3-1-1984

Tort Immunity -- Briscoe v. LaHue: Abandonment of the Balancing Approach in Immunity Cases Under Section 1983

Franklin Miller Williams

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol62/iss3/8

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
Tort Immunity—*Briscoe v. LaHue*: Abandonment of the Balancing Approach in Immunity Cases Under Section 1983

Section 1983 of the Civil Rights Act provides a federal tort remedy for any person whose constitutional rights are violated by a person or agency acting "under color of" state law. Since its inception in 1871, federal courts have struggled to develop an approach to reconcile the conflicting policies underlying section 1983 and common-law principles of tort immunity. The courts must consider two competing interests: the individual's right to a remedy under section 1983 and the public's interest in protecting those involved in the judicial process, as well as certain other public officials, from fear and harassment that might impair the performance of their duties. Read literally, the statute "admits of no immunities." Nevertheless, in several cases the Supreme Court has recognized immunity defenses that have severely restricted remedies for individuals under section 1983. In the past, the Court determined whether to extend immunity to a new class of potential defendants by balancing the interests underlying both the immunity defense and the section 1983 remedy. The analysis of competing interests determined not only whether immunity was available, but also whether the immunity was qualified or absolute. In a recent decision, however, the Court brought the con-

---

1. 42 U.S.C. § 1983 (1976) provides:

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1983 originally was enacted in response to violations of constitutional rights perpetrated by the Ku Klux Klan and ignored by state officials. See infra notes 56-62 and accompanying text.


4. While immunity protects the public's interest in the effectiveness of the judicial process, it necessarily cuts off claims that might have merit. Immunity "negates pro tanto the very remedy which it appears Congress sought to create." Imbler v. Pachtman, 424 U.S. 409, 434 (1976) (White, J. concurring).

5. See infra notes 72-90 and accompanying text.


7. Absolute immunity protects the defendant from liability regardless of the defendant's motives or reasonableness of behavior. W. Prosser, *supra* note 6, § 114, at 776-77; see Veeder, *supra* note 2, at 464.

The Court has extended absolute immunity to defendants who perform functions closely associated with the judicial process. See infra notes 63-90 and accompanying text.
TORT IMMUNITY UNDER SECTION 1983

In Briscoe v. LaHue, the Court faced the question whether police officers acting as witnesses should be treated as witnesses entitled to absolute immunity, or as police officers entitled only to qualified immunity. In deciding to extend absolute immunity to policemen who function as witnesses, the Court expressly refused to consider policy arguments that might have justified exceptions for certain classes of witnesses. Although Briscoe may be criticized for the analysis of legislative intent underlying section 1983, the failure to deal with the problem of police perjury, and the creation of confusion concerning immunity analysis in section 1983 cases, the decision supports two important policies: (1) full disclosure of the truth in judicial proceedings and (2) prevention of frivolous lawsuits.

The controversy in Briscoe arose out of two separate criminal trials that resulted in three convictions. Carlisle W. Briscoe was convicted of burglary in state court after Martin LaHue, a policeman, testified that in his opinion a fingerprint found at the scene of the crime could be matched with Briscoe's. Chris P. Vickers, Jr. and James N. Ballard were jointly convicted of sexual assault in another state court after James W. Hunley, also a policeman, testified that the defendants had coordinated their stories before making similar exculpatory statements to the police. Vickers, with Ballard, and Briscoe filed section 1983 complaints, alleging that the police witnesses who had testified against them had violated their constitutional rights by committing perjury.

8. Under the functional approach, functions protected at common law have the same protection in section 1983 cases, despite the competing interests involved. See infra notes 129-30 and accompanying text.


10. Id. at 1119.

11. The Court was concerned that once police witnesses were excepted from the rule of absolute immunity, other classes of government officials acting as witnesses would have to be considered: "The contours of the proposed exception are not clear. Similar considerations would presumably apply to other government officials and experts, including coroners, medical examiners, psychiatric experts, and social workers." Id. at 1119 n.27.

12. See infra notes 112-28 and accompanying text.

13. See infra notes 129-38 and accompanying text.

14. See infra notes 139-42 and accompanying text.

15. See infra notes 143-45 and accompanying text.

16. See infra notes 146-49 and accompanying text.

17. LaHue, an Indiana policeman, stated that "a latent three-point fingerprint he discovered at the scene of the crime could be linked to Briscoe." Briscoe v. LaHue, 663 F.2d 713, 715 (3d Cir. 1981), aff'd, 103 S. Ct. 1108 (1983). Briscoe alleged that LaHue had seen an F.B.I. analysis indicating that the fingerprint was worthless. Id.

18. It was alleged that Hunley testified falsely that the two men had been together after their arrest and before giving similar statements. Id. at 717.

19. Briscoe alleged that his federal constitutional right to due process had been violated by LaHue's false testimony. Id. at 715. Vickers and Ballard alleged that Hunley had violated their federal constitutional rights to due process and to trial by an impartial jury when he testified falsely against them. Id. at 717.
Both complaints were dismissed in district court. On appeal, the United States Court of Appeals for the Seventh Circuit held in a single opinion that police officers, as well as all other witnesses, had absolute immunity from liability under section 1983.

On certiorari, the Supreme Court considered the issue whether a person convicted of a criminal offense could seek damages under section 1983 against a police witness who committed perjury. In affirming the appellate court’s decision the Supreme Court began with the assumption that if Congress had intended to abolish rules existing at common law, it would have made this intention clear in either the language or legislative history of the statute. Consequently, the Court’s analysis addressed the following questions: (1) whether the common law granted absolute immunity in this situation, (2) whether Congress intended to change common-law principles of immunity, and (3) whether the Court should create an exception to common-law rules.

The Court found that the common law granted absolute immunity both to witnesses and to officials performing critical roles in the judicial process. Either of these categories could include police officers acting as witnesses. After determining the relevant common-law principle, the Court found no manifestation of legislative intent to abolish the absolute immunity defense. The Court also rejected arguments that the rationale underlying witness immunity applied with less force to police witnesses. The Court refused to evaluate the conflicting policies underlying section 1983 and witness immunity,

20. Id. at 717. A motion for summary judgment for LaHue was granted because: (1) the complaint did not allege facts to support a finding of perjury; (2) allegations of perjury do not support a constitutional claim; (3) LaHue’s testimony had not been “under color of state law”; and (4) Briscoe’s claim was blocked by collateral estoppel due to his conviction. Id. at 715-16.

Hunley’s motion to dismiss the complaint against him was granted by a federal magistrate because: (1) Hunley’s testimony had not been “under color of state law”; (2) as a witness, Hunley was absolutely immune from liability; and (3) the complaint did not allege knowing use of false testimony. Id. at 717.

21. Id. at 721.

22. Briscoe, 103 S. Ct. at 1111.

23. Id. at 1113. “One important assumption underlying the Court’s decisions in this area is that members of the 42d Congress were familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and that they likely intended these common-law principles to obtain, absent specific provisions to the contrary.” Id. (quoting City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981)).

24. Id. at 1112-16.

25. Id. at 1116-18.

26. Id. at 1119-21.

27. The Court referred to “judges, prosecutors, and other persons acting ‘under color of law’ who perform official functions in the judicial process.” Id. at 1115.

28. Id. at 1115-16.

29. Id. at 1116-18.

30. These arguments were: Policemen often have a duty to testify about the products of their investigations, and they have a professional interest in obtaining convictions which would assertedly counterbalance any tendency to shade testimony in favor of potentially vindictive defendants. In addition, they are subject to § 1983 lawsuits for the performance of their duties, as to which they have only qualified immunity, and their defense is generally undertaken by their governmental employers. Id. at 1119.
but stressed a functional approach instead; "our cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant."31

Justice Marshall’s dissent sharply criticized the majority’s construction of the statute.32 Marshall initially contended that the Act’s failure to specify any immunity defense indicated the intent of Congress to abrogate common law principles of immunity.33 He found further support for his interpretation in the legislative history.34 Regardless of legislative intent, however, Marshall believed the applicable standard at common law was one of qualified immunity.35 He concluded that the policies served by witness immunity do not justify absolute immunity for police witnesses.36

Understanding the impact of the Supreme Court’s decision in Briscoe requires an understanding of the common law of immunity, the events leading to the enactment of section 1983, and the Supreme Court decisions preceding Briscoe. Tort immunity for participants in judicial proceedings appeared as early as the fourteenth century.37 In the early English courts, defamation actions were initiated by civil and criminal defendants against individuals involved in the judicial process.38 Because of concern that “those who have just cause for complaint, would not dare to complain for fear of infinite vexation,”39 immunity was granted to plaintiffs in civil suits. Similarly, immunity from tort liability allowed witnesses to speak freely40 and judges to decide fairly,41 without fear that the losing party would retaliate with a lawsuit. Another target for tort claims was the jury, whose members were granted immunity from conspiracy claims for conduct during the course of a trial.42 The

31. Id. The term “status” referred to defendant’s official position. Plaintiff’s contention had been that witnesses with the “status” of police officer should not be entitled to absolute immunity. Id. at 1119.
32. Id. at 1121-23 (Marshall, J., dissenting).
33. Id. (Marshall, J., dissenting).
34. Id. at 1126-31 (Marshall, J., dissenting). See infra notes 122-28 and accompanying text.
36. Marshall argued that the expertise and official status of a police officer created potential for manipulation of judicial proceedings that was likely to go unrestrained in the absence of a civil remedy. He felt that perjury is particularly harmful because a police officer has more credibility with the jury than an ordinary witness. Furthermore, a police witness is less likely to be inhibited by fear of subsequent liability because testifying is a normal duty of a policeman and defense against charges based on official conduct would be provided by government counsel. A further consideration was that despite widespread police perjury, prosecutors do not often bring charges against police officers. Marshall believed that these factors opposing absolute immunity clearly outweighed the purposes of absolute immunity: to encourage full disclosure and to conserve judicial resources. He concluded that police witnesses were entitled to no more than qualified immunity. Id. at 1131-33 (Marshall, J., dissenting).
37. Randall v. Brigham, 74 U.S. (7 Wall.) 523, 534 (1868) (citing Book of Assizes, 27 Edw. III pl. 18 (1354)).
38. This does not imply that immunity applied only to defamation actions. Rather, most of the common law cases involved defamation claims because of the limited remedies available to defendants.
42. Id. The Court in Floyd, however, stated that a conspiracy taking place outside the court for the purpose of influencing the outcome of the proceedings would not be protected. This find-
rationale underlying these decisions was that those closely involved in judicial proceedings could perform their functions properly only if they did not have to fear retaliatory litigation. Consequently, the general rule was that "actions will not lie for... words spoken in the course of litigation which are relevant to that litigation." The common-law courts adhered to the standard of absolute immunity, which protects a defendant from liability regardless of motives or reasonableness of behavior. Qualified immunity, on the other hand, protects a defendant from liability only for acts committed without malice and for good cause. Qualified immunity was discussed in early English cases but never adopted. In the United States the concept of qualified immunity was first treated by the Supreme Court in White v. Nicholls. In dictum the Court stated that "the privilege should... be taken with strong and well defined qualifications," specifically, express malice. In Randall v. Brigham the Supreme Court appeared to adopt a standard of qualified immunity for judges. Three years later, however, the Court held in Bradley v. Fisher that

Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those courts, in which there is great conflict in the evidence and great doubt as to the law which should govern their decision... It is in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge.

A secondary rationale was finality to litigation: "If the judicial matters of record should be drawn into question... there never will be an end of causes: but controversies will be infinite." In England, a further rationale supporting immunity for judges was that judges derived their power from the king, whose judgment was unquestionable; therefore, a judge's actions in court could be questioned only by the king himself.

The adversarial nature of the judicial process is likely to arouse hard feelings. Consequently, an unsuccessful litigant might vent his anger through lawsuits against other participants in the proceedings. This rationale was articulated in Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 348 (1871):

That absolute immunity might not be the fairest rule was suggested in Henderson v. Broomhead, 157 Eng. Rep. 964, 967 (Ex. 1859): "In spite of all that can be said against it, we find the rule acted upon from the earliest times."

43. The adversarial nature of the judicial process is likely to arouse hard feelings. Consequently, an unsuccessful litigant might vent his anger through lawsuits against other participants in the proceedings. This rationale was articulated in Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 348 (1871):

Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those courts, in which there is great conflict in the evidence and great doubt as to the law which should govern their decision... It is in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge.

A secondary rationale was finality to litigation: "If the judicial matters of record should be drawn into question... there never will be an end of causes: but controversies will be infinite."

In England, a further rationale supporting immunity for judges was that judges derived their power from the king, whose judgment was unquestionable; therefore, a judge's actions in court could be questioned only by the king himself. Id. at 1307.

45. See supra note 7.
46. See supra note 6.
47. See, e.g., Hodgson v. Scarlett 106 Eng. Rep. 86 (K.B. 1818). In an action for slander against an attorney for words spoken at trial, the court stated that there could be no action for slander "unless actual malice be proved." Id. at 87. Since no actual malice was alleged, the court went on to say: "Here however it is not very material to consider the limits of such privilege; for the defendant is clearly within them." Id.

That absolute immunity might not be the fairest rule was suggested in Henderson v. Broomhead, 157 Eng. Rep. 964, 968 (Ex. 1859): "In spite of all that can be said against it, we find the rule acted upon from the earliest times."

48. 44 U.S. (3 How.) 266 (1845).
49. Id. at 287.
50. Id. at 288. For its qualifying language, however, the Court relied on dicta in a common-law decision. Id. (citing Hodgson v. Scarlett, 106 Eng. Rep. 86 (K.B. 1818)). Express malice is malice proven directly, rather than inferred.
51. 74 U.S. (7 Wall.) 523 (1868).
52. The Court implied that it would not grant immunity "where the acts... are done maliciously or corruptly." Id. at 536.
53. 80 U.S. (13 Wall.) 335 (1871).
judges were absolutely immune from liability.54

While the Supreme Court was struggling with standards of immunity to protect the fact-finding process,55 Congress was faced with another problem: how to guarantee the rights of the freed slaves following the Civil War. Section one of the Civil Rights Act of 1871 (hereafter section 1873)56 was one of a series of actions taken by Congress to protect these rights.57 The state governments had failed to deal adequately with Ku Klux Klan activities that violated the constitutional rights recently accorded to blacks.58 Although state laws were ostensibly designed to prevent such activities, state officials were either unable or unwilling to enforce them.59 The only way to protect the citizens of the states from the Ku Klux Klan was to ensure that state officials performed their duties properly. Thus, Congress saw the need for a remedy against state officials who denied blacks and Union sympathizers equal protection of state

54. "[T]his exemption of the judges from civil liability cannot be affected by the motives with which their judicial acts are performed." Id. at 347. The Court explained that its qualifying comments in Randall, 74 U.S. (7 Wall.) 523 (1868), were not meant to imply that qualified immunity was the proper standard, but to avoid a lengthy explanation of apparently conflicting decisions in cases at common law. Bradley, 80 U.S. at 351.

This explanation, however, came after the enactment of what was later codified as section 1873, so it is likely that if Congress had considered the issue at all, it would have concluded that qualified immunity was the standard. See infra note 119.

55. By protecting those who performed functions critical to the judicial process, immunity was meant to ensure that these functions could be performed properly. The intended consequence was that the outcome of the proceedings would be a fair one for the parties involved.


57. The thirteenth amendment of the Constitution abolished slavery and empowered Congress to enforce this abolition. Comment, Developments in the Law: Section 1983 and Federalism, 90 HAV. L. REV. 1133, 1143 (1977). Section 2 of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, the legislation upon which section 1873 was modeled, was enacted to enforce the thirteenth amendment by providing criminal liability for violations of individual rights by persons acting under color of state law. CONG. GLOBE, 39th Cong., 1st Sess. 67 (1866).

The fourteenth amendment was necessary to silence arguments that the measures enacted to enforce the thirteenth amendment were in excess of Congress' constitutional authority. The fourteenth amendment granted a federal guarantee for certain privileges of individuals. The fifteenth amendment protected voting rights, and the Civil Rights Act of 1870, ch. 114, 16 Stat. 140, allowed federal troops to watch the polls. Comment, supra, at 1142-47.


59. "It is said that the states are not doing the objectionable acts. This argument is more specious than real... What practical security would this provision give if it could do no more than to abrogate and nullify overt acts and legislation of a State?" CONG. GLOBE, 42d Cong., 1st Sess. 375 (1871) (Rep. Lowe). "The State, from lack of power or inclination, practically denied the equal protection of the law to these persons." Id. at 428 (Rep. Beatty). "The state courts, mainly under the influence of [the Ku Klux Klan] are utterly powerless then." Id. at 653 (Sen. Osborn).

But it is a fact, asserted in the report, that of the hundreds of outrages committed upon loyal people through the agency of this Ku Klux organization not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known Union sentiments, white or black, invokes their aid. Then Justice closes the door of her temples.

Id. at 505 (Sen. Pratt).
laws.\textsuperscript{60} In response to a request by President Grant for a legislative solution to this problem,\textsuperscript{61} Congress provided in section 1983 a federal tort remedy for violations of constitutional rights by state officials.\textsuperscript{62}

Seventy years after the enactment of section 1983 the Supreme Court first dealt with the apparent conflict between the language of the Act and common-law defenses of immunity. In \textit{Tenney v. Brandhove}\textsuperscript{63} the Court reasoned that Congress would have explicitly abolished common-law immunities "well grounded in history and reason"\textsuperscript{64} had it meant to do so. Therefore, it held that state legislators acting within the scope of their duties were absolutely immune from liability under section 1983.\textsuperscript{65} This rule was based on the public interest in effective representation, which required that legislators be able to perform their duties uninhibited by fear of civil liability.\textsuperscript{66} Absolute, as op-

\textsuperscript{60} "While one main scourge of the evil—perhaps the leading one—was the Ku Klux Klan, the remedy created was not a remedy against it or its members but against those who representing a State in some capacity were unable or unwilling to enforce a state law." Monroe v. Pape, 365 U.S. 167, 175-76 (1961).

\textsuperscript{61} Examples of conduct by state officials that section 1983 was intended to deter were cited in the legislative debates:

Now, it is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration permanently and as a rule refuse to extend that protection. If every sheriff in South Carolina refuses to serve a writ for a colored man and those sheriffs are kept in office year after year by the people of South Carolina, and no verdict against them for their failure of duty can be obtained before a South Carolina jury, the State of South Carolina, through the class of officers who are its representatives to afford the equal protection of the laws to that class of citizens, has denied that protection. If the jurors of South Carolina constantly and as a rule refuse to do justice between man and man where the rights of a particular class of its citizens are concerned, and that State affords by its legislation no remedy, that is as much a denial to that class of citizens of the equal protection of the laws as if the State itself put on its statute-book a statute enacting that no verdict should be rendered in the courts of that State in favor of this class of citizens. CONG. GLOBE, 42d Cong., 1st Sess. 334 (1871) (Rep. Hoar).

\textsuperscript{62} A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States . . . .


\textsuperscript{63} Beyond these brief statements, the interpretation of legislative intent becomes controversial. See infra notes 120-28 and accompanying text.

\textsuperscript{64} 341 U.S. 367 (1951). In \textit{Tenney} plaintiff alleged that defendants, members of the state legislature, had attempted to intimidate him from exercising his constitutional right of free speech by making him testify before them. \textit{Id.} at 369, 371.

\textsuperscript{65} \textit{Id.} at 376.

\textsuperscript{66} \textit{Id.} at 373-74 (quoting Coffin v. Coffin, 4 Mass. 1, 27 (1808) ("These privileges are secured . . . to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal."))

One commentator suggested that the justification for legislative immunity relied on by several courts was that legislative proceedings were seen to be judicial in nature, but that there were significant distinctions that make this analogy questionable. \textit{Veeder, supra} note 2, at 487 (citing
posed to qualified immunity was necessary because "[t]he privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distraction of a trial... or to the hazard of a judgment against them based upon a jury's speculation as to motives." The Court did not address immunity of other public officials under section 1983.

The Tenney rationale was extended to offer immunity to judges in Pierson v. Ray. Again relying on common law immunity principles, the Pierson Court held that state judges were absolutely immune from liability for judicial acts. The rule was a response to the public interest in allowing judges to exercise independent judgment, unclouded by intimidation. Instead of considering whether the policies underlying section 1983 opposed application of the common-law rule, the Court stated simply that "[w]e do not believe... this settled principle of law was abolished by Section 1983."

The Supreme Court refined its analysis of section 1983 immunity in Imbler v. Pachtman, and extended absolute immunity to state prosecutors in initiating prosecutions. Rather than automatically adopting a rule found to be well supported by history as in Tenney and Pierson, the Court developed a two-step analysis. First, the Court determined that at common law prosecutors enjoyed absolute immunity. The next step was to consider whether the policies supporting immunity at common law justified the same immunity under section 1983. To answer this question required a balancing of "the evils inevitable in either alternative." The balance fell in favor of application of common-law immunity because the accused had protections other than the section 1983 remedy to ensure a fair trial: post-trial procedures to evaluate the fairness of the trial and criminal sanctions to deter the deprivation of constitutional rights. The Court reasoned further that less than absolute im-

---


62. 386 U.S. 547 (1967). Defendant in Pierson, a municipal police justice, convicted plaintiffs, members of a racially mixed group of clergymen, of breaching the peace after they had attempted to use segregated facilities at a bus terminal. Id.

63. Id. at 554-55.

64. Id. at 554 (citing Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871), which granted absolute immunity to judges in an action not brought under section 1983). Bradley disregarded dicta in two earlier opinions, Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868), and White v. Nicholls, 44 U.S. (3 How.) 266, 286-88 (1845), both of which espoused a standard of qualified immunity for judges.

65. Pierson, 386 U.S. at 554.

66. 424 U.S. 409 (1976). In Imbler plaintiff alleged that defendant, a state prosecuting attorney, had caused plaintiff to be convicted of murder by the prosecutor's knowing use of false testimony and suppression of evidence.

67. Id. at 422.

68. Id. at 428 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)).

69. "These procedures include the remedial powers of the trial judge, appellate review, and state and federal post-conviction collateral remedies. In all of these the attention of the reviewing judge or tribunal is focused primarily on whether there was a fair trial under law." Imbler, 424 U.S. at 427.

70. See id. at 429. The criminal counterpart to section 1983 is 18 U.S.C. § 242 (1976), which states:
munity would inhibit a prosecutor’s vigorous performance of his duties, be-

cause in “a close case . . . an acquittal likely would trigger a suit against [the

prosecutor] for damages.”77 Although it refused to address the issue of immu-
nity for prosecutors in administrative or investigative roles, the Court alluded
to the functional analysis more clearly articulated in later opinions.78 In a
concurring opinion, Justice White stated that witnesses also should be abso-
lutely immune from section 1983 liability.79

The Court focused on a functional analysis for the first time in Butz v.
Economou, 80 which is relevant even though it was not a section 1983 action.81
Butz raised the question whether immunity should be extended to administra-
tive law judges. The Court explained that, as with judges in the judicial
branch, the function of an administrative law judge requires independence of
judgment, which, in the absence of absolute immunity, might be jeopardized
by the threat of a lawsuit by the losing party.82 Rather than accept a decision
as sound, the irate party was likely to “ascri[be] improper motives to the

Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully
subjects any inhabitant of any State, Territory, or District to the deprivation of any
rights, privileges, or immunities secured or protected by the Constitution or laws of the
United States, or to different punishments, pains, or penalties, on account of such in-
habitant being an alien, or by reason of his color, or race, than are prescribed for the
punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than
one year, or both; and if death results shall be subject to imprisonment for any term of
years or for life.

77. Imbler, 424 U.S. at 426 n.24.
78. Id. at 430-31.

We agree with the Court of Appeals that respondent’s activities were intimately associ-
ated with the judicial phase of the criminal process, and thus were functions to which the
reasons for absolute immunity apply with full force. We have no occasion to consider
whether like or similar reasons require immunity for those aspects of the prosecutor’s
responsibility that cast him in the role of an administrator or investigative officer rather
than that of advocate.

Id.

See also Comment, Section 1983 and Prosecutorial Immunity, 19 AM. CRIM. L. REV. 81, 86
(1981) (observes that the Imbler Court acknowledged the functional approach without comment-
ing about its applicability). But cf. Comment, Supplementing the Functional Test of Prosecutorial
Immunity, 34 STAN. L. REV. 487, 489 (1982) (argues that the Court not only recognized, but actu-
ally expressed approval of, the functional test).

79. Imbler, 424 U.S. at 432 (White, J., concurring). Justice White argued further that the
Court’s decision actually could contravene the policy underlying immunity by extending absolute
immunity to prosecutors accused of suppressing evidence. Id. at 433.

An analogous argument could be made against witness immunity, because protecting wit-
nesses who intentionally fail to disclose what they know works against the policy of ascertainment
of the truth.

80. 438 U.S. 478 (1978). In Butz the plaintiff alleged that action by several officials of the
Department of Agriculture had interfered with the operation of his commodity futures commis-
sion company. Id. at 480-83.

81. The cause of action in Butz was based on a precedent established in Bivens v. Six Un-
known Named Agents, 403 U.S. 384, 392-97 (1971). Bivens created a civil remedy against federal
officials for violations of constitutional rights. Immunity issues similar to those that arise under
section 1983 actions also arise frequently in Bivens actions. The Butz Court stated that “[w]e
deem it untenable to draw a distinction for purposes of immunity law between suits brought
against state officials under § 1983 and suits brought directly under the Constitution against fed-
eral officials.” Butz, 438 U.S. at 504.
82. See Butz, 438 U.S. at 509.
judge." The Court explained that absolute immunity "stems from the characteristics of the judicial process rather than its location" within a particular branch of the government. Thus, the Court held that because administrative judicial officials were "functionally comparable" to judges, they were entitled to the same protection accorded state judges. Despite this emphasis on a functional approach, the Court in Butz also employed a balancing analysis to consider justifications for granting absolute immunity from liability for constitutional violations. The Court stressed the presence of safeguards in the judicial process to deter official misconduct. It found that "[i]n light of these safeguards, . . . the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women." In dictum the Court stated that the policies underlying absolute immunity for judges also supported absolute immunity for witnesses and advocates.

As its analysis has evolved, the Court, for purposes of immunity analysis, has distinguished between activities within the judicial process and those outside it. Activities "intimately associated with the judicial phase of the criminal process . . . [are] functions to which the reasons for absolute immunity apply with full force." A standard of qualified immunity was adopted, however, in several cases of alleged constitutional violations by public officials not performing roles within the judicial process. The distinction was based on two rationales. First, the danger that the adversarial nature of the judicial process would lead to frequent allegations of improper motive supports absolute immunity for participants in judicial proceedings. Withholding abso-

83. Id. (quoting Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 348 (1871)).
84. Id. at 512.
85. Id. at 513.
86. See id. at 514.
87. See id. at 508. "In each case we have undertaken 'a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.'" (quoting Imbler, 424 U.S. at 421).
88. These safeguards are "[t]he insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal . . . ." Id. at 512.
89. Id. at 512. The reasoning behind immunity for judges is that they can adjudicate more objectively if they have no reason to fear liability. Similarly, witnesses and advocates should be able to perform their roles more effectively if they are unrestrained by the threat of a lawsuit.
90. See id. at 512. A policeman performs a function outside the judicial process when he makes an arrest: he performs a function within the judicial process when he is in a courtroom testifying as a witness. See id. at 430 n.32.
91. Id. at 430. These roles outside the judicial process included police officers making an arrest, executive officials, school board members, hospital superintendents, and prison administrators. See infra notes 95-103 and accompanying text.
92. See supra text accompanying notes 77 & 83. Because there is a clear loser in litigation, the activities of participants in litigation are more likely to lead to retaliation than are the activities of participants in official functions taking place outside of court.

88. These safeguards are "[t]he insulation of the judge from political influence, the importance of precedent in resolving controversies, the adversary nature of the process, and the correctability of error on appeal . . . ." Id. at 512.
89. Butz, 438 U.S. at 514.
90. See id. at 512. The reasoning behind immunity for judges is that they can adjudicate more objectively if they have no reason to fear liability. Similarly, witnesses and advocates should be able to perform their roles more effectively if they are unrestrained by the threat of a lawsuit.
91. Imbler, 424 U.S. at 430. A policeman performs a function outside the judicial process when he makes an arrest: he performs a function within the judicial process when he is in a courtroom testifying as a witness. See id. at 430 n.32.
92. These roles outside the judicial process included police officers making an arrest, executive officials, school board members, hospital superintendents, and prison administrators. See infra notes 95-103 and accompanying text.
93. See supra text accompanying notes 77 & 83. Because there is a clear loser in litigation, the activities of participants in litigation are more likely to lead to retaliation than are the activities of participants in official functions taking place outside of court.
lute immunity from other officials, however, resulted from the policy embodied in section 1983 that "government officials, as a class, could not be totally exempt, by virtue of some absolute immunity, from liability under [the terms of section 1983]."94

The Court first granted qualified immunity under section 1983 in Pierson v. Ray.95 The Pierson Court, again adhering to common-law principles, granted immunity qualified by good faith and probable cause to police officers making an arrest.96 In a later case, Scheuer v. Rhodes,97 the Court applied an analysis similar to the balancing approach adopted in subsequent absolute immunity cases: "Final resolution of this question must take into account the functions and responsibilities of these particular defendants . . . as well as the purpose of 42 U.S.C. § 1983."98 The Court, allowing only qualified immunity, refused to extend absolute immunity to high ranking state executives, because such a decision would render section 1983 effectively meaningless.99 Some degree of protection was necessary, however, because of "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion [and] the danger that the threat of such liability would deter his willingness to execute his office with decisiveness and the judgment required by the public good."100 In later cases, this rationale of protecting officials whose positions require a great deal of discretion, supported extension of qualified immunity to school board members,101 state hospital superintendents,102 and prison administrators.103

95. 386 U.S. 547 (1967). In Pierson policemen arrested demonstrators against racial segregation and charged them with breaching the peace.
96. See id. at 557.
97. 416 U.S. 232 (1974). In Scheuer section 1983 actions were filed on behalf of three students killed at Kent State University. The suits were brought against the Governor of Ohio and several members of the Ohio National Guard.
98. Id. at 243. Scheuer was decided before Imbler v. Pachtman, 424 U.S. 409 (1975), the case in which the Court clearly articulated its balancing approach for the first time.
99. Under the criteria developed by precedents of this Court, § 1983 would be drained of meaning were we to hold that the acts of a governor or other high executive officer have "the quality of a supreme and unchangeable edict, overriding all conflicting rights of property and unreviewable through the judicial power of the Federal Government." Id. at 248 (quoting Sterling v. Constantin, 287 U.S. 378, 397 (1932)).
100. Scheuer, 416 U.S. at 240.
101. Wood v. Strickland, 420 U.S. 308 (1975). In Wood members of a school board expelled plaintiffs from a high school for violating a school regulation against the use of alcohol at school activities. The Court held that defendants were immune unless they "knew or reasonably should have known that the action . . . would violate the constitutional rights of [plaintiffs] or if [they] took the action with the malicious intention to cause a deprivation of constitutional rights." Id. at 322.
103. Procunier v. Navarette, 434 U.S. 555 (1978). In Procunier a prison inmate charged three subordinate officials of the prison, the director of the Department of Corrections, the warden and the assistant warden with violating plaintiff's constitutional rights by interfering with his mail. The
Because the Supreme Court had made no clear statement concerning the proper immunity analysis under section 1983, the lower courts had reached conflicting results on the issue of witness immunity. A common feature of the lower courts' decisions was, however, that none applied the strict functional test the Supreme Court later used in Briscoe. After the Court stated its balancing test in Imbler, the lower courts uniformly applied that analysis rather than a functional one.104

Applying this balancing approach, most circuit courts had adopted a standard of absolute immunity for witnesses, reasoning that the need for un inhibited disclosure by witnesses was as important in a constitutional tort action as in a common law suit.105 Strong arguments against blocking section 1983 liability, however, were frequently made. These arguments fell into three categories. One view was that the policy of protecting witnesses applied with less force when the constitutional rights of a private citizen were violated by a public employee.106 Support for this position that government officials acting as witnesses should be treated differently from private witnesses was derived from the fact that "both Congress and the Supreme Court had created special causes of action to provide a remedy for official misconduct which infringe[d] constitutionally protected interests."107 A second contention was that witness immunity was not necessary for government officials because giving complete and truthful testimony required no exercise of discretion.108 Protection of

---

104. See Charles v. Wade, 665 F.2d 661 (5th Cir. 1982), cert. pending, No. 81-1881; Briscoe v. LaHue, 663 F.2d 713 (7th Cir. 1981), aff'd, 103 S. Ct. 1108 (1983); Myers v. Bull, 599 F.2d 863 (8th Cir.), cert. denied, 444 U.S. 901 (1979) (not addressing the issue but holding that witnesses do not act under color of state law); Burke v. Miller, 580 F.2d 108 (4th Cir. 1978), cert. denied, 440 U.S. 930 (1979); Blevins v. Ford, 572 F.2d 1336 (9th Cir. 1978) (stating that a witness in a civil rights action enjoys absolute immunity but offering no analysis); Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977), cert. denied, 437 U.S. 904 (1978); Brawer v. Horowitz, 535 F.2d 830 (3d Cir. 1976) (Bivens action).


107. Briggs v. Goodwin, 569 F.2d 10, 28 (D.C. Cir. 1977), cert. denied, 437 U.S. 904 (1978). In Briggs plaintiff alleged that a prosecutor made false statements in a hearing that related to a grand jury investigation. The court held that a prosecutor would have only qualified immunity when he was not performing a prosecutorial function. In ruling that defendant's actions were not within the prosecutorial function, the court stated that "absolute immunity is not to be extended to the constitutional tort contest absent the most compelling justification."Id.

108. Charles v. Wade, 665 F.2d 661, 668 (5th Cir. 1982) (Kravitch, J., dissenting) (citing Briscoe v. LaHue, 663 F.2d 713, 719 (7th Cir. 1981), cert. pending, No. 81-1881). In Charles a police officer was accused of concealing evidence that would have exculpated plaintiff. The court held that witnesses were absolutely immune from liability. Id. at 666. The dissent argued that the degree of immunity depended on the degree of discretion the defendant was required to exercise in performing his official function. Since a witness exercised no greater discretion than a police-
"the fearless exercise of discretion" had been an important consideration justifying absolute immunity in cases under section 1983. The final position was that public officials were less likely than private witnesses to be intimidated by the threat of liability because these officials "face the possibility of liability for most of their official acts, . . . may be obligated to testify as an aspect of their official duties, and . . . are normally represented by government counsel in § 1983 actions."

Faced with this diversity of opinion among the lower courts and the ambiguity in its own opinions, the Supreme Court in Briscoe v. LaHue abandoned the balancing approach in favor of a strict functional analysis. In reverting to its stance in Tenney and Pierson, the Court applied the common law rule without weighing policies that might justify an exception.

The Supreme Court began its analysis in Briscoe with an examination of the common law of immunity for judicial participants. The Court found that at common law absolute immunity protected parties, witnesses, attorneys, jury members, and judges from liability. Such immunity, as it applied to witnesses, was based on the policy of encouraging full disclosure, uninhibited by the threat of liability, so that "the paths which lead to the ascertainment of truth [will] be left as free and unobstructed as possible." An intimidated witness would "be inclined to shade his testimony in favor of the potential plaintiff [in a retaliatory lawsuit against the witness]." Similarly, immunity for court officials allowed them to exercise independent judgment without fear of retaliation. The Court concluded that whether police witnesses were considered official participants in the judicial process or private witnesses, they were entitled to absolute immunity.

While the Court's discussion was historically accurate, the focus should have been on the standard of immunity as it appeared to Congress immediately preceding the enactment of section 1983. As Justice Marshall pointed out, in 1871 the only statements by the Supreme Court on the issue of immunity performance any other function, a police witness should be entitled only to qualified immunity. Id. at 1115-16 (citing King v. Skinner, 98 Eng. Rep. 529 (K.B. 1772)).

113. Id. at 1114 (quoting Calkins v. Sumner, 13 Wis. 193, 197 (1860)).

114. Id. at 1115 (citing Veeder, supra note 2, at 470).

The analogous situation of prosecutors is that a prosecutor, in the absence of immunity, might be inclined towards fewer prosecutions, because he is more likely to be sued when he prosecutes than when he chooses not to prosecute. See Note, supra note 3, at 181.


116. Id. at 1116. The Court implied that the preferred classification was that of private witnesses when it said that one reason for denial of recovery here was that the reach of section 1983 "is limited to actions taken 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . .' It is beyond question that, when a private party gives testimony in open court in a criminal trial, that act is not performed 'under color of law.'" Id. at 1112-13.
TORT IMMUNITY UNDER SECTION 1983

Immunity appeared in *White v. Nicholls*[^117] and seemed to indicate that judicial participants were not entitled to absolute immunity, but to immunity in the absence of malice.[^118] Although the Court's comments in *White* were only dicta (later to be overruled) this does not destroy their value for revealing legislative intent. In 1871 Congress probably would have concluded that the standard of immunity for witnesses and court officials was one of qualified immunity.[^119]

In its analysis of the legislative history, the Court concluded that because an examination of the language of the statute[^120] and the legislative debates revealed "no reference to the type of alleged constitutional deprivation at issue in this case: perjury by a government official leading to an unjust conviction,"[^121] Congress did not intend section 1983 to apply to the situation in *Briscoe*. The Court's approach was flawed in two respects: its requirement of a specific reference and its failure to find one. Section 1983 was intended as a broad remedial device;[^122] Congress could not have been expected to anticipate and comment on every situation that might arise to require judicial construction of the Act.[^123] The Court, however, should have found comments in the debates that were relevant to liability for court officials under section 1983.

Liability for judges was specifically mentioned, without contradiction, in the debates.[^124] Furthermore, the sponsor of the Act, Representative Shellabarger, stated that section 1983 was modeled after section 2 of the Civil Rights Act of 1866,[^125] which the Court admitted "makes clear that judges and other 'state officials integral to the judicial process' are subject to criminal liability for violating the constitutional rights of individuals."[^126] Shellabarger

[^117]: 44 U.S. (3 How.) 266 (1845).
[^118]: *Briscoe*, 103 S. Ct. at 1124-25 (Marshall, J., dissenting). Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868), also seemed to adopt a standard of qualified immunity, three years before the enactment of section 1983. See *supra* notes 51-52 and accompanying text. The state courts were divided on the issue of qualified versus absolute immunity. See Comment, *supra* note 57, at 1201.
[^119]: The Court did not clearly adopt a standard of absolute immunity until Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871), decided after the enactment of section 1983; see also Comment, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322 (1969) (argues that section 1983 was intended to allow only qualified immunity for judicial officers).
[^120]: See *Veeder*, *supra* note 2, at 472 ("It is always clear . . . whether absolute or qualified privilege is referred to by the absence or presence in the statute of reference to the term malice.").
[^121]: *Briscoe*, 103 S. Ct. at 1118.

The distinction the Court makes between acquittal and conviction is not significant, because the deprivation of constitutional rights is at least as great when perjury deprives an innocent defendant of his freedom as when it allows a guilty defendant to go free.

[^122]: *CONG. GLOBE*, 42d Cong., 1st Sess. app. 68 (1871) (comments of Rep. Shellabarger) ("This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficiently construed.").
[^123]: See *id.* at app. 67 (comments of Rep. Shellabarger) ("And he would have an inadequate comprehension of the magnitude of the debate . . . who did not enter it with extreme . . . doubt . . . as to his ability to thoroughly explore and consider the questions we approach."). See also Comment, *supra* note 57, at 1156 (suggests that the vague language of the statute may have been intentional to allow the courts to interpret it).
[^125]: *CONG. GLOBE*, 42d Cong., 1st Sess. app. 68 (1871).
[^126]: *Briscoe*, 103 S. Ct. at 1118 n.26 (emphasis in original).
went on to say that "section [2 of the Civil Rights Act] provides a criminal proceeding in identically the same case as [section 1983] provides a civil remedy." Rather than deal with these comments, which seem to indicate a legislative intent to override the common law of immunity, the Court avoided the issue.

Having concluded that both the common law of immunity and the legislative history of section 1983 support absolute immunity for police witnesses, the Court began the final portion of its opinion indicating that it would consider policy arguments that might justify an exception. The Court quickly made clear, however, that its decision would not be based on these policy arguments, but that "immunity analysis rests on functional categories." Reasoning that a police witness "performs the same functions as any other witness," the Court extended absolute immunity to police officers acting as witnesses. This strict functional analysis did not consider the competing policies that have made immunity to section 1983 liability so controversial. For instance, the Court refused to address the very serious problem of police perjury. Prosecutors are often reluctant to prosecute police officers for perjury because of the desire to maintain a close working relationship with the police. Thus, police witnesses may be able to lie with impunity, and one of the safeguards relied on in Butz to justify absolute immunity disappears in the case of police witnesses. Furthermore, the petitioner's arguments that policies underlying absolute immunity apply with less force to police officers deserved consideration. As the dissent pointed out, police perjury is particularly harmful because a police officer has more credibility with the jury than does an ordinary witness. A further consideration is that a police witness is less likely to be inhibited by fear of subsequent liability because testifying is a normal duty of a policeman and defense against charges based on

127. CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (1871).
128. The Court devoted most of its discussion to section 2 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, which was intended to provide federal remedies for conspiracies by the Ku Klux Klan. The Court implied that the comments relied on by the dissent applied to section 2, not section 7 (current section 1983). Briscoe, 103 S. Ct. at 1117-18.
129. Id. at 1119 (citing Butz, 438 U.S. at 513-14). Butz, however, also incorporated a balancing analysis. See supra notes 87-89 and accompanying text.
130. A "functional category" is a category of potential defendants who perform the same function. Briscoe, 103 S. Ct. at 1119.
132. See Neuman, Suing the Law Breakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct, 87 YALE L.J. 447, 449-50 (1978) (argument by United States' district judge that the criminal sanction is not effective as a deterrent). But frequent prosecutions are not necessary to deter misconduct. Indictment alone can severely harm an official's career. See Note, supra note 3, at 203 n.248.
133. "Witnesses are, of course, subject to . . . the penalty of perjury." Butz, 438 U.S. at 512. See supra note 88 and accompanying text. See also Comment, Section 1983 and Prosecutorial Immunity, supra note 78, at 87 (argues that after Butz, the need for absolute immunity outweighed the purpose of section 1983 only when adequate safeguards exist to deter misconduct).
134. Briscoe, 103 S. Ct. at 1119. See also supra notes 106-109 and accompanying text.
official conduct would be provided by government counsel. The Court stated that "[t]hese contentions have some force," implying that, had it applied the Imbler balancing approach, the result might have been a lesser immunity. By applying a functional test, the Court avoided having to balance factors on both sides of the immunity issue; however, the common-law rule that the Court automatically adopted under its functional approach may need reevaluation in light of current concern about police perjury. As Justice Holmes once noted, "It is revolting to have no better reason for a rule than that . . . it was laid down in the time of Henry IV . . . and [that it] simply persists from the blind imitation of the past."

A further criticism of Briscoe is that by failing to adhere to the approach used in its recent precedents, the Court has created confusion about the proper analysis of immunity in section 1983 cases. It seems illogical to deal with competing policies in some cases but to circumvent policy arguments in others by using a strict functional analysis. Courts will have to consider the extent to which the balancing approach has been abandoned, for despite its use of a different analysis in Briscoe, the Court has not explicitly rejected the balancing approach. The question whether that approach has any remaining vitality is likely to arise in the related line of cases that have applied a balancing analysis to section 1983 claims against public officials not "intimately associated" with the judicial process.

Despite these criticisms, Briscoe serves two purposes not fully explained in the opinion. First, the strict functional test prevents uncertainty that could undermine the purpose of witness immunity. Freedom from intimidation depends on confidence that no liability will follow. A clear rule protecting all witnesses conveys this confidence. The Briscoe Court expressed a concern about the boundaries of any proposed exception. A balancing approach...
would obscure the rule of witness immunity by creating nebulous categories of protected and unprotected witnesses. If litigation were necessary in each case to determine whether a witness was entitled to immunity, then any immunity granted would be illusory because the threat of consequent litigation would intimidate the witnesses. Similarly, the qualified immunity usually accorded a public official would be an inadequate substitute for absolute immunity. Because a hearing would be required to determine state of mind, qualified immunity would amount to "no immunity at all." Absolute immunity, in contrast, defeats a suit at its initiation. The clarity of the strict functional analysis, allowing absolute immunity for all witnesses, promotes the policy of "ascertainment of the truth."

Another factor underlying the decision is the proliferation of litigation in federal courts. The Court focused on this problem when it stated that "this category of § 1983 litigation might well impose significant burdens on the judicial system." In light of the current concern for the burgeoning federal caseload, it is not surprising that the Court was reluctant to open the door for a new class of section 1983 claims, a number of which it expects to be spurious. Had the Briscoe Court allowed section 1983 claims against certain types of witnesses, a rash of lawsuits would likely follow as plaintiffs tested the limits of the Court’s ruling. Furthermore, conservation of judicial resources is a major purpose of immunity. The Briscoe rule promotes this


145. "The claims of the individual must yield to the dictates of public policy, which requires that the paths which lead to the ascertainment of the truth should be left as free and unobstructed as possible." Calkins v. Sumner, 13 Wisc. 193, 197 (1860), quoted in Briscoe, 103 S. Ct. at 1114.

146. The number of civil rights cases filed in federal district courts has increased from 296 in the fiscal year ended June 30, 1961 to 17,038 in the same period in 1982 (an increase of 10.5% over the previous year). REPORT OF THE ADMINISTRATIVE OFFICE U.S. COURTS 1982, 108. (Official statistics on civil rights litigation do not distinguish between section 1983 filings and other civil rights filings.) Partly responsible for an increase in section 1983 litigation was the Supreme Court’s 1961 decision in Monroe v. Pape, 365 U.S. 167 (1961). See, Comment, supra note 57, at 1169, 1172. See also McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I, 60 VA. L. REV. 1, 1 n.2 (1974) (estimates that in 1972 there were about 8000 claims filed under section 1983 alone). In Monroe plaintiffs alleged that defendants, police officers, broke into plaintiffs’ house, humiliated plaintiffs, damaged their property, and took them into custody without a search warrant or an arrest warrant. Monroe, 365 U.S. at 169. The Court held that even a state official acting outside of his authority under color of state law could come within the language of section 1983: “under color of any statute, ordinance, regulation, custom, or usage of any State or Territory.” Id. at 168.

147. Briscoe, 103 S. Ct. at 1120.

148. Id.

149. See Comment, The Proper Scope of the Civil Rights Act, 66 HARV. L. REV. 1285, 1295 n.54 (1953) (“Among the arguments . . . in support of immunity [is] . . . the drain on the valuable time of the official caused by insubstantial suits. . . .”); Note, supra note 3, at 191
end by cutting off a number of lawsuits likely to be based on retaliatory motives or meritless distinctions.

After Briscoe any abolition of absolute witness immunity for specific categories of public officials will have to come from Congress. Legislation could prevent uncertainty by identifying classes not entitled to protection. Proceeding on a case-by-case basis, the Supreme Court is unable to speak as clearly as Congress, and lack of a coherent rule contravenes the policy of witness immunity. Furthermore, the Court is bound by precedent not to make the sweeping changes the public may demand. The Court acknowledged this constraint in Briscoe: "[w]e are not writing on a clean slate, and it is not for us to craft a new rule... Congress has the power to fashion an appropriate remedy if it perceives the need for one." One option open to Congress to deal with this problem of frivolous litigation would be to create a quasi-judicial system to screen out claims that appear meritless.

The decision in Briscoe was probably the proper one under the circumstances. A judicial creation of exceptions to absolute witness immunity would nullify the beneficial effects of the rule: to promote uninhibited testimony by witnesses and to prevent the proliferation of unnecessary litigation. The Court's analysis, however, left questions unanswered concerning how immunity should be analyzed under section 1983. The analysis in Briscoe was different from that applied by the Court in earlier cases, but the Court failed to reconcile these divergent approaches. Furthermore, the Court's clear preservation of witness immunity under section 1983 did not resolve the conflict between the policy of encouraging full disclosure at trial and the policy of providing a tort remedy for constitutional violations. Only new legislation can adequately resolve this conflict, by stating a clear rule and a workable procedure to implement it.

FRANKLIN MILLER WILLIAMS

("[P]rosecutorial immunity is based, in part, on the desire to avoid the drain on official time and energy occasioned by the necessity of defending frivolous suits."); Note, Governmental Immunity—Prosecuting Attorney, 6 Am. J. Crim. L. 213, 222 (1978) ("[A] major purpose of the immunity doctrine... is to avoid consumption of the prosecutor's time in defeating frivolous lawsuits.").

150. Briscoe, 103 S. Ct. at 1120 n.30.

151. In Bivens v. Six Unknown Named Agents, 403 U.S. 308, 422-23 (1971) (Burger, J., dissenting), Justice Burger proposed a similar statutory scheme to: (1) remove sovereign immunity, (2) create a cause of action for violation of constitutional rights by federal agents under the fourth amendment, and (3) create a quasi-judicial tribunal to adjudicate these claims. See Note, supra note 3, at 204 (suggesting legislative solution to conflict between immunity and section 1983).