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SPEAKERS

Anthony Sanders, Jaba Tsitsuashvili, Anya Bidwell

A Anthony Sanders 00:24

Hello, and welcome to Short Circuit, your podcast on the federal courts of appeals. I'm your host, Anthony Sanders, Director of the Center for Judicial Engagement at the Institute for Justice. We're recording this on June 6, 2023, although the episode won't be released for a few days. We are getting right into the core of some of what we often talk about at Short Circuit, and that is immunity and accountability, focusing today on what's going on in state courts. So joining me, for one, is a very familiar voice to our listeners, and that's one of the leaders of our Project on Immunity and Accountability at the Institute for Justice, Anya Bidwell. Anya, welcome back.

A Anya Bidwell 01:10

Hey hey. Good to be back.

A Anthony Sanders 01:13

And also joining me is Jaba Tsitsuashvili who is one of our happy warriors on the Project of Immunity and Accountability. Welcome back, Jaba.

J Jaba Tsitsuashvili 01:24

Thank you, Anthony. Happy to be here.

A Anya Bidwell 01:26

I congratulate you on pronouncing Jaba's last name.

A

Anthony Sanders 01:29

Did I actually do it that time?

J

Jaba Tsitsuashvili 01:31

Yeah, you've made...

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Anya Bidwell 01:34

Like a 95%.

J

Jaba Tsitsuashvili 01:36

...yeah, great strides.

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Anthony Sanders 01:37

Thanks. We're, we're still working on it here out here in the Scandinavian Midwest, but one day, I'm able to get the 100%. So Anya, speaking of the Scandinavian Midwest, we're going to start in Iowa today. And some, I guess, unhappy news that some of us received from its supreme court a few weeks ago.

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Anya Bidwell 02:01

Yes. So it is an unhappy news, I suppose. But I wanted to kind of back out a little and kind of have a bigger picture before I discuss it. So there is this inherent distinction between state and federal courts. State courts have general jurisdiction and common law powers to create remedies. Federal courts are of much more limited jurisdiction, and until 1870s, it was pretty much all about diversity suits. Then after the Civil War, you had the recognition of subject matter jurisdiction, and that's how we get to Bivens suits. You could sue federal officials at common law, but then Bivens came about and said, Why don't you just bring cases in federal court directly under the federal constitution? For a while the Supreme Court saw nothing wrong with that. But then Justice Scalia said hold on a minute. Creating remedies is a job for state courts. We don't have these kinds of common law powers. We have to wait for Congress to provide us with an authorization. So that's the beginning of the end for Bivens. That's the road to Egbert v. Boule from last term that we discussed several times on this podcast. The Supreme Court there said that as a general rule, there are no Bivens suits, unless Congress specifically authorizes a cause of action. And that's where we come back to Iowa. What about state courts? Scalia specifically contrasted federal courts with state courts and said that federal courts can't create remedies, but state courts can. And post Egbert v. Boule there's been a fascinating split in state courts on this issue. Two state supreme courts in Nevada and in Michigan, said, yeah, we're state courts, and we have broader powers than federal courts. We don't need to wait for the legislature to authorize causes of action. Where there is a right guaranteed in our state constitution, there will be a remedy recognized by us. But the Supreme Court in Iowa, in a

decision issued a couple of weeks ago, went the other way. It said that state court powers to recognize remedies for common law violations, the ones that Scalia supposedly talked about, are different than state court powers to recognize state constitutional violation. I'm frankly not sure that Scalia made the distinction, but that's the distinction they make. And so they reversed; it's their own opinion from 2017 that actually said the opposite. That just like Nevada, and just like Michigan, said that you can recognize causes of action directly under the Constitution. So this case, the recent case that reverse the 2017 opinion is Burnett v. Smith, and the facts are very straightforward. A waste management truck driver alleged that he was wrongfully arrested by an officer of the Iowa Department of Transportation. Burnett, the truck driver, sued directly under the Iowa Constitution for violations of his Fourth Amendment rights among other things. The wrongful arrest stemmed from the fact that Burnett refused to cooperate in the inspection of the truck, so the officer detained him for obstruction, the charges were dropped, and Burnett turned around and sued the officer. And Iowa Supreme Court used this case as an opportunity to overrule Godfrey, the 2017 decision, that said you can sue for damages directly under the Iowa Constitution. Fundamentally, Burnett said that plaintiffs can only sue for damages under the constitution, if the provision, the constitutional provision itself, specifically authorizes a cause of action. A takings clause that talks about just compensation is pretty much one and only such provision. There aren't any others really, so that's off the table. And if you don't have that authorization within the constitutional text, then you have to wait for the legislature to pass a law authorizing a cause of action just like Bivens, just like actually Egbert v. Boule that pretty much gets rid of Bivens. So in this case, there isn't a law that says you can sue under the search and seizure clause of the Iowa Constitution, so you can't sue. The court does acknowledge, again, that you could sue for common law violations, even if they are constitutional torts, but to the court torts are not a close enough analog to suits under the Constitution. Sovereign immunity, on the other hand, is a close analogue, and according to the Burnett court, shows that we need to wait for the legislature to waive that immunity or authorize damages. The other thing that the court says is that it's not even clear that Godfrey, the 2017 decision, filled the remedial gap, since so far, the cases that they've seen coming under Godfrey rubric really didn't involve constitutional violations. That's kind of like a practical argument that the Court throws out there. And now the practical argument is that because Godfrey is a 2017 decision, there is no reliance issues because it's a recent precedent. The other strange argument they make is that these direct suits for constitutional violations under state constitutions are duplicative of Section 1983 claims. And because of that, there is already a remedy, so why bother with state constitutions? And, you know...

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Anthony Sanders 08:04

Why bother with the Constitution? I mean...

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Anya Bidwell 08:07

Yeah, the case is a lot about like state court, like common law causes of action versus directly under the Constitution, 1983 versus directly under the Constitution, . And the court somehow really thinks that, you know, those kinds of, given that you already have these kinds of alternative remedies, that there is nothing necessarily special about suing directly under the Iowa State Constitution. Really fundamentally, to me, the biggest point here is that in state courts, where judges don't have life tenure, the change can come about super quickly. I call this Burnett opinion the revenge of Judge Mansfield. Because Justice Mansfield is only one of

two judges who was on the court in 2017, when Godfrey was decided, and he dissented along with the other judge, who is still on the court. So a new governor appointed five new justices, and now we have an opinion going the other way saying we can't recognize direct cause of actions under the constitution, just five years later, with no dissents. So, this opinion leaves a lot to be desired. It doesn't really explain very well, and hopefully, Anthony, we can go in depth about it later in the episode. You know, what is that difference between common law causes of action and state constitutional causes of action, and why is it that, you know, when Scalia talks about, state courts having common law powers to recognize remedies that somehow that doesn't apply to when it comes to state constitutions. There isn't much of an exploration of that. It's just really a reversal of the course that they charted in 2017, and saying that, fundamentally, this isn't consistent with separation of powers, and it's, frankly, this opinion has been a lot of headache for us, and we don't want to spend much more time dealing with it. So, you know, that's kind of very much the tenor of the opinion. But at the end of the day, state courts are still active battlefields, right? When it comes to federal courts, on the other hand, that's pretty much a foregone conclusion that you can't sue for damages under the Constitution, Egbert v. Boule told us that and before I go and finish with this, I just want to mention something briefly about a Third Circuit decision, Xi v. Haugen. And this is the latest case that shows that there's pretty much nothing left of Bivens. The facts of the Third Circuit decision are absolutely atrocious. An FBI agent lied during an investigation of a chair of the physics department at the Temple University. This lie then was used as a pretext to break into this guy's home early in the morning, handcuff, and search him, search members of his family, turn his house upside down, then take him into custody, interrogate him, take his DNA sample. There was a lie, there's no question about it. The lie was that the physicist, Professor Xi, sent three emails to Chinese scientists talking to them about this revolutionary superconductor technology, known as "pocket heater." Turns out that the officer knew that the Professor Xi's emails had nothing to do with this revolutionary "pocket heater" technology, and frankly, the pocket heater technology is not that revolutionary in the first place. Nonetheless, he continues the investigation, ruining this guy's life, resulting in raid and arrest, resulting in his demotion, resulting in him being put on administrative leave. And the Third Circuit basically says we really sympathize with the guy. The facts are horrible, right? They are worse than in Bivens by many accounts, but the court says, given Boule, Egbert v. Boule, there's really very little we can do here. And it kind of opens with this phrase, but I think it kind of sums up the Court's attitude, and really, what's happening now in federal courts. The opinion begins with the sentence, "Not all rights have remedies, even when they are enshrined in the United States Constitution." So that's pretty much it. Jaba, by the way, I know that you stopped reading that after you saw that first sentence. So how does it strike you?

Jaba Tsitsuashvili 12:53

I mean, it's, what did Anthony say a minute ago? Like, who cares about constitutions? That's kind of just the theme of these cases. You know, it's just like, it becomes, you know, what's that phrase, like a parchment promise, right? If you just have, if you have a Constitution that gives you all these rights, but then when they're violated, literally nothing can be done about it. And courts are just kind of like, yeah, of course, that's the way it should be. No, it's not the way it should be. Like who said? Like why why is that the way it should be? And so like, I think it's just, you know, illustrates the, it's absurd, but it's like it's just kind of put out there as just handed down from on high, that that's the way it should be. But it shouldn't be.

Anya Bidwell 13:41

Yeah, it's interesting to me how separation of powers is used as an argument, right? That somehow, you know, recognizing a remedy for violation of a constitution is not a judge's job, right? That kind of goes against everything that we learned about being a judge in law school. Somehow you actually can't, you know, look at whether the law was violated and order a remedy if it was, right? That's kind of like Justice Story's thing, but that doesn't seem like the 21st century's court's thing.

Jaba Tsitsuashvili 14:14

Yeah, it's it's getting separation of powers exactly backwards. And, you know, if the Executive or Legislative Branch is violating your constitutional rights, and the court is saying they're the ones that you need to essentially beg for the right to do something about it. That's not what separation of powers is, that's the concentration of powers in the Legislative and Executive.

Anya Bidwell 14:40

That's a good one.

Jaba Tsitsuashvili 14:41

It's fully backwards.

Anya Bidwell 14:43

I like that. That's the concentration of powers in the Executive and Legislature. That's exactly right.

Anthony Sanders 14:48

I gotta remember that one, too.

Anya Bidwell 14:50

Yeah.

Jaba Tsitsuashvili 14:52

With that, I drop the mic and I leave.

Anya Bidwell 14:55

That's right. That's right. Hold on, we got to talk about Louisiana first.

J Jaba Tsitsuashvili 14:58

I'm not gonna do better than that, guys.

A Anthony Sanders 15:01

Yeah, this Iowa opinion really left a lot to be desired, especially because it had a really long kind of wind up, where it made a lot of good points. I think kind of the best argument from the side of, of not having, for want of a better term, implied causes of action, and then it gets to the Constitution and just, the state constitution, and why it's different than, you know, say if a legislature passed a statute and you're suing about a statutory right, and then it gets to the Constitution. And it's like, it's even more messed up if courts have remedies for the Constitution itself, and just leaves it. And there's not, later when I talk about my piece, I'll get into kind of why that's so messed up, but it was really, you know, it's kind of like a court gets, you get almost all the way to the the end zone. Not that I would agree with the reasoning, but the court gets all the way there, and then just kind of the bottom falls out. And there's, you know, there's no touchdown, there's there's no score, there's no nothing, but they pretend like they did it. That's what I really was most disappointed in, I guess, in reading this.

A Anya Bidwell 16:22

I agree. Same with Mack, right? So the Nevada Supreme Court in Mack, this decision from about a year ago, recognized Fourth Amendment cause of action under the Constitution. And the Burnett court goes on to try to distinguish Mack, right? And it kind of again, it kind of winds it up, you know, kind of sets it up. You know, now we're going to like a deathblow to Mack, but then at the end is just saying we disagree with Mack.

J Jaba Tsitsuashvili 16:51

Yeah.

A Anthony Sanders 16:51

We respectfully disagree.

A Anya Bidwell 16:52

Yeah, but it's like you don't really, you're not really explaining what Mack got wrong. You're just saying you're disagreeing with it. Judge Mansfield does a great job laying it out, but then he really doesn't take it all the way in terms of reasoning.

A

Anthony Sanders 17:08

And they don't mention the Michigan case at all that we previously talked about on Short Circuit, right. Which were the two kind of big state court opinions from last year that that made me think, hey there's a trend in the states, I should write a piece about this. And I did. And then this Iowa case comes out.

A

Anya Bidwell 17:28

And it reverses its own trend, right?

A

Anthony Sanders 17:31

Yeah, we have two trends. Yeah, we have really two trends in the states. Some state courts are recognizing they're different, some aren't.

A

Anya Bidwell 17:38

Yeah, and I think that's precipitated by Egbert v. Boule, right, where the Supreme Court is coming down against this idea of implied right of action under the Federal Constitution. And state courts are kind of now thinking, How about us, right? Does that apply to us? Or are we different? And it's not necessarily an alternative route, because you still can't sue federal officials in state courts. So it doesn't really open up a Bivens cause of action in state courts, but it's an incredible alternative remedy for suing state and local officials, especially because in cases like Bosserman and Mack, qualified immunity is not a barrier. So that's a great alternative remedy to sue state and local officers, but we are seeing some courts like the Burnett court going the other way.

A

Anthony Sanders 18:35

Right. And that's, just to clarify, that's because those state courts don't recognize qualified immunity as a defense under state constitutional law. So it's actually better than suing under 1983 in federal court.

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Anya Bidwell 18:51

Exactly, yes. Like Mack said, you know, if the legislature wants to pass a qualified immunity defense, to this kind of a claim, it's more than welcome to do so. But it hasn't, so there isn't qualified immunity.

J

Jaba Tsitsuashvili 19:03

And just on that, alternative remedies kind of point where this Burnett court says, you know, yeah, you can sue them under Section 1983, they have a cause of action there. But like,

number one, you know, obviously that just ignores that the states have their own constitutions for a reason. Number two, it ignores the fact, the difficulty of suing under Section 1983 because of doctrines like qualified immunity and all the ways that the statute has been essentially just kind of like, neutered. And then the third thing is, you know, this passing of the buck goes both ways, because you have a lot of federal judges that say, don't worry about the fact that we've basically eliminated your Section 1983 rights because you can go to state court, and now it's just when you go to one department and they say they'll help you in the other and the other says no they'll help you in the other and then you're just stuck and you got, again, it just comes back to, you know, we have these rights, but nobody's, you know, nobody's willing to acknowledge that they need to be remedied.

A

Anthony Sanders 20:04

But sometimes, the legislature passes a law that lets you sue, like in Louisiana. So doesn't that, you know, solve everything, Jaba?

J

Jaba Tsitsuashvili 20:15

One would hope, but sometimes the court will say "yes, but." So we have a case here out of the Louisiana Supreme Court, and this case is called, sorry, I just wanna get it right, it's Jameson v. Montgomery. So again, just as you said, thematically this is about is, well, okay, if what really matters is and what's primary is what has a legislature told us we can and cannot adjudicate, that feels like it should really kind of carry the day. But this case is an example of where courts don't really mean that when they say it. So the facts of the case are, so basically there was a prosecution for a sex crime and the victims of the family were meeting with the local district attorney, I think at the kind of request of the judge to say, can you all figure out what we can do in terms of pleading guilty or not guilty here. And if there's a guilty plea, what an appropriate sentence might be, and things like that. So long story short, the victim's family expressed its desire. This is all just coming from the complaint, because this is all just the complaint stage of the case. The victim's family says, we want the accused to serve one year behind bars, basically. And we want you to communicate that to the judge and essentially communicate that if he gets a suspended sentence or something like that, basically, our desire is that he spend one year behind bars. They say that instead of taking that information to the judge, the district attorney basically misrepresented what the victim's family wanted. And the end result was a guilty plea, but with probation instead of any prison time. And so the family sued the district attorney. They sued a bunch of people, but just to kind of keep it simple, they sued the district attorney involved and I think his supervisor, and said this violated our constitutional rights as the victims. So just kind of, I'm gonna put aside for a second the actual claim itself, and we'll get to that actually I think when we talk about the concurrence here. They say that there's no prosecutorial immunity here and they say that the reason we know there's no prosecutorial immunity here is because our claim is that the district attorney was intentionally misrepresenting our statements and what we said to him, and there's a Louisiana statute that says that there is qualified or sorry, there is governmental immunity, except when you when you have a claim for a, "act or omission that constitutes criminal, fraudulent, malicious, intentional, willful, outrageous, reckless or flagrant misconduct." So there is a statute that says, yeah, typically, you can get immunity, but if the case that you're bringing alleges the intentional or willful misconduct, then the immunity falls away. So they say, look, we acknowledge that typically, this prosecutor has prosecutorial immunity, but the statute gives us

a way to get around it. That sounds kind of telling of an open and shut case, right. That sounds like the very principle we were just discussing of okay, fine, let the legislature decide. But the majority here says, nope. And the reason they say nope is because they had a prior decision, basically blessing prosecutorial immunity. The Louisiana Supreme Court had a prior decision blessing prosecutorial immunity as kind of consistent with constitutional doctrine and history and all of that. And they say, well, this statute that you're relying on now, it was already on the books, and we ignored it then when we decided that prior case. We ignored it then and so why should we now not ignore it? And that's essentially the reasoning that the court gave. They say, yeah, I mean, we see the statute, we see its words, but we are not going to suddenly give it meaning since we didn't before. So that's kind of just the long and short of it, it just goes to show that it's a heads you lose, tails you lose situation, because, you know, Anya's case, they say you need a statute to authorize this. And this case, we have a statute and they still say, no dice. So it's really frustrating. And then, just to turn to the concurrence really quick, the concurrence and the dissent here. The concurrence says, look, I think that we need to read this statute by its plain terms. I think there's no way that we're not allowed to just ignore the statute like this. And so I don't think that the DAs here get prosecutorial immunity. But what he goes on to say is, I still think that this claim fails, because I don't think that this particular suit alleges a constitutional violation. And so I don't want to get into, I don't see any reason right now for me to get into the merits of basically victims rights and claims and things like that under the under constitutional provisions. But the point that's worth making on this front is all of these immunities they close the courthouse doors before we even get to these questions. But it's worth remembering that the courts have made the actual substance of constitutional claims, also really hard to bring, right? It just it, there's already so many barriers to these suits, even beyond immunity, that like, when they say, you know, we're gonna have a flood of litigation and all of that, and we're gonna be, first of all, you know, putting aside just, well, yeah, if you have a flood of rights violations, then you're gonna have a flood of litigation. And that's just the way it should be.

A Anthony Sanders 26:51

In Louisiana? No way.

J Jaba Tsitsuashvili 26:54

That's just the way it should be. If you have a flood of violations, you should have a flood of lawsuits, but like, putting that aside, right, they've already made it so hard to vindicate these rights on the substance. And so when you impose these immunity barriers, even before all of that, it's just like layering injustice after injustice.

A Anya Bidwell 27:12

And that makes me think, Jaba, about the Burnett case. Or Burnett, I don't know. In Texas, we say "burn-it". Burn-it, durn-it, learn-it.

A Anthony Sanders 27:20

I think in Iowa, it would be "burn-net"

I think in Iowa, it would be "burn net".

Anya Bidwell 27:22

Okay, Burnett. So that makes me think about the Burnett case, because there, one of the reasons they say that Godfrey, that recognized constitutional violation cause of action under the Constitution, is not a big deal, because they say, plaintiffs are losing on the substance of the constitutional claims anyway. You know, and it's like, yes. And so why are you using that as a reason to say that there shouldn't be a direct right of action under the Constitution? You know, that kind of that's just...

Jaba Tsitsuashvili 27:57

It skips the question of why are they losing also. Because I think, you have to remember that one of the reasons they're losing is because the substance of these rights have been eroded too, in a lot of ways, and so there's a double layer.

Anya Bidwell 28:10

Exactly.

Jaba Tsitsuashvili 28:11

And I also just want to quickly, and then finally, there's a dissent here. There's a one Justice dissent that I just love it because it's 1-3 sentences and just disposes of all of these. I'm just gonna read the whole thing. It says, "The district attorney was dishonest with both the victim and the judge. These intentional dishonest acts are outside the course and scope of his duties as an assistant district attorney. I would therefore deny the exception of no cause of action as to the assistant district attorney." That's it. He tears it all apart, says these are lies and dishonesty. This is not what you're supposed to do. You don't get to weasel out of the case. And so I just loved it for its brevity and its honesty.

Anthony Sanders 28:52

And then there's the additional layer here with which you didn't delve into, Jaba, and I don't know enough to really delve into, which is that Louisiana is a civil law jurisdiction that says the concurrence, and thus, I mean, I don't, again, know how Louisiana civil law, the ins and outs of how all that works, but because they're not a common law jurisdiction, so much as other states, they really need to look to the statute and not to whatever doctrines come out of common law. And so therefore, you need to really pay attention to the statute. And even then, it doesn't go in terms of actually using the statute.

Jaba Tsitsuashvili 29:39

Yeah. So again, I think, in a lot of ways, it's hard to know what animates these decisions and

what's truly kind of, you know, why they're doing what they're doing. It could be that they thought this case was weak in the way that the concurrence says, and therefore, they just weren't willing to kind of do the right thing on this one, but like that shouldn't be the basis, right? You should just set out the rules and then some cases will win and some cases will lose, and we got to hear them all, because when there are rights violations, there's got to be a remedy.

A Anthony Sanders 30:14

Yeah, I still can't get over the how they interpreted a statute that came out before a case to incorporate that case. Because otherwise the court would have just been ignoring that statute, and courts don't do things like that.

J Jaba Tsitsuashvili 30:30

Well, it also gets at like the concurrence says, it seems like that statute just wasn't raised in that prior case, right? And so it's, you know, for whatever reason, you can't say we made an error once or this, this wasn't presented to us before, and therefore we must double down on it. It's just...

A Anya Bidwell 30:52

It's inconsistent with the Burnett case, right? Where they are basically saying, oh, we can overturn the precedent. Like we don't like it for so many different reasons, you know, it's really hard to actually execute like, what the hell is the alternative remedy? How are we supposed to figure out what the alternative remedy is? And what about punitive damages? Oh my God, we have to deal with that, too? And attorneys fees? No, it's too much headache, we're just going to overturn this case. And then you have that in Louisiana, where it's like, the case is obviously inconsistent with the statute, right? But no, precedent is sacrosanct.

J Jaba Tsitsuashvili 31:28

Stare decisis is no longer for suckers all of a sudden, yes.

A Anthony Sanders 31:32

And that happens all the time where courts will say, well, this actually, you know, doesn't bear on this statute or this constitutional provision, because it wasn't argued in that case. And so when we do talk about in this case, it's not actually going against that prior precedent, because it wasn't an issue in that case. And yet here, they got that reasoning exactly backwards.

J Jaba Tsitsuashvili 31:54

There's a lot wrong here. There's a lot of bad.

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Anthony Sanders 31:59

Well, I was encouraged at least by that concurrence and the dissent, because I think the difference is that concurrence really reads as a dissent, even though if in this particular case, it wouldn't have been for the plaintiffs. So maybe that...

J

Jaba Tsitsuashvili 32:14

It was a very solid dissent on the immunity grounds. Like no, this is not the way it's supposed to work.

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Anthony Sanders 32:18

So maybe that that shows a little bit of hope for the future in Louisiana. But this is a another layer of precedent now.

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Anya Bidwell 32:24

I don't know. There was a good decision in Iowa in 2017, and then the court changed. In five years, we got a completely different situation. And that kind of, I guess, goes too to this idea of like what is so special about federal courts, right? And federal courts have much more stability than state courts. On the one hand, that's a bad thing. But on the other hand, it's a good thing, right? And with state courts, some hard earned victories, and Godfrey was a very hard earned victory, just evaporated, in a matter of, you know, barely any years. So that's something for us to keep in mind as we are considering state courts as alternatives to federal courts when vindicating people's civil rights.

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Anthony Sanders 32:29

Yeah, you can see plus and minus, and that's, of course, a really large discussion about the length of judicial tenure and life tenure and elected judges. We're not going to go down that road today, but there's definitely pros and cons there. So finally, I will direct our listeners attention to something I wrote, that was published by the good people at Arc Digital a few weeks ago. We'll put a link up in the show notes. You can usually, so Arc Digital is a platform that kind of, is kind of like, substack. And so, you can usually read an article even if you don't have a subscription, at least once or twice. So most people out there, if you find it in the shownotes, you'll be able to link to it to get to it and to read it. But you should also consider subscribing to Arc Digital, as they do good work, and for many different writers who write there. But the the headline is, "Where Does the Law Come From?" And I was pushed towards writing this because in working with Anya and Jaba and Patrick Jaicomo and others at IJ who do this kind of work, the more I've been thinking about it, since IJ got into this area, the more I've been realizing how this whole modern critique, you know, of Bivens and those kinds of cases where you have implied causes of action under the Constitution because legislature, Congress didn't make one for you, how they're really kind of getting the history wrong. So I read some of that

history, and I started writing. I think maybe for listeners today, what I should talk about is a bit about like, the writing process of how I put this together actually changed and got even I think stronger in saying we should have these implied causes of action, as I was researching it. So I was writing about how there's a certain kind of logic that I think a lot of probably listeners and lawyers and judges get into about causes of action for violating statutes. So it used to be, kind of not for that long, actually, in the 60s and 70s, that the Supreme Court was all into implied cause of action where there's a statute. So Congress, and of course, a lot of it was tied up with the Civil Rights Era. So Congress passes a statute, and then often they'll have something in there that says, if someone violates this law, you can sue them for damages. Okay, fine. But then often, Congress wouldn't do that. And so the court would be like, ah, well, they meant to do that. And so we're just going to, you know, come up with our own cause of action, like we would under common law for, you know, like negligence or something that's purely through the courts.

A

Anya Bidwell 36:28

There's this case, Borak, from 1964, right, in the Supreme Court. And the case basically says it is the duty of the courts to be alert, to provide such remedies as are necessary to make effective the congressional purpose.

A

Anthony Sanders 36:45

Yes, yeah. So, the Court is kind of making up a, and I don't use "making up" pejoratively there. I just say they are "coming up with," you might say, this cause of action for damages, to make that statute, you know, get its purpose out there, and not just have to go to, you know, the prosecutors or the federal agency, whoever it is that normally would prosecute that statute when people violate it. But then, over the course of like the 80s and after, this became not an accepted rule in federal courts and state courts. And so today, it's hard to find any kind of court that kind of will come up with its own implied cause of action for a statute. And I've always thought about that until recently that well, that makes some sense, because you wouldn't have that law in the first place without the legislature, and so, it's kind of like the legislature giveth, the legislature can take it away. And so if they want to also give an implied, or not implied, a cause of action, then it's up to the legislature to do that. I thought, well, that kind of makes sense. But then on the other side, you have the Constitution. So the Constitution says you have this right, government can't violate it. Government agents violate it, and you can't sue them unless you have the legislature, which is actually subordinate to the Constitution, create your cause of action, right? This is this outrage that we've been talking about earlier in the show about in Iowa, Louisiana, wherever. Why should you have to depend on the legislature to vindicate your constitutional rights...

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Anya Bidwell 38:28

Preexisting rights.

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Anthony Sanders 38:29

Which yeah, are preexisting, whether they're preexisting or created by the Constitution, they're

Which yeah, are preexisting, whether they're preexisting or created by the Constitution, they're above the legislature, they're above the cops, and the governor and all of that. So it should be different when it comes to a constitution, because then, it's like, why should you defer to the legislature? Why not the courts? The Constitution doesn't say, the Constitution just gives this right, and when it's violated, of course you should have a remedy. So that's why I started writing this piece. And then, as I'm digging into this stuff, you know, it hasn't been really like a big part of my scholarship in the past, I come across this article that I am now raving to everyone about, and you should all go and read. It's a law review article from 1986 by Professor Miles Foy, who is actually still a professor at Wake Forest School of Law. And it goes into the history, like deep history or deep you know, common law English history of implied causes, or not really implied, but causes of action for Acts of Parliament, right, that legislature we had before Congress. It's called "Some Reflections on Legislation, Adjudication, and Implied Actions in the State and Federal Courts". And anyway, long story short is this article I think, more than anything I've read, shows that actually, if you go back to the founding of the country, and then before, courts made up remedies for legislative acts that did not have their own causes of action all the time. Now, it wasn't automatic, but it would be something courts would do to effectuate what, you know, Parliament, or later Congress or a state legislature, was trying to do with a law. And they actually did this well into the 19th century. And somehow, near the end of the 19th century, it kind of became less of a thing. And so then when the Supreme Court started doing it again, in the 1960s, you know, everyone now says, oh it was judicial activism, the Warren Court is doing all kinds of crazy stuff. And it was just because of civil rights era, and they had to do it. And actually, I think they didn't say it very well at the time, but they were going back to what was really a traditional method. And then that was, you know, disposed of as it came to be. So today, when we talk about, you know, a court coming up with a remedy for a violation of the Constitution. I mean, to me that it makes it even stronger that, you know, traditionally they made, they came up with remedies for violations of statutes, even when the legislature didn't say that. And I have tried to research what's been said about this history, and a few scholars have tried to distinguish it or say, well, different for federal courts, because of various historical reasons. But when it comes to state courts, like in Iowa, there's no leg to stand on. And this kind of modern conception that courts just don't come up with remedies, unless you're purely talking about common law, like negligence, is ahistorical. It's not grounded in anything. And so, you know, all the judges should go out there and read Professor Foy's article, and judge accordingly.

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Anya Bidwell 41:59

And it kind of goes back to this idea that the Warren Court, while it's a great civil rights court, did a horrible job of like explaining itself, right? It just kind of said, oh, here it is, like the Bivens decision, too. If you talk to scholars, a lot of them will say, it's really the framing of Bivens that's a problem. Where you know, Justice Brennan just goes into coming up with this, you know, ideas of, you know, this two step framework, and, you know, cautioning hesitation, all this weird language. It really sounds like he's making stuff up.

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Anthony Sanders 42:37

Yeah.

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Anya Bidwell 42:38

Anya Bidwell

Compared to if he were to say, listen, at common law, since the founding of this country, you could sue federal officials for violations of individual rights. So you should be able to continue to sue federal officials for violations of individual rights. If he were to say it that way, then I think conservatives would have had much less problem with it, and frankly, would have had a hard time attacking it. And the same goes to your point, Anthony, with implied causes of action when Congress passed a statute, right? If they were to explain it as listen, that's what happened during you know, parliamentary republic, that we were part of once. A parliamentary monarchical republic.

Anthony Sanders 43:25

That would be going back to the 1650s, but we'll just say the former system.

Anya Bidwell 43:30

Yeah, let's stay away from that. But yeah, if they were to talk about it in those terms, I think they would have been much more persuasive, rather than just saying it is what it is. You know, this is how we feel like doing it. And that's why Scalia attacking it as a heady days, right. Like they were like, arrogant.

Jaba Tsitsuashvili 43:47

I guess the only thing I'll say is that they would have been much more persuasive to the people that needed to be persuaded in this way. Because, you know, frankly, the way that Bivens is written like I don't think I'm unpersuaded by the way that Bivens is written. But if you want to kind of close off lines of attack from people, like Scalia and whoever else who want to attack it in this way, that's how you should have written it.

Anthony Sanders 44:12

Now, I think there's a lot to be said that the judges during the Warren Court era were politicians, and they wrote as politicians and some of that was very persuasive. And some of it when kind of, in later years, we get these, these career judges, right, who have been star appellate court judges for years, and then they're placed on the Supreme Court, like the kind of judges we have now. That's a different audience. And these politicians from the 50s and 60s don't ring right to those of today, even if they were right. They just weren't writing it in the right way in every case. Of course, a lot of the times they were wrong, I get that. But we're talking about a case where actually they were correct, but they weren't writing for the correct audience, I guess is how I put it.

Anya Bidwell 45:06

Yep.

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Anthony Sanders 45:07

Well, there you go. Everyone listening now knows what's wrong, what's right. We had a show a few months ago where we talked about I think both of these cases from Nevada, the Mack case, and then the the Michigan case, and how things are going in the right direction in state courts. So that's kind of what I write about in my article. We have a couple of cases now that are not in the right way in state courts, but I guess the overall it shows that in state courts, where these judges have common law authority, and always have to create causes of action, and they also have their own state constitutions, and sometimes they even have acts of the legislature, there's still hope. There's quite a lot of hope, more hope than in the federal courts, and we will see how these things progress. So thank you both for coming on and enlightening our listeners with this. Perhaps not happy news, but news they can use.

J

Jaba Tsitsuashvili 46:12

Thanks Anthony.

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Anya Bidwell 46:13

And I'm taking concentration of power with me.

J

Jaba Tsitsuashvili 46:16

I just want credit. I just want credit.

A

Anthony Sanders 46:21

Somehow Jaba will be credited. And for the rest of you, thank you for listening, and I hope that all of you, get engaged.