Pulliam v. Allen: Delineating the Immunity of Judges from Prospective Relief

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Judicial immunity is one of the oldest immunity doctrines recognized by English\(^1\) and American\(^2\) law. Generally speaking, it protects judicial officers from civil liability for all judicial acts.\(^3\) Errors in judgment,\(^4\) and even malicious acts\(^5\) are protected so long as the judge has not proceeded in the clear absence of jurisdiction.\(^6\) Though not without its critics,\(^7\) judicial immunity

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2. In one of the first American immunity cases, Chief Justice Kent reviews the doctrine in Yates v. Lansing, 5 Johns. 282 (N.Y. Sup. Ct. 1810), aff'd, 9 Johns. 395 (N.Y. 1811). For another early discussion, see Ross v. Rittenhouse, 2 U.S. (2 Dall.) 160, 164-65 (1792) (holding that a judge sitting in admiralty is not civilly liable for acts within his jurisdiction).


4. See, e.g., Stump v. Sparkman, 435 U.S. 349, 356 (1978); Houlden v. Smith, 14 Q.B. 841, 852, 117 Eng. Rep. 323, 327 (K.B. 1850) (where the judge has jurisdiction, "it is clear that a judge of a Court of Record is not answerable at common law in an action for an erroneous judgment").

5. See, e.g., Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 354 (1871), discussed infra notes 51-61 and accompanying text ("the exemption [of judges from liability] cannot be affected by any consideration of the motives with which the acts are done"); Anderson v. Gorrie, [1895] 1 Q.B. 668, 671 ("To my mind, there is no doubt . . . that no action lies for acts done or words spoken by a judge in the exercise of his judicial office, although his motive is malicious and the acts or words are not done or spoken in the honest exercise of his office.") (per Lord Esher); see also id. at 672 (no liability even where the judge acted "maliciously and for the purpose of gratifying private spleen") (per Justice Kay).

6. See Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1871). See also Hamond v. Howell, 2 Mod. 218, 86 Eng. Rep. 1035 (C.P. 1677), dismissing a suit for false imprisonment brought by a jurymen who had been imprisoned by a judge for failing to return a guilty verdict, as directed, at a trial of William Penn, since the judge was empowered to discipline jurors.

repeatedly has been defended on the grounds that it spares judges the burden of harassing litigation, and aids independent and dispassionate adjudication by eliminating fears of personal liability for judicial decisions. Judicial immunity has been successfully raised to deny relief in a variety of actions, including those brought under section 1983 of the Civil Rights Act.

Although section 1983 has proven to be a popular weapon in the hands of plaintiffs seeking to remedy state deprivations of constitutional rights, its reach is not as broad as the face of the statute might indicate. Though its language does not except any class of actors from the remedies available,

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8. Cf. Gregorie v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950), where Learned Hand, discussing prosecutorial immunity, commented, "to submit all officials, the innocent as well as the guilty, to the burden of a trial . . . would dampen the ardor of all but the most resolute, or the most irresponsible in the unflinching discharge of their duties." Id. See also Garnett v. Ferrand, 6 B. & C. 611, 628, 108 Eng. Rep. 576, 582 (K.B. 1827) (a judicial officer should not "act at the peril . . . of having his reasons and his motives weighed and tried by juries at the suit of individuals who may be dissatisfied with his conduct").

9. These policy grounds were fully articulated in Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871), discussed infra notes 51-61 and accompanying text. See also Sirros v. Moore [1975] Q.B. 118, 136 ("He should not have to turn the pages of his books with trembling fingers, asking himself: 'If I do this, shall I be liable in damages'"); Scott v. Stansfield, [1868] 3 L.R.-Ex. 220, discussed infra notes 99-100 and accompanying text.

10. In Bradley, a judge was sued after disbarring an attorney. See also Carter v. Duggan, 455 F.2d 1156 (5th Cir. 1972) (refusal to process pending indictment); Perkins v. U.S. Fidelity, 433 F.2d 1303 (5th Cir. 1970) (wrongful commitment to state mental institution); Heasley v. Davies, 342 F.2d 786 (8th Cir. 1965) (action for false imprisonment); Spruill v. O'Toole, 74 F.2d 559 (D.C. Cir. 1934), cert. denied, 294 U.S. 707 (1935) (eviction of tenant pursuant to writ of restitution).


12. In 1981, approximately 8% of all cases filed in the federal courts were civil rights actions. See ANNUAL REP. OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 100-03 (1982).

13. Section 1983 provides, in part, that

[e]very 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.

the Supreme Court has held that in enacting section 1983, Congress did not intend to abrogate the immunities from suit traditionally enjoyed at common law by certain officials. Consequently, defendants have often shielded themselves from section 1983 liability by invoking an appropriate immunity.4

Recently, the scope of the common law immunities has been reexamined in cases involving attorneys' fees awards under the Civil Rights Attorney's Fees Awards Act of 1976.16 Codified as 42 United States Code section 1988, the Act allows a plaintiff prevailing in a section 1983 suit to recover, as an element of costs, the attorney's fees expended in bringing the action. Congress considered this provision necessary to increase the availability of legal representation to parties bringing suit under the statute, thereby assisting vigorous enforcement of section 1983 claims.18 Immunity has been considered in the review of such fee awards because there is no indication that the

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14. Pierson v. Ray, 386 U.S. 547 (1967); Tenney v. Brandhove, 341 U.S. 367 (1951). This Note is limited to a discussion of judicial immunity; however, other officials are protected by similar common law doctrines. In Yaselli v. Goff, 12 F.2d 396, 399-407 (2d Cir. 1926), aff'd, 275 U.S. 503 (1927), the court discusses the immunities available to various participants in the judicial process, including grand and petit jurors, witnesses, and prosecutors.


Act permits the recovery of fees in suits where the defendant was immune from the underlying relief. Fees would not appropriately be granted, for instance, where damages had been awarded against a defendant whose immunity from suit originally should have barred the section 1983 action.

The remedies available under section 1983, however, are not limited to awards of damages, and may instead take the form of prospective measures such as injunctions and declaratory relief. In *Supreme Court of Virginia v. Consumers Union*, the United States Supreme Court reviewed the doctrine of legislative immunity and, finding that it barred suits for prospective relief as well as those for damages, denied attorney's fees under section 1988 to a plaintiff who had obtained injunctive and declaratory relief predicated on the legislative activities of the Virginia court. Although it was argued that judicial immunity would bar such relief, the Supreme Court declined to consider whether a judicial officer might, by claiming immunity from section 1983 prospective relief, defeat an award of attorney's fees under section 1988.

The Court squarely addressed this issue in *Pulliam v. Allen*, concluding that prospective relief, and therefore fee awards, were not barred by principles of judicial immunity. Following his arrest on a charge for which he could not have been jailed had he ultimately been convicted, Allen was incarcerated for 14 days by a Virginia magistrate when he was unable to post

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19. *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719 (1980). "[T]here is no . . . indication in the legislative history of the Act to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute legislative immunity." *Id.* at 738-39.


22. 446 U.S. 719 (1980).

23. Consumers Union challenged state disciplinary rules restricting attorney advertising. The Supreme Court found that, when promulgating such rules, the Virginia court acted in a legislative capacity and was, therefore, immune from prospective relief. *Id.* at 734.

24. The Virginia court had argued that judicial immunity would bar a challenge to its initiation of disciplinary actions against attorneys who had violated court rules regarding advertising. The Supreme Court found, however, that when the Virginia court initiated such proceedings, it acted in an enforcement rather than a judicial capacity and could, therefore, be enjoined. *Id.* at 736. Nevertheless, the Court discussed judicial immunity at some length. *See id.* at 735 nn.13-14.

25. *Id.* at 736.


27. Allen was charged with using insulting language in violation of *VA. CODE § 18.2-416* (1982). The maximum penalty under the statute was a $500 fine. A party who later joined Allen's challenge to the magistrate's practices was incarcerated after an arrest for public drunkenness, for which the maximum penalty was a $100 fine. 104 S. Ct. at 1972.
bail. He then brought suit against Magistrate Pulliam, claiming that her practice of imposing bail for non-jailable offenses and of jailing persons who could not post such bail had violated his rights under the sixth, eighth and fourteenth amendments. The district court declared the practice unconstitutional and enjoined it. Subsequently, Allen petitioned for, and was awarded, over $7000 in attorney's fees.

On appeal to the United States Court of Appeals for the Fourth Circuit, Pulliam argued that judicial immunity barred the award of fees against her. The court determined that section 1988 permits attorney's fees awards in cases where prospective relief has been properly granted. Since it had previously concluded that prospective relief could be entered against a judicial officer despite principles of judicial immunity, the court held that the injunctive and declaratory relief granted against Pulliam was appropriate, and therefore upheld the award of fees.

The Supreme Court, in a divided opinion, affirmed the Fourth Circuit decision. Writing for a majority of five, Justice Blackmun looked to the common law to find that judicial immunity did not bar the entry of prospective relief against a judicial officer. Conceding that the equity courts of England would not enjoin a judge or magistrate, he nevertheless maintained that the relief awarded against Magistrate Pulliam was paralleled at common law by the prerogative writs of mandamus and prohibition. Focusing on the latter, Justice Blackmun determined that notwithstanding the doctrine of judicial immunity, a writ of prohibition would issue to restrain a judicial officer acting within his jurisdiction who had misinterpreted a statute. Having thus found that under similar circumstances at common law,
judicial immunity would not bar a form of prospective relief analogous to the injunction entered against Magistrate Pulliam, he concluded that the relief had been properly granted against her. Accordingly, the award of attorney's fees was upheld.

In a dissenting opinion joined by three members of the Court, Justice Powell attacked the majority's analogy to common law, stating that the prerogative writs would not issue against a judicial officer who had acted within his jurisdiction except in circumstances not mirrored in American law. He therefore maintained that rather than illustrating the limits of the doctrine, prohibition and mandamus never invoked questions of judicial immunity since the writs were granted only when, through excess or neglect, a judge had abused his jurisdiction. Finally, the dissent asserted that the distinction between immunity from damages and immunity from prospective relief was unfounded, and that lawsuits attacking decisions made within the jurisdiction of a judicial officer, whether for damages or for injunctive relief, equally threaten the independence of judges which is the fundamental goal of judicial immunity.

Following a review of the American doctrine of judicial immunity, this Note will explore the nature of its common law antecedent in order to illustrate both the origin and purpose of the doctrine. The possible limitations of judicial immunity, as illustrated by the prerogative writs, will then be examined. Finally, a review and analysis of the Court's decision in Pulliam v. Allen will suggest that the decision may impose upon state judges a burden that the common law doctrine was designed to prevent.

I. THE SCOPE OF JUDICIAL PROTECTION IN AMERICA

The propriety of injunctions entered against state officials, including judges, has received a great deal of judicial attention. In Mitchum v. Foster, the Court held that section 1983 represents an exception to statutory provisions that generally forbid federal interference with state court actions. Nevertheless, the Court stressed that principles of comity and federalism should restrain a federal court asked to enjoin a state proceeding.

40. Id. at 1982.
41. Id. Chief Justice Burger and Justices Rehnquist and O'Connor joined in dissent.
42. Id. at 1987.
43. Id. at 1983.
44. Id. at 1987-89.
46. See 28 U.S.C. § 2283 (1982). This section forbids federal court interference in state court proceedings except where the intervention is "expressly authorized by Act of Congress."
Before Pulliam, the Court had not determined whether principles of judicial immunity might offer additional protection to state judicial officers. The consensus among lower federal courts, however, was that immunity would not bar awards of injunctive relief.

The Supreme Court has consistently held, however, that judges acting within their jurisdiction are absolutely immune from awards of damages in suits attacking their judicial acts. The seminal American expression of the doctrine is found in Bradley v. Fisher. In Bradley, an attorney defending a party to the assassination of Abraham Lincoln was disbarred after he allegedly threatened and accosted the presiding judge "in a rude and insulting manner." When the disbarment was later overturned, Bradley brought his case to the Supreme Court. In his opinion, Justice Black denominated these principles "Our Federalism" and discussed them as follows:

What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.

Id. at 44.

As a consequence of this policy of noninterference, the Court in Younger tightened the traditional requirements for equitable relief by holding that where a party seeks to enjoin the prosecution of a state criminal proceeding, "even [a showing of] irreparable injury is insufficient unless it is both great and immediate." Id. at 46 (citing Fenner v. Boykin, 271 U.S. 240 (1926)).


49. See, e.g., In re Justices of Puerto Rico, 695 F.2d 17 (1st Cir. 1982); Richardson v. Koshiba, 693 F.2d 911 (9th Cir. 1982); Heimbach v. Lyons, 597 F.2d 344 (2d Cir. 1979); Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979), cert. denied, 445 U.S. 938 (1979); Slavin v. Curry, 574 F.2d 1256 (5th Cir. 1978); Timmerman v. Brown, 528 F.2d 811 (4th Cir. 1975), rev'd on other grounds sub nom. Leeke v. Timmerman, 454 U.S. 83 (1981). While recognizing the doctrine, the courts rarely considered what effect the entry of prospective relief against judges might have on the policy considerations underlying judicial immunity, and did not undertake extensive examinations of the doctrine. See, e.g., United States v. McLeod, 385 F.2d 734, 738 n.3 (5th Cir. 1967). This lack of analysis is possibly explained by the fact that before 1976, fees could not be awarded, by statute, against a judicial officer following the entry of an injunction under section 1983; the potential consequences for the judge involved were rather less severe when no financial loss could have occurred.

50. See, e.g., Dennis v. Sparks, 449 U.S. 24 (1980) (though judge could be called to testify at the trial of his alleged coconspirators, he was not liable in damages for his actions); Pierson v. Ray, 386 U.S. 547 (1967) (police justice immune from damages for false arrest and imprisonment); Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868) (judge immune from damages for disbarring attorney); Wilkes v. Dinsman, 48 U.S. (7 How.) 89 (1849) (army officer exercising judicial functions immune from damages while acting within his jurisdiction).

51. 80 U.S. (13 Wall.) 335 (1871).

52. Id. at 337.

suit seeking damages. Holding in favor of the defendant judge, the Court articulated a principle of judicial immunity that remains essentially unchanged to this day. 54

Writing for the Court, Justice Field stated that judges of courts of general jurisdiction could not be held liable for their judicial acts, even where the judge had acted in excess of jurisdiction or was allegedly malicious or corrupt. 55 Immunity was lost only in instances where jurisdiction was clearly lacking. 56 The protection afforded judges of limited jurisdiction was coextensive with the jurisdiction of the court; while such judges were immune for decisions regarding matters falling within the jurisdiction of their courts, they lost that immunity in instances where jurisdiction was exceeded. 57

Justice Field devoted much of the opinion to the policy considerations underlying judicial immunity. Noting that litigation invariably leaves one party dissatisfied, Justice Field believed that the judge would replace the judgment as the object of this dissatisfaction and, if unchecked, lawsuits attacking judges would abound. 58 The consequences of such attacks would be serious. First, there was the potential for endless relitigation of the same matter as one judge was called before a second to justify his decisions; in turn, the second judge might be called before a third, and the process might continue indefinitely. 59 In addition, Field believed that rather than devoting


55. Bradley, 80 U.S. (13 Wall.) at 351. Earlier, in Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868), the Court had left open the possibility of damage awards where judges had acted corruptly or maliciously. It retreated from that position in Bradley, stating that "the qualifying words used [in Randall] were not necessary to a correct statement of the law." 80 U.S. (13 Wall.) at 351.

56. Justice Field held that where jurisdiction is clearly lacking, any power exercised by a judge represents a usurpation of authority and no excuse permits him to avoid liability when he is aware of the lack of jurisdiction. On the other hand, an act in excess of jurisdiction would be protected. To illustrate the distinction, Field stated that a probate judge trying a criminal matter would exemplify a situation where a clear absence of jurisdiction existed, since there plainly would be no jurisdiction over the subject matter of the proceeding. A judge of a criminal court of general jurisdiction, however, would merely act in excess of jurisdiction were he to try a matter that was not made a crime by statute, and he would thus not be stripped of immunity. Id. at 351-52. For an analogous example in English law, see infra note 90.

57. 80 U.S. (13 Wall.) at 351. This distinction between judges of general jurisdiction, who enjoy immunity for acts in excess of jurisdiction, and those of limited jurisdiction, who are immune only while acting within their jurisdiction, was articulated earlier in Randall v. Brigham, 74 U.S. (7 Wall.) 523 (1868), and reflects the respective immunities of the English superior and inferior courts. See infra note 96.

58. 80 U.S. (13 Wall.) at 348.

59. Id. See also Butz v. Economou, 438 U.S. 478, 512 (1978) (discussing the immunity of quasi-judicial officers, the Court observed that "controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree," and noted that losing parties are inclined to seek alternative forums).
their full energies to dispassionate adjudication, the potential exposure to liability would force judges to preserve exhaustive records of the evidence and authorities relied on to justify their decisions in subsequent proceedings against them. Finally, Field argued that the independence required for an effective judiciary would be destroyed if judges lived in constant fear of the personal consequences that might ensue from an erroneous decision.

The doctrine of immunity outlined in Bradley has been invoked to bar relief in a number of subsequent actions, and has been effective in shielding judges from liability under the Civil Rights Act. In Pierson v. Ray, the Court held that judicial immunity could be raised as an affirmative defense to actions brought under section 1983. Although it was argued that the statute was intended to apply to all state actors, the Court concluded that Congress had not intended, in enacting section 1983, to abrogate the longstanding tradition of judicial immunity that had existed at common law.

The Court's opinion in Stump v. Sparkman illustrates the modern view of the doctrine in the context of section 1983. In Stump, the Court held that a judge who had ordered the sterilization of a child on the ex parte application of her mother was protected from civil liability under section 1983 by principles of judicial immunity. Writing for the majority, Justice White

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60. 80 U.S. (13 Wall.) at 349.
61. Id. at 348.
62. See supra notes 10, 50.
63. 386 U.S. 547 (1967). The Court justified its decision on the same policy grounds articulated in Bradley. 386 U.S. at 554.
64. Pierson, 386 U.S. at 554-55 (“Immunity of judges for acts within the judicial role is . . . well established, and we presume that Congress would have specifically so provided had it wished to abolish the doctrine.”). This presumption provoked a dissent by Justice Douglas and has been criticized. See, e.g., Feinman & Cohen, Suing Judges: History and Theory, 31 S.C.L. Rev. 201, 222 (1980). But see Block, Stump v. Sparkman and the History of Judicial Immunity, 1980 Duke L.J. 879, 907-10.

The rationale underlying Pierson and other similar decisions is succinctly stated in City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 258 (1981), where the Court observed that the 42nd Congress was aware, when it enacted § 1983, that specific common law defenses were available to certain defendants, and intended that they remain available unless specifically abrogated in the statute.
66. Stump, a circuit court judge with “exclusive jurisdiction in all cases at law and in equity,” granted a mother’s petition to have a tubal ligation performed on her “mentally deficient” daughter without an adversarial hearing. Id. at 357. When the daughter later discovered, contrary to her original understanding, that the operation she had undergone did not involve the removal of her appendix, she brought suit against Judge Stump and others under § 1983. Id. at 351-54.
67. Three justices dissented in Stump. Although there was general agreement as to the basic principles of judicial immunity, the dissenters argued that “what Judge Stump did . . . was beyond the pale of anything that could sensibly be called a judicial act,” and thus was not entitled to immunity. Id. at 364-65. In a separate dissenting opinion, Justice Powell stated
stated a two part test necessary for the invocation of the doctrine. First, the challenged decision would have to be made regarding a matter laying within the subject matter jurisdiction of the court. 

Adopting the reasoning in Bradley, the Court held that since questions of jurisdiction are often difficult, the scope of a judge's jurisdiction is to be construed broadly when immunity is invoked, and liability should attach only where subject matter jurisdiction is plainly lacking. Second, judges were to be protected only for their judicial acts, defined as those normally performed by a judge in his or her judicial capacity. Having found both tests satisfied, the Court held that the defendant judge was not liable for damages under section 1983.

II. THE ORIGIN AND LIMITS OF THE DOCTRINE OF JUDICIAL IMMUNITY

It is often remarked that judicial immunity is a venerable doctrine with roots deep in the common law. Although this view has been criticized, it is clear that a principle of judicial immunity has been recognized in England for more than 400 years, and has provided the foundation for the American formulation of the doctrine.
A. The Common Law Ancestor of Judicial Immunity

At early common law, judges were not immune from suit for their judicial decisions. Because the law did not provide for appellate review, the favored method of attacking adverse decisions of inferior courts was simply to file suit against the judge who had made them. The consequences of erroneous decisions could be quite serious for the offending judge.

Nevertheless, the outlines of the modern doctrine began to take shape during the early seventeenth century, largely as a result of several opinions by Sir Edward Coke. In *Floyd v. Barker,* Coke and the members of the Court of the Star Chamber held that a judge of a King’s court of record could not be charged with conspiracy in the Star Chamber on the basis of his judicial acts. Coke justified his decision on several policy grounds, arguing...
ing that without such a rule, matters would continue ad infinitum as judicial decisions were repeatedly drawn into question "by partial and sinister supposals and averments." In addition, he maintained that the rule was necessary to preserve the dignity of the courts and the monarch who had constituted them. Finally, Coke argued that without such a rule, even the most conscientious judges would be subjected to harassing lawsuits by disgruntled litigants.

The nature of the record of proceedings was particularly important to the decision, and provided the basis for the initial statements of the doctrine. Because the record originally kept in the King's court was viewed as the King's word regarding what had transpired in proceedings before him, the accuracy of the matters it contained was indisputable. When the law courts later became entities distinct from the King and council, the judges

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STONE, COMMENTARIES ON THE LAWS OF ENGLAND, *58-60. While on circuit, Barker had sentenced a prisoner to death and was later brought before the Star Chamber and charged with conspiracy based on his acts during the hearing. Floyd, 12 Co. Rep. at 23-24, 77 Eng. Rep. at 1305-06.

81. Coke is generally credited with first articulating a policy foundation for judicial immunity. See 6 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 237 (2d ed. 1927); Feinman & Cohen, supra note 64, at 208.

82. Floyd, 12 Co. Rep. at 24, 77 Eng. Rep. at 1306. It has been suggested that judicial immunity was an important step in the development of an orderly procedure for review of decisions, because the doctrine promoted finality and ensured that the errors of inferior courts of record would be corrected by proceedings in error, rather than by collateral attacks on judgments. See Block, supra note 64, at 884-85.

83. Floyd, 12 Co. Rep. at 24, 77 Eng. Rep. at 1307. Coke believed that an offending judge, as a delegate of the King's prerogative, should answer to the King himself, rather than to another judge. Id. See also Hamond v. Howell, 2 Mod. 218, 221, 86 Eng. Rep. 1035, 1037 (C.P. 1677) ("If [the judge] doth any thing unjustly or corruptly, complaint may be made to the King, in whose name judgments are given.").

American decisions echo this reasoning although the sovereign authority, of course, is different. See Randall v. Brigham, 74 U.S. (7 Wall.) at 537 ("If faithless, if corrupt, if dishonest, if partial, if oppressive or arbitrary, [judges] may be called to account by impeachment, and removed from office").

84. Floyd, 12 Co. Rep. at 25, 77 Eng. Rep. at 1307 ("those who are the most sincere, would not be free from continual calumniations").

85. 6 W. HOLDSWORTH, supra note 81, at 235-38.

86. See 2 F. POLLOCK & F. MAITLAND, supra note 75, at 666-67. See also 3 W. BLACKSTONE, supra note 80, at *24 (Records "are of such high and supereminent authority, that their truth is not to be called in question . . . [for] it is a settled rule and maxim that nothing shall be averred against a record nor shall any plea, or even proof, be admitted to the contrary.").

87. Originally, a party seeking royal justice would appear before a body variously designated as the Aulia Regis, 3 W. BLACKSTONE, supra note 80, at *38, or the Curia Regis, P. JAMES, AN INTRODUCTION TO ENGLISH LAW 21-22 (6th ed. 1966), which consisted of the King and his council of tenants in chief. The pleas held before the King were recorded on rolls of parchment that were viewed as the King's word as to the matters before him. 2 F. POLLOCK & F. MAITLAND, supra note 75, at 666. This arrangement later proved unpopular because,
who prepared the record of proceedings were able to use it to shield themselves from liability for the matters it contained because, as Coke expressed it, records "import verity in themselves; and none shall be received to aver any thing against the record itself." 88

As later articulated in The Case of the Marshalsea, 89 all decisions made within the jurisdiction of the judge enjoyed the protection of the record and could not be attacked, even where they were mistaken. 90 A judge of a court of record could lose his immunity only if he acted without jurisdiction since decisions made in the complete absence of jurisdiction were outside the protective coverage of the record. 91 These were formed coram non judice 92 and subjected the judge to personal liability.

Accordingly, in its initial formulation, immunity extended only to the

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88. Floyd, 12 Co. Rep. at 24, 77 Eng. Rep. at 1306. See also 5 W. Holdsworth, supra note 81, at 159-60. The importance of a court's status as of record for purposes of immunity was later illustrated in Bonham's Case, 8 Co. Rep. 113b, 77 Eng. Rep. 646 (C.P. 1610), where Coke held that the decision of a tribunal chartered by Parliament could be attacked, since there was a difference between what was done under the special authority granted by Parliament and what was done as a judge of record.

89. 10 Co. Rep. 68b, 77 Eng. Rep. 1027 (C.P. 1613). The Court of Marshalsea had jurisdiction over trespasses within the verge (the area 12 miles from the King's residence) against a member of the King's household, and of debts and contracts between two members of the household. Articuli Super Cartas, 28 Ed. ch. 3 (1300). In this case, however, the court held plea in assumpsit when neither party was of the household.

90. To illustrate a mistaken opinion where immunity would be present, Coke used the example of a court of common pleas issuing a Capias Ad Respondendum (warrant for the arrest of a civil defendant) against a duke. Although the Capias should not issue against a duke, the court had jurisdiction to issue the process as a general matter. Its decision would be erroneous, but not outside its jurisdiction, and immunity would operate. Were a court of common pleas to take cognizance of the appeal of a felony, however, it would act without jurisdiction and would be subject to liability. The Marshalsea, 10 Co. Rep. 68b, 76b, 77 Eng. Rep. 1027, 1040. See supra note 56 for a similar illustration by the Supreme Court.

91. Id. See also Terry v. Huntington, Hard. 480, 145 Eng. Rep. 557 (Ex. 1680) (where the commissioners of excise had, without jurisdiction, adjudged low wines to be strong wines, they were liable to the party injured).

92. See The Marshalsea, 10 Co. Rep. at 76a, 77 Eng. Rep. at 1038. The phrase is generally translated as being in the presence of one not a judge. BLACK'S LAW DICTIONARY 305 (rev. 5th ed. 1979). See Perkins v. Proctor, 2 Wils. 382, 384, 95 Eng. Rep. 874, 875 (K.B. 1768) ("where there is no jurisdiction . . . there is no judge; the proceeding is as nothing"); Terry v. Huntington, Hard. at 483, 145 Eng. Rep. at 558 ("when they exceed their authority, they cease to be [judges], and act as private persons").
judges of the King's courts of record; judges of the inferior law courts and those of rival English courts were not protected. Gradually, however, the doctrine was expanded to protect judges of other courts as well. Judges of the county courts, ecclesiastical courts and other nonrecord courts were brought within the ambit of judicial immunity, although the expression of the doctrine varied.

Additional grounds were subsequently presented in support of immunity, and the need for judicial independence began to receive greater attention. In

93. As noted above, see supra note 87, the superior courts of record were those that evolved from the Curia, in which the proceedings were enrolled. The practice of maintaining plea rolls was often used to distinguish courts of record from others. See, e.g., 3 W. Blackstone, supra note 80, at *24 ("A court of record is that, where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the record of the court . . . ." In addition a court of record had the power to fine and imprison. Id. See also Godfrey's Case, 11 Co. Rep. 42a, 43b, 77 Eng. Rep. 1199, 1202 (K.B. 1615) ("some may fine and not imprison . . . some can neither fine nor imprison, but amerce . . . . [however] no court can fine or imprison which is not a Court of Record.").

94. During the early seventeenth century, a number of competing courts existed, among them were the Admiralty, Chancery, Council and ecclesiastical courts. The relationship between the common law courts of the King's Bench, Common Pleas and Exchequer and these rivals was usually acrimonious. See infra notes 102, 123, 126. By basing the rule of immunity on the record, Coke ensured that only judges of the King's courts would be immune since they alone presided over courts of record. It has been observed that judicial immunity represented, in part, an attempt to establish the supremacy of the law courts over their rivals. 5 W. Holdsworth, supra note 81, at 159-60.


96. During the latter half of the 17th Century, the English law began to distinguish, for purposes of judicial immunity, between superior and inferior courts, the former consisting of the King’s Bench, Common Pleas and Exchequer. Under several earlier decisions, see, e.g., Peacock v. Bell, 1 Saund. 69, 85 Eng. Rep. 81 (K.B. 1667), it had been held that a superior court had the power to determine its own jurisdiction, and was therefore presumptively within it under all circumstances. Accordingly, the improprieties of a superior court came to be viewed as excesses, but not absences, of jurisdiction and did not strip a superior court judge of immunity for his judicial acts. Conversely, the jurisdictional limits of inferior courts were fixed, and the judges of such courts were liable when they knowingly acted without jurisdiction. See 6 W. Holdsworth, supra note 81, at 238-40. See also Miller v. Seare, 2 W. Bl. 1141, 1145, 96 Eng. Rep. 673, 675 (C.P. 1777) ("The protection, in regard to the Superior Courts, is absolute and universal; with respect to the Inferior, it is only while they act within their jurisdiction"). In addition, a writ of prohibition might be entered against an inferior court that had exceeded its jurisdiction. See infra note 109.

Though this distinction is no longer recognized by the English courts, see Sirros v. Moore [1975] Q.B. 118, the American authorities reflect a similar distinction, between courts of general and those of limited jurisdiction, for purposes of judicial immunity. See supra note 57.
Delineating the Immunity of Judges

Taaffe v. Downes, the court of common pleas emphasized that suits before one judge regarding the actions of another could only be in the nature of an appeal. Lawsuits directly attacking decisions were “against the independence of judges” and thus could not be permitted. Many of the policy rationales were collected in Scott v. Stansfield, where immunity was extended to English county court judges. There, it was held that judges should be permitted to exercise their function freely and independently without fear of adverse consequences for mistaken opinions. This rule, the court maintained, was not designed to protect malicious or corrupt judges, but rather served to protect the public’s interest in dispassionate adjudication.

B. The Writ of Prohibition: A Possible Limitation on the Doctrine of Judicial Immunity

In their statements of the principles of judicial immunity, the common law courts did not distinguish between suits for damages and those for injunctive relief. Injunctions, in fact, could not be obtained against a judge and instead ran only against the parties to an action. Nevertheless, the King’s

98. Id. at 18.
100. Scott, [1868] 3 L.R.-Ex. 220, 223. See also Garnett v. Ferrand, 6 B. & C. 611, 625-26, 108 Eng. Rep. 576, 581 (K.B. 1827) (immunity “is given by the law to the judges not so much for [the judge’s] sake, as for the sake of the public . . . that being free from actions, [judges] may be free in thought and independent in judgment, as all who are to administer justice ought to be”).
102. J. High, A Treatise on the Law on Injunctions § 46 (3d ed. Chicago 1890) (“[A] court of equity is devoid of jurisdiction to grant an injunction against the judge of another court . . . . Every judge is supreme and independent in his own sphere, and can not be restrained in the discharge of his functions by the process of injunction.”).

Though they were not directed against judges, injunctions entered against the parties to an action were quite disturbing to the common lawyers who feared they would erode the authority of judgments rendered at law. The law courts wished to curtail the chancellor’s authority to grant relief after judgment, and indicated that if equity courts were to “intermeddle” in affairs triable at law, they would be prohibited. Heath v. Rydley, Cro. Jac. 335, 79 Eng. Rep. 286 (K.B. 1614). The dispute was taken before James I who, notwithstanding Coke’s arguments on behalf of the judges, resolved the matter in favor of the chancellor. A synopsis of these events is contained in note 6 to Crowley’s Case, 2 Swans 1, 91, 36 Eng. Rep. 514, 542 (Ch. 1818). See also 3 W. Blackstone, supra note 80, at *53-54.
103. An injunction would issue against a party to stay trial, or to stay execution of a judg-
courts were successful in controlling rival and inferior courts by way of the prerogative writs.104

Among the principal means of judicial control were the writs of prohibition and mandamus. Mandamus was positive in nature and lay to enforce the performance of a ministerial duty105 while prohibition, on the other hand, was essentially negative in character and was designed to control the unwarranted assumption of judicial power.106

The writ of prohibition was, at least in its effect, similar to injunctive relief,107 and was used at a very early period in the common law.108 Generally speaking, the writ lay to control judges who had exceeded their jurisdiction.109 In some instances, the writ would issue where a substantial proce-
dural irregularity had occurred, namely where a judge had a personal interest in the outcome of a suit before him, or had prevented both sides from being heard. Prohibition was not used, however, to correct the practice of an inferior court, or to remedy an error on the merits of a controversy. Where an excess of jurisdiction was clear, the writ would issue even though the aggrieved party could later challenge the excess by an alternative method.

A party seeking a writ of prohibition would file a “suggestion” that the inferior court was not empowered to try a matter and if jurisdiction was plainly lacking, the writ immediately would be issued by the superior court. If, however, the suggestion was potentially but not clearly meritorious, the applicant would be required to “declare” in prohibition by bringing a “feigned” action against the opposing party, based on the fiction that the other had proceeded in a suit despite a previous prohibition. If, upon argument, it appeared that the grounds presented were sufficient, the writ would be issued against the opposing party and the court below to prohibit them from continuing in the matter. Otherwise, a “writ of consultation”

3 W. BLACKSTONE, supra note 80, at *112.
110. The writ issued in some, but not all, cases where a court violated what has been described as an “invariable condition of regularity.” Gordon, The Observance of Law as a Condition of Jurisdiction, 47 L.Q. REV. 386, 397 (1931).
112. See, e.g., King v. North Ex parte Oakey, [1927] 1 K.B. 491, 500 (where no notice had been given to a party, the court had no jurisdiction over the matter and prohibition was appropriate).
114. See, e.g., Guardians of Lexden v. Southgate, 10 Ex. 201, 156 Eng. Rep. 415 (Ex. 1854) (In denying a writ sought against a county court, Chief Baron Pollock stated “[i]t may be that the decision was erroneous; but, even in a case where there is not a particle of evidence to support the decision . . . that is no ground for prohibition.”); Griffin v. Ellis, 11 Ad. & E. 743, 756, 113 Eng. Rep. 595, 602 (K.B. 1840) (“[I]t has often been held that an erroneous judgment on matters within the cognizance of the Court Christian will not entitle to prohibition.”).
116. 3 W. BLACKSTONE, supra note 80, at *113.
117. Id. The defense to the declaration was almost always conducted by one of the parties, and not the judge. Mayor of London v. Cox, [1867] 2 L.R.-E. & I. App. 239, 280. The party sought to be prohibited could also avoid the necessity of defending against the declaration by acquiescing in the issuance of the writ. Id. at 278.
118. The writ would go “only to inform the conscience of the Court” whether it had power to try an action, and no damages could be recovered unless it was ignored. Mayor of London v. Cox, [1867] 2 L.R. E.-& I. App. 239, 278.
would issue to permit the action to proceed.119

Because it was a prerogative writ, prohibition initially issued only from the King's Bench120 or other superior court of law121 to a rival or inferior court.122 It was thus a popular and effective weapon in the attempts of the law courts to augment their jurisdiction at the expense of rival courts.123 Since the law courts exercised no appellate power over the ecclesiastical courts,124 the principal method available to supplant and control the rival court lay in the writ of prohibition.125 The ecclesiastical courts of England were therefore frequently prohibited.126 In their desire to exercise such control, the law courts developed the fiction that an improper decision on the merits stripped an ecclesiastical court of jurisdiction, thus rendering it sub-

119. 3 W. BLACKSTONE, supra note 80, at *114. The circuitous nature of this process was designed to prevent the precipitous issuance of the writ. See Home v. Earl Camden, 2 H. Bl. 533, 535, 126 Eng. Rep. 687, 688 (H.L. 1795), where Lord Eyre, discussing the procedure for obtaining the writ, noted the "obliquity" in the process and stated "[s]o long as the temporal courts direct parties to declare in prohibition, a prohibition cannot arbitrarily issue, nor upon any but the most solid and substantial grounds." Id.

120. As Coke noted, the Court of Kings Bench would issue writs of prohibition to temporal and spiritual courts "to keep them within their proper jurisdiction." 4 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 71 (London n.d.).

121. See id. at 99 (Court of Common Pleas is authorized to issue the writ); 3 W. BLACKSTONE, supra note 80, at *112 (the writ issued "properly only out of the court of king's bench, being the king's prerogative writ; but . . . it may now also be had in some cases out of the court of chancery, common pleas, or exchequer.").

122. See supra note 109.

123. See supra note 92. Holdsworth describes the early 17th century as a time when the law courts were engaged in a "systematic series of encroachments," 1 W. HOLDSWORTH, supra note 81, at 554, and notes that writs of prohibition and the doctrine of judicial immunity were both useful in establishing the supremacy of the law courts over their rivals. See id. at 229; 6 W. HOLDSWORTH, supra note 81, at 237. Together, the two ensured that while the common law judges could exercise a significant degree of control over the activities of rival courts by issuing writs of prohibition, the doctrine of judicial immunity would protect their decisions from collateral attack in such courts. See Mackonochie v. Lord Penzance, [1881] 6 Ap. Cas. 424, 447, where, in reviewing the use of the writ of prohibition, Lord Blackburn indicates that the "temporal Courts had carried on a long struggle, first, before the Reformation, with the Pope, and afterwards . . . with the Church and the Crown, and many of their decisions may be attributed to a jealousy which they had thus acquired of the Ecclesiastical Courts.


125. See 1 W. HOLDSWORTH, supra note 81, at 229; Jenks, supra note 104, at 528 (the writ was the "special weapon of the King's courts against the ecclesiastical tribunals"). The courts of law also asserted a right to define the jurisdiction of ecclesiastical courts. See Fuller's Case, 12 Co. Rep. 42, 77 Eng. Rep. 1323 (Ex. 1605) ("the determination of a thing, whether it belongs to Court Christian, doth appertain to the Judges of Common Law").

126. The vast majority of entries in Baron Comyns' DIGEST relate to prohibitions entered against ecclesiastical courts. See 7 J. COMYNS, supra note 106; see also J. HIGH, supra note
object to prohibition. 127 The law courts later abandoned this pretense in favor of a more direct approach under which ecclesiastical courts were prohibited even in situations where jurisdiction had not technically been exceeded. 129

Under one exception that developed, ecclesiastical courts were prohibited where they decided contrary to the rules set down in the common law. 130 Although such courts were permitted to rule on temporal matters arising incidentally in disputes generally within ecclesiastical jurisdiction, 131 the law courts were quick to prohibit ecclesiastical courts that decided such matters differently than a law court would have. 132 Thus in Shatter v. Friend, 133 prohibition was entered against an ecclesiastical court that had required two witnesses to prove a legacy whereas a common law court would have only

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106, at § 763 ("[B]ly far the larger portion of the English authorities upon the subject are confined exclusively to questions of ecclesiastical law having no application in this country").

In earlier times, the zeal with which the King's courts prohibited their rivals forced the Ecclesiastical judges to seek relief from the King, who periodically issued statutes to delineate the boundaries of the respective jurisdictions. See, e.g., Articuli Cleri, 9 Edw. II (1315); Circumspecte Agatis, 13 Edw. I (1285). In addition to his disputes with the Chancellor, see supra note 102, Coke also became embroiled in controversies with the ecclesiastical and admiralty judges over the numerous prohibitions issuing from the King's Bench against these courts. See 5 W. HOLDSWORTH, supra note 81, at 142-43, 429-31.

127. See Dobbs, supra note 124, at 60. In Harrison v. Burwell, 2 Ventr. 9, 86 Eng. Rep. 278 (1670), the court prohibited an ecclesiastical court that had jurisdiction over a matter by holding that the judge did not have jurisdiction to rule erroneously.

128. See Gordon, supra note 110, at 393.

129. Blackstone indicates that the writ would issue to prevent an "encroachment of jurisdiction" or when a matter was coram non judice. 3 W. BLACKSTONE, supra note 80, at *111. With regard to the latter term, see supra note 92 and accompanying text.

130. See 3 W. BLACKSTONE, supra note 80, at *112 (The writ issued if an ecclesiastical court handling a matter "clearly within [its] cognizance . . . transgress[ed] the bounds . . . prescribed by the laws of England.").


Originally, the English ecclesiastical courts exercised both criminal and civil jurisdiction. The former encompassed, inter alia, offenses committed by clergymen, heresy, adultery, and defamation. Their civil jurisdiction extended to marriage, divorce, and probate. In the mid-18th century, the ecclesiastical courts lost jurisdiction over virtually all these matters, but retained the power to try clergy. See 11 HALSBURY'S LAWS OF ENGLAND 958 (1st ed. 1912); 3 W. BLACKSTONE, supra note 80, at *87-103; Denning, The Meaning of Ecclesiastical Law, 60 L.Q. REV. 235 (1944).

132. The courts of law would not interfere, however, when the ecclesiastical interpretation coincided with that of the law courts. See Home v. Earl Camden, 2 H. Bl. 533, 536, 126 Eng. Rep. 687, 689 (H.L. 1795) (per Lord Eyre) (ecclesiastical courts will not be prohibited where they expound the common and statute law in a manner consistent with the courts of law); Full v. Hutchins, 2 Cawp. 422, 424, 98 Eng. Rep. 1165, 1166 (K.B. 1776) (An ecclesiastical court "shall not be prohibited, unless the Court proceed to try contrary to the principles and course of the common law.").

required one. Likewise, in White v. Steele, an ecclesiastical court was prohibited after it refused to accept a responsive plea which the common law deemed admissible. The practice of issuing prohibitions under such circumstances grew out of concerns for symmetry and uniformity; it was considered improper that the outcome of a case should vary according to the court in which it was pending.

Somewhat analogously, an ecclesiastical court's misconstruction of an act of parliament was considered sufficient grounds for prohibition. In Gould v. Gapper, the King's Bench held that prohibition could be granted against an ecclesiastical court that had erroneously interpreted a statute relating to the allotment of land. Admitting that jurisdiction properly lay in the ecclesiastical court, the court analogized to cases where decisions contrary to the common law were prohibited, and held that since the proper interpretation of statutes was that set forth by the courts of law, a contrary interpretation by an ecclesiastical court would provide adequate grounds for prohibition. It further held that the writ could issue even after judgment since before judgment had been entered, the law courts would have no way of knowing whether or not a proper interpretation had been placed on the statute in question. Again, the rule was justified on the grounds that it

134. See Breedon v. Gill, 1 Ld. Ray. 220, 221, 91 Eng. Rep. 1043, 1044 (K.B. 1698) (although ecclesiastical courts may determine collateral legal issues, when such "a matter arises which is not of their consuance [sic] properly, the Court of Common Law enforce them to admit such evidence as the Common Law would allow").


136. 3 W. BLACKSTONE, supra note 80 *112 (the matter should be decided according to the common law rule "else the same question might be determined different ways, according to the court in which the suit is depending, which no wise government can or ought to endure"). See also Home v. Earl Camden, 2 H. Bl. 533, 536, 126 Eng. Rep. 687, 689 (H.L. 1795). When discussing an application for prohibition against the prize court, Lord Eyre indicated that "the king's temporal courts are . . . to declare the common and expound the statute law, and the possibility of two different rules prevailing upon the same law . . . ought not to exist." Id.


138. This rule was apparently applicable only to the ecclesiastical courts, and not to the inferior courts of common law. In Farrow v. Hague, 3 H. & C. 102, 109, 159 Eng. Rep. 464, 468 (Ex. 1864), the court denied prohibition to a county court that allegedly had misinterpreted a statute. There, Baron Bramwell stated "looking at the [statute in question], I should say that a writ of error will lie; but if it will not, and the decision is wrong, there has been a mistake for which there is no remedy."


140. Id. at 371, 102 Eng. Rep. at 1112.

141. Id. at 364, 102 Eng. Rep. at 1110.
promoted a necessary uniformity in the law.\textsuperscript{142}

In prohibiting ecclesiastical courts under these circumstances, the law courts consistently held that the availability of an appeal to a higher ecclesiastical tribunal would not defeat an application for prohibition.\textsuperscript{143} Since the law courts exercised no appellate power over ecclesiastical courts,\textsuperscript{144} it was feared that the misinterpretation might continue through successive levels of ecclesiastical review and the opportunity to correct it through prohibition eventually would be lost.\textsuperscript{145}

Apart from the above mentioned instances, the English courts generally held that a court, be it ecclesiastical or common law, would not be prohibited where it mistakenly had decided an issue purely within its jurisdiction.\textsuperscript{146} The party aggrieved was left to pursue alternative remedies and, if none existed, the decision of the inferior court was final and could not be attacked collaterally through the writ of prohibition.\textsuperscript{147}

As was the case with judicial immunity, the English principles regarding the writ of prohibition have made their way into American law. It has been

\textsuperscript{142} The court cited Blackstone to this effect. \textit{Id. See supra} note 136.


\textsuperscript{144} If, however, prohibition was applied for after sentence on the grounds of lack of jurisdiction, the writ would not issue unless the lack of jurisdiction was clear. \textit{See, e.g.}, Hart v. Marsh, 5 Ad. \& E. 592, 601, 111 Eng. Rep. 1289, 1292 (K.B. 1836); Full v. Hutchins, 2 Cowp. 422, 423, 98 Eng. Rep. 1165, 1166 (K.B. 1776) (where jurisdiction was lacking, the writ would go in the "interest reipublicae that [ecclesiastical tribunals] should not encroach on the jurisdiction of the Temporal Courts").

\textsuperscript{145} \textit{See supra} note 124.

\textsuperscript{146} In White v. Steele, 12 CB(NS) 383, 410, 142 Eng. Rep. 1191, 1202 (C.P. 1862), the court stated that the error might continue through successive levels of review, and if the proceedings were "regular on the face of them, the power to prohibit [might] be lost." It is not altogether clear that this fear was appropriate. In Mackonochie v. Lord Penzance, [1881] 6 App. Cas. 424, 452, Lord Blackburn remarked that the Privy Council, when exercising its jurisdiction as the highest level of ecclesiastical review, might be prohibited under some circumstances.


\textsuperscript{148} Farrow v. Hague, 3 H. \& C. 102, 109, 159 Eng. Rep. 464, 468 (Ex. 1864) (the remedy for an erroneous interpretation of a statute by a county court is a writ of error, not prohibition); Episcopus St. David v. Lucy, 1 Ld. Ray. 539, 544, 91 Eng. Rep. 1260, 1263 (K.B. 1702) (if "there are some ecclesiastical canons which restrain [an ecclesiastical judge] from exercising the jurisdiction . . . that is a matter for the consuance [sic] of the [ecclesiastical court of] Delegates upon appeal, but no ground to prohibit them from proceeding").
recognized by both state\textsuperscript{148} and federal courts,\textsuperscript{149} and examples of its use are numerous.

The Supreme Court is authorized to issue the writ where necessary to aid and protect its appellate jurisdiction.\textsuperscript{150} The Court has held that the writ at its disposal is the common law writ which, according to the Court, lies only where an absence of jurisdiction over either the subject matter or the parties is evident.\textsuperscript{151} Its use has been limited solely to instances where it was necessary to prevent an unlawful assumption of jurisdiction.\textsuperscript{152} It does not lie to correct a supposed error on the merits of a controversy; in such instances, the appropriate remedy is an appeal.\textsuperscript{153} Thus, where jurisdiction properly lay with the court sought to be prohibited, the Supreme Court has declined to issue the writ, even where no alternative means of challenging the decision existed.\textsuperscript{154} In such cases, the matter was considered settled and could not be attacked through the use of the writ.\textsuperscript{155}

Apart from the rules that applied where prohibition was sought against the English ecclesiastical courts, the American writ of prohibition thus bears great resemblance to its common law ancestor. It is the latter, however, that figures most prominently in the Supreme Court’s analysis of the scope of judicial immunity in \textit{Pulliam v. Allen}.

\textsuperscript{148} Although a discussion of state court uses of the writ is beyond the scope of this Note, many examples are collected in \textit{F. Ferris & F. Ferris, Jr., supra} note 106.

\textsuperscript{149} \textit{See}, e.g., United States v. Peters, 3 U.S. (3 Dall.) 121 (1795).

\textsuperscript{150} Under 28 U.S.C. \S\ 1651(a) (1982), federal courts may issue “all writs agreeable or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” \textit{See} McClellan v. Carland, 217 U.S. 268 (1910) (in a discussion of the writ of certiorari, the Court held that \S\ 1651 authorizes the issuance of all English common law writs).

\textsuperscript{151} \textit{Ex parte} Gordon, 104 U.S. 515, 516 (1881) (“The writ thus provided for is a common-law writ, which lies . . . only when that court is acting in excess of, or is taking cognizance of matters not arising within its jurisdiction.”). \textit{See also} Smith v. Whitney, 116 U.S. 167, 176 (1886) (A writ of prohibition is never to be issued unless it clearly appears that the inferior court is about to exceed its jurisdiction. It cannot [be used] . . . to correct mistakes. . . . These rules have always been adhered to by this court . . . as well as by the courts of England . . . .”)

\textsuperscript{152} \textit{See}, e.g., \textit{Ex parte} United States, 263 U.S. 389, 393 (1923); \textit{In re} Fassett, 142 U.S. 479, 486 (1892).

\textsuperscript{153} \textit{Ex parte} Pennsylvania, 109 U.S. 174, 176 (1883) (prohibition will not go to correct an error in judgment, “[t]he remedy, if any, is by appeal”). \textit{See also} J. High, \textit{supra} note 106, at \S\ 772 (“[T]he writ is never allowed to usurp the functions of a writ of error or certiorari, and can never be employed as a process for the correction of errors of inferior tribunals.”).

\textsuperscript{154} \textit{Ex parte} Ferry Co., 104 U.S. 519, 520 (1881) (“[I]t is no ground for relief by prohibition that provision has not been made for a review of the court of original jurisdiction, by appeal or otherwise.”).

\textsuperscript{155} \textit{Id.} \textit{See} \textit{Ex parte} Pennsylvania, 109 U.S. 174, 176 (1883).
III. **Delineating the Boundaries of Judicial Immunity: The Supreme Court Decision in *Pulliam v. Allen***

In determining whether attorney’s fees could be assessed against a judicial officer who had been enjoined pursuant to section 1983 of the Civil Rights Act, the Supreme Court in *Pulliam v. Allen* looked to the common law to determine whether judicial immunity barred the entry of prospective relief against a judicial officer. Finding that similar relief was often awarded against judges in the form of the writ of prohibition, the Court concluded that Magistrate Pulliam could not raise the doctrine of judicial immunity to bar the injunctive and declaratory relief awarded against her. Accordingly, since the relief was proper, the court held that the attorney’s fees expended in obtaining it could be recovered from the magistrate under section 1988.

Writing for the majority, Justice Blackmun reviewed the principal common law cases regarding judicial immunity and recognized that judges were protected from awards of damages based on judicial acts occurring within the scope of their jurisdiction. He observed, however, that none of these cases established a rule against the entry of prospective relief. Conceding that injunctions could not be obtained against judges, he determined that, despite the common law emphasis on judicial independence, the King’s Bench exercised control over rival and inferior courts by means of the writs of prohibition and mandamus.

Reviewing the common law use of the writ of prohibition, Justice Blackmun conceded the general rule that it issued in cases where jurisdiction had been exceeded or misused. He found, however, that despite this rule, and notwithstanding the principles of judicial immunity, prohibition often issued to restrain judges who, while acting within their jurisdiction, had misconstrued statutes or misapplied the common law. In his analysis, Justice Blackmun looked principally to instances where a law court had entered prohibition against an ecclesiastical court, and concluded that even where review was available by way of an appeal to a higher tribunal, the common law courts would nonetheless exercise collateral control by prohibiting a rival court under appropriate circumstances. Thus having found that pro-

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157. *Id.* at 1975-76.
158. *Id.* at 1978 n. 15.
159. *Id.* at 1976. The reference to the common law writs of prohibition and mandamus, as illustrative of the limitations of judicial immunity, was apparently first suggested in *Koen v. Long*, 302 F. Supp. 1383, 1389 (E.D. Mo. 1969), *aff’d*, 428 F.2d 876 (8th Cir. 1970).
160. *Id.*
spective relief in the form of the writ of prohibition would be entered in instances where judicial immunity would normally operate to protect a judicial officer from liability for damages, the Court concluded that the common law doctrine extended only to actions for damages, and did not protect a judge from collateral prospective relief.\footnote{162. \textit{Id.} at 1978.}

Turning to a discussion of section 1983, Justice Blackmun noted that the statute does not extend the scope of common law judicial immunity, but merely preserves the doctrine as it previously existed.\footnote{163. \textit{Id.} at 1980 (citing \textit{Pierson v. Ray}, 386 U.S. 547 (1967), discussed \textit{supra} notes 63-64 and accompanying text).} In addition, he observed that section 1988 permits attorney's fee awards against defendants who, while not immune from suits for injunctive relief, are immune from actions seeking damages.\footnote{164. \textit{Id.} at 1982 (citing H.R. REP. NO. 1558, 94th Cong., 2d Sess. (1976), which provides that attorney's fees would be appropriately granted against a defendant who is immune from damages, but not from injunctive relief.} Thus, having found that the common law doctrine did not protect judges from prospective relief, the Court held that judicial immunity could not be raised to defeat the section 1983 injunctive and declaratory relief awarded against Magistrate Pulliam, and that attorney's fees could therefore be recovered under section 1988.\footnote{165. \textit{Pulliam}, 104 S. Ct. at 1982.}

Addressing the policy issues underlying judicial immunity, Justice Blackmun maintained that injunctions, even when entered against a judicial officer who is acting within his jurisdiction, pose less of a threat to judicial independence than awards of damages, and do not invoke the same concerns expressed in previous statements of the doctrine.\footnote{166. \textit{Id.} at 1978.} He noted that the traditional requirements precedent to a grant of equitable relief provided a safeguard against oppressive interference with state court decisions.\footnote{167. \textit{Id.} (citing \textit{Beacon Theatres v. Westover}, 359 U.S. 500 (1959)).} In addition, he stated that the principles of federalism expressed in previous decisions would ensure that injunctive relief was entered only in the clearest of circumstances.\footnote{168. \textit{Id.} at 1979-80. With regard to these principles, see \textit{supra} note 47.} He believed that if, in addition to these safeguards, judicial immunity could be raised to bar injunctive relief, it might thwart the intent behind the Civil Rights Act in situations where such relief is the only remedy against unconstitutional state action.\footnote{169. \textit{Id.} at 1980. Justice Blackmun indicated that Congress intended § 1983 to reach all state actors, and cited Justice Douglas' dissenting opinion in \textit{Pierson v. Ray}, 386 U.S. 547, 548-64 (1967), discussed \textit{supra} notes 63-64 and accompanying text.}

In his dissent, Justice Powell also examined the common law authorities regarding judicial immunity, noting that the doctrine was primarily moti-
vated by a concern for judicial independence. Furthermore, he stated that the burden of harassing litigation was viewed as the principal threat to that goal. Accordingly, he maintained that the majority's distinction, for purposes of judicial immunity, between suits for damages and those for injunctive relief was unfounded in light of the common law emphasis on judicial independence. Whether for injunctions or for damages, lawsuits attacking the decisions of judges who have not exceeded their jurisdiction are equally burdensome and therefore threaten the independent judiciary that the common law sought to preserve. Thus, Justice Powell concluded that consonance with the rationale underlying the common law decisions requires that judges enjoy the same degree of immunity no matter what type of relief is sought.

Turning to the majority's analysis of the scope of judicial immunity at common law, Justice Powell stressed that injunctions could not be obtained against judges, and attacked the majority's reliance on the writ of prohibition as an analogous instrument. On this point, he indicated that the writ would generally not issue against a judge who was acting within his jurisdiction. Accordingly, he maintained that the availability of the writ of prohibition had nothing to do with judicial immunity; prohibition issuing as a consequence of an absence of jurisdiction would implicate none of the principles of immunity since immunity, by definition, was no longer operative when jurisdiction was exceeded.

With regard to the instances where prohibition was issued against ecclesiastical courts that had not exceeded their jurisdiction, Justice Powell argued that the English cases are dispositive only to the extent that they coincide with American practices. He maintained that the relationship that existed between the English law and ecclesiastical courts is not analogous to that between state and federal courts. Likewise, he noted that American courts have confined the use of prerogative writs to instances where jurisdiction is absent or where a duty to act exists, and found that a concern for judicial independence underlies the infrequent use of the writs in American

170. 104 S. Ct. at 1984 (Powell J. dissenting).
171. Id.
172. Id. at 1982.
173. Id. at 1984.
174. Id. at 1985.
175. Id.
176. Id.
177. Id.
178. Id. at 1985-86. Justice Powell noted that much of the English law on prohibition reflected the attempts by the king's courts to establish their supremacy over their rivals.
practice.\textsuperscript{179}

With regard to the implications of the decision, Justice Powell maintained that the majority seriously understated the risk posed by suits for injunctive relief. Using the litigation below as an example, he noted that the trial court had not required an affirmative showing that irreparable harm would ensue absent the entry of injunctive relief, and identified several alternative remedies that were available to Allen.\textsuperscript{180} In addition, he expressed concern that broadly worded injunctions would raise the possibility of contempt proceedings and thus deter judges from freely exercising their discretion.\textsuperscript{181} Finally, he noted that the prospect of attorneys’ fee awards under section 1988 greatly increases the number of section 1983 claims, thereby enhancing the possibility of harassing litigation against judges.\textsuperscript{182}

IV. THE IMPLICATIONS OF \textit{PULLIAM v. ALLEN: "A WIDE, WASTING, AND HARASSING PERSECUTION"}?\textsuperscript{183}

In examining the common law doctrine of judicial immunity, the majority in \textit{Pulliam v. Allen} noted the evident concern of the common law with preserving a detached and independent judiciary. It found, however, that the doctrine of judicial immunity did not protect judges from collateral prospective relief in the form of the prerogative writs issuing from the King’s Bench.

Generally speaking, prohibition issued only where an inferior court had exceeded its jurisdiction.\textsuperscript{184} In such instances, the writ provided no indication of the scope of judicial immunity since, by definition, it had ceased to operate.\textsuperscript{185} Thus, in the great majority of instances, the writ of prohibition posed no threat to the goal of an independent judiciary repeatedly stressed by American\textsuperscript{186} and English courts.\textsuperscript{187}

\textsuperscript{179} \textit{Id.} at 1986 (citing \textit{La Buy v. Howes Leather Co.}, 352 U.S. 249, 258 (1957)) (mandamus has the effect of making trial judges "litigants without counsel other than uncompensated volunteers"); \textit{Banker’s Life & Casualty Co. v. Holland}, 346 U.S. 282-83 (1953); \textit{Ex parte Fahey}, 332 U.S. 258, 259-60 (1947) (mandamus). In addition, Justice Powell noted that judges are not required to appear in mandamus proceedings.

\textsuperscript{180} \textit{Id.} 1987 nn.13-14. Justice Powell noted that Allen could have obtained a writ of habeas corpus, or had an unreasonable bail determination reviewed by a higher court.

\textsuperscript{181} \textit{Id.} at 1988.

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} \textit{Taaffe v. Downes} (C.P. Ireland 1813), \textit{noted in Calder v. Halket}, 3 Moore 28, 40, 13 Eng. Rep. 12, 18 (P.C. 1840) ("If you once break down the barrier of their dignity, and subject them to an action, you let in upon the judicial authority a wide, wasting, and harassing persecution, and establish its weakness in a degrading responsibility.").

\textsuperscript{184} \textit{See supra} notes 109 and accompanying text.

\textsuperscript{185} \textit{See supra} notes 90-92, 96 and accompanying text.

\textsuperscript{186} \textit{See supra} notes 8-9, 60-61 and accompanying text.

\textsuperscript{187} \textit{See supra} notes 8, 97-100 and accompanying text.
Nevertheless, the majority in *Pulliam* found a common law writ of prohibition which issued when previous common law writs of prohibition found by the Court would not; namely, when a judge had erred on a matter within his jurisdiction. The courts against which prohibition would go in such instances, however, occupied a unique place in the English legal system. As the ecclesiastical courts were viewed as a threat to the establishment of the common law as the preeminent source of law in England, the writ of prohibition was used against them by the courts of law to prevent them from exercising jurisdiction over matters viewed properly within the province of the common law. In this country, where the boundaries of the various jurisdictions are more clearly delineated, courts have not used the writ of prohibition to augment their jurisdiction or to replace normal appellate procedures.

Furthermore, the threat to the policy considerations underlying judicial immunity was not as great as in *Pulliam*, since the writ of prohibition did not carry with it an attendant liability for attorney’s fees or damages, and the burden of defending against it normally fell on the parties to the action. Thus, although prohibition would issue against certain judges on the basis of error, the special relationship existing among the law courts and their rivals, and the more attenuated threat to judicial independence make the majority’s analogy to the common law writ of prohibition somewhat less convincing.

In addition, it is not clear that the protections identified by the majority are as substantial as it suggests. In theory, a plaintiff seeking prospective relief against a judge must pass two hurdles. First, he must satisfy the traditional requirements precedent to equitable relief by showing that he will suffer irreparable harm and has no adequate remedy at law. Second, the principles of comity and federalism expressed in *Younger* must be overcome. In combination, these two requirements should pose a substantial obstacle to a plaintiff seeking prospective relief under section 1983. As the dissent points out, however, the facts in *Pulliam* indicate that equitable relief is not always as difficult to obtain as the majority apparently believes. If injunctions are normally entered on such scant evidence, Justice Powell’s fears are well grounded.

188. See supra note 151.
189. See supra notes 123, 125-26.
190. See supra notes 151-55.
191. See supra notes 117-18.
193. See supra note 47.
194. See supra note 180 and accompanying text.
Whether or not the facts in *Pulliam* are representative, the task of defending against actions brought for injunctive relief, even where they do not succeed, must lay a substantial burden on judges. When they may no longer assume that judicial acts within their jurisdiction will be protected, the prospect of defending such actions and the chance they might culminate in substantial attorney's fees awards is likely to bring about justifiable suspense on the part of state court judges, as the dissent suggests.  

V. CONCLUSION  

In *Pulliam v. Allen*, the Supreme Court eliminated the last complete barrier to attorney's fees awards against state judges by holding that judicial immunity could not be raised to bar awards of prospective relief under section 1983 of the Civil Rights Act. Though many federal courts had reached the same conclusion, they had not considered the effect that attorney's fees awards might have on the policy considerations underlying judicial immunity.

The immunity of any public official from suit results from a determination that the ensuing benefits outweigh the occasional wrongs that go unredressed as a consequence. The Supreme Court had previously been willing to strike the balance in favor of an independent judiciary, even where a deprivation of constitutional rights had been alleged. When state judges face the possibility that judicial acts taken within their jurisdiction might be enjoined and attorney's fees subsequently assessed against them, the threat to judicial independence is clear. In this respect, it can only be hoped that the safeguards identified in *Pulliam* will be sufficient to restrain the federal courts from enjoining their state brethren, thus raising an attendant liability for fees, except in the clearest circumstances.

*Thomas J. Noto III*

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that, in the wake of *Pulliam*, he has been sued three times in two months, and that his experience is "not all that unusual."