit{New Orleans Waterworks}:

\textit{But the courts will pass the line that separates judicial from legislative authority if by any order or in any mode they assume to control the discretion with which municipal assemblies are invested, when deliberating upon the adoption or rejection of ordinances proposed for their adoption. . . . If an ordinance be passed and is invalid, the jurisdiction of the courts may then be invoked for the protection of private rights that may be violated by its enforcement.}

164 U.S. at 481 (citation omitted).

\textsuperscript{359} \textit{Monroe v. Pape}, 365 U.S. 167, 206-08 (1961) (Frankfurter, J., dissenting in part). Frankfurter, however, wanted to limit section 1983 actions to challenges of behavior considered to be "legal" under state law. \textit{Id.} at 224-46.


\textsuperscript{361} \textit{See, \textit{eg}}, \textit{Sheuer}, 416 U.S. at 248 (finding support in an injunction case, Sterling v.
arising from the expansion of potential grounds for liability against state and federal officials for both damages and coercive relief, to limit percuniary liability because of perceived unfairness to the official and possible "chilling" of official decisionmaking.\textsuperscript{362}

The increased importance of the legal duty strand and the decreased importance of physical torts as a basis of liability may have heightened the perception that officers did not necessarily act wrongfully in a moral sense when they acted illegally. Of course, imposition of liability based on the legality model, while founded on individual responsibility for illegal acts, never purported to be based on willfulness in inflicting harm or in violating the law. Indeed, subjective good faith was no defense to compensatory damages,\textsuperscript{363} even in cases not involving physical torts.\textsuperscript{364} Even had unfairness to the officer been of greater concern in the case law, the early decisions under the 1871 Civil Rights Act would probably have evoked little sympathy for the official, provided one agreed with the substantive standards applied. The cases generally involved denials of voting rights based on explicit racial classifications,\textsuperscript{365} and one does not get the impression that the defendants failed to share the discriminatory animus evident on the face of the rules they enforced. Common law malice would seem to inhere in use of racial criteria.\textsuperscript{366} A sense of unfairness may have grown, however, as potential section 1983 liability reached new areas.\textsuperscript{367} At the same time, the increasing availability of injunctive remedies may have decreased the perception that damages actions were necessary to enforce legal restraints against the executive branch.

As the Court began to move toward a compromise between the legality and discretion models, it more explicitly acknowledged and balanced their competing goals of protecting the citizen and protecting official decisionmaking. In the past, the Court occasionally

\textsuperscript{362} See supra text accompanying notes 293-97; Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532, 1556 (1972) (expressing skepticism of need to protect officials in light of legislative power to substitute officer liability with governmental liability). But see L. Jaffe, supra note 17, at 249 (continued official liability is a means of achieving governmental responsibility).
\textsuperscript{363} See supra notes 89-93, 263-66 and accompanying text.
\textsuperscript{365} See supra notes 286, 334-36.
\textsuperscript{366} See Monroe v. Pape, 365 U.S. 167, 207 (1961) (Frankfurter, J., dissenting in part) (lower courts appeared to base criminal civil rights liability on malevolence rather than willful violation of law); Casto, supra note 62, at 85-87 (discussing various kinds of malice).
adverted to these competing concerns when deciding cases under a legality or discretionary model, while allowing one such concern to trump the other. 368 The qualified immunity cases of the modern era in fact tried to mesh these competing concerns. 369 The result of the conflict between the discretion and legality models was the colorable legality model. For a time, the subjective good faith prong of good faith qualified immunity gave an alternative basis for liability based on actual illegality accompanied by malice, but the Court ultimately discarded subjective good faith as a basis for liability. It reasoned that the subjective prong made dismissal of insubstantial claims before trial difficult, with consequent harms to official decisionmaking. 370

_Pierson v. Ray_ 371 began the dilution of the legality model. 372 Its holding that police had immunity for arrests with probable cause

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368. See, e.g., _Barr v. Matteo_, 360 U.S. 564 (1959):

We are called upon in this case to weigh in a particular context two considerations of high importance which now and again come into sharp conflict—on the one hand, the protection of the individual citizen against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities.

_Id._ at 564-65; _Gregoire v. Biddle_, 177 F.2d 579 (2d Cir. 1949):

It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.


372. See _Casto, supra note 62_, at 68. For decisions in the lower courts preceding _Pierson_, see _K. Davis, supra note 68_, § 26.06.
and good faith was not alone significant;373 "probable cause" defined an objectively legal arrest and the requirement of subjective bona fides gave an additional means to hold an officer liable even if an arrest were made with objective probable cause. The retreat from the legality model came in the Court's statement that probable cause provided immunity from damages for an arrest under an unconstitutional statute.374 This result was inconsistent with prior cases that, quite logically, did not even consider probable cause as an excuse when an officer acted under an unconstitutional statute.375 After all, under the legality model the plaintiff had only to show the action was illegal, not that it was doubly illegal. Probable cause was relevant only when the officer applied valid rules and standards to particular facts.

This recognition of probable cause under an unconstitutional


374. 386 U.S. at 555; Katten, supra note 9, at 968 (common law rule in existence at time of Pierson was that an officer was liable for warrantless arrest made under an unconstitutional statute); see also O'Connor v. Donaldson, 422 U.S. 563, 577 (1975) (appellate court should have considered whether it was an error to refuse defendant's request for an instruction concerning reliance on state law that was later declared unconstitutional); Michigan v. DeFiliippo, 443 U.S. 31, 37-38 (1979) (arrest not unlawful where supported by probable cause under an ordinance that was subsequently invalidated); Engdahl, supra note 31, at 54; Casto, supra note 62, at 64.

Also, in recognizing judicial immunity for a police magistrate, the Court finally discarded the distinction between inferior and superior court judges for judicial immunity. 386 U.S. at 553-54. Previously, the Court had ignored this distinction. Adair v. Bank of America, 303 U.S. 350, 358 (1938) (acts of conciliation commissioner for bankruptcy court would be judicially immune). For discussion indicating that Congress did not intend state and local judges to be immune from section 1983 liability, see Kates, Immunity of State Judges Under the Federal Civil Rights Acts: Pierson v. Ray Reconsidered, 65 Nw. U. L. Rev. 615, 621-23 (1970).

375. See, e.g., Scott v. Donald, 165 U.S. 58 (1897) (constables held liable for damages caused by seizure under statute which violated the commerce clause); Myers v. Anderson, 238 U.S. 368 (1915) (election officials liable for damages where they denied persons the right to vote pursuant to a state law which violated the fifteenth amendment); Lane v. Wilson, 307 U.S. 268 (1939) (reinstating damages action against three county election officials who refused to register plaintiff to vote pursuant to Oklahoma statute); White v. Greenhow, 114 U.S. 307 (1885) (damages for seizure of property under state statutes impairing obligation of contract); Nixon v. Herndon, 273 U.S. 536 (1927) (reinstating damages action against election official for denying plaintiff right to vote pursuant to state statute excluding blacks from Democratic primary); cf. Nixon v. Condon, 286 U.S. 73 (1932) (reinstating damage action against Texas election judges for refusal to permit blacks to vote pursuant to party rule); Chaffin v. Taylor, 114 U.S. 309 (1884) (state court trespass action against collector for seizing property after plaintiff tendered coupons, despite state's attempt to abrogate action); Smith v. Allwright, 321 U.S. 649 (1944) (overruling Grovey v. Townsend, 295 U.S. 45 (1935), and reinstating damages action against election judges who refused to permit plaintiff to cast ballot in all white primary).
statute as a defense eviscerated the historic role of damages actions against individual officials as a means to test the constitutionality of legislation. By this time, however, other means to test legislation were widely available.376 One reason damages actions have been a significant means of testing voting legislation was because of the Court's limitations on the availability of equity to protect "political" rights,377 limitations that the Court had largely abandoned by the time of Pierson.378 Also, the Court's subsequent decision that local subdivisions are persons suable under section 1983,379 and that they are not entitled to a good faith immunity from damages380 for their policies or practices, have made damages available as remedies for unconstitutional local legislation. It is nevertheless typical of the frequent doctrinal reversals in federal jurisdiction381 that what was once perhaps the easiest theory for recovery of damages against individual officials, and indeed what some members of the Court would have made practically the exclusive theory for recovery382 (that is, behavior of an official under unconstitutional legislation),383 now became one of the most difficult.

The Court subsequently imported a variant of the two-pronged probable cause and good faith immunity to nonpolice contexts.384

376. See supra note 249.
377. Giles v. Harris, 189 U.S. 475, 486 (1903) (equity traditionally has not provided a remedy for political wrongs).
381. See supra notes 343-48 and accompanying text.
382. Monroe v. Pape, 365 U.S. at 242 (Frankfurter, J., dissenting in part); cf. Barney v. New York, 193 U.S. 430 (1904) (acts illegal under state law were found not to be deprivations of property by state under fourteenth amendment). But cf. Home Tel. & Tel. v. Los Angeles, 227 U.S. 278 (1913) (state constitution's due process provision did not bar federal court action alleging confiscatory rates); HART & WECHSLER, supra note 201, at 942-43 (Barney complaint primarily alleged due process violation not because of intrinsic nature of act, but because of violation of state law).
383. A caveat to this generalization was the occasionally invoked doctrine that an officer would not be judicially compelled to violate the positive commands of state law. See C. JACOBS, supra note 113, at 125, 158. It is unclear that this principle ever resulted in recovery being barred for physical trespass as distinguished from other acts that would have amounted to enforcement of state contracts. See, e.g., Louisiana v. Jumel, 107 U.S. 711 (1882). In addition, the Federal Tort Claims Act of 1946 contained an exception to government liability for "[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation be valid." 28 U.S.C. § 2680(a) (1982) (60 Stat. 845, Aug. 2, 1946).
384. In Scheuer v. Rhodes, 416 U.S. 232 (1974), the Court held that high level state officials were entitled to qualified immunity for their actions in calling out and directing the National Guard during campus demonstrations. Id. at 238-49. A police-like standard makes
In *Wood v. Strickland*, the court outlined a two-pronged qualified immunity for school officials. The subjective standard, as for police in *Pierson*, was common law malice. The objective prong asked not whether the officials' actions were actually legal, as when police arrest erroneously but with probable cause under a valid statute, but whether the officials' conduct violated clearly established legal norms. Thus, instead of the critical liability issue being whether the officer acted under an illegal standard (the pre-*Pierson* standard), or failed to act with probable cause (legally) under a lawful standard, the question became whether or not the behavior was grossly illegal; almost-legal behavior was immune from damages.

The dilution of the legality model in section 1983 damages actions made it easier for the Court to modify discretionary immunity for white-collar federal officials. In *Butz v. Economou*, the Court adopted the two-pronged qualified immunity standard of *Wood v. Strickland* for federal officers. The majority and the dissent both claimed the blessing of history for their positions. In fact, history to some extent supported both positions because of the independent strands of legality and discretion. Justice White, writing for the ma-

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386. *Id.* at 321.
387. *Id.* at 322.
388. *See* Procurier v. Navarette, 434 U.S. 555, 565 (1978); Butz v. Economou, 438 U.S. 478, 507 (1978); Kamisar, *supra* note 80, at 585-86 n.236. Professor Kamisar noted the difficulty of the objective good faith standard in the police context: "What might be called 'reasonable grounds to believe there was reasonable grounds to believe' that a crime had occurred (or was occurring) or that evidence of crime would be found in a particular case although there were no really reasonable grounds to believe this was so." (emphasis in original) *Id.* at 587; *see also* Newman, *supra* note 3, at 460-61; Theis, "Good Faith" as a Defense for Police Deprivations of Individual Rights, 59 Minn. L. Rev. 991, 992 (1975).
majority, attempted to reconcile cases decided under the legality model with those under the discretion model by reasoning that the discretion cases, such as *Spalding v. Vilas* and *Barr v. Matteo*, involved mere common law torts rather than violation of constitutional and statutory norms, and concluded that office-wide immunity existed for the former and not the latter. Thus *Butz* did for damages what *Larson* did for injunctions: it magnified the importance of the legal duty strand for suits against individual officers, and diminished the tort strand.

Justice Rehnquist, dissenting in *Butz*, was correct that *Spalding* and *Barr* intended to apply broad discretionary immunity even for violations of constitutional and statutory rights, excepting perhaps the clearest excesses of authority. His dissent thus would have retained discretionary immunity for federal officials excepting the lower ranks, in the Taney style. Justice Rehnquist, however, did not fully take into account the historical support for a legality model, even as against federal officials. He distinguished *Marbury* as a case for "equitable-type relief." Yet, in the nineteenth century, the availability of mandamus and injunctions coincided with the availability of damages against executive officials. Indeed, amenability of the official to a damages action implied that the official was subject to coercive relief when damages were immeasurable or too large.

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392. 438 U.S. at 495; *see also* Nixon v. Fitzgerald, 457 U.S. 731, 746-47 (1982) (characterizing *Butz* as considering for the first time federal executive immunity for constitutional violations); Harlow v. Fitzgerald, 457 U.S. 800, 807-80 (1982) (characterizing *Spalding* and *Barr* as providing absolute immunity for suits at common law); *Note, supra* note 47, at 630-31 (citing lower court precedent for common law/constitutional distinction); *id.* at 639-43 (criticizing the distinction and ultimately rejecting limitation of *Barr* to defamation actions); Schuck, *supra* note 2, at 324 (criticizing distinction).
393. 438 U.S. at 518-19, 522. Certainly the judicial immunity from which *Spalding* and *Barr* arose contemplated that judges would be immune for all but clear excesses of jurisdiction. *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351-52 (1871); *see also* *Note, supra* note 47, at 645 (*Barr* and section 1983 cases irreconcilable).
394. 5 U.S. (1 Cranch) 137 (1803).
395. 438 U.S. at 523.
396. *See supra* text accompanying notes 112-17, 149-52; Byse & Fiocca, *supra* note 78, at 322 (injunctive relief against individual officers rests on the same theory as damages actions, "namely, the answerability of a Government officer as a private individual for conduct injurious to another, and depends upon the assumption that unless enjoined the officer will commit acts which will entitle the plaintiff to maintain an action for damages").
397. *See supra* notes 115-17 and accompanying text.
3. *The Short Life of Subjective Good Faith*

The Court’s final step to a colorable legality standard for executive officers, excepting the President, occurred by the excision of the subjective good faith requirement, \(^\text{398}\) which had allowed courts to decide some cases on the basis of the actual illegality of the official’s actions if combined with common law malice. The Court’s reasoning was typical discretion-mode; the subjective prong of qualified immunity made it difficult to dismiss suits on summary judgment prior to trial, and the burden of trial chilled fearless decisionmaking.\(^\text{399}\)

Prior to *Pierson v. Ray* and *Wood v. Strickland*, subjective good faith had little importance in defining the scope of official immunity.\(^\text{400}\) Subjective bona fides were equally insignificant to both the legality and discretion models. Under the legality model of the Marshall Court, objective illegality determined liability for compensatory damages, and absence of malice was primarily significant as a defense to exemplary damages.\(^\text{401}\) If a statute provided for seizures upon honest belief, then subjective good faith was critical, but only because the standard for a legal seizure so provided.\(^\text{402}\)

Subjective good faith played little role in cases against state and local officers and federal lower level officials in the Taney Court,\(^\text{403}\) and continued to be largely irrelevant to damages actions for the remainder of the century.\(^\text{404}\) Directions of a superior did not excuse illegal exactions,\(^\text{405}\) nor did the good faith of the official relieve him or her of liability for compensatory damages for actions under an unconstitutional statute.\(^\text{406}\) Similarly, in early section 1983 dam-

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399. *Id.* at 814. The usual litany of harms to judgment, however, were now termed “social costs.” *Id.*
401. See *supra* notes 89-92 and accompanying text.
402. See *supra* notes 123-25.
403. E.g., Rogers v. Marshal, 68 U.S. (1 Wall.) 644, 650-51 (1863) (court assumed in dicta that marshal would be liable for deputy's error in altering bond).
404. E.g., Buck v. Colbath, 70 U.S. (3 Wall.) 334, 344 (1865) (error in judgment in seizing wrong property under general writ of seizure could subject marshal to liability); cf. Beckwith v. Bean, 98 U.S. 266 (1878) (two captains arrested plaintiff, whom they suspected of abetting desertion, without warrant and held him without bringing before a magistrate, deposition tending to show plaintiff was guilty should have been admitted to mitigate punitive damages); Bates v. Clark, 95 U.S. 204 (1877) (captain who seized liquor outside Indian territory liable for trespass; good faith would be defense if punitive damages had been sought).
405. See *supra* note 94.
406. See, e.g., Scott v. Donald, 165 U.S. 58 (1897) (federal court damages action for seizures under unconstitutional statute); Chaffin v. Taylor, 114 U.S. 309 (1884) (state court
ages actions enforcing voting rights, subjective good faith was not a factor. Only in a few cases, involving special statutes and emergency conditions, did the Court allow subjective good faith as a defense to compensatory damages.

Subjective good faith was of comparable insignificance where officials enjoyed discretionary immunity. Good faith was mentioned frequently as a boundary of immunity for the exercise of judgment, and occasionally was decisive. Many cases retreated from the malice exception to discretionary immunity, however, when a plaintiff actually made such an allegation. Thus, in a judicial immunity case, Randall v. Brigham, the Court said in dicta that malice might limit a superior court judge's immunity. Three years later, however, the Court decided that a plaintiff’s allegation of malice in a damages action against a judge added nothing to the claim. In recognizing executive immunity by analogy to judicial immunity, Spalding v. Vilas similarly concluded that an allegation of malice did not disturb discretionary immunity. Thus, where officers enjoyed discretionary immunity, the lack of subjective good faith played little role in decisions.

trespass action for seizure of property pursuant to unconstitutional statute); White v. Greenhow, 114 U.S. 307 (1884) (federal court damages action against official who seized property pursuant to unconstitutional statute).


408. Moyer v. Peabody, 212 U.S. 78 (1909) (seizure of plaintiff during insurrection without reasonable ground, but made in good faith and based on honest belief, not actionable); see also Crowell v. McFadon, 12 U.S. (8 Cranch) 94 (1814) (embargo laws authorized customs inspectors to detain vessel if honest belief regarding violation); Otis v. Watkins, 13 U.S. (9 Cranch) 339 (1815) (inspector, suspecting violation of embargo laws, had no duty to use reasonable care in forming opinion; honest and fair belief is enough).

409. E.g., Wilkes v. Dinsman, 48 U.S. (7 How.) 89, 130-31 (1849) (trespass action by marine against commanding officer); South v. Maryland, 59 U.S. (18 How.) 396, 403 (1855) (no action against sheriff for failure to preserve public peace).

410. Dinsman v. Wilkes, 53 U.S. (12 How.) 390, 404-05 (1851) (malice or vindictive feeling was exception from commander's immunity for incorrect exercise of judgment).

411. See Block, supra note 44, at 900-01; see also Jennings, supra note 44, at 272-73. But cf Dinsman, supra note 44, at 390-05.

412. 74 U.S. (7 Wall.) 523 (1868).

413. Id. at 537.


415. See supra note 322.


417. Subjective good faith may have played a larger role in lower court cases. See Borchard, supra note 155, at 8 n.23.
The relative insignificance of subjective good faith in Supreme Court immunity decisions prior to the modern era does not necessarily imply that it was an illegitimate consideration. Rather, the two-pronged qualified immunity standard of *Wood v. Strickland* was closer to the legality model than the single-pronged *Harlow v. Fitzgerald* standard based entirely on the activity's proximity to, but not actual, legality. The subjective prong at least made actual illegality, rather than gross illegality, a relevant standard in damages cases, when actual illegality was combined with subjective bad faith.  

4. *The Colorable Legality Standard's Effect on Judicial Control of Executive Action*

When the Court's current colorable legality standard is added to the Court's treatment of district court denials of qualified immunity on summary judgment as appealable final orders, only cases in which the plaintiff alleges violations of clearly established constitutional norms will go to trial. Justice White recently stated, "As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Thus, contrary to even the expectations of Justice Frankfurter, plaintiffs in section 1983 damages actions against individual officials must show something close to a willful violation of law. The role of the damages action against individual officers in developing the interstices of the law in abuse of power cases, as well as in cases of unconstitutional legislation, thus has been largely eliminated.


420. Cf. *Note, Qualified Immunity for Government Officials: The Problems of Unconstitutional Purpose in Civil Rights Legislation*, 95 YALE L.J. 126 (1985) (courts may misinterpret current *Harlow* standard to mean cases should be dismissed when substantive standard includes element of intent).


423. Justice Rehnquist would like to limit attorney's fee recovery in civil right actions not only by reference to the dollar amount of damages, but also as to whether the case established new law. See *City of Riverside v. Rivera*, 106 S. Ct. 5, 7 (1985) (in chambers opinion of
If the denial of a remedy for every violation of a right is insufferable, then the colorable legality model is likewise, because a large body of harms will go uncompensated.\(^{424}\) A less extreme position is that the legal system need not provide compensation for every cognizable harm caused by government, but should not systematically fail to review any particular class of illegal official behavior.\(^{425}\) This approach looks to whether alternative remedies, including injunctive relief and defenses to government suits, provide effective remedies for violations and disincentives for official misbehavior.

The colorable legality model for immunity in damages actions does not lead to systematic failure to review legislative action, despite its tendency to suppress damages suits.\(^{426}\) Illegal legislation will continue to be subject to judicial review because of the use of the legality standard in injunction cases. The prospective nature of legislation avoids mootness problems; anticipatory remedies, moreover, obviate many hard choices that discourage review of unconstitutional legislation if allowed only by way of defense in criminal proceedings.\(^{427}\) Damages actions supplement injunctive remedies for harms caused by illegal local legislation, although generally not for state or federal.

In contrast to review of legislative action, review of executive action will be more systematically diluted by the colorable legality model. While legislation, owing to its prospective nature, is generally the proper subject of an injunction, abuse of executive authority may tend to inflict more random, completed, and noncontinuing (as to a particular individual) harms, for which neither anticipatory nor

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425. There are many variations of this position. Compare Monaghan, Forward: Constitutional Common Law, 89 Harv. L. Rev. 1, 29 (1975) (particular remedies may not be required as long as substitutes are adequate) with Dellinger, supra note 361, at 1551 ("The focus should then be upon whether there are other remedies available to those in the plaintiff's position that would as fully effectuate the purposes of the constitutional guarantee as the remedy sought," and noting that persons in Bivens' shoes are not effectively protected by exclusionary rule); see also L. Jaffe, supra note 17, at 250-51; Hill, supra note 79, at 1153 n.186; Kamisar, supra note 80, at 596 (good faith immunity for officers in damages actions, coupled with local governmental liability and exclusionary rule, would accomplish "systemic deterrence").

426. See supra text accompanying notes 373-82.

427. Ex parte Young, 209 U.S. 123 (1908). However, Mertens and Wasserstrom point out that criminal procedural statutes, as distinguished from substantive criminal statutes, may escape effective challenge if the Court adopts a good faith exception to the exclusionary rule. Mertens & Wasserstrom, supra note 92, at 426-27.
injunctive remedies are effective. Indeed, the Court recognized *Bivens* actions because such harms may systematically go unredressed. The random and noncontinuing nature of, for example, police investigative abuses, does not mean that such abuses are not frequently repeated. Nevertheless, successfully characterizing such behavior as a pattern or practice in order to hold local government liable, or seeking class relief to avoid mootness, may be impossible given the unpredictability of future victims.

One could argue that sufficient incentives exist for criminal defendants to raise and argue police violations of law, and for police not to commit them in the criminal process. This argument has little force for investigative abuses in cases that the government does not prosecute. Government investigation of dissidents is an area that one would surmise has a low level of prosecution in relation to government investigative abuses. Even for the classes of investigative abuse that more often lead to prosecution, the development of a good faith exception to the exclusionary rule in criminal proceedings would make the decisive standard in criminal contexts not

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428. *Bivens* v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring) ("It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court. . . . For people in Bivens' shoes, it is damages or nothing."); see Jaffe, supra note 49, at 214; Katz, *supra* note 46, at 38-39.


432. See *L. JAFFE*, *supra* note 17, at 250 ("Improperly seized evidence may be excluded, and thus fairly effective deterrence of police abuse is possible without the anomaly of awarding damages to a person for the embarrassment caused him by production of evidence relevant to his civil or criminal liability"); Mertens & Wasserstrom, *supra* note 92, at 365 (court pronouncements of fourth amendment law have systemic effects on police behavior); Hill, *supra* note 79, at 1150 (prior to Weeks v. United States, 232 U.S. 383 (1914), a citizen seeking to enforce fourth amendment rights could sue only in trespass). *But cf.* Newman, *supra* note 3, at 448-49 (little deterrence from exclusionary rule).

actual legality but near legality. Thus, the fourth amendment would be effectively redefined, quite apart from the more explicit dilutions of the probable cause standard, since neither civil nor criminal procedural remedies would be available absent a showing that the police officer was not only lacking probable cause, but was not even close.

Entitlement to immunity based on being close to a legal standard rather than on the legal standard itself naturally tends to obscure and dilute the underlying rule. Hard cases might be decided merely by finding that an official acted in the gray area surrounding the legal standard. The next case, even further from the original standard, might be close enough to the last case that the officer would be in objective good faith. Such dilution could foreseeably


435. Leon, 468 U.S. at 916-17 n.15 (Brennan, J., dissenting) (courts will focus on good faith of officers rather than reviewing sufficiency of affidavits on which warrants issue); Mertens & Wasserstrom, supra note 92, at 457-62 (attack on exclusionary rule is really substantive attack on fourth amendment); Newman, supra note 3, at 460 (“But if the plaintiff’s own case requires him to show an arrest that was not reasonably based on probable cause, what does the defense mean? Surely the officer could not reasonably believe that there was probable cause for an unlawful arrest, for an unlawful arrest is by definition an arrest for which a prudent police officer could not reasonably believe there was probable cause.”); cf. Ashcroft v. Mattis, 431 U.S. 171 (per curiam) (1976) (once officers’ defense of good faith was established, there was no case or controversy; plaintiff could not seek declaration that state statute allowing use of deadly force was unconstitutional). But cf. Tennessee v. Garner, 105 S. Ct. 1694, 1701 (1985) (finding statute unconstitutional on review after district court dismissal and appellate reinstatement of damages action against police officer and city).

Justice White has argued that a good faith immunity in civil actions supports a good faith exception to the exclusionary rule. Stone v. Powell, 428 U.S. 465, 540-42 (1975) (White, J., dissenting); Illinois v. Gates, 462 U.S. 213, 266 (1983) (White, J., concurring) (discussed in Kamisar, supra note 80, at 583-94). The dilution of the legality standard in civil actions, however, should make its maintenance more important in criminal cases.


437. Mertens & Wasserstrom, supra note 92, at 401-06, 448-49.

Whether the constitutional right must be recognized by the Supreme Court or by lower courts is unclear. See Procunier v. Navarette, 434 U.S. 555, 565 (1978); Schuck, supra note 2, at 328 (uncertainty of law is problematic when applying the good faith standard); Developments, supra note 384, at 1216-17 (same); Casto, supra note 62, at 92-94 (urging that “[e]ven a well-reasoned, dissenting opinion or scholarly comment can be an indication that the law is unsettled”, and suggesting a general reasonableness standard in lieu of a clearly established constitutional law standard. Id. at 116-18); Gressman, supra note 286, at 1353 (“It is difficult to convince a jury that the defendant . . . knew of a specific federal right as spelled out by a badly-split Supreme Court decision and willfully intended to deprive his victim of that right.”); Freed, supra note 305, at 561 (problems with settled law approach include overprotection of “culpable federal officials,” and a tendency to use it “to avoid deciding the merits altogether”).
occur in fourth amendment standards if near legality became the standard for the exclusionary rule and civil damages. Violations of first amendment rights of individual, non-civil-service government employees, is another area where good faith immunity may tend to dilute standards. While injunctive relief is a remedy in such actions, the prospects of equity relief may provide insufficient incentives for suit.438 Furthermore, the liability of the government for damages under Monell439 and Owen440 may be doubtful, because of the Court's "policy and practice" requirement.441

The Court's licensing of official behavior that falls within the twilight of legality has not been accidental. Indeed, particularly in the context of police action—where illegal behavior may aid in the apprehension of criminals—many members of the Court view official illegality as beneficial to society, and view conformity to legal standards as too socially expensive.442

The solicitude of the Court for the exercise of power by the official, as opposed to the exercise of rights by the citizen, has led to odd imbalances. While citizens are generally subjected to civil liability in their professional lives according to the evolving standards of tort law, government officials' professional liability requires a prior clear statement of the law, and a willful or constructively willful violation.443 Mistake of law, generally not even a defense to

438. Requests for injunctive relief in individual actions have a tendency toward mootness. Because preliminary injunctions are rarely available for interlocutory reinstatement, discharged employees tend to obtain other jobs by the time of trial. Hostility engendered by the suit and the action that gave rise to it may make a return to former employment undesirable. The incumbency of an "innocent" replacement may further discourage a court from granting injunctive relief even when the plaintiff wants it. When combined with a legal standard narrowly defining protected employee speech and allowing great deference to the government employer's perception of disruptiveness, see Connick v. Myers, 461 U.S. 138 (1983), the additional gray area of colorable legality surrounding the standard makes damages from an individual official unlikely. Yet the intent to discriminate because of speech which, like racial criteria, may inherently involve an element of common law malice, may be present in such cases.

441. See Pembaur v. City of Cincinnati, 106 S. Ct. 1292, 1300 (1986). Pembaur's requirement of a decision by a final decisionmaker may create difficulties in proving a substantive violation by the entity, particularly where the speech-motivated decision is made by an official whose decision is later approved by a higher body.
443. It may be argued, however, that government officials affect citizens' interests in ways that private parties do not. See, e.g., P. Schuck, supra note 71, at 62-64. Whether this suggests an increase or decrease in potential official liability is unclear. The distinction of public officials based on their supposed obligation to act, id. at 62, seems strained given that most privately employed persons are similarly obligated to act or end their employment. Schuck also distinguishes public employees from private individuals in that their obligation to
criminal liability, is now a defense to civil liability for government officials. In suits by citizens against government officials, moreover, the official has a right to summary judgment if his alleged behavior does not meet this standard of willfulness and the denial of summary judgment is an appealable final order. The citizen has no comparable right to appeal if dismissal is denied in most government actions. Indeed, the interlocutory harms suffered by a citizen as a result of erroneous and even uncolorable government actions are a harm which our legal system generally requires the citizen to bear.

The concern that officials not be hedged in by the Constitution has manifested itself in both substantive and procedural decisions outside of the immunity area. The standard for deciding cases in which a government employee alleges a discharge violative of the first amendment is more concerned that government officials will be chilled in making efficient decisions than that government employees will be chilled in the exercise of first amendment rights. Heightened review of the facts in first amendment cases, initially

act differs from the no-duty rule in tort. *Id.* at 63. But public employees are rarely held liable for failure to act, given that most constitutional guarantees are either negative or ensure equal treatment. It is critical to Schuck's thesis that officials are over deterred by the threat of individual liability for damages, *id.* at 68-70; moreover, that there are relatively few penalties attached to inaction. *Id.* at 65, 71-73.

It is also sometimes pointed out that public officials differ from private persons in that they cannot internalize benefits of their risky behavior. *Id.* at 68-69; *see also* Cass, *supra* note 76, at 1136-38 (four models of official behavior based upon whether or not the benefits and/or costs associated with the action are internalized by the official-actor). Similar indirection of incentives exists for most private employees. It is true, however, that given the difficulty of measuring the benefits government produces, and the inability of agencies to internalize such benefits, *see* Olson, *supra* note 295, at 72-73, there may be fewer incentives for public employees to engage in productive behavior than there are for private employees.


Grand juries and preliminary hearings are supposed to guard against uncolorable prosecutions. Damages, however, may be available against non-prosecutorial parties who initiate government proceedings. *See,* e.g., Pizzolato v. Perez, 524 F. Supp. 914, 926 (E.D. La. 1981) (granting injunction against prosecution and damages against non-prosecutorial defendants for bad faith prosecution); *see also* Adickes v. Kress, 398 U.S. 144, 150-52 (1970) (private parties conspiring with state officials can be liable under section 1983). In addition, attorneys' fees may now be awarded under the Equal Access to Justice Act, 28 U.S.C. § 2412 (1982), if the federal government's litigation position was not substantially justified.

invoked to protect the citizen, has more recently been invoked to protect the official. The Court has reinterpreted the "adequate and independent state ground" doctrine—which frequently disallowed review where a state court decided issues on both state and federal grounds—in order to allow more review of state executives' claims of overenforcement of constitutional norms by its own courts.

Thus, the Court has taken care to see that constitutional norms are not overenforced, and has implied that underenforcement may be beneficial for society. That overenforcement of certain constitutional values may lead to undermining other constitutional values is clear. This was particularly true during the Lochner era when solicitude for individual rights of contract thwarted majoritarian self-government. Concern for such overenforcement in fact led to Congress' creation of certiorari. This concern for majoritarian self-government, however, is of less magnitude when its focus is executive behavior rather than legislation. Yet, it is executive misbehavior that has been the primary beneficiary of the Court's indulgence, and that is more likely to escape effective review than legislation under the current scheme of immunities. Most executive officials who enjoy immunity are not elected, and any individual decision of even an elected official is not a direct product of an expression of a constituency, much less of legislative collegiality or judicial due process. The value served, then, aside from the fact

448. Id. at 150-51 & n.10.
450. Nichol, Backing Into the Future: The Burger Court and the Federal Forum, 30 Kan. L. Rev. 342, 344 (1982) (Burger Court has made clear statement that "federal enforcement of constitutional rights takes a back seat to values such as comity, deference, and claimed judicial restraint"); see also A. BICKEL, THE LEAST DANGEROUS BRANCH 143 (2d ed. 1986) ("We enjoy, after all, more freedoms (which is to say, more convenient social disorderliness) than the rule of principle should, or the judges could guarantee us . . .[b]ut . . . the judges have no duty to officiously encourage majoritarian forces of order, which will speak for themselves"); Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 Harv. L. Rev. 1212, 1227 (1978) (public officials have an obligation in some cases to regulate their behavior by higher standards than those imposed by federal judiciary, because reasons of competence and institutional propriety may lead court to underenforce constitutional norms).
452. Cf. A. BICKEL, supra note 450, at 17, 161 (2d ed. 1986) (bureaucracy does not have national electoral mandate). But cf. id. at 18, 193 (concluding executive is most majoritarian branch, but based in part on malapportionment of legislature).
that a judicial decision whether to intervene or not always margin-
ally changes balance of powers (although whether one "redresses"
or "creates" imbalance is a matter of opinion), is primarily the sub-
constitutional value of perceived efficiency. 453

IV. DIRECTIONS AND LIMITS OF FUNCTIONAL IMMUNITIES

Despite the general prevalence of the colorable legality model
for damages immunity for executive officials, the Supreme Court
maintains discretionary model immunity for the President. 454 In
Nixon v. Fitzgerald, the Court's reasons for upholding presidential
immunity were the usual discretionary immunity justifications, 455
such as chill to fearless decisionmaking and distractions of trial. 456
In addition, the Court relied on the President's unique position in
the constitutional scheme. 457 Reminiscent of Spalding, the Court
pointed to judicial immunity as supporting executive immunity,
while ignoring the non-correlative judicial process limitations of the
former. 458 Also typical of the discretion model when applied to ex-
ecutive officers, presidential immunity had no natural boundaries.
Immunity for judges and legislators extends to the outer perimeter
of their judicial or legislative acts. Because there are processes that
define and limit judicial and legislative acts, judges and legislators
do not enjoy immunity for acts within the entire scope of their em-
ployment. 459 No such definable limits exist for executive acts, how-
ever, and the Nixon Court did not attempt to draw any lines.

453. See L. Tribe, supra note 441, at viii.
454. Nixon v. Fitzgerald, 457 U.S. 731, 756 (1982). Nixon was a 5-4 decision, in which
three justices who dissented from the departure from discretionary immunity for high level
federal officials in Butz, along with Justices Powell and O'Connor, comprised the majority.
The four dissenters in Nixon consisted of the Butz majority minus Justice Powell.
455. See supra notes 68-70 and accompanying text.
457. Id. at 749-54. Chief Justice Burger's concurrence particularly emphasized separa-
tion of power concerns. Id. at 760-63. The Court also noted that the President would be a
.target for litigation, as would be judges and prosecutors absent immunity. The Court ac-
knowledged, however, a lack of empirical evidence that unhappy citizens frequently sued the
President.
458. Id. at 758 n.41; see also id. at 763 n.5 (Burger, C.J., concurring). Justice White's
dissent pointed out that, "Judges are absolutely immune from liability for damages, but only
when performing a judicial function." Id. at 766. The Court also pointed to legislative immu-
nity, id. at 758 n.41, ignoring the general lack of enforcement powers of legislators, and
the limitations on types of harms they are privileged to inflict. See supra text accompanying
notes 20-24; see also 457 U.S. at 765 (White, J., dissenting) (members of Congress only im-
459. See, e.g., Nixon v. Fitzgerald, 457 U.S. at 765-66 (White, J., dissenting) (legislative
and judicial immunity only covers legislative and judicial acts); The Supreme Court, 1981
Term, supra note 367, at 230.
Presidential immunity thus resembled its precursors in the Taney Court, which immunized the "general doings" of cabinet officials.\textsuperscript{460} A corollary to the discretion model's intraoffice limitlessness is its interoffice limitlessness.\textsuperscript{461} If the undefined mass of Presidential functions are immune, the functionally similar, undefined mass of functions of other executive officials should similarly be protected.\textsuperscript{462} The separation of powers and political accountability arguments for immunity, however, weaken as one moves down the executive hierarchy. Thus far, the Court has resisted requests to expand Presidential immunity to aides and cabinet officials, despite their exercise of slices of presidential power.\textsuperscript{463} Ironically, it is the amorphous nature of presidential immunity that has made the Court reluctant to extend the immunity to nonpresidential officials.\textsuperscript{464} The \textit{Nixon} decision, however, invites cabinet officials, presidential aides, and governors to keep trying, in hopes of a new Court majority. If the Court should recognize cabinet-level immunity, executive officials of even less stature will no doubt raise claims for absolute immunity. The expansion of immunity in the era between \textit{Spalding v. Vilas} and \textit{Barr v. Matteo} could provide a pattern for future incursions on government accountability.

For the moment, however, presidential immunity represents a unique divergence from the norm of qualified immunity for executive officials.\textsuperscript{465} If the Court does not extend discretionary immunity to lower-level executive officials, presidential immunity by itself will not seriously rend the fabric of executive accountability, for the President can cause few harms without the assistance of nonimmune officials.\textsuperscript{466} Allowing presidential immunity, moreover, may avoid the most direct conflicts between the coordinate branches,

\textsuperscript{460} Reeside v. Walker, 52 U.S. (11 How.) 272, 290, (1850) (mandamus cannot lie against the head of a department for actions involving his general duties).
\textsuperscript{461} See supra text accompanying notes 71-79.
\textsuperscript{462} See Strauss, supra note 1, at 629.
\textsuperscript{464} Harlow, 457 U.S. at 810-11 (undifferentiated extension of absolute presidential immunity to presidential aides inconsistent with functional approach).
\textsuperscript{466} See The Supreme Court, 1981 Term, supra note 367, at 232. One could analogize the President to legislators, who do not actually execute the laws. See supra text accompanying notes 30-31. Since the President does, however, execute the laws, and may affect citizens' interests more directly than can immune legislative activities, Nixon v. Fitzgerald, 457 U.S. at 765 (White, J., dissenting), the analogy is imperfect.
and, hence, may enhance overall the vitality of judicial review.\textsuperscript{467}

While discretionary immunity could expand by analogizing lower level officials' actions to presidential ones, expansion of executive immunities could also occur by analogizing executive functions to those of legislators and judges.\textsuperscript{468} The revolution in procedural due process has brought various diluted forms of judicial due process into the executive branch. The Court, in imposing requirements that administrative officials accord procedural due process, no doubt meant to enhance official accountability. If, however, the Court interpreted compliance with procedural due process within the executive branch as automatically implying judicial-style immunity for executive officers who conduct quasijudicial proceedings, the Court effectively would have substituted diluted due process within the executive branch for judicial due process.

Certain advantages of executive due process may exist over judicial remedies against individual officials that could make them a substantially equivalent substitute. The executive branch may accord predeprivation remedies without individualized showings of irreparable harm. Much executive due process, however, occurs postdeprivation.\textsuperscript{469} In recent years, executive due process has enjoyed the advantage over suits against executive officials of using actual, rather than colorable legality, as its determinative standard for monetary relief.\textsuperscript{470} The citizen could thus find that executive due process more reliably provides monetary remedies. These monetary remedies, however, are more circumscribed than those pro-

\textsuperscript{467} While the Court has expressed reluctance to entertain the idea that its decrees might be disobeyed, see, e.g., Powell v. McCormack, 395 U.S. 486, 549 (1969); McPherson v. Blacker, 146 U.S. 1, 24 (1892), certainly such disobedience may be less likely when the Court controls the President's behavior through subpresidential officials. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653-54 (1952) (Jackson, J., concurring) ("By his prestige as head of state and his influence upon public opinion he exerts a leverage upon those who are supposed to check and balance his power which often cancels their effectiveness.").

\textsuperscript{468} The Court's imposition of procedural due process requirements on executive officials, and the existence of administrative agencies with hybrid functions, have predictably led to claims for judicial and legislative immunity by executive branch officials. See, e.g., Cleavinger, 106 S. Ct. at 496; Butz v. Economou, 438 U.S. 478, 508-17 (1978) (federal agency officials claiming judicial and prosecutorial immunity); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 393 (1979) (individual members of the agency claimed immunity from federal claims since they had acted in their legislative capacity); cf. Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 731-34 (1980) (legislative immunity for judges for promulgating disciplinary rules).


\textsuperscript{470} Because the courts may allow agencies leeway on questions of fact and law, the standard may only approximate that which would be reached in a judicial forum. Deference to agency factfinding particularly may allow for substantial dilution of standards.
vided by judicial due process, since administrative tribunals generally do not grant consequential and punitive damages. Executive due process may, however, provide access to restitutionary remedies, according a reduced burden of proof for the citizen, and at less cost.

The potential benefits of executive due process—predeprivation hearings, reduced expense, and a determination based on legality—are illusory, though, if executive due process does not provide a reliable determination. The disadvantages of executive due process are its reduced reliability because of its lessened formalities, and particularly its provision of less trustworthy decisionmakers. The Court correctly 471 extended judicial immunity into the executive department only where there is both a high degree of formality and an insulated decisionmaker. Federal administrative law judges thus enjoy judicial immunity, 472 while school boards 473 and prison officials, 474 who hear disciplinary proceedings, do not. The independence of the decisionmaker may be the most important factor, 475 not only because it will be correlated with other formalities, but also because it goes to the heart of the trustworthiness of the tribunal. Where an officer combines significant executive functions with judicial functions, the officer may have institutional loyalties to the agency, may be subject to institutional or political pressures, and may not have traditions of judicial professionalism and independence. 476 These concerns will be present even if the officer has no prior connection with the particular case that he or she is deciding. 477 Executives and legislators are supposed to be "political"; the judicial system should not assume that persons who perform execu-

471. See Jennings, supra note 44, at 295, 306-08; The Supreme Court, 1977 Term, supra note 82, at 276.
474. In Cleavinger v. Saxner, 106 S. Ct. 496 (1985), wherein the Court granted only qualified immunity, the Court noted that Butz emphasized
(a) the need to assure that the individual can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; and (f) the correctability of error on appeal.
106 S. Ct. at 501. See Handler & Klein, supra note 47, at 56-59 (emphasizing procedures for vindication as allowing executive immunity for defamation analogous to judicial immunity); Note, supra note 47, at 647 (absolute protection should be accorded officials who bring administrative proceedings with a high degree of formality).
475. See Cleavinger, 106 S. Ct. at 502; Casto, supra note 62, at 111.
476. See Jennings, supra note 44, at 313-14.
tive and legislative functions will suddenly take on the judicial temperament merely because they may provide hearings with a high degree of judicial formality.

If the Court were to extend judicial immunities to decisionmakers who are not truly independent as a matter of both constitutional structure and historical reality, the procedural due process revolution could turn into a counterrevolution. Procedures meant to enhance the accountability of government could undermine it.

A combination of legislative and executive functions in a single individual should similarly suggest lack of immunity. This is not because of lack of trustworthiness, as is the case when officials combine executive and judicial functions; neither legislators nor administrators are paradigmatically nonpolitical and impartial. Rather, the lack of immunity flows from the ability to conceptualize the actionable behavior as at least partly executive, or because the separation of powers concerns are sufficiently reduced that absolute immunity should not be accorded.

Historically, local government bodies that performed hybrid duties have been accorded little immunity from either monetary or injunctive relief. Local governments were frequently sued on their debts in federal courts, which routinely issued writs of mandamus ordering the levy of taxes to compel payment of the judgments. Individual members of subdivision governing boards could be held liable for failure to perform their ministerial duties in raising taxes to pay judgments. In desegregation cases, the federal courts entered systemic injunctive decrees that could include requirements to open schools, make pupil and faculty assignments in a particular way, and raise taxes to support the system. Functional analysis of legislative immunity played no role in these cases. Nor was the Court concerned in Monell that relief may be effectively ordered against the legislature. Indeed, the policy and practice requirement

478. See supra notes 60, 207-08.
479. Amy v. Supervisors, 78 U.S. (11 Wall.) 136, 138 (1870) (supervisors who disobeyed federal mandamus to levy taxes to pay debt individually liable; "[t]he rule is well settled, that where the law requires absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct."); see also Farr v. Thomson, 78 U.S. (11 Wall.) 139 (1870) (affirming the holding of Amy, based substantially on the same set of facts).
480. See, e.g., Griffin v. County School Board of Prince Edward County, 377 U.S. 218, 233-34 (1964) (injunctions to levy taxes and open schools would be appropriate to eradicate racial discrimination).
tends to make entity liability easier to obtain for local legislation than for executive action. The historical record thus suggests that for local government entities, the separation of powers concerns are so reduced, or the functions are so hybrid, that functional analysis serves no purpose.

Functional analysis may, however, be appropriate for state and federal agency officials. For state and federal governments, where legislative and executive functions are separated, the judiciary typically has reviewed legislative action through coercive and damages remedies against the executive. Courts generally will not forbid or require passage of legislation, but may enjoin enforcement of legislation and may require executives to take affirmative acts in the absence of appropriate legislation where necessary to protect individual rights. In deciding a claim for legislative immunity by an agency official, it may be helpful to look to whether there are separate and responsible executing officials against whom effective remedies may be obtained, because remedies against nonimmune officials are a foundation for the recognition of legislative immunity. Combinations of executive and legislative functions should not preclude the ordinary avenues of relief that would be available against the executive if the functions were segregated. Indeed, concerns about ripeness should be lessened, since the assumption that the executive will carry out the will of the legislative branch is particularly strong where legislators and executors are the same persons. Damages should also be more readily available, since the official, acting in his executive capacity, can hardly claim an entitlement to good faith immunity based on his or her following legislative directions.

Where officials combine significant judicial or legislative functions with executive ones, immunity should be reduced to the lowest level with which the official may act with respect to the general class of activity that is the subject of the suit. The tendency to ex-

482. Where there is municipal liability under Monell, individual officer immunities will be largely irrelevant absent a claim for punitive damages, Newport v. Fact Concerts, 453 U.S. 247, 265-66 (1981) (punitive damages not available against political subdivisions in section 1983 actions).

483. Court orders to school boards to submit pupil assignment plans and to defendants in reapportionment suits to submit legislative reapportionment plans could be conceptualized as ordering legislation. Once a Court determines that enforcement of a constitutional plan is necessary to perfect plaintiffs' rights, because an existing plan violates their rights, ordering submission of a constitutional plan for the Court's consideration represents less court interference with a coordinate branch than the Court's adoption of a plan, which does not include the views of the legislature.
pand immunity for executive officials, therefore, should not ignore the fact that judicial due process, rather than mere decisionmaking, underlies judicial immunity, and that availability of effective remedies against nonimmune officials underlies legislative immunity.

V. CONCLUSION

A functional approach to immunities may emphasize harms government officials inflict upon citizens through illegal action, or, conversely, harms citizens inflict on official decisionmaking through lawsuits. Historical antecedents exist for either approach. Changes in official immunity doctrine necessarily reflect alterations in our commitment to the rule of law on the one hand, or deference to executive decisionmaking on the other. Remedies outside of the traditional damages action may alleviate accountability concerns when the Court expands executive immunities. But legislative competence to provide alternative remedies should lessen judicial concern that damages actions will harm executive decisionmaking.484 The current vogue of good faith immunity in damages suits should not obscure that the historic role of suits against government officials was not to punish bad faith behavior, but rather to enforce constitutional and statutory limits on government.

484. See L. JAFFE, supra note 17, at 249; see generally P. SCHUCK, supra note 71.