EQUAL PROTECTION AND STATE IMMUNITY FROM TORT LIABILITY

Krause v. State, 31 Ohio St. 2d 132 285 N.E.2d 736 (1972)

Allison Krause was shot to death during disturbances at Kent State University. The deceased's father brought a wrongful death action against the state of Ohio, alleging that agents of the state had acted negligently in sending armed, inadequately trained National Guardsmen to the campus. The trial court granted defendant's motion to dismiss on the ground that the state had not consented to be sued, and therefore was immune from tort liability. The court of appeals reversed,[1] holding that the immunity doctrine violates the equal protection clause of the fourteenth amendment, and that the state is responsible for the tortious acts of its agents under the doctrine of respondeat superior. The Ohio Supreme Court reversed. *Held*: The provision of the Ohio constitution[2] which permits the state to be sued only with the consent of the legislature does not violate the equal protection clause.[3]

The English doctrine of sovereign immunity[4] was adopted in the United States as a part of common law, and, in theory, served to bar

---

1. Krause v. State, 28 Ohio App. 2d 1, 274 N.E.2d 321 (1971). For commentary on the case prior to the state supreme court's reversal, see 52 B.U.L. REV. 202 (1972); 21 CLEV. ST. L. REV. 25 (1972); 33 U. PITT. L. REV. 611 (1972). *See generally* Verkuil, *Immunity or Responsibility for Unconstitutional Conduct: The Aftermath of Jackson State and Kent State*, 50 N.C.L. REV. 548 (1972).

2. OHIO CONST. art. I, § 16 provides:

> All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay. Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

3. Krause v. State, 31 Ohio St. 2d 132, 285 N.E.2d 736, *appeal dismissed*, 409 U.S. 1052 (1972).

4. The doctrine began as a personal prerogative of the King of England. The maxim "the king can do no wrong" was, in practice, a jurisdictional bar to suits against the king in his courts. Equitable relief could be granted, however, through the king's consent to the use of a petition of right in the Court of Exchequer. *See* L. EHRLICH, PROCEEDINGS AGAINST THE CROWN (1216-1377), at 123-27 (1921); 1 F. POLLACK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 512-18 (1909 ed.). *See generally* G. ROBINSON, PUBLIC AUTHORITIES AND LEGAL LIABILITY (1925). In the sixteenth century courts extended the doctrine to protect the state as a whole. *See* R. WATKINS, THE STATE AS PARTY LITIGANT 1-13 (1927); Barry, *The King Can Do No Wrong*, 11 VA. L. REV. 349 (1925). *See generally* Holdsworth, *The History of Reme-*

suits against all governmental entities.[5] To avoid the inequities of absolute adherence to the doctrine, most states enacted legislation to limit its application.[6] The strictures of the immunity doctrine were relaxed

---

dies Against the Crown, 38 L.Q. REV. 141 (1922). By the eighteenth century courts applied it to local as well as national government in England. *See* W. PROSSER, LAW OF TORTS 970-75 (4th ed. 1971); Borchard, *Governmental Responsibility in Tort*, 34 YALE L.J. 1, 4 (1924). Expansion to local governmental units in England began with Russell v. Men of Devon, 100 Eng. Rep. 359 (K.B. 1788). *See generally* Laski, *The Responsibility of the State in England*, 32 HARV. L. REV. 447 (1919).

5. Justifications for the rule advanced by the United States Supreme Court were generally inadequate. *E.g.*, Kawananakoa v. Polybank, 205 U.S. 349, 353 (1907):

> A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends.

The Siren, 74 U.S. (7 Wall.) 152, 154 (1869):

> The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government.

See also United States v. McLemore, 45 U.S. (4 How.) 286 (1846); United States v. Clark, 33 U.S. (8 Pet.) 436 (1834); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821). Even when legislation apparently abrogated the doctrine, the Court's construction of the statute kept the doctrine in force. Basso v. United States, 239 U.S. 602 (1916) (Tucker Act of 1887). *See generally* Davis, *Tort Liability of Governmental Units*, 40 MINN. L. REV. 751, 770-73 (1956). The eleventh amendment, a response to Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), prevents suits against states by citizens of another state in federal courts. *See* Comment, *Private Suits Against States in the Federal Courts*, 33 U. CHI. L. REV. 331 (1966).

An illustrative example of the process of judicial enlargement of the doctrine is the development of privilege from liability in defamation cases. *See* Barr v. Matteo, 360 U.S. 564 (1959); Spalding v. Vilas, 161 U.S. 483 (1896); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1871); Yaselli v. Goff, 12 F.2d 396 (2d Cir. 1926), *aff'd per curiam*, 275 U.S. 503 (1927). *But see* Greenwood v. Cobbey, 26 Neb. 449, 42 N.W. 413 (1889).

The state courts also applied the doctrine to state governments and all subdivisions thereof. For early examples, see State v. Hill, 54 Ala. 67 (1875); Mower v. Inhabitants of Leicester, 9 Mass. 247 (1812); Clodfelter v. State, 86 N.C. 51 (1882); Black v. Rempublicam, 6 Pa. (1 Yeates) 139 (1792); Clark v. State, 47 Tenn. (7 Cold.) 306 (1869); Commonwealth v. Colquhouns, 12 Va. (2 Hen. & Mun.) 213 (1808). Western states followed precedent, frequently without further rationale. *See, e.g.*, Davis v. State, 30 Idaho 137, 163 P. 373 (1917); Albin Co. v. Commonwealth, 128 Ky. 295, 108 S.W. 299 (1908); Benda v. State, 109 Neb. 132, 190 N.W. 211 (1922); Billings v. State, 27 Wash. 288, 67 P. 583 (1902); State *ex rel.* Harney v. Hastings, 12 Wis. 664 (1860). For the judicial origins of the doctrine in Ohio, see State *ex rel.* Parrott v. Board of Pub. Works, 36 Ohio St. 409 (1881); Miers v. Turnpike Co., 11 Ohio 273 (1842); State v. Franklin Bank, 10 Ohio 91 (1840).

6. *See generally* Note, *Administration of Claims Against the Sovereign—A Sur-*

by three general means: (1) limited consent to sue through the existing judicial system;[7] (2) creation of administrative agencies to hear claims against the state;[8] or (3) direct disposition of claims by the legislature.[9]

In addition, courts, moving away from strict application of the doctrine, have created exceptions to the general rule of immunity.[10] Most courts permit recovery for torts arising in the course of "proprietary," as opposed to "governmental," functions,[11] or out of "ministerial," as

---

vey of State Techniques, 68 HARV. L. REV. 506 (1955). State courts sometimes frustrated attempted legislative relief from the doctrine. *See, e.g.,* Murdock Parlor Grate Co. v. Commonwealth, 152 Mass. 28, 24 N.E. 854 (1890); Manion v. State, 303 Mich. 1, 5 N.W.2d 527, *cert. denied,* 317 U.S. 677 (1942); Smith v. State, 227 N.Y. 405, 125 N.E. 841 (1920). *See generally* Kramer, *The Governmental Tort Immunity Doctrine in the United States 1790-1955,* 1966 U. ILL. L.F. 795; Pugh, *Historical Approach to the Doctrine of Sovereign Immunity,* 13 LA. L. REV. 476 (1953).

7. Usually these states recognize *classes* of tort actions which can be brought against the state. In Arkansas, Illinois, Michigan, and New York a separate court exists to hear these claims. *See, e.g.,* N.Y. CT. CL. ACT §§ 8, 9 (McKinney 1963, Supp. 1972). *See generally* F. SPEIGEL, THE ILLINOIS COURT OF CLAIMS: A STUDY OF STATE LIABILITY (1962); Davis, *Tort Liability of Governmental Units,* 40 MINN. L. REV. 751 (1956).

8. *See, e.g.,* IDAHO CONST. art. IV, § 18; KY. REV. STAT. ANN. §§ 44.070-.160 (1972); MINN. STAT. ANN. §§ 3.66-.86 (1967, Supp. 1973); OHIO REV. CODE ANN. § 127.11 (Page 1953); UTAH CONST. art. VII, § 13. *See generally* Annot., 169 A.L.R. 105 (1947).

9. *See generally* Leflar & Kantrowitz, *Tort Liability of the States,* 29 N.Y.U.L. REV. 1363 (1954); Shumate, *Tort Claims Against State Governments,* 9 LAW & CONTEMP. PROB. 242 (1942). For a discussion of enactment of "private laws" in Congress, see Gellhorn & Lauer, *Congressional Settlement of Tort Claims Against the United States,* 55 COLUM. L. REV. 1 (1955). Some statutes authorize governmental entities to buy liability insurance and prohibit them from raising an immunity defense within the limits of the policy. *E.g.,* MO. REV. STAT. § 71.185 (1969); N.D. CENT. CODE § 39-01-08 (1972); UTAH CODE ANN. §§ 63-30-28 to 63-30-34 (1968); *see* DEL. CODE ANN. tit. 14, § 2904 (1953) (school buses); VA. CODE ANN. §§ 22.284-.294 (1973) (same); *cf.* ARK. STAT. ANN. § 66-3240 (1966) (direct action against insurer). For judicial treatment of the insurance problem, see Sullivan v. Midlothian Park Dist., 51 Ill. 2d 274, 281 N.E.2d 659 (1972); Travelers Ins. Co. v. Village of Wadsworth, 109 Ohio St. 440, 142 N.E. 900 (1924); Cunningham v. County Court, 148 W. Va. 303, 134 S.E.2d 725 (1964). *See generally* Gibbons, *Liability Insurance and the Tort Immunity of State and Local Government,* 1959 DUKE L.J. 588.

10. *See generally* Van Alstyne, *Governmental Tort Liability: Judicial Lawmaking in a Statutory Milieu,* 15 STAN. L. REV. 163 (1963); Note, *Separation of Powers and the Discretionary Function Exception: Political Questions in Tort Litigation Against the Government,* 56 IOWA L. REV. 930, 932-53 (1971); Comment, *Role of the Courts in Abolishing Governmental Immunity,* 1964 DUKE L.J. 888.

11. *See* People v. Superior Court, 29 Cal. 2d 754, 178 P.2d 1 (1947); Henderson v. Twin Falls Co., 56 Idaho 124, 50 P.2d 597 (1935); Hill v. City of Boston, 122 Mass. 344 (1877); Rich Hope Plantation v. South Carolina Pub. Serv. Author., 216 S.C. 500, 59 S.E.2d 132 (1950). "Proprietary" refers generally to activities carried

opposed to "discretionary," acts.[12] States may "consent" to be sued, or "waive" the immunity defense.[13] Some courts refuse to sustain the defense in nuisance[14] or contract[15] actions, and in some jurisdictions the state's immunity does not extend to its agents.[16]

---

on by private entities. Pianka v. State, 46 Cal. 2d 208, 293 P.2d 458 (1956). In Morris v. Mount Lebanon Township School Dist., 393 Pa. 633, 144 A.2d 737 (1958), the court, in determining if an activity was "proprietary," also considered whether the activity was required by statute, and whether it was done primarily to make a profit. *See also* Jones v. City of New Haven, 34 Conn. 1 (1867) (primarily for welfare of inhabitants); Pearl v. Inhabitants of Revere, 219 Mass. 604, 107 N.E. 417 (1914) (profit-making); Keever v. City of Mankato, 113 Minn. 55, 129 N.W. 158 (1910); Pleasants v. City of Greensboro, 192 N.C. 820, 135 S.E. 321 (1926); 22 VA. L. REV. 910 (1936).

12. *See* Elgin v. District of Columbia, 337 F.2d 152 (D.C. Cir. 1964); Hitchins Bros. v. Mayor of Frostburg, 68 Md. 100, 11 A. 826 (1887); Kelso v. City of Tacoma, 63 Wash. 2d 913, 390 P.2d 2 (1964). "Discretionary" refers generally to acts which involve official judgment on the part of an officer—for example, judicial decision-making, and voting by legislators. Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949); Oppenheimer v. Arnold, 99 Cal. App. 2d 872, 222 P.2d 940 (1950). The distinction has also been recognized by statute. *See, e.g.*, Federal Tort Claims Act § 421(a), 28 U.S.C. § 2680(a) (1970); MINN. STAT. ANN. § 466.03(b) (1963); NEV. REV. STAT. § 41.032 (1971). *See also* Dalehite v. United States, 346 U.S. 15 (1953); James, *The Federal Tort Claims Act and the "Discretionary Function Exception,"* 10 U. FLA. L. REV. 184 (1957). The same distinction has been applied to determine whether states are immune from federal excise taxes. *See, e.g.*, Helvering v. Powers, 293 U.S. 214 (1934); South Carolina v. United States, 199 U.S. 437 (1905). *But cf.* New York v. United States, 326 U.S. 572 (1946).

13. *See* Parden v. Terminal Ry., 377 U.S. 275 (1964); Gunter v. Atlantic Coast Line R.R., 200 U.S. 273 (1906); State *ex rel.* Williams v. Glander, 148 Ohio St. 188, 74 N.E.2d 82 (1947) (dissenting opinion). "Waiver" is sometimes the rationale for permitting suit against the government in contract cases. *See, e.g.*, George & Lynch, Inc. v. State, 57 Del. 158, 197 A.2d 734 (1964).

14. *See, e.g.*, Phillips v. City of Pasadena, 27 Cal. 2d 104, 162 P.2d 625 (1945); Windle v. City of Springfield, 320 Mo. 459, 8 S.W.2d 61 (1928); Hines v. City of Rocky Mount, 162 N.C. 409, 78 S.E. 510 (1913); Chandler v. Davidson County, 142 Tenn. 265, 218 S.W. 222 (1919). *Contra*, Landau v. City of New York, 180 N.Y. 48, 72 N.E. 631 (1904).

15. *See, e.g.*, Regents of Univ. Sys. v. Blanton, 49 Ga. App. 602, 176 S.E. 673 (1934); V.S. DiCarlo Constr. Co. v. State, 485 S.W.2d 52 (Mo. 1972); Meens v. State Bd. of Educ., 127 Mont. 515, 267 P.2d 981 (1954); Todd v. Board of Educ. Lands & Funds, 154 Neb. 606, 48 N.W.2d 706 (1951); P, T & L Constr. Co. v. Commissioner, 55 N.J. 341, 262 A.2d 195 (1970).

16. *See, e.g.*, Lenth v. Schug, 226 Iowa 1, 281 N.W. 510 (1939); Heiser v. Severy, 117 Mont. 105, 158 P.2d 501 (1945); *accord, Ex parte* Young, 209 U.S. 123 (1908) (injunction); *cf.* Georgia R.R. & Banking Co. v. Redwine, 342 U.S. 299 (1952); OHIO REV. CODE ANN. § 5923.37 (Page Supp. 1972) (willful misconduct of militia). *But see* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949). *See generally* L. DAVID, THE TORT LIABILITY OF PUBLIC OFFICERS (1940).

In a growing minority of states, courts have attempted to abolish the doctrine on non-constitutional grounds. In these states the legislatures have, as a rule, responded by enacting statutes which either codify, or restrict the effect of, the courts' decisions.[17]

A 1912 amendment to the Ohio constitution[18] abolished the common law defense of governmental immunity and authorized suits against the state "in such courts and in such manner" as the legislature

17. For cases in which courts have led the way in abrogating immunity, see Spencer v. General Hosp., 425 F.2d 479 (D.C. Cir. 1969); Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963); Parish v. Pitts, 244 Ark. 1239, 429 S.W.2d 45 (1968); Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961); Colorado Racing Comm'n v. Brush Racing Ass'n, 136 Colo. 279, 316 P.2d 582 (1957); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); Molitor v. Kaneland Community Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959), *cert. denied*, 362 U.S. 968 (1960); Klepinger v. Board of Comm'rs, 239 N.E.2d 160 (Ind. App. 1968); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961); Spanel v. Mounds View School Dist., 264 Minn. 279, 118 N.W.2d 795 (1962); Rice v. Clark County, 79 Nev. 253, 382 P.2d 605 (1963); Willis v. Department of Conservation, 55 N.J. 534, 264 A.2d 34 (1970).

For cases in which courts have subsequently retreated, see City & County of Denver v. Madison, 142 Colo. 1, 351 P.2d 826 (1960); Perkins v. State, 251 N.E.2d 30 (Ind. 1969); *cf.* State v. Shinkle, 231 Ore. 528, 373 P.2d 674 (1962).

For examples of legislation passed in response to court decisions on the immunity doctrine, see ARK. STAT. ANN. § 12-2901 (Supp. 1971); CAL. GOV'T CODE §§ 810-996.6 (Deering Supp. 1972); ILL. ANN. STAT. ch. 85, §§ 1-101 to 10-101 (Smith-Hurd 1966, Supp. 1973); NEV. REV. STAT. §§ 41.031-.039 (1971); N.J. REV. STAT. § 52:4A-1 (Supp. 1973). *See generally* Kennedy & Lynch, *Some Problems of a Sovereign Without Immunity*, 36 S. CAL. L. REV. 161 (1963).

For examples of legislative initiative, see ALASKA STAT. §§ 9.50.250-.300 (1973); CONN. GEN. STAT. REV. § 7-465 (1966); IOWA CODE ANN. §§ 25A.1-.20 (1967, Supp. 1972); TEX. REV. CIV. STAT. ANN. art. 6252-19 (1970, Supp. 1972); WASH. REV. CODE ANN. §§ 4.92.010-.170, 4.96.010-.020 (1962, Supp. 1972). *See generally* Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law*, 48 MINN. L. REV. 265, 287-93 (1963).

When the immunity doctrine is upheld in court, it is more often on the ground of deference to legislative prerogative than on the merits of the doctrine. Hutchinson v. Board of Trustees, 288 Ala. 20, 256 So. 2d 281 (1971); Duncan v. Koustenis, 260 Md. 98, 271 A.2d 547 (1970); Fette v. City of St. Louis, 366 S.W.2d 466 (Mo. 1963); Gossler v. City of Manchester, 107 N.H. 310, 221 A.2d 242 (1966); Clark v. Ruidoso-Hondo Valley Hosp., 72 N.M. 9, 380 P.2d 168 (1963); McKenzie v. City of Florence, 234 S.C. 428, 108 S.E.2d 825 (1959); Conway v. Humbert, 82 S.D. 317, 145 N.W.2d 524 (1966); *cf.* Nelson v. Turnpike Author., 157 Me. 174, 170 A.2d 687 (1961); Visidore Corp. v. Borough of Cliffside Park, 48 N.J. 214, 225 A.2d 105 (1966), *cert. denied*, 386 U.S. 972 (1967). Some state constitutions prohibit suit against the state. *E.g.*, ALA. CONST. art. I, § 14; W. VA. CONST. art. VI, § 35. *See generally* 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 25.00 *et seq.* (Supp. 1965); Vanlandingham, *Local Governmental Immunity Re-examined*, 61 NW. U.L. REV. 237 (1966).

18. OHIO CONST. art. I, § 16.

might provide. Although an administrative agency was organized in 1917 to hear certain claims against the state,[19] the Ohio General Assembly has never passed general enabling legislation permitting the use of Ohio's courts for such claims.[20] Holding the amendment to be permissive rather than self-executing,[21] courts continued to recognize immunity as a defense.[22]

In Ohio, immunity creates two classifications: first, the distinction between plaintiffs injured by governmental and by non-governmental tort-feasors; and secondly, the distinction between plaintiffs injured by governmental tort-feasors in the exercise of excepted and of non-excepted activities. The United States Supreme Court has established two

19. OHIO REV. CODE ANN. § 127.11 (Page 1953). The "Sundry Claims Board" is authorized to award only up to $1,000; there is no provision for trial by jury or appellate review. The General Assembly is free to overrule the Board's recommendations by refusing to appropriate funds from the treasury. *See generally* Walsh, *The Ohio Sundry Claims Board*, 9 OHIO ST. L.J. 437 (1948).

20. For examples of isolated legislative exceptions to immunity in Ohio, see OHIO REV. CODE ANN. § 111.19 (Page 1953) (fees paid under protest); *id.* § 1523.10 (1964) (fees on water conservation bonds); *id.* § 5301.24 (1970) (foreclosure sales). *See generally* Note, *Claims Against the State of Ohio: The Need for Reform*, 36 U. CIN. L. REV. 239 (1971).

21. That is, the courts held that the 1912 amendment by itself did not grant the right to sue the state, but only authorized the legislature to so grant. Since the legislature has not granted the right, the immunity defense is still available. *See, e.g.*, Farkas v. Fulton, 130 Ohio St. 390, 199 N.E. 850 (1936); Raudabaugh v. State, 96 Ohio St. 513, 118 N.E. 102 (1917). *See also* 1 & 2 PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF OHIO (1912).

22. Schaffer v. Board of Trustees, 171 Ohio St. 228, 168 N.E.2d 547 (1960); Wolf v. Ohio State Univ. Hosp., 170 Ohio St. 49, 162 N.E.2d 475 (1959); Palumbo v. Industrial Comm'n, 140 Ohio St. 54, 42 N.E.2d 766 (1942); Aldrich v. City of Youngstown, 106 Ohio St. 342, 140 N.E. 164 (1922). Liability in Ohio's political subdivisions and municipalities is predicated on the governmental-proprietary functions test. For examples of the confusion created by this test, see Moloney v. City of Columbus, 2 Ohio St. 2d 213, 208 N.E.2d 141 (1965) (zoo—proprietary); Hyde v. City of Lakewood, 2 Ohio St. 2d 155, 207 N.E.2d 547 (1965) (non-profit hospital—governmental); Hack v. City of Salem, 174 Ohio St. 383, 189 N.E.2d 857 (1963) (swimming pool—proprietary); Eversole v. City of Columbus, 169 Ohio St. 205, 158 N.E.2d 515 (1959) (arts and crafts center—proprietary); Broughton v. City of Cleveland, 167 Ohio St. 29, 146 N.E.2d 301 (1957) (garbage disposal—governmental); City of Cleveland v. Board of Tax Appeals, 153 Ohio St. 97, 91 N.E.2d 480 (1950) (parking lot—proprietary); Doud v. City of Cincinnati, 152 Ohio St. 132, 87 N.E.2d 243 (1949) (maintenance of sewer—proprietary); State *ex rel.* Gordon v. Taylor, 149 Ohio St. 427, 79 N.E.2d 127 (1948) (sewer construction—governmental); Selden v. City of Cuyahoga Falls, 132 Ohio St. 223, 6 N.E.2d 976 (1937) (maintenance of swimming pool—governmental); State *ex rel.* White v. City of Cleveland, 125 Ohio St. 230, 181 N.E. 24 (1932) (maintenance of music hall—proprietary); City of Wooster v. Arbenz, 116 Ohio St. 281, 156 N.E. 210 (1927) (street maintenance—governmental).

tests for determining whether legislative classifications violate the equal protection clause. First, while a state is permitted considerable latitude to classify people within its jurisdiction, the classification must bear at least a "reasonable relation" to the purpose of the legislation.[23] Secondly, if the classification is either based on "suspect criteria," such as race, or affects a "fundamental right," a stricter test is applied: there must be a "compelling state interest" or "substantial justification" for creating or enforcing the classification.[24]

Applying the "reasonable relation" test, the majority in *Krause* found a rational basis for each classification. First, the court stated that, although plaintiffs with identical causes of action may be distinguished in Ohio solely on the basis of whether the defendant is a public or private party, it would not "preclude the combined legislative judgment that there *may be* substantive differences between the two types of conduct," public and private.[25] Secondly, the court found that the exceptions to immunity for proprietary functions had been applied by Ohio courts only to *local* political entities and not to the state itself, and that

23. Dandridge v. Williams, 397 U.S. 471 (1970); Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Railway Express Agency v. New York, 336 U.S. 106 (1949); Takahishi v. Fish & Game Comm'n, 334 U.S. 410 (1948); F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920):

> [T]he classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911); Yick Wo v. Hopkins, 118 U.S. 356 (1886). This traditional test applies particularly to economic regulation. *See* Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A.L. REV. 716 (1969). *See generally Developments in the Law—Equal Protection,* 82 HARV. L. REV. 1065, 1131 (1969).

24. Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (emphasis original):

> [W]e reject appellants' argument that a mere showing of a rational relationship between the waiting period [for eligibility in a state welfare program] and these four admittedly permissible state objectives will suffice to justify the classification. . . . [I]n moving . . . appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.

Carrington v. Rash, 380 U.S. 89 (1965). *See* cases cited notes 33-35 *infra*; *cf.* Baker v. Carr, 369 U.S. 186 (1962); Brown v. Board of Educ., 347 U.S. 483 (1954); Skinner v. Oklahoma, 316 U.S. 535 (1942). *See generally* Tussman & tenBroek, *The Equal Protection of the Laws,* 37 CALIF. L. REV. 341 (1949).

25. 31 Ohio St. 2d at 146, 285 N.E.2d at 745 (emphasis added). *Compare* State *ex rel.* Wallace v. City of Cellina, 29 Ohio St. 2d 109, 279 N.E.2d 866 (1972) (dictum), *with* Porter v. City of Oberlin, 1 Ohio St. 2d 143, 152, 205 N.E.2d 363, 369 (1965), *and* State *ex rel.* Hostetter v. Hunt, 132 Ohio St. 568, 9 N.E.2d 676 (1937).

"sufficient substantive differences" exist between state and local governments to justify different treatment.[26]

The "reasonable relation" test is founded upon judicial deference to legislative choice. Even when the state has failed to demonstrate a rational basis, classifications have been upheld if the court can construct one.[27] Thus, the majority in *Krause* was satisfied that immunity was constitutionally permissible after hypothesizing sufficient differences between private, state, and municipal parties to support their different statuses as defendants in tort actions.

The dissent in *Krause*, however, reasoned that the right of access to the courts[28] is as basic as any of the "fundamental rights" recognized by the Supreme Court. Because immunity has the legal effect of denying that right to some, the dissent concluded that the immunity doctrine must be closely scrutinized under the stricter equal protection test.[29] While the state is not required to treat things which are "different in fact" as though they were the same, the determination of whether they *are* different should be based on the "*underlying substantive conduct* involved, *and not the status* of the party-defendant, when a denial of due process is involved."[30] The dissent rejected the state's

---

26. 31 Ohio St. 2d at 146, 285 N.E.2d at 745:

> Whether it is the nature of the conduct or activity undertaken, or the differences in its governmental and corporate existence, we need not now explore. These substantive differences permit of different remedies and defenses.

27. McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); McGowan v. Maryland, 366 U.S. 420, 425-26 (1961):

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

Morey v. Doud, 354 U.S. 457 (1957); Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220 (1949); Goesaert v. Cleary, 335 U.S. 464 (1948).

28. *Cf.* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (damage remedy available for violation of fourth amendment rights although not authorized by Congress); Parden v. Terminal Ry., 377 U.S. 184 (1964) (state's immunity can be waived when its activities fall within federal regulatory powers).

29. 31 Ohio St. 2d at 151, 285 N.E.2d at 747-48 (dissenting opinion) (emphasis original):

> A classification that discriminates with respect to a right of very great importance is not to be sustained merely because the classification has a rational basis; if the state fails to supply a *substantial justification*, its discrimination is invidious and unconstitutional.

30. *Id.* at 153, 285 N.E.2d at 749 (emphasis original).

argument that abrogating immunity would impair the function of state government, pointing out that governments in states where immunity has been eliminated "are still able to provide the functions and services necessary in a modern society . . . ."[31] The dissent noted that increased costs to state government, in any event, are not a sufficient justification for denial of equal protection.[32] The dissent concluded that the doctrine of respondeat superior should apply because the state failed to carry its burden of demonstrating a compelling interest in barring suits by its residents.

The analyses in *Krause* reflect a basic problem in the present status of equal protection litigation, namely, the inadequacy of standards for determining which test to apply. The Supreme Court has clearly established only three major "fundamental interests" to be protected by the stricter test: voting,[33] interstate travel,[34] and criminal appeals.[35] Recent decisions indicate that the present Court will not readily extend this test into new areas.[36] When the interest affected is founded on express constitutional grounds—for example, free speech—it carries its own safeguards.[37] But just what rights not explicitly guaranteed by the Constitution warrant special treatment is unclear.[38]

---

31. *Id.* at 155, 285 N.E.2d at 750.

32. *Id.* at 155 n.18, 285 N.E.2d at 750 n.18, *citing* Shapiro v. Thompson, 394 U.S. 618, 633 (1969).

33. Bullock v. Carter, 405 U.S. 134 (1972); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Williams v. Rhodes, 393 U.S. 23 (1968); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Reynolds v. Sims, 377 U.S. 533 (1964).

34. Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969).

35. Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). *See generally* Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

36. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) (school-financing system based on ad valorem property tax); United States v. Kras, 409 U.S. 434 (1973), *rev'g* 331 F. Supp. 1207 (E.D.N.Y. 1971) (filing fees in bankruptcy); Jefferson v. Hackney, 406 U.S. 535 (1972) (allocation of welfare benefits); Lindsey v. Normet, 405 U.S. 56 (1972) (housing); Schilb v. Kuebel, 404 U.S. 357 (1971) (bail statute). *See generally* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

37. *See, e.g.*, Police Dep't v. Mosley, 408 U.S. 92 (1972).

38. For example, in Shapiro v. Thompson, 394 U.S. 618 (1969), the Court in effect recognized a "constitutional right to travel interstate," without specifying the constitutional ground from which the right derived:

> This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citi-

At the same time, the Court is increasingly less willing to conjecture as to a state's reasons for classifying; even under the "reasonable relation" test, judicial scrutiny is becoming more vigorous.[39] For example, in *Reed v. Reed*[40] the Court invalidated an Idaho statute which gave mandatory preference to men over women in the selection of administrators for decedents' estates. Rather than expanding the stricter test to include sex as a "suspect" criterion, the Court found the statute "arbitrary" under the "reasonable relation" test, although the state had argued that the preference made the selection process more efficient by eliminating hearings on the merits and avoided intra-family disputes —reasons clearly sufficient under older "reasonable relation" interpretations to support the classification.[41]

Because the Supreme Court's use of the equal protection tests does not provide clear guidance, the *Krause* majority's choice of the "reasonable relation" test over the stricter test may be justifiable. Even under the "reasonable relation" test, however, the court should have exam-

---

> zens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. . . . We have no occasion to ascribe the source of this right to travel interstate to a particular constitutional provision.

Id. at 629-30. The problem is the difficulty in predicting when this type of analysis will be applied to other challenged restrictions which admittedly do not affect explicit first amendment rights. *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973):

> It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus the key to discovering whether education is "fundamental" is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution.

39. *See* United States Dep't of Agriculture v. Moreno, 93 S. Ct. 2821 (1973); Sugarman v. Dougall, 93 S. Ct. 2842 (1973); Roe v. Wade, 410 U.S. 113 (1973); James v. Strange, 407 U.S. 128 (1972); Levy v. Louisiana, 391 U.S. 68 (1968); Rinaldi v. Yaeger, 384 U.S. 305 (1966). *See generally* Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966).

40. 404 U.S. 71 (1971). In Frontiero v. Richardson, 410 U.S. 677, 682 (1973), Justice Brennan, writing for four members of the Court, placed sex classifications in the "inherently suspect" group, relying on *Reed*. In his concurring opinion, Justice Powell pointed out that *Reed* "did not add sex to the narrowly limited group of classifications which are inherently suspect," and urged that any decision expanding its authority be reserved. *Id.* at 692.

41. *See* cases cited note 27 *supra*.

ined more closely the rationality of the classifications created by immunity under Ohio law.[42]

42. For example, immunity may be viewed in two ways: from an economic point of view, as a means of protecting the state from the burden of defending lawsuits; and from a personal rights point of view, as preventing individuals from adjudicating tort claims. The first view leads to the "reasonable relation" test, the second to the stricter test. Even assuming that the economic view should prevail, the recent "reasonable relation" cases seem to require an investigation of the relationship between Ohio's financial structure and capacity to perform needed services, and the immunity doctrine, particularly in light of its inconsistent exceptions. *See* note 22 *supra*.