SECTION 1983 AND THE LIABILITY OF LOCAL OFFICIALS FOR LAND USE DECISIONS

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I. INTRODUCTION

A basic proposition of American democracy is that all individuals are responsible for behaving in a manner that comports with the United States Constitution and federal law. Of course, this notion applies to governmental officials as well as to private individuals.

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with immunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it.[1]

The practical meaning of this proposition under any given set of circumstances depends upon a rapidly changing set of legal rules which originated for the most part in close, controversial Supreme Court decisions.[2]

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1. United States v. Lee, 106 U.S. 196, 220 (1882).

2. Of the recent Supreme Court decisions in this area, three have involved five-four decisions. Owen v. City of Independence, 445 U.S. 622 (1980); Butz v. Economou, 438 U.S. 478 (1978); Doe v. McMillan, 412 U.S. 306 (1973) (partial dissent).

These legal rules explain who qualifies for immunity for actions performed as part of their jobs. Such rules are subject to numerous revisions. *See* Monell v. Department of Social Services, 436 U.S. 658 (1978). This article explores the current status

During the 1970's, a series of cases in the United States Supreme Court dealt with various aspects of municipal service and the immunity from suit for federal constitutional violations.[3] Recently, the pace of decisionmaking has accelerated, resulting in additions to and modification of rules concerning the liability for official acts of both municipal officials and the municipalities themselves.[4] This article discusses the liability of local officials, with particular attention to the area of land use law.

In the area of land use, the legal issues raised in connection with the immunity of officials are often more complex than those raised generally in connection with municipal liability.[5] The majority of cases dealing with official liability and immunity have not been land use cases. The cases, brought under Section 1983,[6] typically involve questions of judicial and legislative immunities accorded to judges, prosecutors, legislators, and other officials.[7] Thus, the development

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of the rules and discusses how they affect local officials who participate in the development of land use laws.

3. Owen v. City of Independence, 445 U.S. 622 (1980); Butz v. Economou, 438 U.S. 478 (1978); Monell v. Department of Social Services, 436 U.S. 658 (1978); Doe v. McMillan, 412 U.S. 306 (1973).

4. See pp. 66-76, *infra*, for a discussion of the recent cases. *See also* note 7 *infra*.

5. This complexity results from confusion regarding the role of local officials. Immunity is granted only to judges, prosecutors, legislators, and a select group of government officials. *See* notes 52-84 and accompanying text *infra*. Whether land use officials fall within the select group is unclear. In Owen v. City of Independence, 445 U.S. 622 (1980), the Court explained the procedure for determining when a defendant qualifies for immunity under § 1983. "Where the immunity claimed by the defendant was well established at common law at the time § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity." 445 U.S. at 638. When common law did not grant immunity, the courts have relied upon public policy to determine the issue. *Id*. *See* notes 38-50 and accompanying text *infra*. This article maintains that local legislative officials should be granted absolute immunity when dealing with land use issues.

6. 42 U.S.C. § 1983 (Supp. IV 1980). The provision is set forth in the text at p. 60 *infra*.

7. *See, e.g.*, Supreme Court of Virginia v. Consumers Union of the United States, 446 U.S. 719 (1980) (held that the Virginia Supreme Court acted in a legislative capacity when promulgating the state Code of Professional Responsibility, and hence was immune from liability under § 1983); Butz v. Economou, 438 U.S. 478 (1978) (the general rule calls for qualified immunity from liability for executive officials, although certain crucial executives warrant absolute immunity); Procunier v. Navarette, 434 U.S. 555 (1978) (prison officials are immune from liability under § 1983 unless they know that their actions violate constitutional norms); Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors); Wood v. Strickland, 420 U.S. 308 (1975) (held local

of Section 1983 law has proceeded in the past with scant reference to

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school board officials immune from liability because they acted in belief that their actions were lawful); Doe v. McMillan, 412 U.S. 306 (1973) (legislators have absolute immunity); Pierson v. Ray, 386 U.S. 547 (1967) (held that judges are immune from liability under § 1983; police officers are not immune from liability for an accusation of false arrest, but can present the affirmative defenses of good faith and probable cause); Tenney v. Brandhove, 341 U.S. 367 (1951) (state legislators); Green v. DeCamp, 612 F.2d 368 (8th Cir. 1980) (held that the Nebraska legislature was immune from suit under § 1983 when preparing and publishing legislative committee reports); Doe v. County of Suffolk, 494 F. Supp. 179 (E.D.N.Y. 1980) (social workers do not have absolute immunity in suits for damages); Fox Valley Reproductive Health Care Center, Inc. v. Arft, 454 F. Supp. 784 (E.D. Wis. 1978) (municipal officials have a qualified immunity when performing legislative activities).

Two important cases in this area, Monell v. Department of Social Services, 436 U.S. 658 (1978) and Owen v. City of Independence, 445 U.S. 622 (1980), focused on the liability of municipalities and municipal officials. In *Monell*, the Supreme Court held that municipalities were persons for purposes of § 1983 and thus could be sued under that section for "monetary, declaratory and injunctive relief where. . .the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690. The Court also held that local governments can be sued for deprivation of constitutional rights which result from actions authorized by government custom. *Id.* at 690-91. *Monell* overruled Monroe v. Pape, 365 U.S. 167 (1961), which held that Congress did not intend to "bring municipal corporations within the ambit of [§ 1983]." 365 U.S. at 187. Justice Rehnquist, joined by Chief Justice Burger, dissented in *Monell* because he disagreed with the majority's interpretation of the legislative history of § 1983.

Monell was followed by Owen v. City of Independence, 445 U.S. 622 (1980). *Owen* stated the view that § 1983 imposes liability on every "person" and, under *Monell*, this includes municipalities. The Court noted that municipalities traditionally have not been immune from damage actions. *Id.* at 639-40. The Court recognized that the doctrine distinguishing between government and proprietary functions provided for immunity in certain situations for governmental action and, further, that legislative, as opposed to ministerial actions, were immune from attack. *Id.* at 644. Nevertheless, the Court held that these doctrines did not protect a municipality from suits under § 1983. *Id.* The Court found that the first doctrine did not apply because by enacting § 1983 Congress had, in effect, consented to suits against local governments. The Court explained that the governmental-proprietary distinction was thus used to determine whether the government could be sued in unconsented situations. The legislative activity doctrine was designed to prevent the courts from interfering with municipal discretion. The Court noted, however, that "(A) municipality has no 'discretion' to violate the Federal Constitution". *Id.* at 649. The Court observed that it would be " 'uniquely amiss' " if local governments "were permitted to disavow liability for the injury it has begotten." *Id.* at 651.

Justice Powell, joined by three other justices, dissented. He argued that the history of § 1983, good policy and current practice required that municipal governments be able to raise a claim of qualified immunity based on action undertaken in good faith. *Id.* at 658.

In *Owen*, the Court emphasized that granting municipal officials qualified or absolute immunity meant that many plaintiffs would be denied relief if municipalities

land use questions. In the last several years, however, a number of land use cases have reached appellate courts, raising very complex questions[8]. Understanding the difficult land use issues, however, first requires a general understanding of Section 1983 and official immunity.

II. SECTION 1983 AND OFFICIAL IMMUNITY

A. *The Nature of Official Immunity*

Section 1983 of Title 42 of the United States Code provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[9]

The language of Section 1983 clearly states three requirements for a

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could not be sued. It can be argued that one effect of *Monell* and *Owen* is a new awareness among potential plaintiffs of the possibility of lawsuits. Indeed, municipalities and municipal officers are being sued at an increasing rate. During the 1970's, the number of cases involving claims of official immunity under § 1983 increased dramatically. This is not to say that lawsuits against municipal officials are a satisfactory substitute for suits against a municipality. Rather, it only indicates that plaintiffs have identified another type of defendant. That is, of course, not a complete substitute for suits against a municipality. This is especially true, as will be seen, in light of the uncertainty surrounding the rules involving suits against government officials.

8. *See* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) (held that members of the regional planning agency's governing board had absolute immunity from liability in § 1983 suits for their legislative acts); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1251 (1982) (mayor's veto of a zoning ordinance is a legislative function and hence immune from liability under § 1983); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980) (held city directors absolutely immune with respect to the enactment of zoning amendments); Centennial Land and Dev. Co. v. Township of Medford, 165 N.J. Super. 220, 397 A.2d 1136 (1979) (held township zoning board has absolute immunity as township actions were quasi-judicial); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973) (found that the action of county commissioners in approving zoning charges to be an exercise of judicial authority).

One spur to the increasing volume of litigation is the availability of attorneys' fees to the victorious plaintiff. *See* Civil Rights Attorneys' Fees Act of 1976, 42 U.S.C. § 1988 (Supp. IV 1980); Maine v. Thiboutot, 448 U.S. 1 (1980). As the Court notes in *Thiboutot*, § 1988 applies to every action to enforce § 1983 (and §§ 1981, 1982, 1985 and 1986), even if brought in state courts.

9. 42 U.S.C. § 1983 (Supp. IV 1980). Congress originally enacted § 1983 as part of the Civil Rights Act of 1871 "to enforce the provisions of the Fourteenth Amend-

cause of action. First, Section 1983 requires a defendant who has acted under color of state or local law.[10] In this situation, color of law is essentially equivalent to the state action requirement of the fourteenth amendment.[11]

Second, the 1983 action requires that the plaintiff show deprivation of specific rights, privileges, or immunities secured by the United States Constitution or federal law.[12] This means that damages are available for losses suffered as a result of violations of either federal constitutional or statutory law. No remedy is available under Section 1983, however, for violation of non-federal rights. Deprivation of rights resulting from violation of state or local law is insufficient to constitute a violation of Section 1983.[13]

Third, defendant's conduct must in fact be a cause of plaintiff's deprivation.[14] The cause in fact element becomes crucial when a local governmental body or a superior is sued for unconstitutional actions of employees or subordinates.[15] The plaintiff bears the burden

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ment to the Constitution of the United States." Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13.

10. Gomez v. Toledo, 446 U.S. 635, 640 (1980); Monroe v. Pape, 365 U.S. 167, 171 (1961); German v. Killeen, 495 F. Supp. 822, 828 (E.D. Mich. 1980); Rankin v. Howard, 457 F. Supp. 70, 72 (D. Ariz. 1978), *cert. denied*, 451 U.S. 939 (1981).

11. *See* S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION 38 (1979), *citing* Adickes v. Kress & Co., 398 U.S. 144 (1970). Professor Nahmod notes that there are three classes of cases: those where a state employee acts on behalf of the state pursuant to state authority; those where the employee acts in a manner inconsistent with official policy; and those where a private person acts with some governmental involvement. *Id.* at 39.

Note that although § 1983 requires "color of law," other sections of the Civil Rights acts do not necessarily require state action. *See*, concerning §§ 1985 and 1986, Rankin v. Howard, 457 F. Supp. 70, 74 (D. Ariz. 1978), *cert. denied*, 451 U.S. 939 (1981), and cases cited therein. *See also* German v. Killeen, 495 F. Supp. 822 (E.D. Mich. 1980).

12. *See* note 10 *supra*. *See also* Egan v. City of Aurora, 365 U.S. 514 (1961); Landrum v. Moates, 576 F.2d 1320 (8th Cir.), *cert. denied*, 439 U.S. 912 (1978). For cases based upon violation of federal statutory law, see Maine v. Thiboutot, 448 U.S. 1 (1980) and Greenwood v. Peacock, 384 U.S. 808 (1966). In *Thiboutot*, the Court made clear that it felt that previous decisions had applied § 1983 to federal statutory law. 448 U.S. at 4.

13. *See* German v. Killeen, 495 F. Supp. 822, 829 (E.D. Mich. 1980), *citing* Missouri *ex rel.* Gore v. Wochner, 620 F.2d 183 (8th Cir. 1980), *cert. denied*, 449 U.S. 875 (1981).

14 Gomez v. Toledo, 446 U.S. 635, 640 (1980). *Cf.* Monell v. Department of Social Services, 436 U.S. 658 (1978).

15. Monell v. Department of Social Services, 436 U.S. 658, 694 (1978). *See also* S. NAHMOD, *supra* note 11, at 87.

of proving that defendant's actions were a cause of the deprivation;[16] the burden then shifts to the defendant to show some other, constitutionally permissible, reason for defendant's actions.[17]

When these three requirements are met, the plaintiff has established a cause of action. Usually, the plaintiff seeks to recover damages. Defendants, however, can sometimes avoid liability by claiming immunity.[18] Uncertainty exists regarding the availability and extent of immunity for certain individuals under Section 1983. On its face, Section 1983 contains no mention of any immunities. The statute imposes liability upon "every person"[19] who deprives another of constitutional rights under certain circumstances.[20] No language in the statute specifies any exemptions. Section 1983's language serves a broad purpose of assuring that a "damage remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees."[21] Courts have emphasized that this purpose must be broadly interpreted and "construed generously."[22]

There are, however, countervailing policy considerations. Some concern exists regarding the effect of lawsuits on the performance of governmental officials and their willingness to undertake responsibilities. This concern antedates the passage of Section 1983; it developed initially under the common law. "[T]he common law soon recognized the necessity of permitting officials to perform their official functions free from the threat of suits for personal liability."[23] A

16. Carey v. Piphus, 435 U.S. 247 (1978). *See* S. NAHMOD, *supra* note 11, at 97-98.

17. Gomez v. Toledo, 446 U.S. 635, 640 (1980). *See also* S. NAHMOD, *supra* note 11, at § 8.13 (Supp. 1980).

18. *See* Gomez v. Toledo, 446 U.S. 635, 640 (1980) (public official with qualified immunity may claim that he acted in good faith as an affirmative defense); Hutchinson v. Proxmire, 443 U.S. 111 (1979) (legislative immunity for all speeches made in the Senate); Procunier v. Navarette, 434 U.S. 555 (1978) (qualified immunity for prison officials); Doe v. McMillan, 412 U.S. 306 (1973) (legislative immunity); Gravel v. United States, 408 U.S. 606 (1972) (qualified legislative immunity protects Senators' aides); Pierson v. Ray, 386 U.S. 547 (1967) (judicial immunity).

19. Dodson v. Polk County, 628 F.2d 1104, 1106 (8th Cir. 1980), *rev'd on other grounds*, 102 S. Ct. 445 (1981).

20. *Id.*

21. Owen v. City of Independence, 445 U.S. 622, 651 (1980).

22. Gomez v. Toledo, 446 U.S. 635, 639 (1980). *See also* Marrapese v. Rhode Island, 500 F. Supp. 1207 (D.R.I. 1980).

23. Scheuer v. Rhodes, 416 U.S. 232 (1974). *Scheuer*, 416 U.S. at 239 n.4, pro-

recent case, *German v. Killeen*,[24] drew upon several Supreme Court decisions to set forth three policy reasons for immunity. These policies underlie both the grant of immunity to officials under common law and the extension of immunity to other public officials. First, immunity prevents injustice to an official whose position requires him to exercise discretion.[25] Second, immunity fosters a willingness to execute responsibilities that an employee might be reluctant to undertake if subjected to personal liability.[26] Finally, immunity eliminates the fear that "threat of personal liability might deter citizens from holding public office."[27]

These policies formed the traditional basis for granting immunity at common law. One might argue that Congress' failure to mention immunities when it enacted Section 1983 indicates an intention to abolish the common law immunities for purposes of the provision. The Supreme Court considered that argument in *Tenney v. Brandhove*[28] but rejected it. Speaking for the Court, Justice Frankfurter stated "(w)e cannot believe that Congress. . .would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."[29]

Thus, a conflict exists between the policy of broad liability, reflected in the language of Section 1983, and the need for immunities, shown by the policy justifications set out in *German v. Killeen*. Reso-

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vides a history of the development of immunity in the common law. *See also* Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963). For other sources on the historical development of the immunity doctrine at common law and under § 1983, see Carlisle, *Evolution of § 1983—Verdict in on Liability but Jury Out on Remedy*, 12 URB. LAW. 727 (1980); Casto, *Innovations in the Defense of Official Immunity under § 1983*, 47 TENN. L. REV. 47 (1979); Note, *The Municipal Zoning Power and § 1983 Liability After Owen v. City of Independence*, 12 LOY. U. CHI. L.J. 209 (1981). For a thorough discussion of the need for the protection of individual civil rights versus the need for governmental entities and officials to be free to carry out their duties, see Note, *Civil Rights Suits Against State and Local Governmental Entities and Officials: Rights of Action, Immunities, and Federalism*, 53 S. CAL. L. REV. 945 (1980).

24. 495 F. Supp. 822 (E.D. Mich. 1980).

25. *Id.* at 830.

26. *Id.* at 830, *citing* Scheuer v. Rhodes, 416 U.S. 232 (1974).

27. *Id.* at 830, *citing* Wood v. Strickland, 420 U.S. 308 (1975). *See also* Butz v. Economou, 438 U.S. 478 (1978); Doe v. McMillan, 412 U.S. 306 (1973); Pierson v. Ray, 386 U.S. 547 (1967); Bradley v. Fisher, 80 U.S. (13 Wall.) 335 (1872); Centennial Land & Dev. Co. v. Township of Medford, 165 N.J. Super. 220, 397 A.2d 1136 (1979).

28. 341 U.S. 367 (1951).

29. *Id.* at 376.

lution of these conflicting policies begins with statutory interpretation. Given that Section 1983 contains no express grant of immunities, courts look to whether Congress intended to abolish the immunity of particular governmental officials as it existed at common law.[30]

The Supreme Court dealt with this question of congressional intent in *Tenney v. Brandhove*,[31] where it considered whether a state legislative committee had immunity against a claim that it impermissibly called the plaintiff as a witness in order to intimidate the plaintiff's exercise of his constitutional right to freedom of speech.[32] The *Tenney* Court looked to common law practice and the long history, in both England and in the United States, of "[t]he privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings."[33] The Court held that enactment of Section 1983 and other provisions in the Civil Rights Act did not abrogate the common law immunity of legislators.[34] Several subsequent decisions[35] followed the *Tenney* approach and continued to rely on the common law practice in determining whether or not certain officials were entitled to immunity.[36] The opinions display extensive inquiry into exactly what constituted the common law practice and how Congress intended to affect it by enacting Section 1983.[37]

The Court's inquiry goes beyond an examination of common law practice and speculation about congressional intent, however. In its effort to resolve the conflict between a plaintiff's right to redress for wrongful action taken against him and the need for immunities, the Supreme Court also examines public policy considerations involved in a controversy.[38] Consideration of public policy, in addition to reli-

30. *See, e.g.*, Butz v. Economou, 438 U.S. 478, 502 n.30 (1978); Procunier v. Navarette, 434 U.S. 555, 561 (1978); Pierson v. Ray, 386 U.S. 547, 555 (1967); Tenney v. Brandhove, 341 U.S. 367, 379 (1951).

31. 341 U.S. 367 (1951).

32. *Id.* at 371.

33. *Id.* at 372.

34. *Id.* at 379.

35. Procunier v. Navarette, 434 U.S. 555 (1978); Imbler v. Pachtman, 424 U.S. 409 (1976); Wood v. Strickland, 420 U.S. 308 (1975); Pierson v. Ray, 386 U.S. 547 (1967).

36. *See* text accompanying notes 48-51 *infra*.

37. *See* Owen v. City of Independence, 445 U.S. 622 (1980); Butz v. Economou, 438 U.S. 478 (1978); Monell v. Department of Social Services, 436 U.S. 658 (1978).

38. *See, e.g.*, Butz v. Economou, 438 U.S. 478 (1978); Imbler v. Pachtman, 424 U.S. 409 (1976); Scheuer v. Rhodes, 416 U.S. 232 (1974). A federal district court in

ance on common law practice, is necessary because courts must occassionally infer the existence of immunities in situations not found in common law. Cases today arise involving officials whose existence was unknown to the common law or to the framers of Section 1983.[39] In addition, many activities engaged in by today's officials were also unknown to the common law, particularly in the land use area. This fact is important since an official's activities determines, to some extent, whether and to what extent the official is entitled to immunity. When faced with a case of this kind, most courts recognize the need for inquiry into public policy. Nevertheless, the extent to which public policy considerations can be examined independently of common law practice remains uncertain.[40]

In its most recent opinions,[41] the United States Supreme Court has employed an inquiry which scrutinizes both common law and public policy.[42] *Gomez v. Toledo*[43] involved an action brought under Section 1983 against a public official.[44] The Court discussed several cases in which it had held certain governmental officials entitled to qualified immunity.[45] Recognition of the right of some public offi-

German v. Killeen, 495 F. Supp. 822 (E.D. Mich. 1980), reviewed the Supreme Court decision in this area and distilled three public policy reasons for immunity. *See* notes 24-27 and accompanying text *supra*.

39. *See, e.g.*, Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979). This case involved members of the Tahoe Regional Planning Agency, a multi-state organization. Plaintiffs challenged whether the agency members enjoyed absolute immunity from suit. The plaintiffs argued that absolute immunity should not be granted because such immunity for legislative officials derives from the Speech and Debate Clause of the United States Constitution (U.S. Const. art. I, § 6) which, they asserted, does not apply at the regional level. The Court rejected the plaintiffs' argument, citing Tenney v. Brandhove, 341 U.S. 367 (1951), and noting that regional legislators need the immunity protection as much as legislators at the state and federal levels. The Court also relied on public policy considerations and the similarity between state and regional legislators to reach its conclusion. *See* notes 121-32 and accompanying text *infra*.

40. *See* Doe v. County of Suffolk, 494 F. Supp. 179 (E.D.N.Y. 1980) where the court recognized immunities in a variety of areas "although such immunities are without support in either the language or history of the statute." *Id.* at 180.

41. *See, e.g.*, Gomez v. Toledo, 446 U.S. 635 (1980); Wood v. Strickland, 420 U.S. 308 (1975).

42. *See* text accompanying notes 43-50 *infra*.

43. 446 U.S. 635 (1980).

44. *Id.* at 635.

45. *Id.* at 639 *citing* Pierson v. Ray, 386 U.S. 547 (1967) (immunity granted to a police officer). *See also* Procunier v. Navarette, 434 U.S. 555 (1978) (immunity for prison officials); Wood v. Strickland, 420 U.S. 308 (1975) (immunity for local school

cials to such immunity was based on an unwillingness to infer from legislative silence a congressional intention to abrogate immunities that were both "well established at common law" and "compatible with the purposes of the Civil Rights Act."[46] In *Imbler v. Pachtman*,[47] the Court held findings of immunity were "predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it."[48] *Wood v. Strickland*[49] stated the Supreme Court's combined inquiry most concisely, holding that the right to qualified immunity was established on the basis of "[c]ommon law tradition . . . and strong public policy reasons."[50]

The cases discussed in *Gomez*[51] dealt with the availability of a certain type of immunity—qualified immunity—for local government officials, as did the *Gomez* case itself. There exist, however, two types of immunity, which should be examined in some detail.

B. *Absolute and Qualified Immunity*

Under Section 1983 case law, courts have granted two types of immunity—absolute or qualified. Once a court resolves the question whether an official is entitled to any immunity under the particular circumstances, the question arises whether the official's immunity should be absolute or qualified. Absolute immunity means immunity from all types of liability. For example, in *Supreme Court of Virginia v. Consumers' Union*,[52] the United States Supreme Court held that the nature of absolute immunity under Section 1983 was so comprehensive as to prohibit awards of attorneys' fees, even if plaintiff proved that the defendant had violated his constitutional rights.[53] Absolute immunity defeats a suit for damages at the pleadings

board members); Scheuer v. Rhodes, 416 U.S. 232 (1974) (immunity for the state governor and other executive officers). For a discussion of qualified immunity, see notes 56-57, 92-115 and accompanying text *infra*.

46. *Id.* at 638, *quoting* Owen v. City of Independence, 445 U.S. 622 (1980).

47. 424 U.S. 409 (1976).

48. *Id.* at 421.

49. 420 U.S. 308 (1975).

50. *Id.* at 318.

51. *See* note 45 *supra*.

52. 446 U.S. 719 (1980).

53. *Id.* at 738.

stage.[54] So long as the defendant can show that his actions were within the scope of the immunity, the defendant avoids litigating the merits altogether.[55]

Courts often find an official entitled to some immunity but feel that, due to certain facts, immunity should be qualified.[56] For an official entitled to qualified immunity, liability depends on the circumstances surrounding the official's actions, including his motivation for the action being challenged.[57] Determination of liability, therefore, requires a trial to establish the relevant evidence.

Given the availability of both absolute and qualified immunity, it becomes the task of the courts to determine which type of immunity applies to any particular official. Initially, that determination depends largely on the court's interpretation of congressional intent regarding preservation of common law immunities, coupled with consideration of public policy.

1. Absolute Immunity

Courts have generally concluded that there are three types of indi-

54. Gomez v. Toledo, 446 U.S. 635 (1980); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 611 (8th Cir. 1980); Fralin & Waldron, Inc. v. County of Henrico, 474 F. Supp. 1315 (E.D. Va. 1979); Robinson v. City of Raytown, 606 S.W.2d 460 (Mo. Ct. App. 1980).

55. *See* Procunier v. Navarette, 434 U.S. 555 (1978); Pierson v. Ray, 386 U.S. 547 (1967); Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980).

56. The Supreme Court has maintained that the immunity should be qualified in order to protect private citizens from the misconduct of government officials. Wood v. Strickland, 420 U.S. 308, 320 (1975).

57. In Scheuer v. Rhodes, 416 U.S. 232 (1974) the Court stated that

> [A] qualified immunity is available to officers of the executive branch of the government, the variation being dependent upon the scope of discretion and responsibilities of the office and all the circumstances as they reasonably appeared at the time of the action on which liability is sought to be based. It is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers conduct.

Id. at 247-48.

Therefore, the officer must have a reasonable belief held in good faith to receive qualified immunity. This standard was explained further in Wood v. Strickland, 420 U.S. 308 (1975), when the Court held that an official is not immune if the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [person] affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury. . . ." *Id.* at 322.

viduals entitled to absolute immunity for their official activities: judges, legislators, and prosecutors. In *Bradley v. Fisher*,[58] the Supreme Court noted that immunity for judges "in the exercise of their judicial functions" had been "the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country."[59] The Court found a similar immunity for legislators in *Tenney v. Brandhove*.[60] The reasons for granting such immunity, as discussed earlier, involve freeing the officials from fear of litigation and encouraging the officials to perform their duties without undue inhibition of discretion. For the same reasons, the Court in *Imbler v. Pachtman* held prosecutors entitled to absolute immunity.[61]

A court's initial inquiry is thus whether an official is a judge, legislator, or prosecutor. If the official is found to be in such a position, the court must determine whether the official was acting in a judicial, legislative, or prosecutorial capacity. In *Tenney*, the Court held that state legislators are absolutely immune from damage actions when they act "in a field where legislators traditionally have power to act. . . ."[62] Thus, while a legislator will be absolutely immune for action taken in connection with enactment of legislation or other constitutionally granted action, he will not be immune for activity beyond the scope of that which is constitutionally permitted.[63] For example, if a legislator publicly distributes material infringing on the rights of private individuals, as opposed to distribution of such material within a committee, no immunity will attach.[64]

In short, whenever a court determines that a judge, legislator, or

58. 80 U.S. (13 Wall.) 335 (1872).

59. *Id.* at 347.

60. 341 U.S. 367 (1951).

61. 424 U.S. 409, 431 (1976). *See also* Butz v. Economou, 438 U.S. 478 (1978); Taylor v. Kavanagh, 640 F.2d 450 (2d Cir. 1981); Helstoski v. Goldstein, 552 F.2d 564 (3d Cir. 1977); Brawer v. Horowitz, 535 F.2d 830 (3d Cir. 1976); Halpern v. City of New Haven, 489 F. Supp. 841 (D. Conn. 1980); Safeguard Mut. Ins. Co. v. Miller, 456 F. Supp. 682 (E.D. Pa. 1978); C.M. Clark Ins. Agency v. Reed, 390 F. Supp. 1056 (S.D. Tex. 1975).

62. 341 U.S. at 379.

63. See Gravel v. United States, 408 U.S. 606, 626 (1972) (Speech and Debate Clause does not exempt United States Senator or aide from an otherwise valid criminal law for action taken in preparation for or in the implementation of legislative acts).

64. Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972).

prosecutor is acting within the scope of judicial, legislative, or prosecutorial authority, the official will enjoy absolute immunity from prosecution. The court grants this immunity regardless of the motivation for the action. In other words, even if the official acts out of malice or corruption, absolute immunity will still attach.[65] Under the common law, then, all that matters is whether the individual is a certain type of official acting within the scope of his authority.

As this article went to press, the Supreme Court decided *Nixon v. Fitzgerald*,[66] a case arising out of civil claims for damages against President Nixon. The Court held that the President enjoyed a unique status among executive officials and was entitled to absolute immunity.[67] The Court was careful to emphasize this unique status.[68] Thus, *Nixon* is not likely to effect Section 1983 law as applied to the chief administrative officers at other levels of government.[69]

Obviously, many officials are not judges, legislators, prosecutors or the President of the United States. These officials sometimes enjoy absolute immunity, rather than merely qualified immunity, by virtue of some doctrine other than the existence of immunity at common law.[70] Some officials achieve immunity as employees of persons who enjoy common law absolute immunity.[71] In recent cases, the Supreme Court has extended the protection of absolute immunity to congressional aides, committee staff, and committee consultants in-

65. Stump v. Sparkman, 435 U.S. 349, 355-57 (1978); Pierson v. Ray, 386 U.S. 547, 554 (1967) (immunity applies even when the judge is accused of acting maliciously or corruptly); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 351 (1872).

66. 50 U.S.L.W. 4797 (U.S. June 24, 1982) (No. 79-1738).

67. *Id.* at 4802.

68. *Id.* at 4802-03.

69. The Court did not extend this immunity to presidential assistants. *See* notes 95-98 and accompanying text *infra*.

70. *See, e.g.*, Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) (need to protect the public good); Butz v. Economou, 438 U.S. 478 (1978) (judicial character of administrative agency adjudications); Imbler v. Pachtman, 424 U.S. 409 (1976) (eliminate the fear of prosecution). *See* notes 71-76 and accompanying text *infra*.

71. *See, e.g.*, Imbler v. Pachtman, 424 U.S. 409 (1976) (public officials); Doe v. McMillan, 412 U.S. 306 (1973) (congressional staff); Gravel v. United States, 408 U.S. 606 (1972) (congressional aides); Tarter v. Hury, 646 F.2d 1010 (8th Cir. 1981) (court clerks for actions performed at the direction of the judge); Fowler v. Alexander, 340 F. Supp. 168 (D.C. N.C. 1972) *aff'd* 478 F.2d 694 (4th Cir. 1973) (judicial officers).

vestigating and introducing material at committee hearings.[72] The Court expressed concern in *Gravel v. United States*[73] that the effectiveness of a legislator could be impaired by fear that subordinates would be sued.[74] Under *Gravel*, if a legislator would himself be immune from liability, then where the legislator's actions affect a subordinate, immunity for the subordinate is absolute.[75] In like manner, a number of courts have accorded absolute immunity to judicial employees or other employees whose actions are an integral part of the judicial process.[76]

Some officials cannot derive their immunity indirectly as employees of immune officials. To determine when these officials obtain absolute immunity, courts follow what is known as the functional analogy approach, developed by the Supreme Court in *Butz v. Economou*.[77] The Court in *Economou* recognized the necessity of absolute immunity "to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation."[78] From this premise, the Court went on to state a key notion:

> We think that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process that those who participate in such adjudication should also be immune from suits for damages.[79]

The Court pointed out that similar procedures and safeguards are

72. Doe v. McMillan, 412 U.S. 306 (1973); Gravel v. United States, 408 U.S. 606 (1972).

73. 408 U.S. 606 (1972).

74. *Id.* at 617.

75. The Court in *Gravel* emphasizes that where their action is illegal, legislative employees will not be protected even if the action (and their roles leading up to the action) is protected. For example, if the U.S. House of Representatives passes a legislative resolution authorizing an illegal arrest, the staff members will be absolutely immune for their work in passing the resolution but not in carrying out the illegal arrest. *See* Kilburn v. Thompson, 103 U.S. 168 (1880). Moreover, if an employee commits illegal acts during the course of otherwise-protected authority, he will not be immune. *See* Dombrowski v. Eastland, 387 U.S. 82 (1967).

76. Boullion v. McClanahan, 639 F.2d 213 (5th Cir. 1981); Kermit Constr. Corp. v. Banco Credito y Ahorro Ponceno, 547 F.2d 1 (1st Cir. 1976); Burkes v. Callion, 433 F.2d 318 (9th Cir. 1970), *cert. denied*, 403 U.S. 908 (1971); German v. Killeen, 495 F. Supp. 822 (E.D. Mich. 1980); Rankin v. Howard, 457 F. Supp. 70 (D. Ariz. 1978), *cert. denied*, 451 U.S. 939 (1981); Holmes v. Silver Cross Hosp., 340 F. Supp. 125 (N.D. Ill. 1972).

77. 438 U.S. 478 (1978).

78. *Id.* at 512.

79. *Id.* at 512-13.

present in federal hearings and court proceedings, concluding that "there can be little doubt that the role of the modern federal hearing examiner or administrative law judge within this framework is 'functionally comparable' to that of a judge."[80]

Further, the Court in *Economou* described certain positions with functions analogous to those of a prosecutor; those positions are also entitled to absolute immunity.[81] The *Economou* opinion placed strong reliance on the need to protect the decision-making process engaged in by these officials.[82] The Court weighed the risk of an unconstitutional act against the preservation of independent judgment and came down in favor of the latter.[83] The functional analogy approach has been followed by the courts in a number of recent cases.[84]

At least one commentator has argued that the *Economou* decision indicates the Supreme Court is moving in a new direction. Edith Netter, in her article *Official Liability Under Section 1983: The Immunity Maze*,[85] states that prior to *Economou*, courts used an "extent of discretion" test and accorded greater immunity to officials with greater discretion.[86] The *Economou* decision, under her analysis, marks a departure which will change the approach taken by courts.[87] Netter notes, however, that the difference between the extent of discretion test and the functional analogy test is not perfectly clear.[88]

To this writer, the differences between the two tests are minimal. The language of some of the earlier cases suggests that "extent of discretion" is simply a phrase which describes one of the underlying policy considerations for granting immunity. When the Court in *Economou* argued that one official performs functions analogous to those performed by another official and, therefore, it is equally im-

80. *Id.*

81. *Id.* at 515.

82. *Id.* at 516.

83. *Id.*

84. *See, e.g.*, Sellars v. Procunier, 641 F.2d 1295 (9th Cir.), *cert. denied*, 102 S. Ct. 678 (1981); Dodson v. Polk County, 628 F.2d 1104 (8th Cir. 1980), *rev'd on other grounds*, 102 S. Ct. 445 (1981).

85. 32 LAND USE L. & ZONING DIG. 3, Feb. 1980.

86. *Id.* at 5.

87. *Id.* at 6.

88. *Id.*

portant to protect the former's independence,[89] the Court might well have been saying that the official deserved protection because he exercised more discretion.

Whether or not that is so, this writer considers the functional analogy test preferable for a number of reasons. The amount of discretion held by one official in comparison to another official is a difficult thing to measure. Does a school administrator have more or less discretion than a planner? In a more complicated vein, does a school administrator performing a particular action have more or less discretion than a planner performing a different action? The functional analogy approach, which begins with the common law immunities and moves on to public policy considerations, allows for a degree of clarity and a limited amount of analysis. As the Eighth Circuit has noted:

> A finding of qualified immunity is usually preseded by an inquiry into whether the public official in question enjoyed immunity at common law. There is, of course, no pre-Section 1983 common law with regard to the liability of public defenders. The dispositive question, then, is whether some degree of immunity is justified as a matter of public policy.[90]

Courts determine whether or not immunity is justified by examining how the functions of the official in question relate to those of other officials who regularly exercise discretion. Courts do not, however, weigh the amount of discretion; it is unlikely that they could.

Therefore, under the *Economou* functional analogy approach, courts will grant absolute immunity to officials who function analogously to those enjoying such immunity at common law. When an official's functions are not sufficiently analogous but, due to public policy considerations, the official deserves protection from damage actions, courts will grant qualified immunity. It would appear that courts will find that any official who exercises some discretion is entitled to qualified immunity under certain circumstances.[91]

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89. 438 U.S. at 514.

90. Dodson v. Polk County, 628 F.2d 1104, 1107 (8th Cir. 1980), *rev'd on other grounds*, 102 S. Ct. 445 (1981).

91. Presumably, the extent of discretion test remains relevant for officials not exercising discretion, *i.e.*, acting in a ministerial function. If the action is illegal, the official will be liable. The purposes for § 1983 immunity are relevant, however, if the official had some discretion in the matter. Thus, a policeman has some discretion as to whether to apprehend and arrest a suspicious individual running out of a store window with a radio partially hidden under his jacket, but the policeman has no

2. Qualified Immunity

Having decided that an official enjoys qualified immunity, a court must determine when that immunity is applicable. Until recently, Courts had used a two-part test to aid in this determination. An official would escape liability for a violation of Section 1983

> so long as he meets both the subjective and objective tests of good faith, that is, he must have believed in his own mind that his conduct was lawful and his belief must have been reasonable in the light of settled principles of constitutional law.[92]

The two parts of this test raise different issues.

In the past, the subjective part of the test posed no great problem. Essentially, there had to be an absence of malice, and the inquiry would be into the defendant's state of mind.[93] The question was whether defendant had a good faith belief in the lawfulness of his conduct or whether he had an intent to injure. This test had not been difficult to apply.[94]

As this article went to press, the Supreme Court, in *Harlow v. Fitzgerald*,[95] a case involving civil claims for damages against President Nixon and some of his aides, held that the subjective test created an excessive burden on officials by making it too easy to sue based on a defendant's state of mind.[96] Thus, the Court eliminated the subjective test for suits against federal officials.[97] In a footnote, the Court indicated that this conclusion would also hold for Section 1983

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discretion to refuse to make an arrest ordered by a judge. In the first case, the policeman should enjoy qualified immunity. In the second? "So if the speaker by authority of the House shall order an illegal act, though that authority shall exempt him from questions, his order shall no more justify the person who executed it than King Charles' warrant for levying ship money could justify his revenue officers," Stockard v. Hansard, 112 Eng. Rep. 1112 (1839).

What then of the building inspector who refuses to issue a building permit because it has not been authorized by an appropriate body? In tort law, he would act at his own peril. *See* W. PROSSER, LAW OF TORTS § 132 (4th ed. 1971). Prosser criticizes the use of discretion as a test because of the impossibility of drawing the line between discretionary and non-discretionary functions. *Id.*

92. Doe v. County of Suffolk, 494 F. Supp. 179, 181 (E.D. N.Y. 1980).

93. *See* Procunier v. Navarette, 434 U.S. 555 (1978); Scheuer v. Rhodes, 416 U.S. 232 (1974).

94. *See* Procunier v. Navarette, 434 U.S. 555 (1978); Wood v. Strickland, 420 U.S. 308 (1975).

95. 50 U.S.L.W. 4815 (U.S. June 24, 1982) (No. 80-945).

96. *Id.* at 4820.

97. *Id.*

cases.[98]

Consequently, after *Harlow* only the objective test remains and it has proven troublesome. In *Scheuer v. Rhodes*,[99] the Supreme Court stated that the availability of qualified immunity to government officials would depend upon scope of the officials' discretion, responsibilities of office, and all circumstances as they "reasonably appeared" at the time of the action being challenged.[100] Setting forth a broad standard, the Court held that "[i]t is the existence of reasonable grounds for the belief formed at the time and in the light of all the circumstances, coupled with good-faith belief, that affords a basis for qualified immunity of executive officers for acts performed in the course of official conduct."[101]

In *Wood v. Strickland*,[102] the Supreme Court adopted a "reasonableness" guide for deciding what constitutes good faith.[103] Rejecting an objective/subjective choice, the Court stated that not only must a school board member have the requisite good intent, but he must meet a standard based on "knowledge of the basic, unquestioned constitutional rights of his charges."[104] The school official must know or reasonably should have known that his actions would not violate a student's constitutional rights.[105] The Court does not, by this standard, expect the official to be able to predict the future course of constitutional law.

Justice Powell, believing that the majority in *Wood* was requiring a higher standard than in previous cases, filed a separate opinion. Justice Powell contended that what constitutes "settled constitutional law" is often open to dispute.[106] He argued that even settled consti-

98. *Id.* at 4820 n.30. The Court also refused to extend a blanket immunity to Presidential aides, even though in a companion case it held the President to be absolutely immune from civil suits. *See* text accompanying notes 66-69 *supra*. The Court distinguished the *Gravel* derivative immunity doctrine (*see* text accompanying notes 73-76 *supra*) by limiting that form of immunity to aides of judges, legislatures, and prosecutors performing only judicial, legislative, or prosecutorial functions. *Id.* at 4818.

99. 416 U.S. 232 (1974).

100. *Id.* at 247.

101. *Id.* at 247-48.

102. 420 U.S. 308 (1975).

103. *Id.* at 322.

104. *Id.*

105. *Id.*

106. *Id.* at 329.

tutional principles may be quickly overturned, especially when five-four decisions are common.[107]

Nonetheless, *Wood v. Strickland* expanded the good faith doctrine with its controversial holding that school officials were responsible for knowledge of basic constitutional principles. The Court's decision involved only the field of education, so it remains unclear whether this standard should be applied to other administrative offices.

O'Connor v. Donaldson[108] followed shortly after *Wood*. *O'Connor* involved a former mental patient who sued a hospital superintendent for keeping him confined even though he was not mentally ill. The superintendent claimed a defense of good faith action taken under a state law which he believed was valid.[109] The superintendent argued that he could not reasonably have known that the law was, in fact, invalid.[110] The Court reiterated that, under *Wood*, the relevant question was whether a defendant knew, or reasonably should have known, that his conduct would violate someone's constitutional rights.[111] The Court added that "[f]or purposes of this question, an official has, of course, no duty to anticipate unforeseen constitutional developments."[112] By this language, the majority diminished the concern, expressed by some members of the Court in *Wood*, over requiring a defendant to know whether the law under which he acts is constitutional. The Court did not, however, totally allay the concern. Under *O'Connor*, a defendant had no duty to anticipate *unforeseeable* constitutional developments.[113]

In *Harlow v. Fitzgerald*,[114] the Court clarified this to some extent by noting that where the law was not clearly established, an official could not be responsible for anticipating subsequent legal developments.[115] Thus, the problem of anticipating developments is eliminated although the question of whether the law is clearly established is anything but cut and dried. In considering the issue of objective

107. *Id.*
108. 422 U.S. 563 (1975).
109. *Id.* at 569.
110. *Id.* at 576.
111. *Id.* at 577.
112. *Id.*
113. *Id.*
114. 50 U.S.L.W. 4815 (U.S. June 24, 1982) (No. 80-945).
115. *Id.* at 4820.

good faith in the land use context, the reader should keep in mind the following questions: Should the status of the official make a difference? How much time was available for deliberating over the decision? Was a lawyer available to explain the relevant law? How settled is the law in the area? In the absence of more than a few court decisions, is a defendant free to presume that he is not responsible for knowledge of the law since there may well be no clearly established law? If a decision-making body strictly follows some standard procedures, are courts less likely to find that body or its members "unreasonable"?

The courts have not yet provided answers to these questions. Many of these issues will undoubtedly work their way up to the Supreme Court.[116] Such issues are particularly crucial in the field of land use because many principles of constitutional law relating to zoning and other land use areas remain undecided or unclear despite seventy years of litigation.

III. SECTION 1983 AND LAND USE

While the Supreme Court has decided a number of Section 1983 cases involving municipalities and local officials, few cases directly involved land use issues. As a consequence, uncertainties remain in Section 1983 law concerning the extent of its applicability to land use decisions. Courts must address two important questions in this area. First, do local officials enjoy either qualified or absolute immunity? Second, how should a court characterize the actions of such officials?

A. *Governmental Immunity and Local Legislative Officials.*

When considering the extent of Section 1983's applicability to the local level, a major issue is the degree of immunity to be accorded local legislative officials. While there has been no difficulty finding that local administrative officials are only entitled to qualified immunity,[117] controversy exists over whether to extend absolute immunity to local legislative officials. The Supreme Court has not yet ad-

116. For a review of decided cases, see S. NAHMOD, *supra* note 11, appendix A; Note, *Civil Rights Suits Against State and Local Governments, Entities and Officials: Rights of Action, Immunities and Federalism*, 53 S. CAL. L. REV. 945, 1021-1059 (1980).

117. *See* Thomas v. Younglove, 545 F.2d 1171 (9th Cir. 1976); Jones v. Diamond, 519 F.2d 1090 (5th Cir. 1975); Curry v. Gillette, 461 F.2d 1003 (6th Cir.), *cert. denied*, 409 U.S. 1042 (1972); Parine v. Levine, 274 F. Supp. 268 (E.D. Mich. 1967).

dressed this question. Lower court opinions, however, provide some guidance. Most early cases held that local officials do not enjoy absolute immunity for legislative decisions.[118] Courts taking this position reason that local legislative officials were not immune at common law.[119] Recently, however, some courts have reached a contrary conclusion.[120]

While the Supreme Court has yet to speak to the issue, a recent decision provides a clue to the Court's view on the question. One issue with which the Court dealt with in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*[121] was whether the individual members of the governing body of an interstate regional planning agency were entitled to absolute immunity.[122] Some doubt existed about whether the governing officials were, in fact, legislators.[123] The Court chose to treat the officials, who had adopted a land use plan, as legislators undertaking actions which were legislative in character.[124]

The principal issue in *Lake Country Estates* was whether Section 1983 absolute immunity applied to regional legislators or was limited to legislators at federal and state levels. The Court held that absolute immunity extended to regional legislators.[125] The Court based its holding, not on any common law argument, but on the need for immunity to protect the public good.[126] The same rationale that ap-

118. *See* Lane v. Inman, 509 F.2d 184 (5th Cir. 1975); Curry v. Gillette, 461 F.2d 1003 (6th Cir.), *cert. denied*, 409 U.S. 1042 (1972); Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958); Smetanka v. Borough of Ambridge, 378 F. Supp. 1366 (W.D. Pa. 1974).

119. *See* Cobb v. City of Malden, 202 F.2d 701, 707 (1st Cir. 1953) (Magruder, J., concurring). *See also* Nelson v. Knox, 256 F.2d 312, 315 (6th Cir. 1958).

120. *See* Shannon Fredericksburg Motor Inn v. Hicks, 434 F. Supp. 803 (E.D. Va. 1977); Teamsters Local 822 v. City of Portsmouth, 423 F. Supp. 954 (E.D. Va. 1975), *aff'd*, 534 F.2d 328 (4th Cir. 1976).

121. 440 U.S. 391 (1979).

122. *Id.* at 393.

123. 440 U.S. at 407-09.

124. *Id.* at 405. Justice Blackmun, dissenting in part, found the classification inappropriate for several reasons. He expressed uncertainty as to the meaning of the term "regional legislator" used by the Court to describe the officials. *Id.* at 408. Justice Blackmun pointed out that the officials possessed some executive powers and that they were not accountable to the electorate. *Id.* He also noted that the agency lacked rules for internal discipline, unlike most legislative bodies. *Id.* Despite his dissent, one cannot infer that Justice Blackmun would not extend § 1983 immunity to the local level. Central to his dissent was the Court's characterization of the agency officials as legislators.

125. *Id.* at 406.

126. *Id.* at 405, *citing* Tenney v. Brandhove, 341 U.S. 367 (1951).

plied to legislative officials at the state and federal level, the Court reasoned, should apply here. The Court cited its prior decision in *Butz v. Economou* as support for its conclusion.[127] In *Economou*, the Court emphasized that it was the "nature of the responsibilities" and not the particular location within the government which determined whether there was absolute immunity.[128] Since *Economou* involved federal officials, it was not directly applicable. The Court's discussion of that case, however, reemphasized its reliance on the functional approach.

Thus, the Supreme Court in *Lake Country Estates* extended absolute immunity to regional level officials. The Court, however, specifically refrained from deciding whether its holding should also apply to local governmental officials at county and municipal levels.[129]

Justice Marshall dissented from the Court's decision to limit its holding to the regional level. He believed the logic of the holding required its application to local officials as well, and he explicitly challenged the desireability of extending absolute immunity to such officials. Justice Marshall argued that "if the sole inquiry under that test is the nature of the officials' responsibilities, . . . not the common law and constitutional underpinnings of the privilege itself . . .,"[130]

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127. 440 U.S. at 405 n.30.

128. *Id.*

129. *Id.* at 404 n.26. The Court stated: "Whether individuals performing legislative functions at the purely local level, as opposed to the regional level, should be afforded absolute immunity from federal damage claims is a question not presented in this case." *Id.*

In support of their claim that absolute immunity did not extend to the TRPA officials, petitioners argued that the Speech and Debate Clause of the Constitution, art. I, § 6, did not apply to state or "regional legislators." *Id.* at 404. The Court rejected the argument citing the public need for absolute immunity. The majority also asserted that immunity under § 1983 arose from an interpretation of federal law, not from a constitutional provision which may or may not be applicable. *Id.* The Speech and Debate Clause provides that "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any other place." *Id.* at 404 n.27, *citing*, U.S. CONST. art. I, § 6. The Court reasoned that the clause was not applicable to state legislators and therefore did not apply to "regional legislators." 440 U.S. at 404.

In his dissent, Justice Blackmun noted that some lower federal courts had found the Speech and Debate Clause applicable to state legislatures. Apparently because of these decisions and the fact that the issue of application of the Clause to State legislatures was not directly presented, Justice Blackmun dissented from the majority's peremptory consideration of the question. *Id.* at 409.

130. 440 U.S. at 408.

then Section 1983 protection could presumably extend to local officials, in derogation of the need to find exceptions on a narrow basis.[131] Justice Marshall also expressed concern that the regional legislators were beyond electorate control and that the grant of absolute immunity under these circumstances increased to a dangerous degree the lack of accountability felt by some appointed officials.[132]

While the Supreme Court has not yet ruled on the extension of absolute legislative immunity to the local level, some lower courts have dealt with the issue. The Eighth Circuit in *Gorman Towers, Inc. v. Bogoslavsky*[133] addressed the question whether absolute immunity extended to local officials acting in a legislative capacity.[134] In *Gorman*, the city directors (i.e., "legislators"), rezoned some property to a single-family classification. This prevented the plaintiff from building a proposed multi-family project which would have been permissible under the previous ordinance. The court first observed that state and regional legislators have an absolute federal common law immunity from "liability for damages occasioned by their legislative acts . . .,"[135] an immunity left untouched by enactment of Section 1983. In support of this proposition, the court cited *Lake Country Estates*.[136]

Common law immunity did not, however, provide the basis for the court's decision. In reaching its conclusion, the *Gorman* court considered the conflicting policy arguments for immunity.[137] The court found a strong interest in having governmental officials free from fear of litigation. At the same time, the court reasoned that society has an interest in checking improper conduct. The court contended that the interest in freeing officials from fear of litigation was just as important at the local level as it was for the state legislators in *Tenney v. Brandhove*.[138] Further, the court argued that such interests may be even more important at the local level.[139] The court referred to *Ligon*

131. *Id.*
132. *Id.* at 407.
133. 626 F.2d 607 (8th Cir. 1980).
134. *Id.* at 612.
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*

v. Maryland,[140] a federal district court case that suggested that the proximity of local officials to their constituents makes them even more vulnerable to suit than state or federal officials.[141] The *Ligon* court believed this was especially true in the land use area, where local decision-making can have a direct and substantial effect on the value and development of property.[142]

The *Gorman* court rejected the notion that absolute legislative immunity depends on a particular system of institutional checks and balances. The court argued that it is not the particular form or procedure which is important; what is important is whether there are effective checks, in whatever form, on improper legislative conduct.[143] The opinion listed four factors in a local land use case which provide such checks. First, a plaintiff can attack a zoning decision on direct judicial review as being arbitrary, capricious, or unreasonable. Second, a plaintiff can go into federal court to attack unfair legislation. Third, a federal statutory provision, 18 U.S.C. Section 242, a criminal analogue of Section 1983, punishes willful deprivation of constitutional rights. Finally, local legislators are subject to the electoral process.[144] Since all four factors are present in a land use case whether or not immunity is granted, the court's argument loses some of it persuasiveness. The basic point, however, is that these checks are similar to the typical restraints on legislative behavior, and, because of this similarity, provide an argument that local legislators are no different from legislators at other levels for purposes of Section 1983.

A number of other recent decisions have adopted the position taken in *Gorman*, most notably the Fourth Circuit in *Bruce v. Riddle*.[145] The court in *Riddle* reiterated the important points set forth by the *Gorman* court regarding public policy and checks on improper

140. 448 F. Supp. 935 (D. Md. 1977).

141. *Id.* at 947.

142. *Id.*

143. 626 F.2d at 613.

144. *Id.*

145. 631 F.2d 272 (4th Cir. 1980). *See also* Fralin & Waldron, Inc. v. County of Henrico, 474 F. Supp. 1315, 1320 (E.D. Va. 1979); Kent Island Joint Venture v. Smith, 452 F. Supp. 455, 458-59 (D. Md. 1978); Ligon v. Maryland, 448 F. Supp. 935, 947 (D. Md. 1977); Blake v. Town of Delaware City, 441 F. Supp. 1189, 1200-01 (D. Del. 1977); Shellburne, Inc. v. New Castle County, 293 F. Supp. 237, 241-44 (D. Del. 1968). *But see* Nelson v. Knox, 256 F.2d 312, 315 (6th Cir. 1958); Fox Valley Reproductive Health Care Center v. Arft, 454 F. Supp. 784, 786 (E.D. Wis. 1978) (local legislators allowed only qualified immunity).

legislative conduct.[146] In addition, the Fourth Circuit referred back to *Owen v. City of Independence*, where the Supreme Court held that a city did not enjoy any Section 1983 immunities.[147] The *Riddle* court noted that in the dissent in *Owen*, four Justices stated that a city councilman was absolutely immune under the *Lake Country Estates* doctrine.[148] Even though that was not the position of the Supreme Court's majority in *Owen*, the *Riddle* court considered the statement significant. Since the point was not a source of dispute between the *Owen* majority and minority, the inference is that the Supreme Court will probably allow immunity for local level officials.

Other circuit courts have ruled favorably on a grant of absolute immunity to local officials. Most recently, the Fifth Circuit ruled in *Hernandez v. City of Lafayette*[149] that local legislative actions are entitled to absolute immunity.[150] The *Hernandez* court reasoned the logical implication of holding legislators at state levels absolutely immune is that local legislative actions should also be held absolutely immune.[151]

There are, to be sure, federal appellate court cases taking a more equivocal position. In *Morrison v. Jones*,[152] the Ninth Circuit refused to extend absolute immunity to members of a county board of supervisors, arguing that the Supreme Court had not yet done so.[153] The Ninth Circuit also found, however, that the record was not sufficiently developed to conclude that the dispute involved legislative activity.[154] A Fifth Circuit case, *Crowe v. Lucas*,[155] relied on *Monell v. Department of Social Services* to rule that it made no sense to allow a major or local alderman a greater amount of immunity than that allowed the city itself.[156] At the same time, though, the court made no judgment regarding whether a legislative activity was present. Since neither court expressly found legislative activity before refusing to

146. 631 F.2d at 274-75.
147. *Id.* at 275. *See* note 7 *supra*
148. *Id.* at 279, *citing* 445 U.S. 622, 664 n.6 (Powell, J., dissenting).
149. 643 F.2d 1188 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1251 (1982).
150. *Id.* at 1193.
151. *Id.* at 1194.
152. 607 F.2d 1269 (9th Cir. 1979), *cert. denied*, 445 U.S. 962 (1980).
153. *Id.* at 1274.
154. *Id.*
155. 595 F.2d 985 (5th Cir. 1979), *cert. denied*, 102 S. Ct. 1251 (1982).
156. *Id.* at 989. *See* note 7 *supra*.

grant absolute immunity, the decisions constitute only dicta. To date, no circuit court has explicitly held that absolute immunity does not extend to local legislative officials.[157]

In sum, the decisions favoring an extension of absolute immunity to local legislative officials were decided directly on point and without dicta, they reflect the reasoning of at least some members of the Supreme Court, and they are consistent with the Supreme Court's increased reliance on the functional approach. The opposing decisions are less firm and fail to provide strong support for the refusal to extend immunity. Although the Supreme Court has yet to rule on this issue, all indications strongly suggest that the Court will accord absolute immunity to local legislative officials.

B. *The Character of the Action*

Once courts determine the status of local governmental officials with respect to Section 1983, they must resolve the issue of how to characterize an action of a local or regional land use official. As discussed above, courts only grant absolute immunity to an official who is performing a legislative, judicial, or prosecutorial act.[158] Thus, under *Butz v. Economou*, the issue is whether any particular action is sufficiently similar to a legislative or judicial action, rather than an administrative action, to warrant protection under the absolute immunity doctrine.[159] If not, then the official will only receive qualified immunity.[160] Thus, the classification of official action is crucial to Section 1983 analysis.

In the field of land use control, however, this approach poses severe problems. First, courts have not clearly defined the distinction between legislative, judicial, or executive acts for purpose of Section 1983. Second, courts have been slow to clarify the legal theories underlying many basic zoning concepts. For example, one only has to consider the different concepts of a regulatory "taking"[161] to realize

157. *But see* Fox Valley Reproductive Health Care Center v. Arft, 454 F. Supp. 784 (E.D. Wis. 1978). The court in *Arft* refused to extend absolute immunity to the local level, but failed to provide a supporting rationale.

158. *See* notes 52-84 and accompanying text *supra*.

159. 438 U.S. 478, 513-15 (1978).

160. *Id.* at 508.

161. *See* F. BOSSELMAN, D. CALLIES & J. BANTA, THE TAKING ISSUE (1973); ENVIRONMENTAL QUALITY 1973: THE FOURTH ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY 121-50 (1973). In the latter, the authors identify four taking theories used by courts. The first is the physical invasion theory. The effect of the

how unclear the fundamental principles of zoning are. Finally, courts must exercise caution in applying general rules that vary from situation to situation. "When a governmental action is characterized as 'legislative' or 'adjudicative,' there is the risk that the characterization will be carried beyond the specific issue being decided."[162]

These general problems become readily apparent when one considers the nature of specific local actions. Is a rezoning legislative, judicial, or administrative in nature? Is the granting of a variance a judicial, quasi-judicial, or administrative action? What is the character of a planning commission's recommendation to the city council on a proposed rezoning? This article does not seek to provide a definitive answer to the questions of administrative, judicial, or legislative classification (assuming that is even possible). Rather, this paper merely seeks to show that the failure to provide adequate definitions for local zoning actions may result in potentially serious problems when a Section 1983 case arises in the land use area. These potential problems become readily apparent when one examines both the scholarly theories and judicial approaches to characterizing the nature of the actions of local land use officials.[163]

Commentators have identified several methods for deciding

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challenged regulation is analogized to a physical appropriation or confiscation. Under the nuisance and abatement theory, the zoning regulation is characterized as a device to eliminate nuisance-like uses. Here, no compensation is required (*i.e.*, no taking occurs) if the challenged regulation prevents nuisance-like uses. The third theory involves a balancing test: the public benefit is weighed against the private loss to determine if a taking has occurred. Finally, the diminution of value theory holds that a taking occurs when the regulation causes an excessive economic loss. The loss can be measured in two ways. One can measure the extent of the loss in absolute terms. Alternatively, one can measure the remaining economic value of the property.

162. Strawberry Hill 4 Wheelers v. Board of Comm'rs, 287 Or. 591, 602, 601 P.2d 769, 773 (1979).

163. *See, e.g.*, Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980) (legislative); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980) (legislative); Kinderhill Farm Breeding Assocs. v. Appel, 450 F. Supp. 134 (S.D.N.Y. 1978) (executive or administrative actions); Shellburne, Inc. v. New Castle County, 293 F. Supp. 237 (D. Del. 1968) (legislative); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973) (judicial). *See also* Adelfio, *Governmental Immunity from Zoning*, 22 B.C. L. REV. 783 (1981); Rockwell, *Constitutional Violations in Zoning, The Emerging Section 1983 Damage Remedy*, 33 U. FLA. L. REV. 168 (1981); Cunningham, *Rezoning by Amendment as an Administrative or Quasi-Judicial Act: The "New Look in Michigan Zoning"*, 73 MICH. L. REV. 1341 (1975); Harris, *Rezoning—Should It Be a Legislative or Judicial Function?*, 31 BAYLOR L. REV. 409 (1979); Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 60 (1963); *Developments in the Law-Zoning*, 91 HARV. L. REV. 1427 (1978).

whether a local zoning action is legislative, administrative, or judicial.[164] Most of these methods have developed from questions concerning the procedural due process protection afforded owners of property and to the scope of judicial review.[165] Accordingly, the primary focus of these approaches is on the legislative versus adjudicative or administrative function.[166] One can distinguish this from the Section 1983 characterization problem which primarily focuses upon the administrative versus legislative or judicial functions.[167] Nevertheless, these approaches are useful in the 1983 context, since both the procedural due process cases and the 1983 cases examine the basic nature of the actions of a local land use official.

In a 1978 Harvard Law Review survey of recent developments in the law of zoning,[168] the authors distinguish three approaches utilized in the procedural due process cases for deciding whether a zoning action is legislative or administrative. First, some courts adopt the view that the identity of the decisionmaking body determines the character of an action. Thus, when a legislative body enacts legislation, it acts in a legislative fashion, regardless of the content of the legislation.[169] Second, other courts simply label a zoning action as judicial, legislative, or administrative and thereafter always classify

164. *See, e.g.*, LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE (1980); Harris, *Rezoning—Should it be a Legislative or Judicial Function?*, 31 BAYLOR L. REV. 409 (1979); Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U.L.Q. 601 (1963); Note, *Civil Rights Suits Against State and Local Government Entities and Officials: Rights of Actions, Immunities, and Federalism*, 53 S. CAL. L. REV. 945 (1980); Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972).

165. *See, e.g.*, Booth, *A Realistic Examination of Rezoning Procedure: The Complementary Requirements of Due Process and Judicial Review*, 10 GA. L. REV. 753 (1976); Sullivan, *Araby Revisited: The Evolving Concept of Procedural Due Process Before Land Use Regulating Bodies*, 15 SANTA CLARA L.J. 50 (1974).

166. *See, e.g.*, Cunningham, *Rezoning by Amendment as an Administrative or Quasi-Judicial Act: The "New Look in Michigan Zoning"*, 73 MICH. L. REV. 1341 (1975); Nott, *Zoning Amendments—The Products of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130 (1972).

167. *See* S. NAHMOD, *supra*, note 11, at 191-228 for a general discussion. The Supreme Court made this distinction in Imbler v. Pachtman, 424 U.S. 409 (1976); Butz v. Economou, 438 U.S. 478 (1978).

168. *Developments in the Law-Zoning*, 91 HARV. L. REV. 1427 (1978) (hereinafter cited as *Developments*).

169. *Id.* at 1509, *citing*, Berg v. City of Struthers, 176 Ohio St. 146, 198 N.E.2d 48 (1964); State *ex rel.* Hunzicker v. Pulliam, 168 Okla. 632, 37 P.2d 417 (1934).

that action similarly. Thus, a variance might always be classified as an administrative action, whereas the adoption of a comprehensive plan might always be legislative.[170] The third view distinguishes between general policy formulations (legislative) and specific applications of previously formulated policy (administrative).[171]

The authors, noting problems with all three tests,[172] propose their own two-part test. First, they would inquire whether the facts underlying the action are legislative. That is, whether they relate to generalizations on a policy or state of affairs, rather than relating to specific individuals or specific situations.[173] The second inquiry is whether the impacts of an action are general (legislative), or have differential impact on specific individuals (administrative). For example, the denial of a variance has a specific impact on a developer and thus is administrative. The rezoning of land for an airport would be legislative since it would have a greater impact on some individuals than others but would not affect specified individuals.

Some authors, however, classify zoning actions as legislative or judicial (or quasi-judicial).[174] The authors of the Harvard Law Review

170. *Developments, supra* note 168, at 1509, *citing*, Burns v. City of Des Peres, 534 F.2d 103 (8th Cir. 1976); *cert. denied* 429 U.S. 861 (1976); Dwyer v. City Council, 200 Cal. 505, 253 P. 932 (1927); Josephson v. Autrey, 96 So.2d 784 (Fla. 1957); Wippler v. Hohn, 341 Mo. 780, 110 S.W.2d 409 (1937).

171. *Developments, supra* note 168, at 1509, *citing*, City of Bowie v. County Comm'rs, 258 Md. 454, 267 A.2d 172 (1970); Kelley v. John, 162 Neb. 319, 75 N.W.2d 713 (1956); Myers v. Schiering, 27 Ohio St.2d 11, 271 N.E.2d 864 (1971); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973).

172. *Developments, supra* note 168, at 1509-10. The authors reject the first test because it permits the availability of procedural rights to turn on the legislative allocation of zoning powers. The first and second tests share the defect of labeling certain actions without inquiring into the surrounding circumstances. The third test is rejected because it "produces the anomalous result that a hearing would be granted whenever a decision implemented previous policy, but could be denied whenever a decision on a specific application is used to announce a new general policy." *Id.* at 1510. Indeed, this is what has happened using a variant of the third test in § 1983 actions. *See* Three Rivers Cablevision, Inc. v. City of Pittsburgh, 502 F. Supp. 1118, 1136 (W.D. Pa. 1980); Kinderhill Farm Breeding Associates v. Appel, 450 F. Supp. 134, 136 (S.D.N.Y. 1978).

173. Actions requiring a policy determination for resolution are characterized as involving legislative questions. Actions presenting questions about the application of policy to specific individuals or situations are said to involve administrative or adjudicative questions. *See Developments, supra* note 168, at 1510, *citing*, 1 K. Davis, Administrative Law Treatise §§ 7.02, -.06 (1958); Davis, *The Requirement of a Trial-Type Hearing*, 70 HARV. L. REV. 193 (1956).

174. *See, e.g.*, Comment, *Zoning Amendment—The Products of Judicial or Quasi-*

article do not mention the possibility of zoning actions being judicial. Similarily, the authors (and courts)[175] that use the legislative-judicial dichotomy typically do not give substantial consideration to classifying zoning actions as administrative. From the point of view of most authors, this distinction is not important. Their concern typically is the question of procedural safeguards, and there are procedural safeguards that apply to both administrative and judicial actions that do not apply to legislative actions.

Some authors and courts recognize the dichotomy, but are inclined to use "administrative" and "quasi-judicial" interchangeably. This is most notable in the report of the American Bar Association's Advisory Commission on Housing and Urban Growth,[176] an otherwise exemplary discussion of the character of local land use actions. Similarly, some courts treat certain actions, usually called legislative, as administrative. Other courts appear to treat the same actions as judicial or quasi-judicial. This is not always just a difference in terminology; courts may analyze facts differently. Thus, it is clear that courts are far from uniform in characterizing local zoning actions.

It is beyond the scope of this article to try to answer why some authors and cases seem to select one dichotomy over another rather than to recognize a trichotomy (or fail to distinguish between administrative and quasi-judicial). Nevertheless, for Section 1983 purposes, the differences can be crucial. Consider the actions of a Board of Zoning Appeals (BZA) in granting a variance and a planning commission in issuing a conditional use permit.[177] One can make a good intuitive argument that courts should consider a decision by a planning commission to issue the permit as administrative. It is granted

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Judicial Action, 33 OHIO ST. L.J. 130 (1972) where the author lists the characteristics distinguishing between legislative and quasi-judicial actions. Judicial action involves specific situations, application of policy and retrospectivity. Legislative action is general in scope, involves policy formulation and is prospective in nature. *See also* Harris, *Rezoning—Should it be a Legislative or Judicial Function*, 31 BAYLOR L. REV. 409 (1979); Cunningham, *Rezoning by Amendment as an Administrative or Quasi-Judicial Act: The "New Look" in Michigan Zoning*, 73 MICH. L. REV. 1341 (1975).

175. Strawberry Hill 4 Wheelers v. Board of County Comm'rs, 287 Or. 591, 601 P.2d 769 (1979); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973).

176. HOUSING FOR ALL UNDER LAW 263-280 (R. Fishman ed. 1978).

177. Assume that the permit will be final unless an appeal is taken to the city counsel. Thus, the decision is that of the planning commission unless appealed. Assume also that appeals from the BZA are taken to court. In actuality, of course, this will vary from jurisdiction to jurisdiction.

by an administrative body. It is specific to one individual. There is no policy being made; the planning commission is implementing legislation. Theoretically at least, it is only the use of the owner's land that is at issue. As long as he meets the standards of the ordinance, his neighbors have no rights concerning his use of his land.[178]

On an intuitive basis, the BZA action is more complicated to analyze. If a court views the action as administrative, the court will then treat the BZA action in a fashion similar to that of the planning commission. Conversely, if the court characterizes the action as judicial or quasi-judicial, then the BZA members will enjoy absolute immunity. There are sound reasons for viewing the BZA's action as administrative. It is undertaken by an administrative body implementing the zoning ordinance and affecting by its actions certain specific individuals. It is not judicial in the sense that one thinks of a court case involving two sets of litigants in a formal lawsuit (even though there may be a neighbor who is fighting the action). Nor is it in the form of a criminal action where the public is bringing action against an individual. The absence of these factors would argue for labeling zoning variances as "administrative."

On the other hand, a variance is somewhat different from a conditional use permit. Although the BZA is not passing legislation, it is interpreting the limits of the zoning ordinance for the purpose of setting the constitutional limits on city action, at least if it truly applies the hardship test typically found in zoning ordinances.[179] Additionally, unlike the planning commission, its decision is often truly final and can frequently only be appealed through the judicial system. These factors may well argue for a label of judicial rather than legislative. However, reality intrudes at all times. While the BZA may

178. The question whether a decision is legislative, administrative, or judicial is not to be wholly determined by whether the underlying facts are called legislative, adjudicative, or even mixed legislative-adjudicative. For a discussion of legislative and judicial facts, see citations at note 164.

179. Typically, zoning law permits the granting of a variance only on a showing of unusual hardship, which can be interpreted to mean that the ordinance will be a taking of property unless a variance is granted. *See, e.g.*, Puritan-Greenfield Improvement Assoc. v. Leo, 7 Mich. App. 659, 153 N.W.2d 162 (1967); Otto v. Steinhilber, 282 N.Y. 71, 24 N.E.2d 851 (1939); Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938). On the other hand, some ordinances permit a variance on a showing of practical difficulties, which does not reach the constitutional dimension. *See, e.g.*, Palmer v. Board of Zoning Adjustment, 287 A.2d 535 (D.C. 1972); Hoffman v. Harris, 17 N.Y.2d 138, 216 N.E.2d 326, 269 N.Y.S.2d 119 (1966); Village of Bronxville v. Francis, 1 A.D. 2d 236, 150 N.Y.S.2d 906 (1956).

well have a hardship standard to uphold, it would be foolish to fail to recognize that many BZAs make decisions as if they were administrative bodies. Thus, the real standard for a variance may well be, "Do I think that the variance requested is a good one?" This argues more strongly for a classification of administrative. A finding of "administrative" also accords with an intuitive feeling that the BZA and the planning commission are both engaged in activities which, to some extent, interpret and implement the zoning ordinance, and that while appeal procedures may differ, the boards are both dealing (at least in the situations mentioned) with individuals and affecting their specific rights. As Professor Mandelker has noted, both boards play a role in zoning administration.[180]

Thus far, only two boards have been considered. When one considers the number of different activities each engages in, and the other boards, legislative bodies, and administrative officials that function in zoning, the true nature of the problem is made manifest. To date, there are an insufficient number of clear cases to help one reach a definitive answer for purposes of Section 1983. Nevertheless, the next section examines the findings of the courts in order to begin to piece together a rational approach to the problem.

1. The Courts Approach the Problem

The courts have generally been able to avoid the question of precisely defining what a zoning action is, but eventually they will have to directly confront the problem in Section 1983 cases. The courts that have examined the question under Section 1983 have either used a policymaking-implementation distinction[181] or a surface classification of the type of action.[182] Few courts have used the complex Harvard Law Review test[183] or the simplistic identity of the decisionmaking body text.[184]

One court used the decisionmaking body test as a factor in determining the Section 1983 liability of land use officials. In *Centennial Land and Development Co. v. Township of Medford*,[185] the court con-

180. Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U. L.Q. 60.

181. *See* note 171 and accompanying text *supra*.

182. *See* note 170 and accompanying text *supra*.

183. *See* note 173 and accompanying text *supra*.

184. *See* note 169 and accompanying text *supra*.

185. 165 N.J. Super. 220, 397 A.2d 1136 (1979).

cluded that members of planning and zoning boards share enough of the characteristics of judges that their actions should be considered quasi-judicial and the members, therefore, subject to absolute immunity.[186] Factors the court relied upon included findings that state law set fixed terms of office, prohibited the holding of simultaneous elective office, prohibited removal of a member except for cause after a public hearing, prohibited conflicts of interest, and, in the case of board of zoning appeals officials at least, required a degree objectivity related to that of judges.[187] The *Centennial* court, however, did look to other factors in addition to the characteristics of the decisionmaking body.[188]

In *Supreme Court of Virginia v. Consumers Union of the United States*,[189] however, the Supreme Court rejected a pure decisionmaking body test in a Section 1983 case. In *Consumers Union*, the issues revolved around the constitutionality of a state bar code prohibiting attorney advertising after a United States Supreme Court decision declaring such prohibitions unconstitutional.[190] The Supreme Court of Virginia, charged with the responsibility to prepare state bar rules, refused to change the state rule after the Supreme Court's decision. Consumers Union requested, *inter alia*, that the members of the Virginia court be required to pay attorneys' fees as a result of their refusal to conform the bar code to the United States Supreme Court ruling.[191]

The Supreme Court examined the nature of the state court's rulemaking powers and held that the Virginia Supreme Court, in es-

186. *Id.* at 230, 397 A.2d 1141.

187. *Id.*

188. The court examined both public policy and common law tradition. *Id.* at 224, 397 A.2d at 1138. In discussing public policy, the court balanced the public's interest in compensation for a wrong they have suffered and society's interest in protecting public servants for liability resulting from error in job performance. The court recognized that zoning officials make decisions that significantly affect a community. Without immunity, the court believed it would be difficult to attract qualified people to positions on zoning boards. *Id.* at 227, 397 A.2d at 1140.

The court also discussed the procedural safeguards that apply to zoning hearings. Finding that the safeguards in zoning hearings were similar to those in judicial proceedings, the court concluded that zoning officials are entitled to absolute immunity. *Id.* at 232, 397 A.2d at 1142.

189. 446 U.S. 719 (1980).

190. *See* Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

191. 446 U.S. at 729.

tablishing rules for attorneys, acted in a legislative capacity.[192] The Court consequently found the members of the state court absolutely immune from liability.[193] The Supreme Court rejected the view that the formal organizational structure of the decisionmaking body is determinative.[194] The Court also rejected the contention that absolute immunity did not obtain since legislative authority had been delegated to a non-legislative body.[195]

The Supreme Court noted, however, that state court judges are not absolutely immune when administering the bar code. Thus, judges do not have absolute immunity when exercising their own independent enforcement authority by initiating proceedings against attorneys.[196] In so holding, the Supreme Court acknowledged that a single body—here the Virginia Supreme Court—can act in judicial, legislative, and administrative capacities. Accordingly, the decisionmaking body test, by itself, appears to have little viability.

Cases involving the liability of non-legislative and non-judicial officials for legislative, administrative, and judicial acts also illustrate the preference for characterization tests that look beyond the identity of the decisionmaking body. One has to look at the kind of action the official is engaged in to determine whether there is any immunity. The question is somewhat complicated because many activities of local planning officials do not involve final decisionmaking, but rather involve advising the legislative body. This may include such actions as making recommendations for rezoning by the planning commission or recommendations for plat approval. It is safe to conclude, although there is little direct case law on the point, that in such instances the board members receive the immunity granted to the final decisionmaker.

In one case that considered the issue directly, *Fralin & Waldron, Inc. v. County of Henrico, Virginia*,[197] the court held that where the planning commission makes recommendations on pending legislation, it is engaged in legislative activity. The court reasoned that the commission's recommendation is an integral step in enacting zoning legislation.

192. *Id.* at 731.
193. *Id.* at 734.
194. *Id.* at 724.
195. *Id.* at 731-34.
196. *Id.* at 736.
197. 474 F. Supp. 1315 (E.D. Va. 1979).

This type of reasoning has indirect support in some of the Supreme Court's decisions. Thus, in *Butz v. Economu*, the Supreme Court indicated that significant participants in a particular process are entitled to certain immunities pertaining to that process: "Absolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harassment or intimidation."[198] In discussing the immunities of hearing examiners, the Court noted their power to "make or recommend" decisions.[199] Where the process requires the assistance of others, whether commission members or staff, or where the position of others in, for example, the legislative process is critical, then it is reasonable to apply the same immunities to the recommending bodies and officers as to the decisionmakers.

Enacting zoning legislation is a multi-stage affair. It involves recommendations by staff or planning consultants, recommendations by a planning body (accompanied by a hearing), and a final decision by the city council or other relevant legislative body. If the process is to have internal integrity, then one cannot treat the decisionmaker different from other participants. If the legislator obtains absolute immunity, then the others should as well. If the legislator receives only qualified immunity, then the others should be treated in a similar fashion.[200]

Instead of using the identity of the decisionmaking body test, many courts base their characterization on an examination of the particular action and determine that the action is of one type or another. This surface characterization presents several problems.

First, states disagree as to whether zoning actions are legislative, executive, or judicial. In fact, courts even disagree over whether they should treat specific zoning actions in the same fashion. For example, some courts have held that an initial comprehensive zoning ordinance is legislative in nature, but that rezoning conducted, as it is, on a piecemeal basis, is not.[201] Similarly, a distinction may be made

198. 438 U.S. at 512.

199. 438 U.S. at 513. This may perhaps be stretching the point a bit because the Court also emphasized the independence of federal hearing examiners. Nonetheless, many hearing examiners do play their major role in the recommendation of decisions and this is of course what planning commissioners do in matters of local land-use decisions.

200. *See* Gravel v. United States, 408 U.S. 606, 616-18 (1972).

201. Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975); Cooper v. Board of County Commissioners, 101 Idaho 407, 614 P.2d 947 (1980); Donnelly v.

between a comprehensive plan and a zoning ordinance or variances referring to specific parcels.[202]

Second, even where courts do not make such fine distinctions, they still face the question of how to characterize the action. On this matter state courts are not in universal agreement. The majority of courts that have considered the question have concluded that rezonings are legislative in nature.[203] This was the case in *Robinson v. City of Raytown*,[204] where the city board of aldermen rezoned property from multi-family to single-family, allegedly without giving adequate notice and without holding a proper hearing. The court denied a finding of liability on the grounds that a rezoning was a legislative action.[205] Likewise, the majority of federal courts have held rezonings to be legislative actions.[206] Moreover, one case has held that a mayor vetoing a zoning ordinance is engaging in a legislative action where zoning is a legislative activity.[207]

City of Fairview Park, 13 Ohio St. 2d 1, 233 N.E.2d 500 (1968); Barrie v. Kitsap, 84 Wash. 2d 579, 527 P.2d 1377 (1974); Fleming v. Tacoma, 81 Wash. 2d 292, 502 P.2d 327 (1972).

202. See the dissent of Justice Stevens in City of Eastlake v. Forest City Enters., 426 U.S. 668, 683-91 (1976) and cases cited therein. The idea here is that a comprehensive zoning plan is legislative in nature because it is general and applicable throughout the jurisdiction. A rezoning, on the other hand, may not be legislative because it is specific to one parcel. Moreover, a rezoning, while done by the legislative body, requires the sort of expertise that one finds in an administrator (and hence the typical planning commission role of advising the legislative body on rezonings).

203. *See* Ensign Bickford Realty Corp. v. City Council, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977); Josephson v. Autrey, 96 So.2d 784 (Fla. 1957); City of Coral Gables v. Carmichael, 256 So. 2d 404 (Fla. Dist. Ct. App. 1972); Hall Paving Co. v. Hall County, 237 Ga. 14, 226 S.E. 2d 728 (1976); Mahoney Grease Serv. v. City of Joliet, 85 Ill. App. 3d 578, 406 N.E.2d 911 (1980); Kirk v. Tyrone Township, 398 Mich. 429, 247 N.W.2d 848 (1976); Denney v. City of Duluth, 295 Minn. 22, 202 N.W.2d 892 (1972); Wippler v. Hohn, 341 Mo. 780, 110 S.W.2d 409 (1937); Robinson v. City of Raytown, 606 S.W.2d 460 (Mo. Ct. App. 1980); Lanton v. City of Austin, 404 S.W.2d 648 (Tex. Civ. App. 1966).

204. 606 S.W.2d 460 (Mo. Ct. App. 1980).

205. *Id.* at 466.

206. *See* Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 613-14 (8th Cir. 1980); Fralin & Waldron, Inc. v. County of Henrico, 474 F. Supp. 1315, 1320 (E.D. Va. 1979), *aff'd* 631 F.2d 272 (4th Cir. 1980); Bruce v. Riddle, 464 F. Supp. 745, 746-48 (D.S.C. 1979); Legon v. Maryland, 448 F. Supp. 935, 947-48 (D. Md. 1977); Shannon Fredericksburg Motor Inn v. Hicks, 434 F. Supp. 803 (E.D. Va. 1977); Shellburne Inc. v. New Castle County, 293 F. Supp. 237 (D. Del. 1968).

207. Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1251 (1982).

Some courts, however, have chosen to characterize rezonings as judicial or quasi-judicial in nature. The most important line of cases has arisen in Oregon and relates to the scope of judicial review concerning the conformity of zoning ordinances to a comprehensive plan. In *Fasano v. Board of County Commissioners*[208] the Supreme Court of Oregon held that not all local zoning acts were legislative in nature. Ordinances which lay down general policies could be legislative, but "a determination whether the permissible use of a specific piece of property should be changed is usually an exercise of judicial authority. . . ."[209] While the *Fasano* decision involved a different (non-1983) context, it is relevant for Section 1983 decisions. The *Fasano* doctrine is not limited to Oregon, but has been followed in other states.[210]

Some jurisdictions have found a rezoning decision to be administrative in nature, and, of course, this is likely to open the door to potential Section 1983 lawsuits.[211] This was the case in *Gorman Towers v. Bogoslavsky*,[212] where the court in a rezoning case found that the issue was not raised and therefore not appropriate for review. The court, however, noted in a footnote that while zoning is ordinarily a legislative act,[213] one could argue that zoning was an administrative function. The court cited Justice Stevens' dissent in *City of Eastlake v. Forest City Enterprises, Inc.*[214] to the effect that several state courts have considered rezoning to be quasi-judicial or administrative in nature.

Surface characterization of an action as legislative, executive, or judicial is only one way of approaching the problem. Courts have

208. 264 Or. 574, 507 P.2d 23 (1973).

209. *Id.* at 581, 507 P.2d at 26.

210. *See* Cooper v. City & County of Denver, 191 Colo. 252, 552 P.2d 13 (1976); Colorado Springs v. District Court, 184 Colo. 177, 519 P.2d 325 (1974); Cooper v. Board of County Comm'rs., 101 Idaho 407, 614 P.2d 947 (1980); Kropf v. Sterling Heights, 391 Mich. 139, 215 N.W.2d 179 (1974). *But see* Kirk v. Tyrone Township, 398 Mich. 429, 247 N.W.2d 848 (1976). The *Fasano* doctrine has also been specifically rejected. *See* Ensign Bickford Realty Corp. v. City Council, 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977); Hall Paving Co. v. Hall County, 237 Ga. 14, 226 S.E.2d 728 (1976).

211. *See* Bowie v. County Comm'rs., 258 Md. 454, 267 A.2d 172 (1970); Kelley v. John, 162 Neb. 319, 75 N.W.2d 7813 (1956); Myers v. Schiering, 27 Ohio St. 2d 11, 271 N.E.2d 864 (1971); Bird v. Sorenson, 16 Utah 2d 1, 394 P.2d 808 (1964).

212. 626 F.2d 607, 611 (8th Cir. 1980).

213. *Id.* at 611 n.5, *citing* Village of Belle Terre v. Boraas, 416 U.S. 1, 4, 9 (1974).

214. 426 U.S. 668, 683-85 (1976).

indicated that they will look to the substance of the action rather than to its form. Thus, regardless of how courts originally classify a particular action, there may well be other factors that suggest the substance of the act. For example, where zoning proceedings appear to be legislative, rigorous procedural requirements may make the action more like a judicial or administrative activity. Thus, there may be hearing requirements, procedural requirements or notice, and other rules more appropriate to an administrative proceeding than to a legislative action. For example, in *Centennial Land and Development Co. v. Township of Medford*[215] the court considered the characteristics of the proceedings, concluding that judicial procedures were appropriate to these boards. Planning and zoning boards were required to hold public hearings on development proposals, and the hearings were subject to the requirements of a state open hearings law. Further, the presiding officer was authorized to administer oaths and issue subpoenas and all witnesses were subject to cross examination by any interested party. The Board had to reduce its decisions to writing, provide reasons for its conclusions, and publish its decisions in an official newspaper. The court concluded that the Boards' actions were quasi-judicial in nature and found applicable the public policy interests that protect judges in similar cases.

In reaching its decision, the court in *Centennial Land* relied heavily on *Butz v. Economou*, arguing that *Economou* placed an emphasis on the safeguards built into the position at issue.[216] The court viewed this as a fundamental change from *Wood v. Strickland*.[217] Nevertheless, the court referred to language in *Wood* finding qualified immunity appropriate where absolute "immunity would not sufficiently increase the ability of school officials to exercise their discretion in forthright manner."[218] The court felt that for planning and zoning board members, the presence of absolute immunity would make a difference.

The court's reliance upon *Economou* seems misplaced. First, the controls on irregular action are only one facet of the overall *Economou* analysis and there is no indication in *Economou* that the Court intended this factor to be definitive. Additionally, to rely on the ex-

215. 165 N.J. Super. 220, 397 A.2d 1136 (1979). *See* text accompanying note 185 *supra*.

216. 165 N.J. Super. at 229, 397 A.2d at 1141.

217. *Id.* at 233, 397 A.2d at 1143.

218. *Id.* at 233, 397 A.2d at 1142.

tent of control test to this degree means that one is likely to reach different conclusions about planning and zoning boards where such restrictions do not exist, even though these boards may be performing similar tasks.

Finally, several courts appear to accept the policy-implementation distinction. For example, *Alder v. Lynch*[219] involved a refusal by the elected legislative Board of County Commissioners, functioning as a board of adjustment, to grant a variance. Quite obviously rejecting the view that the nature of the body undertaking the action determined the character of the action, the court argued that in this situation the elected officials were not engaging in legislative activity. The court found that the officials were not conceiving "public policy from the myriad policy options open to the soverign."[220] Rather, the court believed that the Board's action was similar to actions of other officials who exercise limited discretion. The court believed that the actions of zoning officials in a variance case, while somewhat broader than the actions of the school officials in *Wood*, were sufficiently similar to warrant only qualified immunity.[221]

A federal district court adopted this view in *Three Rivers Cablevision v. City of Pittsburgh*,[222] a case involving the city council's grant of a cable franchise. The court held that legislative acts are broad policy statements "establishing guidelines by which the future conduct of an entire group of persons falling within a particular classification will be judged."[223] Executive acts consisted of the application of legislation to the circumstances. The Harvard authors may disapprove of the wording of the decision since it involved adopting a view they believed caused difficulties. The decision appears to permit absolute immunity for the zoning action taken.[224] However, the circumstances in *Three Rivers* would seem to justify a similar outcome under either test.

219. 415 F. Supp. 705 (D. Neb. 1976).

220. *Id.* at 712.

221. The court did refer to the actions of school board officials as quasi-judicial, but this occurred before *Economou* changed the emphasis from extent of discretion, which was important to the *Adler* court, to the functional analogy approach. Nonetheless, it is clear that the *Adler* court felt that the variance action was similar to executive acts. *Id.* at 712.

222. 502 F. Supp. 1118 (W.D. Pa. 1980).

223. *Id.* at 1136.

224. *See* text at note 224 *infra*.

The United States Supreme Court has taken a similar approach, although its articulation of the standard is not sufficiently developed to provide a clear path through the thicket. Nonetheless, the Court in *Consumers Union*[225] in rejecting the identity of the decisionmaking body test, adopted a policymaking-implementation distinction. The Court, quoting from a dissent in the District Court, stated that:

> Disciplinary rules are rules of general application and are statutory in character. They act not on parties litigant, but on all those who practice law in Virginia. They do not arise out of a controversy which must be adjudicated, but instead out of a need to regulate conduct for the protection of all citizens. It is evident that, in enacting disciplinary rules, the Supreme Court of Virginia is constituted a legislature.[226]

The Supreme Court agreed that the Virginia court, in establishing rules for attorneys, acted in a legislative capacity and leaving its absolutely immune from liability.[227] As mentioned earlier, the Court also noted that state court judges are not absolutely immune in their enforcement capacities when they administer the bar code.[228]

While the Court helped to clarify some questions, it did not provide enough analytical scaffolding to indicate clearly how it will examine other kinds of cases when they arise. For example, the decision suggests that the passing of general legislation is legislative while the administration of legislation is administrative. There is no clear indication that the Court will treat the enactment of very specific legislation, such as a rezoning, as administrative. It would appear from the decision that the Court will adopt a very pragmatic, factually oriented approach, but that too is uncertain. Nor does the Court speak to the reliance by the New Jersey courts on the importance of procedural safeguards as determining whether absolute immunity is available. As noted above, in *Centennial Land and Development Co. v. Township of Medford*[229] a New Jersey court held many of the cases finding qualified immunity for local officials wrongly decided because they relied on *Wood's* language that offi-

225. 446 U.S. 719 (1980).

226. *Id.* at 731, *quoting*, Consumers Union of United States v. American Bar Assoc., 470 F. Supp. 1055, 1064 (E.D. Va. 1979) (Warriner, J., dissenting).

227. 446 U.S. at 731-32.

228. *Id.* at 736.

229. 165 N.J. Super. 220, 397 A.2d 1136 (1979). *See* text accompanying notes 185-88 *supra*.

cials exercising discretion should receive only qualified immunity unless they required absolute immunity to exercise their discretion.[230] According to the New Jersey court, *Wood's* finding that a school board official has qualified immunity did not apply to a zoning board member because in the latter situation there were rigorous procedures that made such cases quasi-judicial.[231] The New Jersey court emphasized language in *Economou* relating to the importance of procedural safeguards as determinative.[232] At present, it appears that the New Jersey court is out of line with the other decisions, including *Consumers Union*, which appear to consider the principal decision-making factor to be whether or not the action speaks to legislative activities. The existence of procedural safeguards, under this analysis, would be a factor, but only a factor, in most cases.

Courts granting absolute immunity to legislative officials for zonings have held that persons implementing or enforcing the acts are only entitled to qualified immunity. In *Fralin & Waldon, Inc. v. County of Henrico, Virginia*,[233] the court found that while planning commission members were immune from suit when they recommend zoning legislation, these same commission members were only qualifiedly immune when enforcing the legislation.[234] In *Fralin*, the legislation downzoned an area and the planning commission subsequently refused to approve a plan for low- and moderate-income housing because of the legislation. The court also applied the same double standard to the secretary of the planning commission, who was held absolutely immune with respect to the downzoning but not the enforcement action.[235]

The question arises whether to distinguish among different types of

230. *Id.* at 233, 397 A.2d at 1143.

231. *Id.*

232. *Id.*

233. 474 F. Supp. 1315 (E.D. Va. 1979).

234. *Id.* at 1321.

235. *Fralin* involved a discrimination suit which, under the doctrine of Village of Arlington Heights v. Metropolitan Dev. Corp., 429 U.S. 252 (1977), required a showing of intent to discriminate before a constitutional violation could be found. This means that in *Fralin*, the finding of a violation would be tantamount to a finding that defendants would be liable under § 1983, and, of course, not liable if there is no underlying violation. A similar situation occurred in German v. Killeen, 495 F. Supp. 822 (E.D. Mich. 1980), and cases cited therein. However, given that a § 1983 action can be brought for a violation of the Fair Housing Act, which may require intent to discriminate, a violation of § 1983 can be proven without a lesser showing than an showing of intent, Metropolitan Housing Dev. Corp. v. Arlington Heights, 558 F.2d

permit actions. Thus, while the *Fralin* situation may not result in absolute immunity, should other types of permits, such as zoning variances, entitle the decisionmakers to such immunity? Initially, it is fair to note that the same types of definitional problems arise here that have arisen in the case of the question of absolute immunity for legislative actions. Many would be inclined to make a distinction between, for example, the granting of a variance and the refusal to issue a development permit or the refusal to approve a conditional use permit. The latter, it may be argued, are administrative, while the role of the board of zoning appeals in granting or not granting a variance is a form of quasi-judicial action. Under this analysis, one may expect courts to grant absolute immunity for variance actions. This may not necessarily prove to be the case. In *Adler v. Lynch*,[236] the court concluded that the variance action was so closely constrained by state law that qualified immunity should govern in this situation.[237] This decision was cited with approval in *Kinderhill Farm Breeding Associates v. Appel*,[238] where the court "found no federal case holding the grant or denial of a permit to be legislative activity entitled to absolute protection. . ."[239] The Harvard Law Review article supports this position "because a variance decision normally produces a differential impact and because it will usually be made on the basis of administrative facts best known by the applicant and his neighbors."[240] Using this or some similar test makes sense because it captures what seems to be the nature of a variance decision. In addition, it provides a consistent pattern for other administrative decisions, such as the issuance of conditional use permits or the approval of subdivision plats. These actions are certainly administrative in nature and it makes little sense to treat variance actions, however theoretically different, in a contrary fashion.[241] BZA variance decisions are based on specific facts, tend to create differential effects, and are often subject to the same procedures, including notice, hearing, and

1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); Resident Advisory Bd. v. Rizzo, 429 F. Supp. 222 (E.D. Pa. 1977).

236. 415 F. Supp. 705 (D. Neb. 1976).

237. *Id.* at 712.

238. 450 F. Supp. 134 (S.D.N.Y. 1978).

239. *Id.* at 136.

240. *Developments*, *supra* note 168, at 1512.

241. This is especially true when one considers how frequently boards of zoning appeals decide cases on what they think is appropriate without regard to the strict standards which may govern their actions.

so forth.[242]

In addition to the more specific kinds of actions, local officials also make decisions that are more general in nature. This includes items such as the passage of a comprehensive plan (which may or may not be enacted into law by the legislature) and broad policy recommendations for development of large areas of the municipality. Here, if these officials are to be held liable for mere recommendations, it makes sense to accord them absolute immunity, using a functional approach to the question. Of course, in the sense of applying expertise to the solution of certain problems, they are functioning very much in the manner of administrators.

Unfortunately, the uncertain situation concerning differing state characterization of local actions is likely to persist for at least a while. Thus, the Supreme Court needs to address the relationship between state court pronouncements as to the characterization of certain actions and the uniform practice of Section 1983 law. The question of characterization of any particular action—whether it is zoning, subdivision, granting of a variance, or whatever—depends on the state court's initial analysis of that action. Typically, federal courts have either accepted the uncontested state court characterization or accepted prior state court characterization without further inquiry.[243]

Many characterization questions have a strong factual component. If courts are going to perform the more sophisticated analysis suggested above, they will frequently be delving into factual issues such as whether any particular action has broad policy implications, or whether there are procedural limitations surrounding individual actions. Such questions raise legal and factual issues and for the most part, it would be reasonable for federal courts to be circumspect in establishing general principles here.

However, there are legal limits as well. Consider two suits filed in two states on rezonings from commercial to residential where plaintiffs allege that the rezonings constitute an unlawful taking of property. If plaintiffs in both states sue under Section 1983 and both cases

242. There is one major area of difference and that is that appeals from a variance decision will typically go to the local courts, whereas appeals from, say, a conditional use decision will go the city's legislative body. This, by itself, would not seem to change the nature of the action from administrative to judicial, although it might be a factor.

243. *See, e.g.*, Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 611, n.5 (8th Cir. 1980).

reach the United States Supreme Court at the same time, the Court will be forced to reach some consistent principles for decision where the two state courts take different views on the nature of rezoning. Thus, reliance upon state characterization raises a question of insuring that federal policy prevails where state interpretation might make consistent application of Section 1983 rights impossible. This is a serious problem, especially since the purpose of Section 1983 is to vindicate victims suffering from deprivations of underlying constitutional or federal rights.

The question of state policy defeating federal policy has arisen in a few cases involving procedural issues. In *Marrapese v. State of Rhode Island*,[244] a federal district court considered whether a federal or state discovery rule should apply in a Section 1983 action. In *Marrapese*, the plaintiff claimed that despite a three year state statute of limitations, the court should allow him to bring suit after five years since he only was able then to discover the harm. The court discussed a recent United States Supreme Court case, *Board of Regents v. Tomanio*,[245] which had held that in Section 1983 actions federal courts should follow state tolling rules. Nonetheless, the *Marrapese* court concluded that federal law should govern questions of accrual because otherwise unjust action would go unpunished in spite of federal policy.[246] A state statute of limitations only determines how long someone has to bring suit—the federal policy is still enforceable; a discovery rule that shuts out application of the policy, however, prevents recovery unjustly. The *Marrapese* court relied on the *Tomanio* case for the authority that "federal courts may disregard an otherwise applicable state law if the law is 'inconsistent with the federal policy underlying the cause of action under consideration.' "[247] Other federal courts have reached a similar conclusion.[248]

Although the *Tomanio* and *Marrapese* cases address judicial and procedural issues, there should be no difference in substantive interpretations of the actions of local officials. It is the action, not the

244. 500 F. Supp. 1207 (D. R.I. 1980).

245. 446 U.S. 478, 483-86 (1980).

246. 500 F. Supp. at 1226.

247. *Id.*, *quoting* Board of Regents v. Tomanio, 446 U.S. 478, 485 (1980) and Johnson v. Railway Express Agency, 421 U.S. 454, 465 (1975).

248. *See* Lavallee v. Listi, 611 F.2d 1129 (5th Cir. 1980); Briley v. California, 564 F.2d 849 (9th Cir. 1977); Martin v. Merola, 532 F.2d 191 (2d Cir. 1976); Cox v. Stanton, 529 F.2d 47 (4th Cir. 1975).

name, that counts: "[T]he fact that a State may give . . . a 'legislative' label should not save an otherwise invalid procedure."[249] Likewise, the name given an action by a state court should not affect the Section 1983 rights of potential litigants. This problem is an important one and it is to be hoped that the courts will consider it more carefully as cases arise in the future.

2. A Few Words of Caution

The uncertainties indicated by the analysis above—the difficulties of classification of local land use actions and the potentially ambiguous role of the federal courts—suggest caution in trying to develop precise classifications usable in Section 1983 analysis. This caution is further justified in the light of some general considerations.

First, the search for unambiguous classifications of actions runs into some serious problems of a generic nature. In the past, most courts have not had to classify actions precisely. As indicated, it made no difference whether courts considered an action administrative, judicial, quasi-judicial, or anything else as long as it was not legislative. This lack of necessity to classify zoning actions precisely also exists in classification problems in general. As the Administrative Law article in California Jurisprudence 3d notes, "[I]t is frequently difficult if not impossible to place a particular power or function in a single category and seldom necessary to do so."[250] The article does attempt to provide some key to the meaning of administrative and executive, *i.e.*, "carrying out a legislatively completed policy" or "involving legislative discretions as to policy in completing and perfecting the legislative process."[251] However, beyond that statement, the article concludes that aside from meaning "not judicial," the term "administrative" is frequently incapable of precise meaning.[252] This suggests that the typical designation of an action may not be a simple task and that any analysis is likely to result in difficulties if done on the basis of some prior theory without sensitivity to all the aspects of the particular situation.

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249. City of Eastlake v. Forest City Enters., 426 U.S. 668, 686 (1976) (Stevens, J., dissenting). The procedure in question in *City of Eastlake* was the requirement of a referendum on zoning amendments.

250. 2 CAL. JUR. 3d, *Administrative Law* § 43. The author is indebted to Professor Earl Murphy of the Ohio State University School of Law for discussions on this point.

251. *Id.* at § 45.

252. *Id.* at § 43.

Second, other broad considerations make categorization very difficult. On the one hand, legislative bodies typically grant to courts the power to decide legal issues. They may, however, also delegate that power to administrative bodies to interpret the law. Looking at the land use decisions of local bodies from this perspective, courts undoubtedly have a strong tendency to consider many local actions as being of a judicial nature. Under this view, such actions are very different from administrative actions involving the giving of grants or the investigation by the police of a reported crime. No one can deny that there is a strong element of judicial decision-making in many of the local land use decisions.

At the same time, however, as has already been noted in reference to Professor Mandelker's article,[253] the boards that make decisions in the planning and land use area constitute a peculiar institutional arrangement that functions in many respects as a major segment of the administrative framework for the local planning process. Mandelker notes that, as originally conceived, planning commissions and boards of zoning appeals were merely a "supporting cast"[254] for the zoning ordinance, but that the complicated expectations raised by the zoning ordinance "requires delicate adjustments among competing land uses. These adjustments cannot always be made before the fact."[255] Thus, Mandelker finds that the local boards have become a prominent feature of the actual administration of zoning. Administration was not to be left simply to the zoning inspector.

To the extent, then, that a local land use board is functioning as an administrative agency in fact, there will be a feeling that its functions ought to be classified as administrative rather than judicial.

These broad considerations of course reinforce the view discussed earlier that many actions may have characteristics of several classifications of activity.[256] Any claim of immunity under Section 1983 may well defy the neat classification Section 1983 analysis seems to imply. This makes the application of Section 1983 law especially difficult in the land use field.

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253. Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U. L.Q. 60.

254. *Id.* at 63.

255. *Id.*

256. *See* notes 240-42 and accompanying text *supra*.

IV. CONCLUSION

Section 1983 law has been shaped, as is all law, by logic and by the accident of circumstance. Since relatively few land use cases involve Section 1983, most of the law has come from other situations. While there is no reliable statistical data, one commentator, Peter Schuck, believes that a reliable study will show that most Section 1983 defendants are police officers, prison officials, public school officials, welfare officials, and public officials acting as employers.[257] In an interesting point, he goes on to say that these officials "personally and directly deliver the most basic governmental services to a public that is often hostile or needy (or both), and they exercise substantial discretion in doing so."[258]

Thus, most Section 1983 law suits involve low level bureaucrats and not high level public officials. *Scheuer v. Rhodes*,[259] a case against the governor of Ohio, obviously indicates that this is not entirely the case. Nevertheless, planning decisions are often made by individuals who have different responsibilities and interact with the public, not as a "street level bureaucrat,"[260] nor even as a high level administrator, but rather as a citizen volunteer on a planning board of some type or as a local legislator engaging in administrative or legislative decisions. These officials do not need to serve as a policeman needs his position. They are quite likely to be upset at the possibility of suits that may subject them to damage judgments, court and lawyers' expenses, and a great deal of unsettling uncertainty, even if they are held to be immune or not liable.[261]

Anyone who has ever talked to a group of local officials about Section 1983 can understand this. Indeed, Schuck argues that "no empirical question is more central to an evaluation of official immunity,

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257. Schuck, *Suing Our Servants: The Court, Congress and the Liability of Public Officials for Damages*, SUP. CT. REV. 281, 293 (Kurland, Casper, & Hutchinson ed. 1980).

258. *Id.*

259. 416 U.S. 232 (1974).

260. *See* LIPSKY, STREET LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICE (1980). *Cf.* Schuck, *supra* note 257, at 294.

261. One commentator, Martin Jaron, Jr., believes that it is very difficult to win a § 1983 lawsuit under the doctrine of qualified immunity. *See* Jaron, *The Threat of Personal Liability Under the Federal Civil Rights Act: Does it Interfere with the Performance of State and Local Government*? 13 URBAN LAW. 1 (1981). But it is also the threat of a suit and difficulties connected with it which create concern in the minds of officials potentially subject to suit.

liability rules than this: how do public officials actually perceive and evaluate the risk of incurring these costs?"[262] Schuck is perhaps overstating the case because the equally important empirical questions are how Section 1983 liability affects the character of decision-making and how the liability affects the attitude of citizens toward their officials. However, the existence of liability undoubtedly will have some major effect on an individual's actions and his willingness to serve on governmental bodies. Whereas a policeman may tend to respond by not acting or by responding "by the book," a planning commission member may well decide to resign. Thus, not only the quality of our public decisions, but also the character of our public servants may be affected. If local governments can find and provide adequate insurance policies for local officials, the situation will be relieved. Or, if the local government indicates it will cover all costs, including damage awards, suffered by citizen bureaucrats, then this too will be of value. But the extent of availability of insurance policies is unclear and they tend to be costly and issued by only a few companies.[263]

Some doubt also exists as to the coverage of general liability policies with respect to civil rights actions. To date, only a few cases have decided the question and they are inconsistent and insufficient in number to be definitive.[264] Presumably, in the future, insurance companies will be more likely either to exclude coverage for civil rights actions to avoid escalating liability or provide specific policies for civil rights actions.

The existence of insurance coverage, however, is not entirely a pos-

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262. Schuck, *supra* note 247, at 307. Schuck details the types of conduct which arise when risk aversion becomes a significant factor. These include inaction, delayed actions, formulations and changes in the character of decisions.

263. The author is a member of a municipal planning commission for the City of Worthington. The Ohio city recently purchased liability insurance for its zoning board and planning commission members. The city manger, David Elder, indicated in a conversation that it was difficult to locate a policy that provided such coverage. Unfortunately, the author is unaware of any study on insurance for local government officials in cases of adverse § 1983 judgments. Thus, the comments expressed here are based on limited personal knowledge. The problem is undoubtedly widespread, however.

264. *See* Rolette County v. Western Casulaty and Ins. Co., 452 F. Supp. 125 (D. N.D. 1978) (no coverage, but the application to 1983 action is uncertain because no coverage at all has been allowed under the policy); Grant v. North River Ins. Co., 453 F. Supp. 1361 (N.D. Ind. 1978) (coverage found). For details, see Platter & Baker, *The Status of Personal Liability and Comprehensive General Liability Insurance Coverage of Civil Rights Damage*, INSURANCE COUNCIL JOURNAL 259 (April 1981).

itive feature. While it undoubtedly will relieve local officials of a fear of government service, it also creates other problems. Specifically, it relieves local officials of the risk that Section 1983 imposes and spreads that risk among the general population. This could make the threat of Section 1983 actions meaningless. In this case, the only remedy a local government has is removal of the official—not a great deterrent to unprincipled behavior if the official is an unpaid or low-paid commissioner or board member. Of course, removal of a paid planning employee would be very effective. If the official is an elected official, removal would have to be accomplished at the polls. The question of insurance in such actions thus raises important policy questions that need to be studied.

Nor do municipalities typically give a "hold-harmless" pledge to their public servants. In most cases, the situation remains ambiguous. This is so not only because the city wishes to keep its options open, but also perhaps because to give such assurances could result in some officials acting without sufficient restraint. The municipality always has the remedy of removal, however. Nevertheless, until the courts work out the liability rules, this problem will remain.[265]

Beyond the question of official response under uncertain law, uncertainty also exists regarding how courts will interpret the law in the land use context. Cases have raised the question of how to characterize land-use decisions for Section 1983 purposes. One of the accidents of circumstances, however, is that up until now, most courts have generally not had to deal with these questions. Further, when they have, it has usually been in the non-1983 context of deciding whether procedural restraints and practices suffice to render a decision administrative or judicial rather than legislative. When looking at the issue from this point of view, courts may well tend to emphasize those restraints; that is, courts often consider these procedural safeguards as a favorable aspect of the local decision-making process

265. This article is not a guide to planning officials on how to reduce their liability. There are, however, obvious ways to do so without unduly compromising the quality of decisionmaking. The incidence of due process claims may be reduced by following consistent procedures, by providing adequate reasons for the decisions, and by being careful to treat different parties in the same manner. Given the deference courts traditionally extend to substantive decisions by local governments, it is unlikely that official conduct will be declared unpermissible if local authorities act properly. This fact is not limited to § 1983 lawsuits, but applies equally to suits seeking to overturn local decisions on other grounds.

since they protect the public and, usually, at little relative cost.[266]

However, in Section 1983 cases, there is reason to favor the opposite approach—to call things legislative or judicial rather than administrative in order to avoid official liability. From the point of view of the public servant and his government, the rules allowing liability of an interpretation of "administrative" are very significant indeed. Moreover, unlike the requirements of notice and public hearing, the existence of Section 1983 liability may well change the character of public decisions so as to result in a poorer governmental process.

This, then, is an area the courts must come to grips with. Now, more than ever, courts have reason to grapple with the characterization of local zoning actions. Unfortunately, the problem is also complicated by the local nature of zoning as compared with the federal character of Section 1983. To have the federal courts make such determinations for the states because of a non-land-use federal law, raises the spector of considerable state-federal controversy. On the other hand, to allow the state courts to define an action may well result in chaos in the interpretation of Section 1983. The federal courts have long had an involvement in decisions relating to police, school officials, welfare workers, and the like. Except for issues of exclusion and related questions, however, they have refrained from evaluating local zoning decisions. To vindicate Section 1983 rights, federal courts may, at least to some extent, become more involved in the local zoning process. Of course, many kinds of cases will arise where the definition may not matter. Additionally, a court can avoid the problem by treating the issue as a factual question peculiar to the circumstances of that case. A court may well find that states have sufficiently different rules and procedural requirements to justify the differing interpretations states give to land use actions. Given the ability of courts to avoid conflict of a direct kind, federal court reaction of this nature can be expected.[267]

The next five years or so will be critical. The possible outcomes raise no small differences. They can affect the character of land use decisions, the type of people and bodies who make them, and the relationship between state and federal courts. It may seem a case of

266. At least this is so compared to the various hurdles which may have to be jumped in the development process. *See, e.g.*, Hagman, *Vesting Issue: The Rights of Fetal Development Vis-A-Vis the Abortions of Public Whimsy*, 7 ENVTL. L. 519 (1977).

267. Of course, the Supreme Court could conceivably change its interpretation of § 1983 or Congress could amend it.

the Section 1983 tail wagging the local land use zoning dog, but unless the Supreme Court revises its approach, zoning law will have to examine itself and its foundations with greater care. Of course, the results of this may be clearly beneficial: sometimes an old dog needs a good tail-wag.[268]

268. *Cf.* Gorman Towers Inc. v. Bogoslavsky 626 F.2d 607, 616 (8th Cir. 1980).

NOTES