

79172-4

NO. 34274-0-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

MARK POTTER, on behalf of himself
and the class he represents,

Appellant,

v.

WASHINGTON STATE PATROL,
a Washington State Agency,

Respondent.

APPEAL FROM THE THURSTON COUNTY
SUPERIOR COURT

Cause No. 04-2-01086-9

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in denying plaintiff-appellant's motion for partial summary judgment on liability and granting defendant-appellee's cross-motion for summary judgment on plaintiff's conversion claim.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether defendant, the Washington State Patrol, is liable for conversion where it seized plaintiff's and class members' vehicles pursuant to a mandatory impound policy that exceeded its lawful authority under RCW 46.55.113 and that violated Washington Constitution art. 1, § 7.

2. Whether the State Patrol is entitled to immunity under Restatement (Second) of Torts § 265 for its unlawful seizures of vehicles, where its mandatory impound policy exceeded its statutory authority under RCW 46.55.113 and the seizures under that policy were *per se* unreasonable under the statute and Washington Constitution art. 1, § 7.

III. STATEMENT OF THE CASE

A. Procedural History.

Plaintiff filed this lawsuit as a putative class action on June 1, 2004 on behalf of all registered owners whose vehicles had been impounded by

the Washington State Patrol under the Patrol's mandatory impound policy for vehicles whose drivers were cited for Driving While License Suspended ("DWLS") violations. Plaintiff's complaint asserted claims for conversion, negligent, reckless, willful and wanton misconduct, and violation of RCW 46.55.113 and Washington Constitution art. 1, § 7. CP 3-9. Plaintiff sought reimbursement of impound fees, loss of use damages, and compensation for vehicles lost to auction following seizure under the mandatory impound policy, which was ruled unlawful by the Washington Supreme Court in All Around Underground v. Washington State Patrol, 148 Wn.2d 145, 60 P.3d 53 (2002).

On October 8, 2004, the trial court granted in part and denied in part the State's motion to dismiss under CR 12(b). The court dismissed plaintiff's claims for negligent, reckless, willful and wanton misconduct and violation of RCW 46.55.113 and Washington Constitution art. 1, § 7. The court concluded that plaintiff did state a viable cause of action for conversion. CP 10-11.

On February 28, 2005, the trial court granted class certification on the conversion claim and defined the class as "[r]egistered owners of motor vehicles that were impounded by the Washington State Patrol solely for Driving While License Suspended violations during the period of

June 1, 2001 through December 19, 2002, who have not resorted to any other judicial or administrative method to challenge the legitimacy of the impound of their vehicle.” CP 12-13.

On September 16, 2005, plaintiff moved for partial summary judgment on liability on the conversion claim. The State cross-moved for summary judgment on November 1, 2005. On December 9, 2005, the trial court held a hearing on the cross-motions for summary judgment and granted defendant’s motion. CP 199-200. That order is the subject of this appeal.

B. Facts Relating To Summary Judgment Motion.

For many years, the Washington legislature has authorized law enforcement officers to impound vehicles under certain circumstances when the vehicle’s driver is arrested for DWLS or various other driving-related or non-traffic offenses. The laws authorizing such seizures have been amended and recodified several times.¹

¹ For example, former RCW 46.20.435(1), enacted in 1982 and amended in 1985, provided in relevant part, “[u]pon determining that a person is operating a motor vehicle ... with a suspended or revoked license ... a law enforcement officer may immediately impound the vehicle that person is operating.” CP 79. In 1996, RCW 46.20.435 was repealed and the provisions of RCW 46.20.435(1) were incorporated in RCW 46.55.113, which had been enacted previously to authorize impoundment of vehicles in DUI and other situations. See Laws of 1996, ch. 89, §§ 1 and 3 (CP 113-115). RCW 46.55.113 was amended again in 1997 as part of the partial decriminalization of the offence of driving without a valid license. Laws of 1997, ch. 64, § 7 (CP 124).

In 1998, the legislature amended RCW 46.55.113, the law that currently governs impound of vehicles for DWLS violations and other reasons. As amended, the law provided in relevant part, “Whenever the driver of a vehicle is arrested for a violation of ... RCW 46.20.342 or 46.20.420 [driving while license suspended or revoked], the vehicle is subject to impoundment, pursuant to applicable local ordinance or state agency rule at the direction of a law enforcement officer.” RCW 46.55.113(7) (1999); Laws of 1998, ch. 203, § 4 (CP 134-35).

On August 4, 1999, the Washington State Patrol adopted a new DWLS impound policy in response to the legislature’s amendment of RCW 46.55.113. See Wash. St. Reg. 99-18-026 (Aug. 4, 1999). The Patrol codified this policy at WAC 204-96-010. CP 148-49. It is undisputed that this new policy required impoundment in every instance where a driver was cited for driving with a suspended or revoked license. The stated purpose of the rule implementing this policy was “to make towing DUI/suspended drivers' vehicles' mandatory.” Wash. St. Reg. 99-18-026 (Aug. 4, 1999). The State Patrol’s 2001 and 2002 Regulation Manuals also list DWLS/R impounds under the heading “Mandatory Impounds,” and state:

When a driver of a vehicle is arrested for a violation of [RCW 46.20.342 – Driving while license suspended or revoked]. The arresting officer shall cause the vehicle to be impounded.

CP 30, 33. In pleadings before the Washington Supreme Court and other state courts, the State Patrol also acknowledged its policy was mandatory in nature. See CP 38; CP 41 (“the Patrol’s WACs, enacted pursuant to RCW 46.55.113 and 120, require impoundment when the driver is arrested for driving while license suspended.”).

On December 12, 2002, the Washington Supreme Court issued its decision in All Around Underground, 148 Wn.2d at 145. The Supreme Court found that the State Patrol had a mandatory DWLS impound policy and held that this policy exceeded the agency’s lawful authority. Specifically, the Court held that RCW 46.55.113 requires officers to exercise discretion before impounding vehicles for DWLS violations and that the State Patrol’s policy violated the statute by denying officers the ability to exercise such discretion. 148 Wn.2d at 159. In response, the State Patrol issued a high priority bulletin on December 18, 2002 advising troopers of the invalidity of the mandatory impound policy and directing them to impound DWLS vehicles only in limited circumstances until adoption of a new rule. CP 43-44. The Patrol ultimately adopted a new rule in 2004. CP 151.

This lawsuit followed on the Supreme Court's decision in All Around Underground. The procedural history of the suit is summarized in Section III.A, *supra*.

On December 9, 2005, the trial court held a hearing on the parties' cross-motions for summary judgment in this case. The court rejected the State Patrol's argument that the doctrine of legislative immunity shielded it from liability for seizures under the unlawful mandatory impound policy. RP 40:20-41:19. The court, however, accepted the State Patrol's argument that its actions were privileged under Restatement (Second) of Torts § 265 (1977), which states:

One is privileged to commit an act which would otherwise be a trespass to a chattel or conversion if he is acting in discharge of a duty or authority created by law to preserve the public safety, health, peace, or other public interest, and his act is reasonably necessary to the performance of his duty or the exercise of his authority.

The trial court echoed the language of § 265 in granting defendant's motion for summary judgment:

In that regard, based upon the arguments presented, in my analysis --- although I believe the arguments on both sides are understandable and with some logic -- I conclude that the Patrol had legislative authority to impound. The manner in which they exercised that authority to preserve public safety and other public interests and the manner in which it was performed was perceived to be reasonably necessary to the performance of the duty or the exercise of authority.

Accordingly, I conclude, notwithstanding it's subject to vigorous debate, that the action of the State Patrol through its agent troopers was privileged and renders it not liable for conversion.

RP 42:5-20.

IV. ARGUMENT

A. Standard of Review.

“When reviewing a grant of summary judgment, an appellate court undertakes the same inquiry as the trial court.” Grundy v. Thurston County, 155 Wn.2d 1, 6, 117 P.3d 1089 (2005). Summary judgment will be affirmed if, but only if, “there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law.” CR 56(c); Dickgieser v. State, 153 Wn.2d 530, 535, 105 P.3d 26 (2005). This Court reviews the facts and law underlying a summary judgment ruling *de novo*, Grundy, 155 Wn.2d at 6, and determines questions of law without deference to the decision of the trial court, Clark County Citizens United, Inc. Clark County Natural Resources Council, 94 Wn. App. 670, 675, 972 P.2d 941 (1999).

B. Summary Of Argument.

The State Patrol's mandatory impound policy exceeded its lawful authority under RCW 46.55.113 and violated Washington Constitution art. 1, § 7, which requires officers to exercise discretion and consider the

availability of reasonable alternatives to impound before seizing a vehicle. Because impounds pursuant to the mandatory policy exceeded the agency's lawful authority, they constituted conversion of the plaintiff's and class members' vehicles.

The State Patrol's mistaken belief that the mandatory impound policy was consistent with the 1998 amendment to RCW 46.55.113 provides no defense to the claim for conversion. The State Patrol's erroneous interpretation of the statute does not provide a lawful justification for its actions where its policy in fact violated the statute and constitution. As a general principle, good faith or lack of wrongful intent is not a defense to an action for conversion. Also, the Washington Supreme Court repeatedly has declined to extend qualified or good faith immunity to state agencies as opposed to individual government officers.

For these same reasons, the trial court erred in relying on the logic of Restatement (Second) of Torts § 265 to immunize the State Patrol from liability in this case. That provision, which has never been adopted by a Washington appellate court, confers good faith immunity on individuals only where their actions are authorized under law and are reasonable. Here, the State Patrol's mandatory impound policy was not authorized by RCW 46.55.113 and was patently unreasonable under the State

constitution and 30 years of consistent judicial precedent. Moreover, application of Restatement § 265 to the State Patrol, as opposed to an individual law enforcement officer, would conflict with the State's broad waiver of sovereign immunity and Supreme Court precedent denying qualified or good faith immunity to governmental entities.

Finally, the State Patrol is not entitled to legislative immunity, as it unsuccessfully argued below. The State Patrol cannot immunize its unlawful mandatory impound policy merely by codifying it in the WAC. In addition, legislative immunity adheres only to individual legislators, does not apply to garden variety rulemaking like that conducted by the State Patrol, and does not apply to enforcement, rather than enactment, of an unlawful regulation.

For these reasons, the Court should reverse the trial court's grant of summary judgment to the State Patrol and should remand with directions to grant summary judgment on liability in favor of the plaintiff.

C. The State Patrol Is Liable For Conversion Because It Seized Vehicles In Excess Of Its Lawful Authority.

1. The State Patrol's Mandatory DWLS Impound Policy Exceeded Its Statutory Authority.

In All Around Underground, 148 Wn.2d at 145, the Supreme Court considered whether the State Patrol's mandatory impound policy for

DWLS drivers violated RCW 46.55.113. That statute, as amended, provides in relevant part:

Whenever the driver of a vehicle is arrested for [DWLS] . . . the vehicle is subject to impoundment, pursuant to applicable local ordinance or state agency rule at the direction of a law enforcement officer.

The Supreme Court held that the State Patrol's mandatory impound policy was unlawful because the language of RCW 46.55.113 requires law enforcement officers to exercise discretion prior to impounding a vehicle:

Unlike the State Patrol's regulation the statute does not require impoundment of every vehicle when its driver is arrested for driving with a suspended or revoked license; it merely authorizes individual impoundments. In the language of RCW 46.55.113, whenever the driver is arrested "the vehicle is subject to impoundment . . . at the direction of a law enforcement officer." The phrase "subject to" cannot be construed to mandate impoundment by removing from the individual officer discretion on whether to impound, especially in light of the subsequent phrase "at the direction of a law enforcement officer."

All Around Underground, 148 Wn.2d at 154-55.

The Court further held that the State Patrol could not justify particular seizures conducted under the mandatory policy on the basis that the impoundment was nonetheless reasonable under the circumstances of the stop. In overruling the district court's approval of this defense, the Court wrote:

We reject this reasoning on grounds of logic. Since WAC 204-96-010 [the mandatory impound policy] divests officers of all discretion on whether to impound a particular vehicle, the officer who impounded All Around's van cannot have reasonably exercised discretion he did not have.

148 Wn.2d at 150 n.2. Thus, the Court concluded that speculation as to whether an officer would have impounded a particular vehicle if he had exercised reasonable discretion was irrelevant when the impounds were in fact ordered under a mandatory policy.

2. The State Patrol's Mandatory Impound Policy Exceeded Its Constitutional Authority Because It Did Not Allow Officers To Consider The Availability Of Reasonable Alternatives To Impoundment.

In addition to exceeding its statutory authority, the State Patrol's policy also exceeded its lawful authority under Washington Const. art. 1, § 7 by eliminating officers' ability to consider and utilize reasonable alternatives to impound.

In All Around Underground, the Supreme Court declined to reach the constitutionality of the State Patrol's policy under the principle that constitutional issues should be avoided if a case can be decided on statutory grounds. 148 Wn.2d. at 159-60. Nonetheless, the Court left little doubt about the outcome of the constitutional question. See Becerra v. City of Warden, 117 Wn. App. 510, 516-17, 71 P.3d 226 (2003). The

Court also left no doubt that the exercise of discretion required under the statute – and prohibited by the State Patrol’s policy -- is directly linked to the need to consider reasonable alternatives as required by Washington Constitution art. 1, § 7 and the Court’s prior decisions in this arena.

In fact, the Court made clear that it was construing RCW 46.55.113 to require the exercise of discretion prior to impoundment specifically to avoid a conflict between the statute and long-established precedents holding that consideration of reasonable alternatives to impound is a constitutional requirement. In rejecting the dissent’s argument that the statute does not require the exercise of discretion by individual officers, the Court explained:

The dissent ... seems to suggest the legislature may delegate to municipalities and agencies authority to issue mandatory-impoundment regulations, which is why, in the dissent’s view, WAC 204-96-010 does not exceed the statutory authority in RCW 46.55.113. **But courts have long held it is a constitutional requirement to consider reasonable alternatives to impoundment before impounding a vehicle.** See *supra* n.4. See also *Anderson v. Morris*, 87 Wn.2d 706, 716, 558 P.2d 155 (1976) (“Where a statute is susceptible to more than one interpretation, it is our duty to adopt a construction sustaining its constitutionality if at all possible.”).

Id. at 155 n.8 (emphasis added). Thus, although the Court phrased its decision primarily in terms of discretion, in doing so, the Court acknowledged and relied on the long line of precedents holding that

consideration of available alternatives is a prerequisite for a vehicle seizure to be reasonable and pass constitutional muster under article I, § 7 of the Washington Constitution. *Id.* at 151, n.4 (citing State v. Houser, 95 Wn.2d 143, 153, 622 P.2d 1218 (1980); State v. Reynoso, 41 Wn. App. 113, 119, 702 P.2d 1222 (1985); State v. Greenway, 15 Wn. App. 216, 219, 547 P.2d 1231 (1976); State v. Hill, 68 Wn. App. 300, 305, 306, 842 P.2d 996 (1993); State v. Coss, 87 Wn. App. 891, 899, 943 P.2d 1126 (1997)).

Even if this principle was not clear from the majority decision in All Around Underground, almost 30 years of consistent precedent from the Washington Supreme Court and Courts of Appeal have held that impounding a vehicle is not reasonable, and therefore violates constitutional safeguards, when reasonable alternatives to impound exist. In State v. Bales, 15 Wn. App. 834, 837, 552 P.2d 688 (1976), *rev. denied*, 89 Wn.2d 1003 (1977), a case involving impoundment incident to arrest on a traffic warrant, the court held, “Impoundment of a citizen’s vehicle following his or her arrest on a traffic charge is inappropriate when reasonable alternatives to impoundment exist.”

A year later, in State v. Hardman, 17 Wn. App. 910, 912, 567 P.2d 238 (1977), *rev. denied*, 89 Wn.2d 1020 (1978), which involved impound

following an arrest for DUI, a different division of the court of appeals held, “the State has the burden of proving that an impoundment is reasonable under the circumstances existing at the time of the search, and an impoundment is improper when reasonable alternatives to impoundment exist.”

If the State’s burden to justify an impoundment has any meaning under the Fourth Amendment, the mere showing that the vehicle would otherwise have been left on private property for an unknown length of time is not sufficient to allow the impoundment.... The State must demonstrate also that the officer at least thought about alternatives; attempted, if feasible, to get from the driver the name of someone in the vicinity who could move the vehicle; and then reasonably concluded from his deliberation that impoundment was in order.

17 Wn. App. at 914.²

In 1980, the Supreme Court decided Houser, 95 Wn.2d at 143. The Court recognized that, due to the mobility of cars and reduced expectation of privacy in motor vehicles, “the impoundment of a vehicle will be considered reasonable if an officer has probable cause to believe that it was stolen or that it was being used in the commission of a felony.” 95 Wn.2d at 149. However, where the vehicle is not evidence or fruit of a

² Although Hardman referenced the Fourth Amendment rather than the State constitution, the Washington courts have held that Washington Constitution art. 1, § 7 provides more expansive protections than the Fourth Amendment. E.g., State v. Goucher, 124 Wn.2d 778, 782, 881 P.2d 210 (1994); State v. Williams, 102 Wn.2d 733, 741-42, 689 P.2d 1065 (1984).

felony, the Court held impoundment is reasonable only in the absence of available alternatives. The Court based its conclusion on both Wash. Const. art. I, § 7 and the Fourth Amendment.

It is unreasonable to impound a citizen's vehicle following his or her arrest when there is no probable cause to seize the car and where a reasonable alternative to impoundment exists.... Accordingly, we believe the impoundment of defendant's vehicle was unreasonable and violative of his constitutional rights.

Id. at 153. See also State v. Davis, 29 Wn. App. 691, 698, 630 P.2d 938 (1981) (explaining Houser), *rev. denied*, 96 Wn.2d 1013 (1981).

State v. Stortroen, 53 Wn. App. 654, 769 P.2d 312 (1989), and State v. Barajas, 57 Wn. App. 556, 561-62, 789 P.2d 321, *rev. denied*, 115 Wn.2d 1006 (1990), both involved impounds for driving without a valid license. In Stortroen, the court explained:

Although RCW 46.20.435(1) allows impound of vehicles driven by a driver without a valid license, that provision must be enforced with reference to constitutional requirements and to the circumstances of the case. None of the circumstances justifying impoundment were present here, and [Officer] Fry failed to pursue reasonable alternatives to impoundment.

53 Wn. App. at 658. Similarly, in Barajas, the court held that an impound was unreasonable and unlawful where the trooper seized the vehicle solely for a minor traffic infraction and did not consider alternatives. 57 Wn. App. at 561-62.

In Reynoso, 41 Wn. App. at 113, another invalid license case, the court explained that the impound “was unreasonable and thus unlawful” where there was a licensed passenger in the car and the vehicle’s owner was available to retrieve the vehicle. The court expressly rejected the State’s argument that consideration of reasonable alternatives was not necessary where a statute or ordinance authorized impoundment and held that “enforcement of [the statute] must be reasonable in order to satisfy constitutional requirements.” 41 Wn. App. at 118-19.³

In Hill, 68 Wn. App. at 306, the court grounded its decision specifically on Wash. Const. art, I, § 7 and reiterated, “In Washington, impoundment is inappropriate when reasonable alternatives exist.” In Coss, 87 Wn. App. at 898-90, the court similarly explained:

Although an officer is not required to exhaust all possibilities, the officer must at least consider alternatives; attempt, if feasible, to obtain a name from the driver of someone in the vicinity who could move the vehicle; and then reasonably conclude from this deliberation that impoundment is proper.... It is clear from the record that a reasonable alternative to impoundment existed.... Accordingly, the impoundment was unreasonable and thus unlawful.

³ Although the court also held that the officer’s failure to exercise discretion violated the authorizing statute, it decided the constitutional question as a separate basis for holding the impoundment unlawful.

Id. at 899-90. This passage was specifically cited in All Around Underground for the proposition that the deterrent and public safety goals of RCW 46.55.113, while valid, do not support mandatory impoundment of DWLS vehicles in all circumstances. 148 Wn.2d at 158.

In short, for almost 30 years, the Washington courts held that impoundment for DWLS and similar infractions is reasonable and constitutional only if no reasonable alternatives to impound exist. By refusing to allow troopers to consider reasonable alternatives under its mandatory DWLS impound policy, the State Patrol not only violated RCW 46.55.113, but exceeded its authority under article 1, § 7 of the Washington Constitution. See Coss, 87 Wn. App. at 898-900. For this reason as well, vehicle seizures under the State Patrol's mandatory DWLS impound policy lacked lawful justification and constituted conversion of the class members' property.

3. Governmental Entities Are Liable For Conversion When They Seize Property In Excess Of Their Statutory Or Constitutional Authority.

The tort of conversion is “the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of possession of it.” Judkins v. Sadler-Mac Neil, 61 Wn.2d 1, 3, 376 P.2d 837 (1962) (quoting Salmond on the Law of Torts (9th ed. 1936),

§ 78, p. 310). Even temporary, unlawful deprivations of property give rise to actionable claims of conversion. Demelash v. Ross Stores, 105 Wn. App. 508, 522, 20 P.3d 447, 454, *rev. denied*, 145 Wn.2d 1004, 35 P.3d 380 (2001).

The definition of conversion as the “willful” interference with another’s property does not imply that willful misconduct or an intent to violate the lawful rights of another is an essential element of the tort. Rather, “willful” in this definition has its ordinary legal meaning of “voluntary or intentional, but not necessarily malicious.” Black’s Law Dictionary (7th ed. 1999) (definition of “willful”). “Wrongful intent is not a necessary element of conversion, and good faith cannot be shown as a defense to conversion.” Paris Am. Corp. v. McCausland, 52 Wn. App. 434, 443, 759 P.2d 1210 (1988) (citing Clapp v. Johnson, 186 Wash. 327, 57 P.2d 1235 (1936)); *see also* In re Marriage of Langham, 153 Wn.2d 553, 560, 106 P.3d 212 (2005). A defendant’s knowledge or ignorance that it has seized the property of another unlawfully is irrelevant to its liability for conversion; the act itself gives rise to the tort. Judkins, 61 Wn.2d at 3-4.

In Boss v. City of Spokane, 63 Wn.2d 305, 307-308, 387 P.2d 67 (1963), the Washington Supreme Court held that where a governmental

entity impounds a person's vehicle pursuant to a policy that exceeds its statutory authority, the government actor is liable for conversion. As is evident in Boss, whether the governmental body has exceeded its statutory authority is a question of law.

In Boss, the plaintiff sued the City of Spokane and two individual police officers for conversion after his vehicle was impounded. The officers arranged for the plaintiff's vehicle to be towed pursuant to a Spokane Police Department policy that allowed officers to impound an illegally parked vehicle that had five outstanding parking violations. The plaintiff's vehicle had been ticketed seven times for overtime parking violations. Defendants argued that a municipal ordinance authorized by state law provided the authority to impound plaintiff's vehicle under these circumstances. The ordinance stated:

Whenever a peace officer finds a vehicle unattended in such a position that it constitutes an *obstruction to traffic*, blocks the use of a fire hydrant, provides a danger to travel, ... he is hereby authorized to remove and tow away said vehicle.

63 Wn.2d at 307 (quoting former RCW 46.48.300) (italics in original).

The City contended that "the policy of the police department was a valid interpretation of this ordinance" because cars that were illegally parked on a chronic basis were an obstruction to traffic and a nuisance to the public.

Id. The Court rejected this contention and noted that only a “strained” interpretation of the word “obstruction” would support the policy under which plaintiff’s vehicle was towed. Id. The Court concluded that “the impounding of the vehicle was not authorized by this ordinance and, therefore, amounted to a conversion of it by defendants.” Id.⁴

The parallels between Boss and the present case are resounding. Here, as in Boss, the State Patrol conducted impounds pursuant to a policy that purported to implement an authorizing statute or ordinance. Here, as in Boss, the law enforcement agency’s impound policy exceeded the limits of the enabling legislation, as well as, in this case, constitutional restraints on the government’s seizure of vehicles. Here, as in Boss, the government is liable for conversion because the seizures were not validly authorized. Unlike in Boss, however, this Court does not need to determine whether the agency’s mandatory impound policy for DWLS violators exceeded its statutory authority because the Washington Supreme Court already has decided this issue.

⁴ Boss’s claim against the City was dismissed because he failed to file a tort claim with the City in advance of filing his lawsuit. However, his claim against the police officers for conversion was permitted to go forward. Boss, 63 Wn.2d at 308-09.

In Price v. City of Seattle, Civ. No. 03-01365-MJP, the federal district court for the Western District of Washington relied on Boss in determining that the City of Seattle was liable for conversion of plaintiff class members' vehicles. See Order Granting Motion for Partial Summary Judgment (June 27, 2005) (App. A hereto). Judge Pechman granted summary judgment to the class on plaintiffs' claim that the City's seizure of vehicles under a mandatory DWLS impound policy exceeded the City's lawful authority and constituted conversion under Washington law. Id. While certainly not binding on this court, Judge Pechman's well-reasoned decision supports the conclusion that, under Boss and All Around Underground, summary judgment against the State Patrol should have been granted in this case.

The holding in Boss is in accord with other jurisdictions that have held governments liable for conversion where they seized property in excess of their lawful authority. For example, in Crosby v. City of Chicago, 298 N.E.2d 719 (Ill. App. 1973), the court held that the City of Chicago was liable for unlawfully detaining plaintiff's car because its officers failed to comply with a state statute regarding vehicle seizures. Although the seizure apparently would have been lawful had the proper procedures been followed, the failure to follow the statutory requirements left the City liable

for conversion. Id.⁵ In the Matter of 1969 Chevrolet, 656 P.2d 646, 649 (Ariz. App. 1982), held the State of Arizona liable for conversion after police instituted forfeiture proceedings and auctioned plaintiff's vehicle following an unlawful search and seizure; the fact that the arresting officer acted in good faith did not change the result. In Heimberger v. Village of Chabanse, 463 N.E.2d 1368 (Ill. App. 1984), the court held the village's governing body liable for conversion after it unlawfully authorized the removal of plaintiff's property from land that he leased. And in Gore v. Davis, 256 S.E.2d 329 (Ga. 1979), the Georgia Supreme Court held that the plaintiff stated a proper claim for conversion against a tow company that auctioned his vehicle pursuant to a state abandoned vehicle law that later was determined to be unconstitutional.

Notably, in both Crosby and In the Matter of 1969 Chevrolet, as here, statutes existed authorizing the seizure of the subject vehicles by law enforcement officers under the proper procedures and substantive circumstances. However, in both cases, as in this case, the governmental defendants failed to comply with the substantive or procedural limits on their authority under the laws, leading the courts to conclude that they had unlawfully converted the owners' vehicles. Moreover, as the Arizona

⁵ The court declined to rule on plaintiff's challenge to the constitutionality of the statute because it was able to decide the case on non-constitutional grounds. 298 N.E.2d at 723.

court explained, the good faith belief of the defendants in the scope of their authority was no defense; to establish a conversion, “the intent required is not necessarily a matter of conscious wrongdoing”, but “rather an intent to exercise a dominion or control over the goods which is in fact inconsistent with plaintiff’s rights.” 656 P.2d at 650.⁶

For the same reasons, the State Patrol should be held liable for conversion of the plaintiff’s and class members’ vehicles in this case. Although RCW 46.55.113 allows impoundment of DWLS vehicles in some instances, seizure is only authorized after the arresting officer exercises reasonable discretion and considers the availability of reasonable alternatives. By making impoundment mandatory, the State Patrol exceeded its powers under the statute and State constitution and deprived class members of their property without lawful authority.

4. The State Patrol’s Mandatory Impound Policy Was *Ultra Vires* And Unconstitutional From Its Inception, And Impounds Pursuant To That Policy Were Unlawful.

Before the trial court, the State Patrol argued that its seizures of class members’ vehicles did not constitute conversion because the vehicles

⁶ The State Patrol argued below that In the Matter of 1969 Chevrolet was not a conversion case at all and that the Arizona court merely used conversion principles in determining the amount of damages for the wrongful forfeiture. In fact, the Arizona court expressly stated, “We hold that the State of Arizona’s conduct constituted a conversion of Mr. Moore’s car.” 656 P.2d at 650.

were impounded pursuant to WAC 204-96-010, which was valid at the time of the impounds. This contention is nothing less than an attempt to rewrite, or at least ignore, the pertinent legal history. The State Patrol's mandatory impound policy, as implemented in the field and codified in the WAC, was *ultra vires* from its inception; it did not become so only once the Supreme Court issued its decision in All Around Underground. Similarly, impounds ordered by state troopers without the exercise of discretion prohibited by the policy were unlawful because they exceeded statutory authority and constitutional restraints, a fact that was as true before the decision in All Around Underground as it was afterwards.

The Georgia Supreme Court's decision in Gore, 256 S.E.2d at 329, is instructive on this point. In Gore, the defendant tow company impounded plaintiff's vehicle in accordance with a state statute that was in force and effect at the time of the seizure. Nonetheless, the Court held that the tow company could be held liable for conversion when that statute was subsequently held unconstitutional. The statute in Gore surely appeared valid when the tow company impounded the vehicle in that case, just like the State Patrol argues that its impound regulation was valid prior to All Around Underground. However, in both instances, the legal authority relied

on by the defendant was defective and the impoundments were in fact unlawful.

The State Patrol also argued before the trial court that the seizures under its mandatory impound policy had lawful justification because it reasonably assumed that the legislature intended to allow mandatory impounds for DWLS violations by enacting the 1998 amendment of RCW 46.55.113. Even if the State Patrol's interpretation of the intent behind the 1998 amendment appeared reasonable at the time, however, this belief is irrelevant. The fact remains that in All Around Underground, the Supreme Court held that the State Patrol's mandatory impound policy exceeded the agency's authority under RCW 46.55.113 and that impounds pursuant to that policy were unlawful.

The State Patrol's reliance on the presumed legislative intent behind the 1998 amendment suffers from two additional flaws. First, the Supreme Court necessarily rejected this argument in All Around Underground when it determined that the legislature did not intend to allow impounds absent the exercise of discretion by individual officers.

Second, even had this been the legislature's intent, it would have foundered on the requirements of Washington Constitution art. 1, § 7. The

legislature cannot override the constitution any more than the State Patrol can.

As the Supreme Court explained in All Around Underground, Washington's "courts have long held it is a constitutional requirement to consider reasonable alternatives to impoundment before impounding a vehicle." 148 Wn.2d at 155 n.8. In particular, the courts have consistently stated and applied this rule even where impoundment was authorized by statute for violation of DWLS or similar traffic offenses. See, e.g., Coss, 87 Wn. App. at 889; Hill, 68 Wn. App. at 300; Barajas, 57 Wn. App. at 556; Stortroen, 53 Wn. App. at 654; Reynoso, 41 Wn. App. at 113. Although the language of the 1998 amendment to RCW 46.55.113 differs in some respects from the language of the statutes in those cases, those differences are irrelevant. The legislature cannot trump the constitution, and a change in statutory language cannot alter the constitutional requirement that an officer exercise discretion and consider reasonable alternatives before impounding a vehicle.

What the State Patrol's argument really amounts to is a good faith defense to liability for conversion. However, as explained in section III.C.3, above, even if the State Patrol acted in the good faith belief that its mandatory impound policy was consistent with state law, its lack of

knowledge or wrongful intent is no defense to a claim of conversion. There is no question that the State Patrol intended to impound the class members' vehicles and did so voluntarily. Because the nondiscretionary impounds in fact exceeded the lawful authority of the State Patrol and its troopers, the agency is liable to the plaintiff class members for conversion of their property.

In sum, there is no basis in law or fact for the defendant to argue that its mandatory impound policy was a valid exercise of agency authority until the time that the Supreme Court said it was not. The fact that individual impounds were conducted consistent with that policy and with WAC 204-96-010, the codification of that policy, simply proves plaintiff's point. All of the impounds under the mandatory policy exceeded the State Patrol's authority under RCW 46.55.113 and the Washington Constitution and therefore lacked lawful justification; compliance with an *ultra vires* administrative rule does not change that conclusion.

D. The Trial Court Erred In Granting Judgment To The State Patrol On The Basis Of Restatement (Second) of Torts § 265.

Despite the precedents of Boss and All Around Underground, the trial court relied on Restatement (Second) of Torts § 265 to relieve the State Patrol of liability for its mandatory impound policy. The trial court's

reliance on Restatement § 265 is misplaced and conflicts with the State's waiver of sovereign immunity and Supreme Court precedent refusing to extend qualified or good faith immunity to government entities.

1. Restatement § 265 Is Inapplicable To This Case Because The State Patrol's Mandatory Impound Policy Exceeded The Agency's Lawful Authority And Was Unreasonable Under The State Constitution.

Restatement (Second) § 265 has never been adopted by the Washington appellate courts and has rarely been cited by the courts in any jurisdiction. However, even if the Washington courts were to accept § 265 as a general proposition, it is inapplicable to this case by its own terms.

Restatement (Second) § 265 states:

One is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion if he is acting in discharge of a duty or authority created by law to preserve the public safety, health, peace, or other public interest, and his act is reasonably necessary to the performance of his duty or the exercise of his authority.

As the text and comments to § 265 make clear, the provision provides immunity from claims only where a police officer's actions are authorized under law and reasonable under the circumstances. Comment (a) to the section explains, "It is beyond the scope of this Restatement to state when an officer or a private citizen is under a duty to act, *or is authorized to act.*" Restatement (Second) § 265, comment a (emphasis

added). The Restatement and its comments further state that the section applies only if an officer's actions are "found to be authorized," *id.*, and if the officer "exercise[s his authority] in a reasonable manner," Restatement (Second) § 265.

Thus, courts interpreting this provision have held that a law enforcement officer is not relieved of liability for the seizure or destruction of property in the course of his duties if he acted unreasonably, Downs v. United States, 522 F.2d 990, 1004 (6th Cir. 1975), or in excess of his constitutional or statutory authority, *e.g.*, Blake v. Town of Delaware City, 441 F. Supp. 1189, 1205 & n.64 (D. Del. 1977) (retention of vehicles after charges against plaintiff were dismissed and charging ordinance was declared unconstitutional was not privileged under Restatement § 265); Lee v. Radulovic, 1994 U.S. Dist. LEXIS 9871, *12 (N.D. Ill. 1994) (if officer entered home without warrant or permission, that "would defeat the defendants' claim of privilege").

In addition, § 265 applies on its face only to individual actions by individual officers or citizens. Nothing in the language of § 265 or any of the reported cases suggests that it can be extended to immunize a municipality from liability for an unlawful policy or practice. As

explained in subsection D.2, *infra*, to do so would conflict with the law in this State regarding limitations on the immunity of governmental entities.

In this case, the State Patrol's mandatory impound policy is not shielded by § 265 because the policy exceeded the State Patrol's statutory and constitutional authority. See Sections III.C.1-2, *supra*. Section 265 does not apply where a law enforcement action – or policy – is not authorized by law. Restatement § 265, comment a; Lee, 1994 U.S. Dist. LEXIS 9871, *12. Moreover, the Washington courts repeatedly have held that impoundment of vehicles without the consideration of reasonable alternatives is *per se* unreasonable and violates Washington Constitution art. 1, § 7. E.g., Houser, 95 Wn.2d at 153; Barajas, 57 Wn. App. at 561-62; Reynoso, 41 Wn. App. at 118-19; Hill, 68 Wn. App. at 306. Because the State Patrol's mandatory impound policy stripped officers of the ability to consider reasonable alternatives, the policy and the seizures pursuant to that policy were by definition unreasonable and unauthorized and outside the limited privilege created by § 265.

2. Application Of § 265 In This Case Would Conflict With The State's Waiver Of Sovereign Immunity And Supreme Court Precedent Denying Good Faith Or Qualified Immunity To Government Agencies.

Application of Restatement § 265 to relieve the State Patrol of liability in this case also would conflict with Washington Supreme Court

authority holding that governmental entities are not entitled to good faith immunity under Washington law. Section 265 essentially provides qualified or good faith immunity to governmental actors for claims of conversion and trespass to chattels. See Reimer v. Short, 578 F.2d 621, 628 & n.5 (5th Cir. 1978).⁷ However, the Washington Supreme Court expressly has held that extension of good faith immunity to government agencies, as opposed to individual officers, would conflict with the broad waiver of sovereign immunity enacted by the legislature in Ch. 4.92 RCW. See Savage v. State, 127 Wn.2d 434, 444, 899 P.2d 1270 (1995) (calling RCW 4.92.090 “one of the broadest waivers of sovereign immunity in the country”).

In Savage, 127 Wn.2d at 445-47, the Supreme Court held that a state agency generally does not share the personal immunity enjoyed by its officers and is subject to liability for their tortious conduct even where the officers are qualifiedly immune. The Court explained that extension of qualified, or good faith, immunity to the government entity would be contrary to the purpose of the legislature in abrogating the state’s sovereign immunity:

⁷ In Reimer, a 42 U.S.C. § 1983 case, the court referenced Restatement § 265 as possibly conferring a reasonable good faith defense to conversion and trespass to chattel claims. Id. The court also noted comment a to the Restatement and wrote, “it is questionable whether the common law affords a police officer who has committed a trespass to a chattel or a conversion the defense of reasonable good faith.” Id.

In sum, given the legislative mandate abrogating sovereign immunity, the different purposes personal and government immunity are designed to serve, and the policy concerns just discussed, extending the qualified personal immunity of parole officers to the State would be not only judicially unwarranted but normatively unwise. Government liability, combined with qualified personal immunity for officers, is better suited to accommodate the concerns with which tort law is ultimately concerned. The benefits of maintaining this dichotomy in the liability structure have been identified by one commentator:

exclusive governmental liability may have advantages from a deterrence point of view. By encouraging higher standards of care in the selection, training, equipment, and supervision of personnel, such a system can have at least as positive an effect on governmental performance as one based upon liability of the individual official. It would also protect the official from any paralyzing threat of direct personal liability, thus presumably improving morale and effectiveness.

(Footnote omitted.) George A. Bermann, *Integrating Governmental and Officer Tort Liability*, 77 Colum. L. Rev. 1175 (1977).

127 Wn.2d at 447. The Court further explained that “maintaining the potential of state liability ... can be expected to have the salutary effect of providing the State an incentive to ensure that reasonable care is used in fashioning guidelines and procedures....” *Id.* at 1276.

In reaching this conclusion, the Supreme Court implicitly overruled its decision in Guffey v. State, 103 Wn.2d 144, 690 P.2d 1163 (1984), an impound case in which the Court extended the police officer's individual qualified immunity to the State. See Savage, 127 Wn.2d at 459 (Madsen, J., dissenting) (recognizing majority's implied overruling of Guffey).⁸ The Savage Court explained that Guffey is "not sound authority for the extension of qualified immunity from the agent to the State" and further pointed out that Guffey was "based on a misapprehension about a general agency principle which was overruled by a more recent case." 127 Wn.2d at 442-43.⁹

In Hertog v. City of Seattle, 138 Wn.2d 265, 280-81 n.4, 979 P.2d 400 (1999), the Court affirmed its holding in Savage and explained that an individual government officer might have qualified personal immunity if he acted in accordance with agency regulations and directives, but that the government agency itself would remain liable if those regulations and directives were unreasonable or otherwise deficient. That is precisely the situation here. Individual state troopers might have qualified personal

⁸ The majority in Savage stated that Guffey had been impliedly overruled by Babcock v. State, 116 Wn.2d 596, 809 P.2d 143 (1991), a contention that Justice Madsen disputed. Compare Savage, 127 Wn.2d at 439 n.3 (majority opinion) and id. at 459 (Madsen, J., dissenting).

⁹ The Court also noted at least three other specific problems with Guffey's reasoning and conclusion. Id. at 443.

immunity for seizing vehicles in accordance with the State Patrol's DWLS impound policy. Agency commanders also might be entitled to qualified personal immunity for directing the mandatory impound policy in the belief that it was authorized by the amendment to RCW 46.55.113. However, under Savage and Hertog, no good faith or qualified immunity extends to the State Patrol itself, whether its liability is premised on the agency's own misfeasance in promulgating the mandatory impound policy or on *respondeat* liability for the unlawful acts of its officers in impounding vehicles without the exercise of discretion required by the law and the constitution. Cf. Owen v. City of Independence, 445 U.S. 622, 650-56, 100 S. Ct. 1398, 63 L.Ed.2d 673 (1980) (under 42 U.S.C. § 1983, municipalities are not entitled to qualified immunity based on the good faith of their officers, even where the officers are qualifiedly immune). Because Restatement § 265 does nothing more than create a qualified immunity for officers who seize or damage property in the reasonable and authorized pursuit of their duties, extension of the § 265 privilege to the State Patrol itself would conflict with RCW 4.92.090 and Supreme Court precedent in Savage and Hertog.

In addition, application of § 265 to this case would create a special class of claims for which the government is immune. In Savage, Hertog,

and related cases, the courts have held that government agencies are not entitled to good faith immunity against claims of negligence, assault, or other causes of personal injury. Nothing in Savage or its progeny provides any basis for carving out an exception to this rule for claims of conversion or trespass to chattels. For this reason, as well, the trial court erred in adopting the principles of § 265 and conferring good faith immunity on the State Patrol.

In sum, extension of the good faith privilege of Restatement § 265 to an unlawful, *ultra vires* municipal policy is not supported by the language or logic of the provision and effectively extends a qualified immunity to the State Patrol in contravention of Savage and Hertog. The trial court was incorrect in applying the logic of that provision to the State Patrol, and this Court should correct that error.

E. The State Patrol Is Not Entitled To Legislative Immunity.

Before the trial court, the State Patrol argued that it is entitled to legislative immunity because it embodied its mandatory DWLS impound policy in a codified rule, WAC 204-96-010. The trial court correctly rejected this contention. However, should the State Patrol reassert the argument in this appeal, the Court should reject the contention for at least four reasons.

1. Plaintiff's Conversion Claim Arises From The Physical Impoundment Of Motor Vehicles, Not The Adoption Of An Administrative Rule.

First, plaintiff's claim for conversion does not arise from the State Patrol's promulgation of an administrative rule, but from the physical act of impounding motor vehicles without exercising the discretion required by RCW 46.55.113 and Washington Constitution art. 1, § 7. The cause of action would be the same if the State Patrol had never adopted the rule, but simply trained and directed its officers to implement a mandatory impound policy for DWLS vehicles.¹⁰ Indeed, the State Patrol is and should be liable under the doctrine of *respondeat superior* for the unlawful impounds conducted by its troopers even in the absence of a central policy and direction. See Savage, 127 Wn.2d at 438 n.2 (State can be sued under both a *respondeat* theory and for its own negligence for injuries caused by an inadequately supervised parolee); Robel v. Roundup Corp., 148 Wn.2d 35, 52-53, 59 P.3d 611 (2002) (“[O]nce an employee's underlying tort is established, the employer will be held vicariously liable if the employee was acting within the scope of his employment.”). The State Patrol's

¹⁰ In fact, in Price v. City of Seattle, class counsel is pursuing a similar action against the City of Seattle. The City's mandatory impound policy was never codified, but was implemented through training and supervision of Seattle Police Department officers. There is no rational basis for concluding that a municipality that implements a mandatory impound policy through training and policy direction may be held liable for conversion, but that the State Patrol is entitled to legislative immunity for an identical practice simply because of its codification.

alleged legislative act in codifying the mandatory impound policy does not provide the basis for plaintiff's conversion claim, and legislative immunity does not apply.

The absurdity of the State Patrol's argument can be demonstrated by examples only slightly more extreme than the present case. If the State Patrol implemented a policy of using chokeholds to subdue all suspects or of strip-searching all arrestees it surely could not argue that victims of such practices would be deprived of a cause of action because the agency took the step of embodying the policy in a codified rule. To hold otherwise would allow all government agencies to shield themselves from liability for injuries caused by any *ultra vires* or unconstitutional policy or practice, no matter how egregious, simply by memorializing the policy in a regulation.

2. Legislative Immunity Extends Only To Individual Legislators, Not The Governmental Entity Itself.

Second, legislative immunity adheres to *individual* legislators, not to the municipal or state government as a whole. See, e.g., Carver v. Foerster, 102 F.3d 96, 102-05 (3rd Cir. 1996) ("We know of no circuit that currently accepts the doctrine of municipal legislative immunity under Section 1983.") (citing cases); Berkley v. Common Council, 63 F.3d 295, 300 (4th Cir. 1995) (same), *cert. denied*, 516 U.S. 1073 (1996); Kuzinich

v. County of Santa Clara, 689 F.2d 1345, 1349 (9th Cir. 1982) (individual legislators entitled to legislative immunity, but “[t]here is no immunity protecting the County”). This point was made in Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 405 n.29, 59 L.Ed.2d 401, 99 S.Ct. 1171 (1979), when the Supreme Court held that the individual members of the governing board of an interstate compact were entitled to legislative immunity, then observed, “If the respondents have enacted unconstitutional legislation, there is no reason why relief against TRPA itself should not adequately vindicate petitioners’ interests.”

The rationale for limiting legislative immunity to individual office-holders was explained at length in Carver, 102 F.3d at 103-04:

...First, we do not believe local governments face the same mix of perverse incentives as individual legislators when sued or threatened with suit.... If the legislator is held personally liable for suit, however, even the most conscientious public officer will be encouraged to vote against legislation that may be beneficial for the community at large for fear that personal liability will outweigh his genuine interest in helping his constituents.... Or he may even decide to forgo public office altogether. In sum, the result of personal liability is the chilling of potentially beneficial legislative activity and the distraction of public officials from community matters....

The same concerns do not arise when local governments are held liable for violations under § 1983. First, city or county liability for constitutional violations only adds to the collective risk of loss that the legislator already should be considering when he decides whether or not to enact a new piece of legislation. If a county policy

causes a constitutional wrong, the county should be made to bear the losses caused by that violation....

In addition, liability on the part of the local governing body may deter future unconstitutional legislation, thereby contributing to the enforcement of constitutional norms within our society....

Finally, because a legislator's own money is not at risk, county liability does not distract the legislator from his job of serving the community's interests.

This reasoning mirrors that set forth by the Washington Supreme Court in King v. City of Seattle, 84 Wn.2d 239, 244, 525 P.2d 228 (1974) (quoted in Bender v. City of Seattle, 99 Wn.2d 582, 590, 664 P.2d 492 (1983)), which denied extension of discretionary immunity to government entities:

These fears [upon a rationale for personal liability of government officials for discretionary acts] are not founded upon fact, however, if it is the municipality and not the employee who faces liability. The most promising way to correct the abuses, if a community has the political will to correct them, is to provide incentives to the highest officials by imposing liability on the governmental unit. The ranking officials, motivated by threats to their budget, would issue the order that would be necessary to check the abuses in order to avoid having to pay damages.

See also Savage, 127 Wn.2d at 445 ("To insulate the Government from liability for the inevitable mishaps which will occur when its employees perform their functions without fear of liability not only is unjust, but also serves no purpose for which sovereign immunity need exist") (quoting Downs v. United States, 382 F. Supp. 713, 750 (M.D. Tenn. 1974)).

The cases cited by the State Patrol to the trial court are not to the contrary. In Bogan v. Scott-Harris, 523 U.S. 44, 53, 140 L.Ed.2d 79, 118 S. Ct. 966 (1998), the mayor and city council members were held entitled to legislative immunity under § 1983 for introducing, passing, and signing a bill, but the Court recognized that liability could still attach to the municipal government. In Kaahumanu v. County of Maui, 315 F.3d 1215, 1217 (9th Cir. 2003), individual members of the county council sought legislative immunity from claims under 42 U.S.C. § 1983, but defendants' motion did not extend to the claims against the county itself. The same was true in Mission Springs, Inc. v. City of Spokane, 134 Wn.2d 947, 969, 954 P.2d 250 (1998), where legislative immunity was asserted only by individual members of the city council, not the municipality itself.

In short, legislative immunity is inapplicable here, because plaintiff sued only the State Patrol, not any individual agency officials.

3. Legislative Immunity Does Not Extend To The Type Of Agency Rulemaking That Occurred In This Case.

Third, even if legislative immunity could attach to a law-making entity, rather than the individual legislators, it does not extend to the type of garden-variety rulemaking conducted by the State Patrol here. In Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 734, 64 L.Ed.2d 641, 100 S. Ct. 1967 (1980), the United States Supreme Court

applied legislative immunity to the Virginia Supreme Court's issuance of and failure to amend unconstitutional professional ethics rules, because the Virginia Court "is exercising the State's *entire* legislative power with respect to regulating the Bar, and its members are the State's legislators for the purpose of issuing the Bar Code." (emphasis added). However, the Court noted that legislative immunity is not warranted where state officials "are merely exercising a delegated power to make rules in the same manner that many executive and agency officials wield authority to make rules in a wide variety of circumstances." *Id.*

Here, the State Patrol was not exercising the state's "entire legislative power" with respect to DWLS impounds nor was the agency the state's designated legislative body for that subject. To the contrary, the State Patrol was implementing a statute, RCW 46.55.113, adopted by the state legislature, a typical executive function and one that also was delegated to municipalities throughout the State. Holding that a state agency is immune from liability whenever it enacts regulations to implement a statute, even if the regulations violate the statute and State constitution, stretches the concept of legislative immunity beyond any reasonable bounds.

4. Legislative Immunity Does Not Extend To Enforcement Of An Unlawful Rule.

Fourth, in Supreme Court of Virginia, the United States Supreme Court also held that a state agency does not enjoy legislative immunity for *enforcing* a rule that it created even if it was entitled to immunity for *enactment* of the rule. In that case, the Virginia Court possessed “independent enforcement authority” over members of the bar in addition to rulemaking authority with respect to the Bar Code. 446 U.S. at 724, 734. Therefore, while the members of the Virginia high court enjoyed legislative immunity for promulgating unconstitutional provisions in the Bar Code, the Court and its chief justice could properly be held liable in their *enforcement* capacities. *Id.* at 736. The Court refused to allow the Virginia Court to shield itself from liability by authorizing its own tortious misconduct by legislative rule.

Similarly, the State Patrol cannot absolve itself of liability for its unlawful seizure of class members’ vehicles by promulgating a rule authorizing the misconduct. Like the Virginia Supreme Court, the State Patrol had authority under RCW 46.55.113 to both promulgate *and enforce* the former WAC 204-96-010. The Washington Supreme Court has held that the State Patrol’s mandatory impoundment of vehicles under WAC 204-96-010 violated Washington statutory law. All Around

Underground, 148 Wn.2d at 159. The Court indicated that the nondiscretionary impoundments likely violated the state and federal constitutions as well. Id. at 155 n.8. Thus, the State Patrol may be held liable for its tortious misconduct *in its enforcement capacity*, even if it was operating under color of a rule bearing the characteristics of legislation, just as the Virginia Supreme Court could be held liable for enforcing an unconstitutional rule that it promulgated.

The Washington Supreme Court has recognized the public benefit of allowing suits for damages against state agencies for the wrongful formulation and implementation of substandard agency rules. “[M]aintaining the potential of state liability...can be expected to have the salutary effect of providing the State an incentive to ensure that reasonable care is used in *fashioning guidelines and procedures*” for agency activities. Savage, 127 Wn.2d at 446 (emphasis added). That salutary effect is particularly appropriate here, where the State Patrol adopted a mandatory impound policy that exceeded its authority under the enabling legislation and violated the safeguards on personal liberty and property guaranteed by the Washington Constitution. The State Patrol cannot immunize itself from all liability for its violation of citizens’ constitutional

and statutory rights simply by promulgating a WAC purporting to authorize the tortious conduct.

V. CONCLUSION

There is no factual dispute that the Washington State Patrol developed and implemented a mandatory impound policy for DWLS vehicles. Following All Around Underground, there is equally no question that this policy violated the agency's authority under RCW 46.55.113. Thirty years of consistent judicial precedent also establish that this policy was unreasonable under Washington Constitution art. 1, § 7.

Because impounds pursuant to the mandatory policy lacked lawful authority and were constitutionally unreasonable they constituted conversion of the class member's vehicles. The Washington legislature and courts have recognized that it is precisely in such circumstances that state agencies should be held liable in tort in order to deter the trampling, whether intentional or inadvertent, of citizens' rights that have been secured by the state laws and constitution. The trial court's application of Restatement (Second) of Torts § 265 to relieve the State Patrol of liability is inconsistent with the limited scope of that provision and conflicts with the State's waiver of sovereign immunity and the Supreme Court's recognition that good faith immunity does not extend to state agencies.

For these reasons, the Court should reverse the trial court's grant of summary judgment to the Washington State Patrol and should remand with directions to grant plaintiff's motion for partial summary judgment on liability.

RESPECTFULLY SUBMITTED this **21th** day of **April, 2006**.

SCHROETER, GOLDMARK & BENDER



ADAM J. BERGER, WSBA #20714
Counsel for Appellant
810 Third Avenue, Suite 500
Seattle, Washington 98104
(206) 622-8000

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

MARK POTTER, on behalf of
himself and the class he represents,

Plaintiff,

v.

WASHINGTON STATE
PATROL, a Washington State
Agency,

Defendant.

No. 34274-0-II

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on **April 21, 2006**, the following
document:

APPELLANT'S OPENING BRIEF

was served on the following counsel **via ABC Legal Messenger**

Shannon Inglis, AAG
900 Fourth Avenue, Suite 2000
Seattle, WA 98164



Mary Frøelich
Paralegal

BY _____
STATE OF WASHINGTON
COURT OF APPEALS

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APPENDIX A

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARION PRICE, et al.,

Plaintiffs,

v.

THE CITY OF SEATTLE, et al.,

Defendants.

No. C03-1365P

ORDER GRANTING PLAINTIFFS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND DENYING
DEFENDANT'S MOTION TO
DISMISS CLASS LIABILITY
CLAIMS

This matter comes before the Court on Plaintiffs' Motion for Partial Summary Judgment on Conversion Claim, (Dkt. No. 120), and Defendant the City of Seattle's ("the City") Motion to Dismiss Class Liability Claims, (Dkt. No. 123). Having reviewed the pleadings and supporting documents, and having heard oral argument by the parties, the Court hereby MODIFIES the class definition, GRANTS Plaintiffs' motion, and DENIES the City's motion.

For the reasons outlined below, the class is redefined to include "all registered owners of motor vehicles impounded by the City solely for driving while a license is suspended or revoked from March 20, 2000 through December 27, 2002." This excludes registered owners of motor vehicles impounded by the City for driving while a license is suspended or revoked ("DWLS") and other impoundable offenses.

The Court grants Plaintiff's motion. The City's DWLS impound policy did not allow officers to exercise the necessary discretion to consider the availability of reasonable alternatives to impound.

1 It was effectively a mandatory impound policy with limited exceptions. The City does not present
2 sufficient evidence to show a genuine issue of fact on this question. A policy barring consideration of
3 reasonable alternatives to impound is unlawful. Impounds carried out pursuant to such an unlawful
4 policy constitute conversion. Contrary to the City's contention that Plaintiffs cannot show causation
5 on a class-wide basis, causation is shown by the fact that all cars impounded solely for DWLS
6 violations were necessarily impounded pursuant to an unlawful policy. Post hoc rationalizations that
7 each of the impounds would have been reasonable under the circumstances does not save the City
8 from summary judgment.

9 The Court denies the City's motion. The key issue in Plaintiffs' impound related claims is the
10 nature of the City's policy and whether that policy was unlawful, not whether each impound for a class
11 member's car was reasonable under the circumstances. Similarly, the key issue in Plaintiffs' due
12 process post-impound hearing claim is the nature of the hearing that was available as a rule, not
13 whether each class member demanded a hearing in which to argue that the impound policy was
14 unlawful. Both are issues that are appropriate for class treatment.

15 BACKGROUND

16 According to Plaintiffs, the City implemented a policy since at least 1999, called "Operation
17 Impound," whereby it required police officers to impound every vehicle after its driver was pulled over
18 and it was discovered that the driver had a suspended license regardless of the circumstances and
19 whether there were reasonable alternatives to impoundment. The policy, according to Plaintiffs, did
20 not allow police officers the discretion to determine whether there were reasonable alternatives to
21 impound. The City denies these allegations and contends that officers did have discretion in
22 determining whether to impound such cars.

23 Plaintiffs filed suit alleging conversion, negligent, reckless, and wanton misconduct, unjust
24 enrichment, and violations of state statute, the Washington Constitution, and the Fourth and Fourteenth
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1 Amendments. The Court certified a damages class of “all registered owners of motor vehicles
2 impounded by the City for DWLS violations from March 20, 2000 through December 27, 2002.”

3 Plaintiffs now move for summary judgment on their conversion claim. The City moves to
4 decertify the class and dismiss the class claims.

5 ANALYSIS

6 Summary judgment is not warranted if a material issue of fact exists for trial. Warren v. City
7 of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995), cert. denied, 516 U.S. 1171 (1996). The underlying
8 facts are viewed in the light most favorable to the party opposing the motion. Matsushita Elec. Indus.
9 Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). “Summary judgment will not lie if . . . the
10 evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v.
11 Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The party moving for summary judgment has the
12 burden to show initially the absence of a genuine issue concerning any material fact. Adickes v. S.H.
13 Kress & Co., 398 U.S. 144, 159 (1970). However, once the moving party has met its initial burden,
14 the burden shifts to the nonmoving party to establish the existence of an issue of fact regarding an
15 element essential to that party’s case, and on which that party will bear the burden of proof at trial.
16 Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). To discharge this burden, the nonmoving
17 party cannot rely on its pleadings, but instead must have evidence showing that there is a genuine issue
18 for trial. Id. at 324. “The mere existence of a scintilla of evidence in support of the [non-moving
19 party’s] position will be insufficient; there must be evidence on which the jury could reasonably find
20 for the [non-moving party].” Anderson, 477 U.S. at 252.

21 I. Plaintiffs’ Motion

22 The tort of conversion is the willful and unlawful interference with a person’s use or
23 possession of his property. Judkins v. Sadler-Mac Neil, 61 Wn.2d 1, 3, 376 P.2d 837 (1962);
24 Demelash v. Ross Stores, Inc., 105 Wn.App. 508, 522, 20 P.3d 447 (2001). Contrary to the City’s
25 contention otherwise, conversion need not involve a permanent deprivation of property; it includes

1 temporary deprivations. Id. If a municipality impounds a car pursuant to a policy that has been
2 deemed unlawful, the impound constitutes a conversion. Boss v. City of Spokane, 63 Wn.2d 305,
3 307, 387 P.2d 67 (1963) (impound pursuant to a police department policy that exceeded a city
4 ordinance amounted to a conversion).

5 For a vehicle impound to be lawful under Article I, § 7 of the Washington Constitution, the
6 impound must be reasonable. It is unreasonable to impound a vehicle if there is no probable cause and
7 “where a reasonable alternative to impoundment exists.” State v. Houser, 95 Wn.2d 143, 153, 622
8 P.2d 1218 (1980); State v. Hill, 68 Wn.App. 300, 306, 842 P.2d 996 (1993) (“In Washington,
9 impoundment is inappropriate when reasonable alternatives exist.”); State v. Coss, 87 Wn.App. 891,
10 898, 943 P.2d 1126 (1997). This principle underlies the Supreme Court’s decision in All Around
11 Underground. The central focus in All Around Underground was RCW 46.55.113, which provided
12 that when a driver is arrested for a DWLS violation, the vehicle is subject to impound, pursuant to
13 applicable local ordinance, at the direction of a law enforcement officer. The Supreme Court
14 interpreted this statute as merely granting discretionary authority to impound for DWLS violations but
15 not mandating impounds for DWLS violations. 148 Wn.2d at 154-55. Without passing judgment on
16 the constitutionality of RCW 46.55.113, the Court noted that grants of discretionary impound
17 authority have been found constitutional before, and in fact the constitution requires the officers
18 consider reasonable alternatives to impound, which necessarily relies on the officer exercising
19 discretion. Id. at 155 and n.8.

20 Here, the evidence outlined below shows that the City’s DWLS impound policy instructed
21 Seattle Police Department (“SPD”) officers to impound all cars involved in DWLS violations. While
22 the policy provided for limited exceptions (i.e. safety and/or officer being called away on emergency),
23 those exceptions did not include the consideration of reasonable alternatives to impoundment.
24 Similarly, while some officers may not have followed the policy, that does not negate the mandatory
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1 nature of the policy. In effect, the City had a mandatory impound policy allowing for limited
2 exceptions.

3 Plaintiffs present evidence from Seattle Police Department ("SPD") that shows the mandatory
4 nature of the DWLS impound policy. First, SPD's Operation Impound officer training documents
5 instructed officers to impound cars involved in DWLS violations in all circumstances unless extreme
6 circumstances justify not impounding, such as when the officer is called away on a pressing emergency
7 or when impoundment would put either the officer or the passengers in danger. (Berger Decl., Ex. 10
8 ("Not impounding the vehicle of a suspended driver is like not arresting a DWI suspect. This can only
9 be done on those rare occasions when extreme circumstances justify it."), Ex. 11, Ex. 12 ("Even if the
10 registered owner was a passenger with a valid operator's license and stated they were unaware that the
11 driver was DWLS, the vehicle may be impounded.")).

12 Second, SPD's policy on impoundments generally required the officer to consider reasonable
13 alternatives to impoundment as a basis for not impounding the car. (Id., Ex. 14 ("A vehicle should be
14 impounded only after all other reasonable alternative dispositions have been eliminated.")). SPD's
15 "Training Topic" on DWLS impounds specifically distinguished the procedures for DWLS impounds
16 from the procedures for impounds generally. (Id., Ex. 12 ("The purpose of this Training Topic is to
17 explain the procedure for citing, booking, and impounding vehicles driven by DWLS [] violators. For
18 information on other types of impounds, read Department Policy and Procedure Manual Section 2.089
19 on Impounding Vehicles [SPD's policy on impoundments generally, cited above].")).

20 Third, in SPD records in individual DWLS cases from July, August, and September 1999,
21 SPD's Lt. Getchman in charge of Operation Impound informed officers that all cars involved in
22 DWLS violations must be impounded and requested an explanation as to why those particular cars
23 were not impounded. (Id., Ex. 4).

24 Fourth, in an SPD memorandum to officers detailing the number of DWLS citations and
25 impounds for 2000 and 2001, Lt. Getchman indicated that "SPD would prefer 100% impoundment;

1 however discretion may be used for reasons of safety or when otherwise advisable.” (Id., Ex. 15).
2 The memo noted that approximately 4% of all DWLS citations did not result in a vehicle impound.
3 Plaintiffs point out that most of these were due to auto theft, accident, the car was a rental car or used
4 for a business, the officer was called away from the scene, or the officer felt compassion for the driver
5 and/or passengers.

6 Plaintiffs also present evidence from the City. In various individual impound appeals, Lt.
7 Getchman, the officer in charge of the Operation Impound program, stated unequivocally in an
8 affidavit that officers were instructed to impound all vehicles driven by DWLS violators (except in
9 cases where the officer was called away to handle an emergency situation). (Id. Ex. 2 (“[O]fficers
10 were instructed that impoundment of a vehicle driven by a person with a suspended driver’s license is
11 required in all cases and is not optional with the officer.”) (emphasis added)), Ex. 3). Other officers
12 testified in other individual impound appeals that SPD’s policy was to require impound in all cases
13 without considering the availability of reasonable alternatives. (Id., Ex. 5). After the Washington
14 Supreme Court issued its decision in All Around Underground, the City’s attorney wrote an internal
15 email on the decision stating that the Supreme Court’s ruling would apply to the City’s ordinance
16 because it was identical to the one struck down in All Around Underground. (Id., Ex. 19).

17 At oral argument, the City claimed that these affidavits and testimony from the individual
18 impound appeals should be discounted on the ground that the City’s defense is now different; counsel
19 claimed that the City was defending against potential equal protection claims in these prior cases,
20 whereas now it is defending against a class action conversion claim (as well as state and federal
21 constitutional claims. While the City may certainly change its legal defenses according to the claim
22 brought against it, it cannot change the facts. The City’s representatives testified under oath to
23 municipal and superior court judges that the policy was mandatory.

24 Using a different tactic, the City attempts to counter with evidence that it claims shows that the
25 City’s impound policy allowed officers to exercise discretion in deciding whether to impound cars

1 involved in DWLS violations. This evidence, however, is not sufficient to show that there is a genuine
2 issue of fact as to the nature of the City's DWLS impound policy. First, two SPD officers state in
3 declarations that they do not believe that the City ever had a mandatory impound policy and that based
4 on their training, they were to use discretion in determining whether impound was warranted,
5 including considering whether there were any alternatives to impoundment. (Hughey Decl., ¶ 6,
6 Ornelas Decl., ¶ 10). Two officers' individual beliefs do not refute the existence of a policy that the
7 City and SPD consistently asserted required mandatory impounds.¹ Second, SPD Chief of Police R.
8 Gil Kerlikowske states in a declaration that the SPD did not have a policy requiring mandatory
9 impounds of cars driven by DWLS violators and that officers were trained to use their discretion in
10 determining whether to impound. (Dkt. No. 75, Ex. 39; see also Berger Decl., Ex. 18 (Kerlikowske
11 Dep.)). Chief Kerlikowske's statements do not indicate that officers were trained to consider the
12 availability of reasonable alternative to impound as a reason to decline to impound for a DWLS
13 violation.

14 Third, the City points to deposition testimony by Lt. Getchman, but his testimony contradicts
15 his prior unequivocal affidavit. "[A] party cannot create an issue of fact by an affidavit contradicting
16 his prior deposition testimony." Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991).
17 This same logic applies when the witness first testifies via affidavit, but later testifies to the contrary in
18 deposition. Lt. Getchman's deposition was taken November 2, 2004 -- well after this litigation was
19 underway and the salient issues became clear to the parties. He stated that SPD was not trying to
20 impound 100% of the cars, but then he was asked if he ever told officers that SPD would prefer 100%
21 impound to which he responded that he had. (Buck Decl., Ex. 1 (Getchman Dep.) at 38). Lt.
22 Getchman was asked if officers were instructed not to impound if a licensed driver was available, to
23 which he answered that he did not know if they were instructed but he understood that officers had

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25 ¹ Additionally, as Plaintiffs note in their reply, the City does not provide any documentation to
support these officers' statements about the training they received or the City's written policies.

1 discretion and would use it as necessary depending on the situation. (Id. at 41-42). Similarly, he was
2 asked if officers were instructed not to impound if the car could be legally parked at the scene, to
3 which he responded that officers perhaps had the option to leave the car parked but he could not point
4 to any written material to show that this was part of the City's DWLS impound policy. (Id. at 42-43).
5 To the extent that Lt. Getchman asserts in his deposition that SPD's policy was to allow officers to
6 exercise discretion, that assertion directly contradicts his prior affidavit that impoundment for DWLS
7 violations was not optional with the officers. Thus, this deposition testimony is not sufficient to
8 survive summary judgment.

9 The City argues unpersuasively that reasonableness can be determined only by looking at the
10 facts and circumstances of each individual case. As support, the City points to the various impounds
11 of cars driven by named Plaintiff Allen R. Nunnery, in which two officers state that they each exercised
12 discretion in deciding whether to impound Mr. Nunnery's car, including considering whether there
13 were any reasonable alternatives to impoundment, and concluded based on the circumstances that
14 impound was appropriate.² It is true that "[t]he reasonableness of a particular impoundment must be
15 determined from the facts of each case." Coss, 87 Wn.App. at 898; see also All Around Underground,
16 148 Wn.2d at 150 n.3. However, it is illogical to inquire into the reasonableness of the impounds done
17 pursuant to the City's DWLS impound policy when that policy barred the officer from making such an
18 inquiry. Regardless of whether the officers would have found any particular DWLS impound
19 reasonable because of a lack of reasonable alternatives, the City's policy was that the officer should
20 impound in all circumstances (unless called away on another emergency or the impound presented a
21 safety risk to the passengers). The City maintains that the officer's subjective understanding is not
22 controlling, but rather the objective facts determine the reasonableness of the impound. As such,
23 according to the City, post hoc determinations are acceptable in determining reasonableness. Under

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25 ² Officer Hughey decided not to impound Mr. Nunnery's car in a later encounter, but this
occurred in May, 2003, which was after the All Around Underground decision came out.

1 the City's theory, the City's policy would be irrelevant. That argument was rejected in All Around
2 Underground. The Supreme Court noted that the district court found in a post hoc fashion that the
3 impound at issue was reasonable and therefore compliant with the constitutional requirement to
4 exercise discretion. 148 Wn.2d at 150 n.2. The Supreme Court rejected that finding because it was
5 based on faulty logic. Because the state patrol regulation at issue divested officers from exercising
6 discretion, the officer "cannot have reasonably exercised discretion he did not have." Id. Thus, it is
7 illogical to justify impounds based on a post hoc reasonableness determination if the policy authorizing
8 the impound barred the officer from considering the reasonableness at the time. Because the City's
9 policy barred the officers from considering the availability of reasonable alternatives to impound, the
10 reasonableness of each of the impounds at issue has no bearing on whether the City impounded these
11 cars pursuant to an unlawful policy.

12 Lastly, the City's causation argument is not persuasive. Plaintiffs conceded at oral argument
13 that it may be appropriate to redefine the class to include only owners of cars that were impounded
14 solely for DWLS violations. By redefining the class as such, all of the cars impounded that fall within
15 the class were necessarily impounded pursuant to the City's DWLS impound policy. Therefore,
16 individual inquiries into the cause of the impound are not necessary.

17 In sum, the City's DWLS impound policy unlawfully precluded officers from considering the
18 availability of reasonable alternatives when determining whether to impound a car driven by a DWLS
19 violator. Because SPD officers impounded cars driven by DWLS violators pursuant to an unlawful
20 policy, the City is liable for conversion.

21 II. The City's Motion

22 The City argues that the class must be decertified because the lawfulness of each of the
23 impounds at issue depends of whether each impound was reasonable in light of the particular
24 circumstances of each case and that this is a fact-specific determination inappropriate for class
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1 treatment. Similarly, the City argues that the lawfulness under due process requirements of the post-
2 impound hearings is a fact-specific determination inappropriate for class treatment.

3 The City fails to present new evidence or new legal authority to justify bringing a motion on
4 issues that the Court has addressed on previous occasions. Further, the analysis above effectively
5 resolves the City's motion. Class treatment is appropriate because the core issue in this case is the
6 nature of the City's DWLS impound policy and its post-impound hearing procedure.

7 CONCLUSION

8 The Court MODIFIES the class definition to include "all registered owners of motor vehicles
9 impounded by the City solely for driving while a license is suspended or revoked from March 20, 2000
10 through December 27, 2002." This excludes registered owners of motor vehicles impounded by the
11 City for DWLS violations and other impoundable offenses.

12 The Court GRANTS Plaintiff's motion. The City's DWLS impound policy did not allow
13 officers to exercise the necessary discretion to consider the availability of reasonable alternatives to
14 impound. It was effectively a mandatory impound policy with limited exceptions. The City does not
15 present sufficient evidence to show a genuine issue of fact on this question. A policy barring
16 consideration of reasonable alternatives to impound is unlawful. Impounds carried out pursuant to
17 such an unlawful policy constitute conversion. Contrary to the City's contention that Plaintiffs cannot
18 show causation on a class-wide basis, causation is shown by the fact that all cars impounded solely for
19 DWLS violations were necessarily impounded pursuant to an unlawful policy. Post hoc
20 rationalizations that each of the impounds would have been reasonable under the circumstances does
21 not save the City from summary judgment.

22 The Court DENIES the City's motion. The key issue in Plaintiffs' impound related claims is
23 the nature of the City's policy and whether that policy was unlawful, not whether each impound for a
24 class member's car was reasonable under the circumstances. Similarly, the key issue in Plaintiffs' due
25 process post-impound hearing claim is the nature of the hearing that was available as a rule, not

1 whether each class member demanded a hearing in which to argue that the impound policy was
2 unlawful. Both are issues that are appropriate for class treatment.

3 The clerk is directed to provide copies of this order to all counsel of record.

4 Dated: June 27, 2005

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Marsha J. Pechman
United States District Court

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APPENDIX B

NON-WASHINGTON & NON-9TH CIRCUIT CASES

**WILLIAM BERKLEY, JR.; CARRIE L. CHANCE; ALLEN R. COPLEY;
ALFRED J. CAREY; HARMON H. MARKS; BASIL S. SCOTT; WILLIAM F.
THAXTON, Plaintiffs-Appellants, v. THE COMMON COUNCIL OF THE CITY
OF CHARLESTON, Defendant-Appellee. REGINA ALEXANDER, Amicus Curiae.**

No. 94-1121

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

63 F.3d 295; 1995 U.S. App. LEXIS 21666

**June 6, 1995, Argued
August 11, 1995, Decided**

PRIOR HISTORY: **[**1]** Appeal from the United States District Court for the Southern District of West Virginia, at Charleston. Charles H. Haden II, Chief District Judge. (CA-93-758-2).

DISPOSITION: REVERSED AND REMANDED

COUNSEL: ARGUED: James Anthony McKowen, HUNT, LEES, FARRELL & KESSLER, Charleston, West Virginia, for Appellants.

John Richard Fowler, HUDDLESTON, BOLEN, BEATTY, PORTER & COPEN, Charleston, West Virginia, for Appellee. ON BRIEF: Blake Benton, HUDDLESTON, BOLEN, BEATTY, PORTER & COPEN, Charleston, West Virginia, for Appellee.

Martha A. Geer, PATTERSON, HARKAVY & LAWRENCE, Raleigh, North Carolina, for Amicus Curiae.

JUDGES: Before ERVIN, Chief Judge, RUSSELL, WIDENER, HALL, MURNAGHAN, WILKINSON, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, and MOTZ, Circuit Judges, and PHILLIPS, Senior Circuit Judge. Judge Luttig wrote the majority opinion, in which Chief Judge Ervin, Judges Hall, Murnaghan, Wilkins, Niemeyer, Hamilton, Williams, Michael, and Motz and Senior Judge Phillips joined. Senior Judge Phillips wrote a special concurring opinion, in which Chief Judge Ervin and Judge Murnaghan joined. Judge Widener wrote a dissenting opinion. Judge Wilkinson wrote a dissenting opinion, in which **[**2]** Judge Russell and Judge Widener joined.

OPINIONBY: LUTTIG

OPINION: **[*296] OPINION**

LUTTIG, Circuit Judge:

We heard this case en banc to decide whether a municipality, here the City of Charleston, is entitled to absolute immunity from liability under 42 U.S.C. § 1983 for the unconstitutional enactments and actions of its local legislature. The numerous circuits that have addressed the question have unanimously concluded, in recognition of Supreme Court precedent, that municipalities are not entitled to such an immunity. We now join our sister circuits and hold that a municipality is not immune from liability under section 1983 for the enactments and actions of the local legislative body.

I.

In *Monell v. New York City Dep't of Social Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), the Supreme Court held that municipalities and other local governments are "persons" subject to liability for constitutional violations under 42 U.S.C. § 1983. *Id.* at 690. A municipality may only be found liable under section 1983, however, 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 **[**3]** body's officers." *Id.* Since *Monell*, municipalities and local governments have repeatedly, and unsuccessfully, attempted to secure some immunity from liability in suits brought under section 1983.

In the course of adjudicating these various claims to immunity, the Supreme Court has left no doubt that municipalities and local governments are not entitled to immunity from suits brought under section 1983. Chief Justice Rehnquist, writing for a unanimous Court, could

not have been any clearer when he observed recently that "unlike various government officials, municipalities do not enjoy immunity from suit -- either absolute or qualified -- under § 1983." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 122 L. Ed. 2d 517, 113 S. Ct. 1160, 1162 (1993). The Chief Justice based his observation in *Leatherman* on the Court's decision in *Owen v. City of Independence*, 445 U.S. 622, 63 L. Ed. 2d 673, 100 S. Ct. 1398 (1980), where, in denying municipalities a qualified immunity defense to claims brought under section 1983, see *id.* at 650, the Court "held" that "municipalities have no immunity from damages liability flowing from their constitutional violations," *id.* at 657. In the face [**4] of such clear and broad pronouncements by the Supreme Court, we have little trouble concluding that a municipality is not immune from section 1983 liability for unconstitutional enactments and other legislative activities of the local legislature. n1

n1 Our dissenting colleagues do not challenge our reading of this controlling caselaw. They ground their dissent instead exclusively on what they perceive to be the unacceptable policy implications of our decision. Ours, however, is not to craft a wise or effective policy, but rather, only to interpret section 1983 consistently with the Supreme Court's interpretation of that statute. In performing this task, we must assume that, to the extent they are relevant, the Court considered the forceful policy arguments advanced by the dissent before making the categorical statements that it did in *Monell*, *Owen*, *Lake Country Estates*, and *Leatherman*.

[*297] Apart from the unequivocal statements in the Court's opinions, the reasoning employed by the Court in *Owen* [**5] forecloses any other conclusion. In *Owen*, the Court explained that it will only recognize an immunity from suit under section 1983 where "a tradition of immunity was so firmly rooted in the common law [at the time of the statute's enactment] and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.'" *Id.* at 637. After surveying the common law at the time of the enactment of section 1 of the Civil Rights Act of 1871, the predecessor statute to section 1983, and after evaluating the public policy considerations behind municipal liability, the Court held that there was no justification in history or tradition, or in policy, for affording municipalities immunity from suit under section 1983.

With regard to the inquiry into tradition, the Court unqualifiedly concluded that "there is no tradition of immunity for municipal corporations." *Id.* at 638. Though the Court was able to identify two common law doctrines that might have served as a basis for municipal immunity, it held that neither of these immunities survived Congress' enactment of section 1 of the Civil Rights Act of 1871. *Id.* at 644. [**6]

The first of these common law doctrines "sought to distinguish between a municipality's 'governmental' and 'proprietary' functions," with the municipality subject to liability for the latter, but immune from liability as to the former. *Id.* The Court found that by 1871, the immunity from suit for a municipality's "governmental functions" had largely been "nullified" by the states. *Id.* at 645-46; see also *id.* at 646 (referring to "nominal existence" of such an immunity). In any event, because the governmental function immunity was rooted in principles of sovereign immunity, *id.* at 645, the Court held that the immunity was "obviously abrogated" by the enactment of section 1983, *id.* at 647:

By including municipalities within the class of "persons" subject to liability for violations of the Federal Constitution and laws, Congress -- the supreme sovereign on matters of federal law -- abolished whatever vestige of the State's sovereign immunity the municipality possessed.

Id. at 647-48 (footnote omitted).

The Court in *Owen* identified as a second common law protection available to municipalities in the nineteenth century a doctrine that "immunized [**7] a municipality for its 'discretionary' or 'legislative' activities," but which did not protect municipalities from liability for acts "ministerial" in nature. *Id.* at 644. This doctrine was grounded in separation of powers principles, the concern being that "for a court or jury . . . to review the reasonableness of the city's judgment on [discretionary or legislative] matters would be an infringement upon the powers properly vested in a coordinate and coequal branch of government." *Id.* at 648. As it had found with the municipality's common law immunity from liability for its "governmental" actions, the Court found the municipality's immunity from liability for its "discretionary" or "legislative" activities to be largely hollow at the time Congress enacted the Civil Rights Act of 1871. *Id.* More importantly, the Court found that the very rationale behind the immunity for discretionary activities precluded any claim that the immunity survived the enactment of section 1983:

The common-law doctrine [of legislative or discretionary immunity] merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality. [**8] But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court [**298] passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes.

Id. at 649. The Court in *Owen* thus rejected any sovereign immunity or separation of powers justification for municipality immunity from suit under section 1983, and the Court was able to identify no other possible historical or doctrinal source of immunity from suit for constitutional violations.

If there were any doubt that the Court's pronouncements in *Leatherman* and *Owen*, coupled with the Court's reasoning in *Owen*, preclude the municipal legislative immunity asserted in this case, it is obvious from the facts before the Court in *Owen* that the abrogation of municipality immunity effected by section 1983 extends as well to a municipality's legislative activities. In [**9] *Owen*, the local Chief of Police claimed that the City of Independence, the City Manager, and members of the City Council in their official capacity, had deprived him of his protected liberty interest in his "good name, reputation, honor, or integrity" without due process of law, in violation of the Fourteenth Amendment. *Id.* at 633 n.13 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437, 27 L. Ed. 2d 515, 91 S. Ct. 507 (1971)). Specifically, he alleged that "the city -- through the unanimous resolution of the City Council -- released to the public an allegedly false statement impugning [his] honesty and integrity." *Id.* n2 Thus, the plaintiff in *Owen*, like the plaintiffs in this case, directly challenged the city's exercise of a core legislative function, embodied in an official vote of the local legislative body. n3 After considering both the nature of the asserted constitutional violation and the City Council's role in causing the violation, the Court was left with "no doubt that the Court of Appeals correctly concluded that the city's actions deprived petitioner of liberty without due process of law." *Id.* The Court's denial to the municipality of a qualified immunity [**10] defense for the unconstitutional legislative activities in

Owen leads inescapably to the conclusion that a municipality is not entitled to an absolute immunity for the very same governmental conduct. See, e.g., *Hollyday v. [**299] Rainey*, 964 F.2d 1441, 1445 (4th Cir.) (opinion of Luttig, J.) ("The reasoning of the Court in *Owen* would appear to apply with equal force to a claim of absolute municipal immunity based upon the testimonial privilege of the municipality's officers and agents."), cert. denied, 121 L. Ed. 2d 567, 113 S. Ct. 636 (1992).

n2 The City Council's involvement in the unconstitutional deprivation in *Owen* was extensive:

On the evening of April 17, 1972, the City Council held its regularly scheduled meeting. After completion of the planned agenda, Councilman Roberts read a statement he had prepared on the investigation. Among other allegations, Roberts charged that petitioner had misappropriated Police Department property for his own use, that narcotics and money had "mysteriously disappeared" from his office, that traffic tickets had been manipulated, that high ranking police officials had made "inappropriate" requests affecting the police court, and that "things have occurred causing the unusual release of felons." At the close of his statement, Roberts moved that the investigative reports be released to the news media and turned over to the prosecutor for presentation to the grand jury, and that the City Manager "take all direct and appropriate action" against those persons "involved in illegal, wrongful, or gross inefficient activities brought out in the investigative reports." After some discussion, the City Council passed Roberts' motion with no dissents and one abstention.

Owen, 445 U.S. at 627-29 (footnotes omitted) (emphasis added).

[**11]

n3 Actions virtually identical to those of the City Council in *Owen* were held to be legislative in nature in *Tenney v. Brandhove*, 341 U.S. 367, 377-78, 95 L. Ed. 1019, 71 S. Ct. 783 (1951). In *Tenney*, the plaintiff charged a committee of the California Senate with violating his constitutional rights by holding a hearing in which the committee impugned plaintiff's reputation and at which the committee chairman "read into the record a statement concerning an alleged criminal record of [plaintiff's], a newspaper article denying the truth of [plaintiff's] charges, and a denial by the Committee's counsel -- who was absent -- that [plaintiff's] charges were true." *Id.* at 371. The Court in *Tenney* granted the individual legislators absolute immunity from suit because these actions were within "the sphere of legitimate legislative activity." *Id.* at 376; see also *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1196 (5th Cir. Unit A May 1981) ("The constitutional violation about which the plaintiff in *Owen* could legally complain was caused by the members of the city council while performing a legitimate legislative function."), cert. denied, 455 U.S. 907 (1982). On similar facts in *Owen*, the municipality was not afforded any immunity.

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Indeed, the Court routinely cites the enactment of legislation as the prototypical government conduct that can give rise to liability under Monell's "policy or custom" requirement. In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986), for instance, a majority of the Court joined Justice Brennan's observation that "no one has ever doubted . . . that a municipality may be liable under § 1983 for a single decision by its properly constituted legislative body . . . because even a single decision by such a body unquestionably constitutes an act of official government policy." *Id.* at 480; see also *id.* at 483 n.12 (plurality) ("If county employment policy was set by the Board of County Commissioners . . . that body's decisions would provide a basis for county liability."). Even the dissenters in *Pembaur* agreed that an unconstitutional enactment of a local legislature could give rise to municipal liability under section 1983:

Another factor indicating that policy has been formed is the process by which the decision at issue was reached. Formal procedures that involve, for example, voting by elected officials, prepared reports,

extended deliberation, or [**13] official records indicate that the resulting decisions taken "may fairly be said to represent official policy." *Monell, supra*, at 694. *Owen v. City of Independence*, 445 U.S. 622, 63 L. Ed. 2d 673, 100 S. Ct. 1398 (1980), provides an example. The City Council met in a regularly scheduled meeting. One member of the Council made a motion to release to the press certain reports that cast an employee in a bad light. After deliberation, the Council passed the motion with no dissents and one abstention. *Id.* at 627-29. Although this official action did not establish a rule of general applicability, it is clear that policy was formed because of the process by which the decision was reached.

Pembaur, 475 U.S. at 500 (Powell, J., dissenting). And in *City of St. Louis v. Praprotnik*, 485 U.S. 112, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988), a case in which the Court divided three ways over the proper standard for determining when municipal action amounts to a custom or policy, the Court was unanimous that a municipality can and will be held liable under section 1983 for an unconstitutional exercise of power by the municipality's legislative body. See *id.* at 126 (O'Connor, J., joined by Rehnquist, C.J., and White and Scalia, JJ.) [**14] ("One would have to conclude that policy decisions made . . . by the Mayor and Aldermen," who are authorized to adopt ordinances relating to personnel administration, "would be attributable to the city itself."); *id.* at 125 (actions of "official or body that has the responsibility for making law" can give rise to municipal liability under section 1983); *id.* at 138 (Brennan, J., concurring in the judgment, joined by Marshall and Blackmun, JJ.) ("Nor have we ever doubted that a single decision of a city's properly constituted legislative body is a municipal act capable of subjecting the city to liability."); *id.* at 140 ("In *Owen* and *Fact Concerts* we deemed it fair to hold municipalities liable for the isolated, unconstitutional acts of their legislative bodies . . ."); n4 *id.* at 147 (Stevens, J., dissenting) (presuming that legislative acts can give rise to municipal liability).

n4 In *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981), the Court considered a section 1983 claim against a municipality that was premised on the unconstitutional conduct of the local legislature. The plaintiffs in *Fact Concerts* challenged the Newport City Council's decision, rendered through a vote of the Council, to cancel a city license issued to a concert promoter unless the

promoter removed the band Blood, Sweat and Tears from the concert program. See *id.* at 250-52 (plaintiff charged city and City Council with content-based censorship based upon the Council's "vote[] to cancel the license for both days unless Blood, Sweat and Tears were removed from the program").

[**15]

[*300] Our holding today that a municipality does not enjoy immunity with respect to the acts of its legislative body, thus, should come as no surprise. In fact, every other circuit that has considered this issue has either held or presumed that a municipality is not entitled to absolute legislative immunity from suits brought under section 1983. See, e.g., *Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 72, 74 (2d Cir. 1992) (rejecting "out of hand" the claim that a municipality "is entitled to absolute immunity for its legislative acts," and "holding that there is no immunity defense, either qualified or absolute, available to a municipality sought to be held liable under 42 U.S.C. § 1983"); *Aitchison v. Raffiani*, 708 F.2d 96, 100 (3d Cir. 1983) (citing *Reed v. Village of Shorewood*, 704 F.2d 943, 953 (7th Cir. 1983)) ("Liability against the municipality is not precluded simply because the [local legislators] were found immune in their individual capacities."); *Reed v. Village of Shorewood*, 704 F.2d 943, 953 (7th Cir. 1983) (holding that a "municipality's liability for [the official acts of municipal policy makers] extends to acts for which the [**16] policy-making officials . . . might enjoy absolute immunity because the acts were legislative or judicial in character"); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1350 (9th Cir. 1982) (complete immunity of county legislators does not immunize county); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1196 (5th Cir. Unit A May 1981) ("We consider the Supreme Court's decision in *Owen* and its caveat in *Lake Country Estates* to be dispositive of the city's argument and hold that the City of Lafayette is not entitled to a legislative immunity from damages under § 1983 . . ."), cert. denied, 455 U.S. 907 (1982); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 613 n.7 (8th Cir. 1980) ("*Owen* would seem to provide a remedy for unconstitutional municipal legislation." (emphasis omitted)).

In the face of this overwhelming authority, the City of Charleston attempts to justify its claim of absolute legislative immunity by reference to the tradition and policy justifications supporting the legislative immunity for individual legislators. While there is indeed a long tradition of granting individual legislators at all levels of government a [**17] broad immunity from suits based upon their legitimate legislative activities, n5 and though

there are undoubtedly strong public policy justifications for such immunity, n6 the Supreme Court has instructed that [*301] the defenses available to an official in a personal capacity action simply "are unavailable" in a suit against a governmental entity. *Kentucky v. Graham*, 473 U.S. 159, 167, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985) (citing *Owen*); see also *Owen*, 445 U.S. at 638 n.18 (factors supporting an immunity for officers sued in individual capacity "differ[] significantly" from factors considered when "only the liability of the municipality itself is at issue").

n5 The protections afforded federal legislators are found in the Constitution itself. See U.S. Const. art. I, § 6, cl. 1 ("The Senators and Representatives . . . for any Speech or Debate in either House . . . shall not be questioned in any other Place."); *Gravel v. United States*, 408 U.S. 606, 615, 33 L. Ed. 2d 583, 92 S. Ct. 2614 (1972) (finding "incontrovertible" the conclusion that the Speech or Debate Clause "at the very least protects [Congressmen] from criminal or civil liability and from questioning elsewhere than in the [Congress]" for matters related to the legislative process). The majority of states have adopted similar constitutional provisions granting state legislators absolute immunity from suits based on actions and statements made during the legislative process. See *Tenney v. Brandhove*, 341 U.S. 367, 375, 95 L. Ed. 1019, 71 S. Ct. 783 (1951).

Building on this tradition, the Supreme Court has also recognized an absolute immunity from section 1983 liability for state and regional legislators, who are not otherwise protected by the Speech or Debate Clause and whose state immunity would not protect them from suits brought under section 1983. See *id.* at 376 (holding that state legislators are entitled to immunity from civil liability under section 1983 for actions and statements made "in the sphere of legitimate legislative activity"); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405, 59 L. Ed. 2d 401, 99 S. Ct. 1171 (1979) (holding that legislators serving on regional, multi-state entity are entitled to absolute immunity on reasoning of *Tenney*).

And, though the Supreme Court has expressly reserved the issue, see *id.* at 404 n.26, most circuits, including this one, have relied on *Tenney* and *Lake Country* to hold that local legislators, sued in their individual capacity, are entitled to absolute immunity from section 1983 suits relating to their legitimate legislative activities.

See *Bruce v. Riddle*, 631 F.2d 272, 279 (4th Cir. 1980) ("If legislators of any political subdivision of a state function in a legislative capacity, they are absolutely immune from being sued under the provisions of § 1983."); see also *Goldberg*, 973 F.2d at 72 (collecting cases).

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n6 As the Court observed in *Tenney*,

Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence, but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.

Tenney, 341 U.S. at 377; see also *Collinson v. Gott*, 895 F.2d 994, 1007 (4th Cir. 1990) (Wilkinson, J., concurring in the judgment) ("Federal trials may yet degenerate into partisan affairs if litigation provides the political opponents of presiding officers with another forum to score points."); *id.* at 1008 ("The flow of information through the [legislative] process could be severely jeopardized if every public meeting carried with it the threat of civil liability . . .").

The Court has made clear that neither the tradition nor the public policy considerations supporting [**19] a broad legislative immunity for legislators sued in their individual capacity has persuasive force when the liability of the municipality is at issue. The Court foreclosed reliance on the tradition of legislative immunity for individual legislators when it stated in unequivocal terms that "there is no tradition of immunity for municipal corporations." *Id.* at 638.

As to the public policy behind granting individual officers an immunity, the Court explained in *Owen* that the "overriding considerations of public policy," which, on occasion, have led the Court to conclude that an "official be given a measure of protection from personal liability," are "less compelling, if not wholly inapplicable,

when the liability of the municipal entity is at issue." *Id.* at 653. The Court in *Owen* cited two such policy considerations: first, the injustice of holding a public officer personally liable for making discretionary decisions mandated by his public employment, and second, "the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Id.* at 654 (quoting *Scheuer v. Rhodes*, [**20] 416 U.S. 232, 240, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974)). The Court dismissed the first concern as simply inapplicable when the municipality's liability is at issue. See *id.* And, though the second rationale, concerned with the deterrent effect of an adverse judgment, would seem to apply to municipalities as well as to individuals, the Court nonetheless found that this rationale likewise "loses its force when it is the municipality, in contrast to the official, whose liability is at issue." *Id.* at 655. The Court explained that

at the heart of this justification for a qualified immunity for the individual official is the concern that the threat of personal monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters of public policy. The inhibiting effect is significantly reduced, if not eliminated, however, when the threat of personal liability is removed. First, as an empirical matter, it is questionable whether the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties; city officials routinely make decisions [**21] that either require a large expenditure of municipal funds or involve a substantial risk of depleting the public fisc. More important, though, is the realization that consideration of the municipality's liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury.

Id. at 655-56 (citations and footnotes omitted) (emphases in original); see also *id.* at 653 n.37 (citing *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405 n.29, 59 L. Ed. 2d 401, 99 S.

Ct. 1171 (1979)) ("The justifications for [*302] immunizing officials from personal liability have little force when suit is brought against the governmental entity itself."). Indeed, in the Court's view, the very existence of an immunity for individual officials cuts strongly in favor of denying immunity to the municipality the official represents. In *Owen*, for instance, the Court concluded that, in light of the qualified [**22] immunity already afforded to officials sued individually, the only way to "properly allocate[]" the costs of constitutional violations among government officials, municipalities, and victims, is to deny an immunity defense to the municipality. *Id.* at 657. And in *Lake Country Estates*, the Court justified its grant of absolute immunity to regional legislators serving on the Tahoe Regional Planning Agency (TRPA), in part on the fact that a plaintiff would still be able to proceed against the regional entity:

If the [legislators serving on TRPA] have enacted unconstitutional legislation, there is no reason why relief against TRPA itself should not adequately vindicate petitioners' interests.

Lake Country Estates, 440 U.S. at 405 n.29 (emphasis added). n7

n7 Similarly, in granting absolute immunity to state legislators in *Tenney*, the Court was careful to "note[]" that this is a case in which the defendants are members of a legislature. Legislative privilege in such a case deserves greater respect than where . . . the legislature seeks the affirmative aid of the courts to assert a privilege." *Tenney*, 341 U.S. at 378; see also *id.* at 379 (Black, J., concurring) ("It is not held that the validity of legislative action is coextensive with the personal immunity of the legislators."); *id.* ("The Court holds that the Civil Rights statutes were not intended to make legislators personally liable for damages to a witness injured by a committee exercising legislative power." (emphasis added)).

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In sum, though the issue before us today is an important one, it is ultimately easily resolved. The Supreme Court effectively answered the question fifteen years ago in *Owen*. A unanimous Court in *Leatherman* recently reaffirmed *Owen*, and every other circuit to have addressed the issue has read *Owen* as foreclosing the possibility of legislative immunity for municipalities. In accord with this controlling, and otherwise impressive,

body of authority, we hold that a municipality is not entitled to an absolute immunity for the actions of its legislature in suits brought under 42 U.S.C. § 1983.

II.

In the instant case, the appellants' complaint alleged that, in enacting the annual budget for the City of Charleston in 1993, Charleston's Common Council denied appellants a salary increase on the impermissible ground that the appellants had actively supported a candidate in the prior mayoral election other than the one favored by a majority of the members of the Common Council, in violation of the First Amendment. The plaintiffs thus directly challenged the Common Council's execution of a core legislative function. J.A. at 72 (opinion of district court) ("Plaintiffs' complaint [**24] squarely attacks a classic legislative function of the Council."); see also *Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988) ("Budgetmaking is a quintessential legislative function reflecting the legislators' ordering of policy priorities in the face of limited financial resources." (citation omitted)). n8

n8 Because the Common Council's decision to deny the salary increases was legislative, we decline the appellees' invitation to deny the City's claim of legislative immunity on the ground that the Council's action was administrative in nature. See *Roberson v. Mullins*, 29 F.3d 132, 135 (4th Cir. 1994).

The district court dismissed the complaint without addressing the merits of plaintiffs' claim, holding that the City of Charleston, the real party in interest in this case, see *Goldsmith v. Mayor and City Council of Baltimore*, 987 F.2d 1064, 1066 n.2 (4th Cir. 1993), is absolutely immune from suits challenging the activities of the Common Council of the City of Charleston. The district [**25] court reasoned:

Plaintiffs' allegation that the Council denied their raises solely because of their political support of Mayor Hall would necessarily require an examination of the Council's motive for its vote. Such an inquiry "runs squarely afoul of the doctrine of legislative immunity." Where a suit would require testimony from legislators [*303] regarding their legislative activities, "the doctrine of legislative immunity has full force."

J.A. at 73 (citation omitted). Because we hold today that the City of Charleston is not entitled to absolute immunity under section 1983 from suits involving the decisions and enactments of Charleston's Common Council, the judgment of the district court is reversed. To the extent that our opinions in *Baker v. Mayor and City Council of Baltimore*, 894 F.2d 679, 682 (4th Cir.), cert. denied, 498 U.S. 815 (1990), and *Schlitz v. Commonwealth of Virginia*, 854 F.2d 43, 45-46 (4th Cir. 1988), n9 can be read to confer legislative immunity on municipalities from suits brought under section 1983, those decisions are overruled.

n9 Under *Baker* and *Schlitz*, Charleston's council members may be privileged from testifying in federal district court as to their motives in enacting legislation. Because appellants do not challenge this testimonial privilege, except to the extent that such a privilege could be interpreted to afford municipalities immunity from liability under section 1983, we do not address herein the vitality of this privilege in the wake of *Owen* and today's holding.

[**26]

The judgment of the district court is reversed and the case is remanded for further proceedings.

REVERSED AND REMANDED

CONCURBY: PHILLIPS

CONCUR:

PHILLIPS, Senior Circuit Judge, specially concurring:

I concur in the majority opinion, which I think admirably demonstrates why extant Supreme Court precedents compel the result reached.

I write specifically only to state my understanding that the laudatory comments in footnote 1 respecting the dissenting opinion are not intended to imply that were we free to do so, we would accept its policy arguments for granting municipalities absolute immunity to § 1983 claims for monetary relief for their unconstitutional legislative acts. It may be proper at our level to use a dissenting opinion as a vehicle for suggesting re-examination of extant Supreme Court authority on policy grounds, but I would not want to be thought persuaded by those made in the dissent here. With all respect to the elegance and fervor with which its political theories are advanced, I think it greatly overstates the threats to de-

mocratic government at the local level that it suggests flow from exposing municipalities to such suits. And, I believe it important to point out [**27] that there is not a shred of evidence in the record before us, either in the form of anecdotal or expert opinion testimony or by way of "Brandeis brief," to support the assertion that any such practical threats actually exist and are being experienced in the real world. In the absence of such evidence, I think the more appropriate policy assumption--were any appropriate in the case presented to us--is that there is no such inhibiting effect on local government as the dissent posits. We are not referred to any other lower federal or state court decision which has expressed similar concerns, though municipal exposure to such claims has been a generally recognized legal reality now for years. The "chilling effect" on official conduct that is posited is one that could only be experienced by individual legislators, and they have the protections both of absolute legislative immunity to suit and of testimonial privilege if they prefer not even to participate in litigation against the municipality itself. And, the experience of history which presumably informed the common law's refusal to accord such immunity (as documented in the Supreme Court decisions refusing to accord it as to § 1983 [**28] claims) must surely have confirmed that no such inhibiting effect was being generally experienced.

Chief Judge Ervin and Judge Murnaghan join in this special concurrence.

DISSENTBY: WIDENER; WILKINSON

DISSENT:

WIDENER, Circuit Judge, dissenting:

I respectfully dissent.

I agree with and concur in Judge Wilkinson's excellent dissenting opinion.

In my opinion, the decision of the majority in this case is contrary to the most fundamental notions of our form of representative government. The subordination of the legislative branch of government espoused by the majority in this case will prove to be as fatal [**304] to this commonwealth as that Plato warned of.

Where there are three orders, then, any plurality of functions or shifting from one order to another is not merely utterly harmful to the community, but one might fairly call it the extreme of wrongdoing. And you will agree that to do the greatest of wrongs to one's own community is injustice.

Surely.

The Republic of Plato, Oxford University Press 1968-3 reprint, Chapter XII, p. 129.

WILKINSON, Circuit Judge, dissenting:

The practical consequence of the majority's decision is to subject local legislators to federal [**29] suit for routine votes on a municipal budget. By doing so, we have consigned to federal court the most basic and important acts of a democracy. This amounts, literally, to local government by lawsuit. Because such a result stretches 42 U.S.C. § 1983 beyond all reasonable bounds and does grave harm to our fundamental democratic notions of political participation and representation, I respectfully dissent.

I.

This controversy involves nothing more than a political dog fight over a municipal budget -- the kind that arises in local governing bodies every day. If municipal budget disputes must now regularly be replayed in actions for damages under 42 U.S.C. § 1983, then the federal courtroom will come to replace the county meeting hall and city council chambers as the cornerstone of American politics. With all respect to the majority, the Supreme Court has not sounded this sort of death-knell for democratic governance. n1 The majority's rationale is that this outcome is appropriate because plaintiffs have sued a municipal legislative entity for damages rather than the individual legislators themselves. The majority apparently believes that because legislators remain personally immune [**30] from damages for a vote on a municipal budget, their immunity interests are sufficiently vindicated. It is a mistake, however, to equate the sum of the immunity interests in this case with the prospects of personal monetary liability. Much more is at stake.

n1 My good colleagues in the majority suggest that their approach is governed by precedent, while the dissenting opinion is somehow driven by policy. See majority opinion note 1. In this regard, the majority summons to its aid extended quotations, but those quotations simply do not address the situation at hand. See dissenting opinion § § II and III, *infra*. Specifically, the precedent relied upon by the majority does not contain a single reference to the propriety of turning routine votes on a municipal budget into a § 1983 damages dispute. Indeed, the majority does not contend otherwise, but only states that "we must assume" that the Supreme Court has considered

and disposed of this question. I think it legitimate that there be at least a pause before the most essential function of local government is swept away by "assumption." The majority has decided a legal question of first impression, and has taken a significant practical leap. Surely it will seem so to innumerable elected office-holders, who suddenly discover that their votes on a budget are subject to judicial review, and that the legislative vestiges of local government are now justiciable as a matter of nothing more than ipse dixit.

[**31]

The absence of municipal immunity for a legislator's votes on a municipal budget erodes the viability of the entire local political process. The abrogation of municipal immunity for such votes will subtly transform the nature of political accountability. Pecuniary penalties, albeit against the municipality, will come to substitute for traditional reckonings at the polls. Local legislators will have to explain their votes on legislative appropriations to a court as well as to the electorate. That is not how democracy was meant to function.

This case will prove all too typical. The complaint presents a budget dispute involving municipal salary outlays between the council supporters and opponents of Charleston Mayor Kent Strange Hall. Budget fights of this kind invariably produce winners and losers. Under the majority's ruling, the losers of such struggles now have an engraved invitation to proceed to federal court. It will be simple to portray any budgetary cut as plaintiffs have here -- as an act of "political retaliation" in violation of the First Amendment. Indeed, a complaint may be expected to characterize any legislative success of an opposing faction in its most pejorative [**32] political [**305] light. Under *Fed. R. Civ. P. 12(b)(6)*, a federal court must accept those allegations as true. Justice Frankfurter must have had this dispute in mind when he wrote:

"in times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies." *Tenney v. Brandhove*, 341 U.S. 367, 378, 95 L. Ed. 1019, 71 S. Ct. 783 (1951) (emphasis added).

The damage done to the political process will be acute. Lawsuits by disgruntled individuals may replace the voice of the electorate as the agent of municipal change and the instrument of municipal policy. This sad development is made worse because it occurs in the context of some 85,000 city and county governments, which were established to provide the purest and most direct form of political participation available to American citizens. "In the township, as well as everywhere else, the

people are the source of power; but nowhere do they exercise their power more immediately." 1 Alexis de Tocqueville, *Democracy in America* 64 (P. Bradley ed. 1945).

Lawsuits such as this one also substantially weaken the ability of individual legislators to carry out the [**33] will of the voters. Instead of enjoying the freedom to cast votes according to their consciences and the wishes of their constituents, legislators must now look over their shoulders at the possible legal consequences of a vote cast or an argument advanced. Statements made on items in a local budget will now turn up as evidence of unconstitutional "political" motive in federal court. Legislators will have to consider how legislative action will be viewed by the most litigious members of their community. Such consequences are clearly contrary both to the purpose of § 1983 and the ideals of good government. As the Supreme Court has noted, "any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process." *Spallone v. United States*, 493 U.S. 265, 107 L. Ed. 2d 644, 110 S. Ct. 625 (1990). The very purpose of immunity is "to insure that the legislative function may be performed without fear of outside interference." *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 731, 64 L. Ed. 2d 641, 100 S. Ct. 1967 (1980).

These concerns have been repeatedly acknowledged as the basis of individual legislative immunity. See, [**34] e.g., *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 404-405, 59 L. Ed. 2d 401, 99 S. Ct. 1171 (1979); *Scheuer v. Rhodes*, 416 U.S. 232, 240-41, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); *Acevedo-Cordero v. Cordero-Santiago*, 958 F.2d 20, 22 (1st Cir. 1992). As a practical matter, they are no less powerful when the legislative entity itself is sued. A suit for damages against the legislative entity transfers a budget dispute to federal court just as surely as a suit against legislators in their individual capacities. Every discretionary trade-off in a municipal budget decision will now be subject to judicial secondguessing.

The complaint in this case seeks damages for past and future lost wages and benefits, embarrassment, humiliation, and reputational injury. It concludes -- as is typical -- with a demand for trial by jury. And in the absence of any municipal immunity, budget-making by jury trial may become the rule, not the exception. It is easy to see how the multiple motivations of legislators on a budget vote will present a genuine issue of material fact. Juries will thus come to serve as proxies for the larger electorate, and be drawn into the partisan passions of local political life. This concern over [**35] the politicization of the courts has been a critical ingredient of legislative immunity from the outset. *Tenney*, 341 U.S.

at 378. It also should inform the existence of a derivative municipal immunity in the particular context of a budgetary dispute.

Another important immunity interest overlooked by the majority is a legislator's need for freedom from the burdens of litigation. The Supreme Court has repeatedly stressed that immunity under § 1983 is "an immunity from suit rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985) (emphasis in original). See also *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S. Ct. 534, [**306] 116 L. Ed. 2d 589 (1991); *Davis v. Scherer*, 468 U.S. 183, 195, 82 L. Ed. 2d 139, 104 S. Ct. 3012 (1984). This is so because the consequences of § 1983 actions include "the general costs of subjecting officials to the risks of trial -- distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Harlow v. Fitzgerald*, 457 U.S. 800, 816, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982).

All three of Harlow's immunity concerns are implicated in this lawsuit. The Harlow burdens are no less significant because the action is brought against the [**36] municipal entity; as the only "real" persons involved, legislators still must carry the weight of the impositions and distractions of every case brought. In the case of municipal government, moreover, the consequences of an abrogation of all immunity are especially severe. Local elected officials may not enjoy the recognition of those who hold state or federal office. Many, however, are public-spirited citizens, and especially in smaller communities, they often serve part-time and for nominal pay. In this case, for example, the Council of the City of Charleston meets only twice a month. See *City of Charleston, W. Va. Charter and General Ordinances* § 21 (Michie 1975). The twenty-six members of the council are paid \$ 2.50 for each meeting they attend, and their yearly salary may not exceed one hundred dollars. *Id.* at § 86. Subjecting part-time officials to the periodic vicissitudes of litigation will, in Harlow's words, both inhibit "discretionary action" and deter "able people from public service." *Harlow*, 457 U.S. at 814. Going from council deliberations on Monday night to depositions on Tuesday morning will not encourage citizens to seek local office. The abrogation [**37] of immunity may make the sacrifice involved in public service unacceptable, and help ensure that the hassles of public life outweigh the sense of satisfaction to be found in it.

The majority's belief that individual immunity is sufficient thus does not capture the true scope of the relevant immunity interests. Legislative immunity was created to protect a range of interests, not simply to provide a shield against personal damage awards. See *Tenney*, 341 U.S. at 376-77. Under the majority's rule, litigants

will now be able to circumvent these protections by the simple expedient of naming the legislative body in their complaints. The spirit of municipal reform will surely suffer. Local elections often reflect the electorate's desire either for greater public services or for greater property tax relief. If, however, rescission of spending is to be characterized as actionable retribution, and budgetary retrenchment is to be justiciable as a First Amendment claim of political retaliation, then expenditures, once made, will become semi-sacrosanct. All municipal reform is "retaliation" of a sort -- reform by definition represents change from the preceding regime which a dissatisfied electorate [**38] decided to throw out. The absence of municipal immunity means municipal elections will no longer bring fresh brooms, because council members charged to carry out an electoral mandate will think twice before making any statement or casting any vote that will tie them up indefinitely in court. n2 II.

n2 My brother Phillips contends that no such chilling effect is present because no Brandeis brief has proclaimed its existence. The failure of officials to act because of fear of § 1983 litigation, however, is not a matter that is apt to be openly expressed or assiduously documented. The elaborate structure of immunities for § 1983 suits is testament enough that some courts, including the Supreme Court, believe this type of litigation chills, even if the fact has thus far eluded my concurring brother.

Because immunity interests of great importance are at issue in this case, Congress must be specific if it wishes to abrogate them. It is well-established that when Congress seeks to alter the federal-state equilibrium [**39] in a fundamental way, its intention to do so must be "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985). The Supreme Court has further held in similar contexts that 42 U.S.C. § 1983 fails to provide such a clear and specific statement and thus cannot by itself alter the balance of [**307] rights and immunities between the states and the federal system. In *Will v. Michigan Dep't. of State Police*, 491 U.S. 58, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989), for example, the Court found that § 1983 "falls far short" of the demands of specificity and so does not provide a cause of action directly against the states. *Id.* at 65. Likewise, in *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 69 L. Ed. 2d 616, 101 S. Ct. 2748 (1981), the Court held that § 1983 does not allow punitive damages against localities. It found that "Congress would have

specifically so provided had it wished to abolish the doctrine" of municipal immunity from punitive damages, yet did not do so in 42 U.S.C. § 1983. *Id.* at 263-64 (quoting *Pierson v. Ray*, 386 U.S. 547, 555, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967)).

Language in other cases addressing the subject of municipal liability under § 1983, such as *Monell v. New York City Dep't. of [**40] Social Services*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978), appears to reject such a requirement of greater specificity. The majority has meticulously canvassed that language, and I respect the conscientious manner in which it has gone about its task. I do not read the cases discussed by the majority, however, to suggest that the very legislative core of local government is subject to sweeping displacement.

The question of municipal liability presented in this case represents a problem of an entirely different magnitude than that considered in *Monell* and its progeny. In *Monell*, for example, the Supreme Court examined municipal liability for an unconstitutional employment policy of mandatory, unpaid pregnancy leave for female city workers. *Id.* at 660-61. It was clearly an attack on an administrative policy of two city agencies, the Department of Social Services and the Board of Education. *Monell* established that a municipality might be liable for the policies of its executive departments. It did not involve a direct challenge to the vote of a municipal legislature, much less a vote on a local budget, and the city council was not even a named defendant in the case.

Likewise, in *Leatherman [**41] v. Tarrant County Narcotics Intelligence and Coordination Unit*, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993), the issue was municipal liability for the actions of police in searching homes for narcotics. Again, the county legislature was not involved and no legislative immunity questions were even implicated. Finally, *Owen v. City of Independence*, 445 U.S. 622, 63 L. Ed. 2d 673, 100 S. Ct. 1398 (1980), did involve a suit against a city council, among others. The action there dealt with a due process claim by a city employee who was libelled by a report released by the council when he was discharged from his job. *Id.* at 627-28. The Court refused to grant qualified immunity to the council. *Id.* at 638.

Just like *Monell* and *Leatherman*, however, *Owen* never contemplated the extension of § 1983 liability to legislative votes on local budgets. In *Owen*, the Court did reject the idea that § 1983 preserved a distinction between "discretionary" and "ministerial" functions as a basis for immunity. *Owen*, 445 U.S. at 648-49. Notably, however, the discussion of "discretionary" acts brought within the scope of § 1983 municipal liability focused on policy-making decisions by executive bodies. *Id.* It

never went [**42] so far as to suggest that fundamental legislative acts were also subject to federal judicial review, and it never touched upon the budgetary process.

The fact that it did not is significant. Decisions about the allocation of public resources are the quintessential task undertaken by an elected representative body, whether it is the City of Charleston Common Council or the Congress of the United States. See *Rateree v. Rockett*, 852 F.2d 946, 950 (7th Cir. 1988) (noting budget-making is the "classic legislative function"). Democracy decides nothing if it cannot set priorities for spending limited public funds. Section 1983 actions that challenge votes on budgetary items are simply different from suits contesting the constitutionality of an executive policy or alleging misconduct on the part of municipal employees. Allowing federal courts to recalculate basic decisions on spending and taxation severely disrupts the balance of federalism. [*308] Before improvident interference of momentous importance into municipal government affairs is authorized, it is entirely proper to apply the rule of statutory specificity with some modicum of strictness. The specificity requirement, just like [**43] the immunity analysis in the preceding section, must be informed by the unprecedented political nature of the present complaint.

Section 1983 is not sufficiently specific to do the job the majority would have it do. When Congress passed this law in 1871, it had no idea it would metastasize to this extent. The members of the 42d Congress never dreamed they were subjecting local legislative bodies to monetary liability and litigation over individual items in a budget, and so of course failed to include language that would override the presumption against upsetting the federal-state balance. To the contrary, as Owen recognized, § 1983 preserved "traditions of immunity . . . so firmly rooted in the common law and . . . supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish [such] doctrines.'" *Owen*, 445 U.S. at 637 (quoting *Pierson*, 386 U.S. at 555). The language of § 1983, which speaks in only the most general terms of "the deprivation" of federal "rights, privileges, or immunities," does not include an intention to displace local authority over local budgets. If Congress had wished to station the federal judiciary [**44] at the vortex of state and local politics, it would have said so. In fact, the judiciary's hand is considerably strengthened if the statutory language makes such a congressional intention clear. "The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation. . . ." *American Fire & Cas. Co. v. Finn*, 341 U.S. 6, 17, 95 L. Ed. 702, 71 S. Ct. 534 (1951). The very generality of § 1983, however, ensures that the impending judicial involvement in municipal budget disputes will be perceived as self-propelled.

III.

An additional difficulty with the majority's position is the gap that it creates in the overall structure of defenses to § 1983 actions. In striking a balance between vindication of individual rights and limitation of the social costs of litigation, the Supreme Court has always been careful to provide governmental defendants under § 1983 with at least some defense to liability. See *Ander-son v. Creighton*, 483 U.S. 635, 638, 97 L. Ed. 2d 523, 107 S. Ct. 3034 (1987). Thus, individual officials always possess a defense of immunity, whether absolute or qualified. *Id.* at 638-39. Municipalities and municipal bodies, on the other hand, can ordinarily rely on a "custom or policy" defense, [**45] which requires proof that the municipality actually "caused" the alleged violation through the adoption of an official policy by a "final decision-maker." *St. Louis v. Praprotnik*, 485 U.S. 112, 123, 99 L. Ed. 2d 107, 108 S. Ct. 915 (1988). As a number of commentators have noted, the "custom or policy" defense for municipalities is in many ways the de facto equivalent of an immunity defense, given the difficulty of establishing the requisite proofs. See, e.g., Peter H. Schuck, *Municipal Liability Under § 1983: Some Lessons From Tort Law and Organizational Theory*, 77 *Geo. L. J.* 1753 (1989); Susanah M. Mead, 42 *U.S.C. § 1983 Municipal Liability: The Monell Sketch Becomes a Distorted Picture*, 65 *N. C. L. Rev.* 517, 548 (1987).

Thus, a network of defenses covers nearly the entire spectrum of § 1983 claims. The single circumstance where there is no immunity of any sort is the one we are faced with here -- a suit for damages against the local legislature itself. Because the legislature is a public body, not an individual, it possesses no absolute or qualified immunity defense of its own. See *Leatherman*, 113 S. Ct. at 1162. Moreover, because the legislature is nearly always the "final decisionmaker" [**46] in the locality, it cannot avail itself of any meaningful custom or policy defense. See *Pembaur v. Cincinnati*, 475 U.S. 469, 480, 89 L. Ed. 2d 452, 106 S. Ct. 1292 (1986). I am not suggesting, of course, that the city council lacks a Pembaur "custom or policy" defense for any technical or formal reason of pleading. Rather, the point is that as a practical matter, the Pembaur defense is of no value to a city council because it is automatically a final decision-maker. Thus, the toughest hurdle of the [*309] defense is easily bypassed in any challenge to a legislative budget vote. In contrast, courts have crafted a much stronger "custom or policy" defense for municipal executive bodies by requiring strict proof that the action complained of actually originated from a true "final decision-maker." See *Praprotnik*, 485 U.S. at 127. In sum, a legislative defendant which should by all rights enjoy the greatest protection from § 1983 liability is left in the most defenseless position of all. A testimonial privilege for indi-

vidual legislators, to which the majority alludes, see majority opinion, note 8, is no answer to this problem. For one thing, the source and scope of such a privilege has not been explained. For [**47] another, the practical value of such a privilege is virtually nil. In fact, it makes the dilemma of municipal liability for legislative acts even worse. The losing legislative faction in a budget dispute will readily waive the privilege and testify in court. At that point, the value of any testimonial privilege to the prevailing side becomes as tenuous as the value of, say, the Fifth Amendment privilege against self-incrimination after the prosecution has presented its case-in-chief. Any legislator invoking the privilege will be the object of suspicion in the courtroom, and the municipality will be left in the untenable position of staving off liability in the face of one-sided evidence.

The end result is that strict liability for this narrow class of § 1983 defendants, which serves to "convert[] municipal governance into a hazardous slalom through constitutional obstacles that often are unknown and unknowable." *Owen*, 445 U.S. at 665 (Powell, J., dissenting). Together with the perception of municipalities as deep pockets, this gap in § 1983 defenses generates a perverse incentive to sue local councils, thereby ensuring these lawsuits will be targeted where they [**48] can do the most harm to representative government.

The simple solution to this problem is to extend the well-established immunity of individual legislators to cover the legislative body whenever a cause of action "would perforce require testimony of the legislators involved regarding their motives" in a legislative vote. *Hollyday v. Rainey*, 964 F.2d 1441, 1443 (4th Cir.), cert. denied, 121 L. Ed. 2d 567, 113 S. Ct. 636 (1992). We have recognized the need to extend legislative privileges to limit the burdens on individual legislators in other kinds of suits against municipalities. *Baker v. Mayor and City Council of Baltimore*, 894 F.2d 679, 682 (4th Cir.), cert. denied, 498 U.S. 815 (1990) (ADEA suit); *Schlitz v. Virginia*, 854 F.2d 43, 45 (4th Cir. 1988) (same). The need for such protections is no less compelling in the context of 42 U.S.C. § 1983.

IV.

The district court's opinion in this case was short and to the point. It stated that "plaintiffs' case squarely attacks a classic legislative function of the Council, its vote on the City budget." The court also noted that resolution of the dispute "would necessarily require an examination of the Council's motive for its vote." Finally, [**49] it quoted the Seventh Circuit's holding that a budget vote is not rendered an "administrative" employment decision merely because it impacts city employees:

Almost all budget decisions have an effect on employment by either creating or eliminating positions or by raising or lowering salaries. This reality, however, does not transform a uniquely legislative function into an administrative one. . . . Employment decisions are not administrative when accomplished through traditional legislative functions. They are not "employment decisions" at all but instead, legislative, public policy choices that necessarily impact on the employment policies of the governing body. The political decision making inevitably involved in exercising budgetary restraint strikes at the heart of the legislative process and is protected legislative conduct.

Rateree, 852 F.2d at 950-51.

I would affirm that judgment. Providing immunity here would not result in any absence of remedies for those opposed to the actions of local legislatures. See *Harlow*, 457 U.S. at 814 (explaining that one basis for rejecting immunity is to avoid [**310] cutting off only available avenue for the rectification of constitutional [**50] injuries). The correctives for abuse of power in this context are legion. First and foremost, any local legislature that oversteps its bounds must answer to the electorate itself. See *Tenney*, 341 U.S. at 378 ("Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses."). See also *The Federalist* No. 57, at 385 (James Madison) (B. Wright, ed. 1961) (arguing that greatest check on the legislature is the vigilant "spirit which actuates the people of America"). The democratic process relies on the voters, not the courts, as the first line of defense against legislative excess.

Legislatures themselves possess effective internal mechanisms for countering misbehavior in the give-and-take of public debate and deliberation. Also, legislative action in a multi-member body requires coalition-building among individual legislators, which acts as a further check on arbitrary or extreme conduct. See Clayton P. Gillette, *Plebiscites, Participation, and Collective Action in Local Government*, 86 *Mich. L. Rev.* 930, 943-44 (1988). Many local legislatures have internal disciplinary powers as well. In this case, for example, members of the Common [**51] Council may be removed from the legislature for "official misconduct" by either a two-thirds vote of the council or by the circuit court of Kanawha County. *City of Charleston Charter and General Ordinances* § 19. Public scrutiny through the press also exposes and deters legislative action that crosses permissible lines.

Finally, state laws, both civil and criminal, provide additional means by which a wayward local legislature can be held accountable. See *Long v. City of Weirton*, 158 W. Va. 741, 214 S.E.2d 832, 859 (W. Va. 1975) (allowing state law suits against municipalities in West Virginia); City of Charleston Charter and General Ordinances § 32 (providing criminal sanctions for corruption by council members). See also, e.g., *N. C. Gen. Stat. § 160A-485* (1976); S.C. Code § § 5-7-70, 15-77-230 (1979); *Virginia Electric & Power Co. v. Hampton Redevelopment & Housing Authority*, 217 Va. 30, 225 S.E.2d 364, 368 (Va. 1976). Indeed, the majority fails to acknowledge that municipalities are subdivisions of the states and are themselves creatures of state law. See *W. Va. Code § 8-1-1 et. seq.* (1990) (providing for creation and regulation of West Virginia municipalities). The primary responsibility [**52] for legal regulation of localities has, under our system of federalism, always fallen to the states. Federalism is no mere "political theory," (see concurrence of Phillips, J.) but a structural premise of our Constitution. So, for that matter, is democracy. The idea that local legislatures will run amok if budget struggles are not the subject of § 1983 actions in

damages runs counter to the realities of checks and balances in our democratic system.

V.

Many disputes must be resolved by litigation, but this is not one of them. In the end, litigation such as this robs local politics of any pretense to finality. The abrogation of immunity in the context of a municipal budget battle further signals the demise of the political question doctrine, upon which courts have long depended to distance themselves from partisan affairs. The rule of law was not meant to be synonymous with the transfer of purely political business to our courts. There is no more political a business than legislative appropriations. Abraham Lincoln never spoke of government "of the judiciary, by the judiciary, and for the judiciary." He knew from sad experience that judicial involvement carried its own special [**53] dangers of abuse, and he understood that true democracy reserved to the people the right to determine their own destiny.

Judge Russell and Judge Widener join in this dissent.

FRANKLIN R. BLAKE, Plaintiff, v. **THE TOWN OF DELAWARE CITY**, Delaware, a Municipal Corporation; **PHILLIP CRUCHLEY**, Individually and in his capacity as former Mayor of the Town of Delaware City, Delaware; **RICHARD T. GANNON**, **ROBERT JANISZEWSKI**, and **ROBERT HARRISON**, Individually and in their capacity as former Council Members of the City Council of the Town of Delaware City, Delaware; **EMILY TUGEND**, Individually and in her capacity as former Mayor of the Town of Delaware City, Delaware; **WILLIAM PRESS**, **LAWRENCE GICKER**, **RICHARD T. GANNON**, **ROBERT HARRISON**, and **MORRIS McCARTHY**, Individually and in their capacity as Council Members of the City Council of the Town of Delaware City, Delaware; **G. W. GRIFFIN**, Individually and in his capacity as Chief of Police of the Town of Delaware City, Delaware; **DAVID DENICK**, Individually and in his capacity as Patrolman, Police Department, Town of Delaware City, Delaware; **WARNER T. FORAKER**, **KENNARD HARDING**, and **JOHN F. BOYER, JR.**, Individually and in their capacity as members of the Police Advisory Board of the Town of Delaware City, Delaware; **JAMES BAKER** and **NICHOLAS DeLEO**, Individually and in their capacity as owners of Baker and DeLeo Auto Parts, Defendants

Civil Action No. 76-108

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

441 F. Supp. 1189; 1977 U.S. Dist. LEXIS 12949

November 14, 1977

COUNSEL: [**1]

John B. Kennedy of Kennedy & Kennedy, Wilmington, Delaware, for plaintiff.

Sheldon N. Sandler of Bader, Dorsey & Kreshtool, Wilmington, Delaware, for all defendants except James Baker and Nicholas DeLeo.

Morton R. Kimmel of Kimmel & Spiller, P.A., Wilmington, Delaware, for defendants, James Baker and Nicholas DeLeo.

JUDGES:

Latchum, Chief Judge.

OPINIONBY:

LATCHUM

OPINION:

[*1193] LATCHUM, Chief Judge.

In this case, the plaintiff, Franklin R. Blake ("Blake"), seeks compensatory and punitive damages in

the amount of \$2 million dollars for alleged violations of his constitutional rights. n1 The defendants are the Town of Delaware City, eleven individuals who hold or have held positions in the government or on the police force of Delaware City (together with Delaware City, hereinafter collectively referred to as "municipal defendants") and James Baker ("Baker") and Nicholas DeLeo ("DeLeo"), the owners of an automobile parts business. Blake claims that the defendants passed an ordinance prohibiting Delaware City residents from keeping inoperable motor vehicles [*1194] on their property and three years later enforced that ordinance against Blake, all as part of a conspiracy to "get" [**2] him and drive him out of business. The case is now before the court on the defendants' motions for summary judgment. n2

n1 Complaint, Docket Item 1.

n2 Docket Items 102 and 103.

I. *Background*

On February 8, 1971, the Mayor and Council of Delaware City adopted Ordinance 2007, which made it a crime to keep an inoperable motor vehicle outside a garage on private property for more than thirty days, "except in commercial automobile storage yards properly licensed by the State of Delaware." n3 Defendant Philip Cruchley ("Cruchley") was mayor at the time and defendants Richard T. Gannon ("Gannon"), Robert Janiszewski ("Janiszewski") and Robert Harrison ("Harrison") were members of the city council. The plaintiff alleges that three other defendants, as members of the Police Advisory Board ("PAB"), advised the city council to enact the ordinance. n4

n3 Docket Item 107A, pp. 1-2.

n4 The three PAB members were: Warner T. Foraker ("Foraker"), Kennard Harding ("Harding") and John F. Boyer ("Boyer"). Docket Item 1, par. 18.

[**3]

After it became effective, the Delaware City Police enforced Ordinance 2007 periodically, but Blake was the first person they arrested under it. n5 The arrest, which occurred on June 29, 1974, culminated a series of events which began in May 1974, when Police Chief G. W. Griffin ("Griffin"), Sergeant David Denick ("Denick") and former Mayor Emily Tugend ("Tugend"), all of whom have been named as defendants herein, allegedly agreed to start enforcing the ordinance again. Thereafter, Denick and two PAB members, Foraker and Harding, conducted a tour of the Town and compiled a list of violators. These three defendants identified a total of forty-nine vehicles as being in violation of the ordinance; thirteen of these belonged to the plaintiff. Denick then proceeded to notify each of the violators. He testified at his deposition that on June 19, 1974, he gave Blake a written notice of violation and explained Ordinance 2007 to him. n6 Blake denies ever receiving notice of the violation, n7 and for present purposes, the Court will accept his testimony as true. On June 29, 1974, Denick arrested Blake. n8

n5 Denick Dep., Docket Item 104, pp. 14, 38-39; Denick attributed the failure to arrest anyone before June 29, 1974, to the fact that everyone else who had received a notice of violation had voluntarily corrected the problem. *Id.* p. 14.

[**4]

n6 Denick Dep., Docket Item 104, p. 44.

n7 Docket Item 1, par. 29; Blake Dep., Docket Item 35, p. 13.

n8 Blake also named the members of the Delaware City Council at the time of his arrest as defendants in this action. Blake alleges that the following defendants were council members at that time: William Press ("Press"), Lawrence Gicker ("Gicker"), Maurice McCarthy ("McCarthy"), Gannon, and Harrison. Docket Item 1, par. 19.

Section 5 of Ordinance 2007 n9 authorizes the City to cause any vehicles in violation of the ordinance to be removed, provided the owner of the property on which they are situated receives at least ten days notice of the violation. A few days before Sergeant Denick arrested Blake, he made arrangements with Baker and DeLeo to have any cars which remained in violation towed away. Baker accompanied Denick on the date of the arrest and, after Blake had been taken into custody, began towing the thirteen vehicles to his storage yard. Denick instructed Baker to segregate the cars from [*1195] the others in Baker and DeLeo's yard and to hold them. n10

n9 Section 5 provides:

"The Mayor and Council of Delaware City may, upon ten (10) days written notice to the owner of such a motor vehicle, or upon ten (10) days written notice to the owner of real estate upon which such a vehicle is parked, stored or maintained, cause the same to be removed, the cost and expense of which may be paid by the Mayor and Council of Delaware City and thereafter entered as a lien upon the property upon which said vehicle was stored or upon the property of the owner of said vehicle." Docket Item 107A, p. 1.

[**5]

n10 Baker Dep., Docket Item 88, pp. 10, 13-14, 18; Denick Dep., Docket Item 104, pp. 21-22, 59.

On January 15, 1975, a Delaware Common Pleas Court judge held Ordinance 2007 to be unconstitutional, dismissed the charges against Blake, and ordered the return of all personal property which had been taken from Blake. n11 The City appealed to Superior Court, but the decision was affirmed. n12 More importantly, the defendants never returned the cars to the plaintiff. It now

appears that all of the cars were shredded and sold for salvage. n13

n11 The Court held the ordinance violated the due process clause in that the period of time provided for removal of the vehicles after notice, thirty days, was arbitrarily short. Docket Item 108A, pp. 8-12.

n12 *State v. Blake*, Cr. A. 75-02-0122A (Del. Super., filed July 14, 1975) (letter opinion) (Docket Item 107A, p. 44).

n13 Baker testified that he had the cars shredded approximately nine months after he obtained them. Baker Dep., Docket Item 88, pp. 11, 16. He sold them for about \$45 each. *Id.*

[**6]

On March 10, 1976, Blake instituted this action for damages against Baker and DeLeo, the town of Delaware City and the other municipal defendants, in both their official and individual capacities. In a confused and poorly drafted Complaint, Blake claims that the defendants, individually and in concert: (1) violated his right to procedural due process by depriving him of his cars and other personal property on June 29, 1974, without notice and an opportunity to be heard; n14 (2) caused Blake's arrest and the seizure of his property and conducted the same "without a warrant, without probable cause, and in an unreasonable manner, thereby violating the Fourth Amendment . . ."; n15 (3) directed Sergeant Denick to arrest Blake pursuant to a warrant which was void because it was based on an unconstitutional ordinance; n16 and (4) "falsely, maliciously, and without probable cause effected a criminal complaint against the Plaintiff" on June 29, 1974, and instituted prosecution pursuant to that complaint. n17

n14 Count I, Docket Item 1, pars. 27-31.

n15 Count II, Docket Item 1, pars. 32-34.

n16 Count III, Docket Item 1, pars. 35-38.

[**7]

n17 Count IV, Docket Item 1, pars. 39-45.

Originally, the plaintiff based these claims on 42 U.S.C. § § 1983 and 1985(3) and their jurisdictional counterpart, 28 U.S.C. § 1343(3). Blake later amended his complaint to allege that the matter in controversy

exceeded \$10,000 and to invoke the Court's general federal question jurisdiction under 28 U.S.C. § 1331. n18

n18 Docket Item 85.

In addition to the above mentioned federal claims, the Complaint asserts a state law claim for conversion of Blake's personal property against all the defendants. The plaintiff requests that the Court exercise pendent jurisdiction over the conversion claim. n19

n19 Count V, Docket Item 1, par. 51.

In their answers n20 and memoranda in support of their motions for summary judgment, n21 the defendants have raised numerous defenses including the lack of subject matter jurisdiction, the statute of limitations, and various immunities. These defenses are considered first in relation to the plaintiff's federal law claims and then in relation to his pendent state law claims.

n20 Docket Items 5 and 9.

n21 Docket Items 107 and 109.

II. Defenses to Federal Law Claims

A. Jurisdiction

It is well settled that a municipality is not a "person" within the meaning of either 42 U.S.C. § 1983 or § 1985. *Monroe v. Pape*, 365 U.S. 167, 187-91, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961); *United States ex rel. Gittlemacker v. County of Philadelphia*, 413 F.2d 84, 86 (C.A. 3, 1969); *Folk v. Wilson*, 313 F. Supp. 727, 728 (D. Del. 1970). Moreover, [*1196] because an action for damages against municipal officers in their official capacity would be satisfied out of the municipal treasury, Sections 1983 and 1985 and their jurisdictional counterpart, 28 U.S.C. § 1343(3), [*9] provide no basis for exercising jurisdiction over any of the individual defendants in their official capacity. n22 See *Monell v. Department of Social Services*, 532 F.2d 259, 264-66 (C.A. 2, 1976), cert. granted, 429 U.S. 1071, 97 S. Ct. 807, 50 L. Ed. 2d 789 (1977); *Patton v. Conrad Area School District*, 388 F. Supp. 410, 416-17 (D. Del. 1975). Accordingly, the federal statutory claims against Delaware City and the other municipal defendants in their official capacities will be dismissed.

n22 The Court could hear an action under 42 U.S.C. § 1983 or § 1985 against the defendants in their official capacity for injunctive relief, but the Complaint requests damages only. See *Rochester v. White*, 503 F.2d 263, 266-67 (C.A. 3, 1974); *Patton v. Conrad Area School District*, 388 F. Supp. 410, 418 (D. Del. 1975); *O'Brien v. Galloway*, 362 F. Supp. 901, 905 (D. Del. 1970).

The plaintiff, however, also relies on this Court's general federal question jurisdiction under 28 U.S.C. § 1331(a) n23 as [**10] a basis for his claims that the defendants have deprived him of his constitutional rights. Liberally construed, the Complaint asserts a claim for damages against the municipal defendants directly under the Fourteenth Amendment. n24 It is well settled that this Court presently has *jurisdiction* under 28 U.S.C. § 1331 to hear Fourteenth Amendment claims for money damages against a municipality. *City of Kenosha v. Bruno*, 412 U.S. 507, 513-14, 516, 37 L. Ed. 2d 109, 93 S. Ct. 2222 (1973); *Mahone v. Waddle*, 564 F.2d 1018 at 1022 (C.A. 3, 1977) (slip op. at 5-6); *Gagliardi v. Flint*, 564 F.2d 112 (C.A. 3, 1977) (slip op. at 6). As the Third Circuit emphasized in the *Mahone* case, however, the jurisdictional issue is separate and distinct from the question: whether the Fourteenth Amendment gives rise to a *cause of action* for damages against a municipality. 564 F.2d at 1022-1023 (slip op. at 5-6). The Supreme Court has never decided the latter issue. n25 And although several district court judges in this circuit have interpreted certain Third Circuit opinions n26 as recognizing an implied cause of action for damages under the Fourteenth Amendment, n27 two recent opinions [**11] written by Judge Rosenn indicate that the Third Circuit also has not yet decided the issue. n28 In *Gagliardi v. Flint*, *supra*, the majority held that the cases referred to in note 26, *supra*, dealt only with the district court's jurisdiction, and that none of them "even purported to decide whether a damage remedy may be implied from the fourteenth [**1197] amendment." 564 F.2d at 115 (slip op. at 4-5 n.3). Finally, the Court notes that other Circuits have reached conflicting decisions on this issue. n29 The case *sub judice* squarely raises the issue whether an implied private right of action for damages against a municipality exists under the Fourteenth Amendment. Given the absence of controlling authority, the Court, after reviewing much of the case law and commentary, concludes that it would be inappropriate to imply the proposed cause of action. Because the subject has received extensive treatment recently by the courts in this circuit, n30 this Court will not retrace the background of the issue.

n23 Docket Item 85. Section 1331(a) provides:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

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n24 Docket Item 1, pars. 1-3, 30, 33; see Docket Item 108, pp. 22-23.

n25 *Mount Healthy School District Board of Education*, 429 U.S. 274, 279, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977). The Court expressly has left the question open on several occasions. *E.g., Id.; Aldinger v. Howard*, 427 U.S. 1, 4 n.3, 49 L. Ed. 2d 276, 96 S. Ct. 2413 (1976); *City of Kenosha v. Bruno*, 412 U.S. 507, 514-15, 37 L. Ed. 2d 109, 93 S. Ct. 2222 (1976).

n26 See *Rotolo v. Borough of Charleroi*, 532 F.2d 920 (C.A. 3, 1976) (per curiam); *McCullogh v. Redevelopment Authority of Wilkes-Barre*, 522 F.2d 858 (C.A. 3, 1975); *Skehan v. Bloomsburg State College*, 501 F.2d 31 (C.A.3), *vacated on other grounds*, 421 U.S. 983, 95 S. Ct. 1986, 44 L. Ed. 2d 474 (1975).

n27 See, *e.g., Sedule v. Capital School District*, 425 F. Supp. 552, 555 n.3 (D. Del. 1976); *Redding v. Medica*, 402 F. Supp. 1260, 1261 (W.D. Pa. 1975); *Connell v. City of Wilmington*, Civ. No. 76-182 (D. Del., filed May 3, 1977) (unpublished opinion). See generally *Gagliardi v. Flint*, *supra*, 564 F.2d at 117-118 (slip op. at 9-10), (Gibbons, J., concurring) and cases cited therein. But see *Crosley v. Davis*, 426 F. Supp. 389 (E.D.Pa. 1977); *Pitrone v. Mercadante*, 420 F. Supp. 1384 (E.D.Pa. 1976).

[**13]

n28 *Gagliardi v. Flint*, *supra*, 564 F.2d at 115 (slip op. at 4-5 n. 3); *Mahone v. Waddle*, *supra*, 564 F.2d at 1022-1025 (slip op. at 7-11); *accord id. at 1056-1058* (slip op. at 69-72) (Garth, J., dissenting and concurring). Judge Gibbons in a concurring opinion in *Gagliardi* argued that the cases cited in note 26, *supra*, do hold that "a Fourteenth Amendment cause of action could be asserted against municipal corporations." 564 F.2d at 1024-1025 (slip op. at 9-11).

n29 Compare *Kostka v. Hogg*, 560 F.2d 37 (C.A. 1, 1977) (refusing to imply a cause of action for damages) with *Brault v. Town of Milton*, 527 F.2d 730, 732-35 (C.A. 2), vacated on other grounds, 527 F.2d 730, 736 (1976) (en banc) and *Hostrop v. Board of Junior College*, 523 F.2d 569, 576-77 (C.A. 7, 1975). For a compilation of the cases and commentary on this issue, see *Mahone v. Waddle*, supra, 564 F.2d at 1058 (slip op. at 72 n. 37) (Garth, J., concurring and dissenting).

n30 E.g., *Mahone v. Waddle*, supra, 564 F.2d at 1056-1061 (slip op. at 69-77) (Garth J., concurring and dissenting); *Gagliardi v. Flint*, supra, 564 F.2d at 117 (slip op. at 8-25) (Gibbons, J., concurring); *Crosley v. Davis*, supra, 426 F. Supp. at 394-97; *Pitrono v. Mercadante*, supra, 420 F. Supp. at 1388-91.

[**14]

The Supreme Court established the methodology for analyzing such questions when it created a private right of action for damages against federal officers who violated the Fourth Amendment in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971).

"When there is a request for the judicial creation of a supplemental damages remedy arising directly under a constitutional provision, *Bivens* . . . teaches that a federal court should proceed with caution. Compare *Cort v. Ash*, 422 U.S. 66, 78, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975). It should carefully assess the existing remedies and consider the extent to which there has been a Congressional or other determination that the supplemental remedy should not be available." *Kostka v. Hogg*, 560 F.2d 37 at 42 (C.A. 1, 1977) (slip op. at 7).

Concerning the first inquiry, the adequacy of existing remedies, the reasons for implying a cause of action for damages against a municipality under the Fourteenth Amendment are much less compelling than those in *Bivens*. See *Pitrono v. Mercadante*, supra, 420 F. Supp. at 1389. The only alternative remedy available [**15] in *Bivens* was a state tort law action against the federal officers, which the Court found inadequate because (1) state tort law might not protect all the interests protected by the Fourth Amendment and (2) state law could not "undertake to limit the extent to which federal authority can be exercised." *Bivens v. Six Unknown Named Agents*,

supra, 403 U.S. at 390-95; see *Kostka v. Hogg*, supra, 560 F.2d at 41-42 (slip op. at 6-7). In the instant case, 42 U.S.C. § 1983 represents the alternative remedy. Section 1983, which protects the same interests as are protected by the Fourteenth Amendment, makes municipal officials personally liable for any conduct on their part which violates the civil rights of others. The principal advantage of implying a damages remedy against a municipality directly under the Fourteenth Amendment would be the assurance of a financially responsible defendant. n31 Clearly, the remedy provided by Section 1983 is more adequate than the alternative remedy available to the plaintiffs in *Bivens*. See *Mahone v. Waddle*, supra, 564 F.2d at 1060-1061 (slip op. at 76-77) (Garth, J., concurring and dissenting); *Kostka v. Hogg*, supra, 560 F.2d at 41-42 [**16] (slip op. at 6-8).

n31 Several other less tangible benefits of imposing liability on municipalities for civil rights violations by their employees are suggested in Note, *Damages Remedies Against Municipalities for Constitutional Violations*, 89 Harv.L.Rev. 922, 923 (1976).

On the second question, the appropriateness of implying a cause of action directly under the Fourth Amendment, the Court in *Bivens* stated: "The present case involves no special factors counselling hesitation in the absence of affirmative action by Congress." 403 U.S. at 396. [**198] The same cannot be said in this case. Judge Garth in a separate opinion in *Mahone v. Waddle*, identified three factors, besides a less compelling need, which "counsel hesitation" in the judicial creation of a Fourteenth Amendment action for damages against a municipality. 564 F.2d at 1058-1061 (slip op. at 73-77). First, the Fourteenth Amendment contains an enforcement provision, Section five, n32 which clearly indicates "that the framers of the [**17] Fourteenth Amendment intended to confer upon Congress -- not the courts -- the primary responsibility for developing appropriate measures to enforce the Amendment." *Id.* (emphasis in original). In sharp contrast, "[none] of the first eight Amendments contains a similar provision." *Id.* n33 Although Section five does not preclude the courts from developing remedies to enforce the Fourteenth Amendment, n34 it "counsels strongly against judicial alteration of the scheme of enforcement developed by Congress." *Id.* at 1059 (slip op. at 74).

n32 Section five of the Fourteenth Amendment provides: "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

n33 The Third Circuit has implied causes of action directly under the First Amendment, *Paton v. LaPrade*, 524 F.2d 862 (C.A. 3, 1975), and the Fifth Amendment, *United States ex rel. Moore v. Koelzer*, 457 F.2d 892 (C.A. 3, 1972).

n34 See *Ex parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908); *Gagliardi v. Flint*, 564 F.2d at 117 (slip op. at 24) (Gibbons, J., concurring).

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The second factor "counselling hesitation" against implying a cause of action here is the fact that, although Congress, by enacting Section 1983, created a damage remedy for violations of Fourteenth Amendment rights, it chose to exempt municipalities from liability under that section. *Monroe v. Pape*, *supra*. Related to this is the third factor, namely, "the failure of Congress to bring municipalities within the scope of 42 U.S.C. § 1983 during the sixteen years since *Monroe v. Pape* was decided." *Mahone v. Waddle*, *supra*, 564 F.2d at 1059 (slip op. at 74) (Garth, J., concurring and dissenting). This failure is particularly noteworthy in light of the "sustained and vigorous" legislative campaign to subject municipalities to liability under Section 1983. *Id.* at 1059-1060 (slip op. at 74-76).

Having found (1) that the need for an implied cause of action for damages against a municipality for the constitutional torts of its employees is not serious given the remedies provided under 42 U.S.C. § 1983, and (2) that it would be inconsistent with the spirit of Section five of the Fourteenth Amendment to imply a damage action against a municipality in situations in which Congress, [**19] at least implicitly, refused to do so, n35 this Court concludes that the Fourteenth Amendment does not provide the plaintiff Blake with a cause of action against defendant Delaware City for damages. Further, because recovery ultimately would be from the Delaware City treasury, the claims asserted under the Fourteenth Amendment and 28 U.S.C. § 1331 against the municipal defendants in their official capacity must also be dismissed for failure to state a cause of action.

n35 *Mahone v. Waddle*, *supra*, 564 F.2d at 1060 (slip op. at 76) (Garth, J., concurring and dissenting); cf. *Aldinger v. Howard*, 427 U.S. 1, 15-19, 49 L. Ed. 2d 276, 96 S. Ct. 2413 (1977) (refusal to exercise pendent party jurisdiction over municipality when § 1983 was basis for federal claim); *Moor v. County of Alameda*, 411 U.S. 693, 36 L. Ed. 2d 596, 93 S. Ct. 1785 (1973) (refusal to use § 1988 to circumvent *Monroe v. Pape*).

Having dismissed the federal claims against Delaware City and all the municipal defendants in their official [**20] capacity, it is necessary to consider one other preliminary matter concerning the federal claims against the defendants in their individual capacity. The Complaint alleges a conspiracy among the defendants to deprive Blake of his constitutional rights and seeks relief under 42 U.S.C. §§ 1983 and 1985(3). To make out a cause of action under Section 1985(3) the plaintiff must allege "some racial, or . . . otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Griffin v. Breckenridge*, 403 U.S. 88, 102, 29 L. Ed. 2d 338, 91 S. Ct. 1790 (1971). Because Blake [**199] has not alleged any class-based discriminatory motivation, he has not stated a cause of action cognizable under 42 U.S.C. § 1985(3). *Id.*; see *Hazo v. Geltz*, 537 F.2d 747, 749 (C.A. 3, 1976); *McNally v. Pulitzer Publishing Co.*, 532 F.2d 69, 74-75 (C.A. 8, 1976). This conclusion does not require dismissal of the conspiracy claims, however; for the Court considers the allegations in the Complaint sufficient to support a cause of action for conspiracy under Section 1983. Section 1983 provides a remedy for all violations of rights secured by the Constitution, not only those [**21] stemming from class-based discrimination. *Hahn v. Sargent*, 388 F. Supp. 445, 450 (D. Mass.), *aff'd*, 523 F.2d 461 (C.A. 1, 1975), *cert. denied*, 425 U.S. 904, 47 L. Ed. 2d 754, 96 S. Ct. 1495 (1976). And several courts have recognized civil causes of action for conspiracy based on 42 U.S.C. § 1983. See, e.g., *Hazo v. Geltz*, *supra*, 537 F.2d at 749; *Mizell v. North Broward Hospital District*, 427 F.2d 468, 473 (C.A. 5, 1970); *Hoffman v. Halden*, 268 F.2d 280, 292-93 (C.A. 9, 1959).

B. Statute of Limitations

The defendants contend that the statute of limitations has run with respect to any claims for damages based on the adoption of Ordinance No. 2007 in 1971. As noted in *Gordenstein v. University of Delaware*, 381 F. Supp. 718, 727 (D. Del. 1974):

"Congress has not prescribed a limitations period for the commencement of suits under [42 U.S.C.] Section 1983. This Court must therefore observe the limitations period governing analogous causes of action under state law. *Howell v. Cataldi*, 464 F.2d 272 (3d Cir. 1972)."

Blake seeks to recover damages for injuries to his person and to his personal property. The parties agree that the applicable [**22] statutes of limitations are 10 Del. C. §

§ 8107 and 8119, n36 both of which provide for a two year limitations period.

n36 Docket Item 107, p. 14; Docket Item 108, pp. 18-19. Section 8107 covers actions to recover damages for injury to personal property; Section 8119 covers actions "for the recovery of damages upon a claim for alleged personal injuries." The Court notes that, at least with respect to the civil conspiracy claims for injury to personal property, the three year period of limitations provided for in *10 Del. C. § 8106* might apply. See *Freedman v. Beneficial Corp.*, 406 F. Supp. 917, 924 (D. Del. 1975). It is unnecessary to resolve that question, however, because the events upon which this suit is based all occurred either less than two years before the suit was filed or more than three years before that date.

Blake instituted this action on March 10, 1976. The actions upon which Blake basis his claims for damages are: (1) the adoption of Ordinance 2007 on February 8, 1971, (2) his arrest and **[**23]** the seizure of his cars on June 29, 1974, and (3) the defendants' failure to return his cars after January 15, 1975, when a Common Pleas Court held Ordinance 2007 unconstitutional. The statute of limitations clearly has not run on the last two of these events, each of which occurred less than two years before the plaintiff instituted this action. To determine whether the claims based on the adoption of the ordinance are time barred, it is necessary to determine when Blake's cause of action thereon accrued. Blake contends that the statute of limitations did not begin to run until the ordinance was declared unconstitutional on January 15, 1975, or, alternatively, until the ordinance was enforced against him on June 29, 1974. Blake alleges that the defendants enacted Ordinance 2007 in 1971 for the purpose of "getting" him and putting him out of business. n37 He sued the defendants both as individual tortfeasors and as members of a conspiracy. The individual and conspiracy claims are analyzed separately below.

n37 Docket Item 1, par. 14; Docket Item 108, p. 21.

[24]**

Individual claims have been asserted against defendants Cruchley, Gannon, Janiszewski, and Harrison for adopting Ordinance 2007. In Delaware,

"Statute of limitations begin to run when proper parties are in existence capable of suing and being sued, and a cause of action exists capable of being sued on forthwith." *Keller v. President, Directors and Company of Farmers Bank*, **[*1200]** 41 Del. 471, 476, 24 A.2d 539, 541 (Super. Ct. 1942).

If Blake's allegation that the ordinance was adopted to put him out of business were true, he could have sought injunctive and declaratory relief in the state courts immediately after the ordinance became effective in 1971. n38 Therefore, the Court concludes that the individual causes of action based on the enactment of Ordinance 2007 are barred by the statute of limitations.

n38 The record indicates that the plaintiff believed he was being harassed by Delaware City officials when the Council adopted Ordinance 2007. See Blake Dep., Docket Item 35, pp. 30-33; Docket Item 73, Answer 37.

[25]**

Regarding the claim that the defendants conspired to violate Blake's constitutional rights, the applicable rule under Delaware law is:

"The statute of limitations in a civil conspiracy runs from the time of the overt act which is alleged to have caused the damages complained of even though damages continue to flow indefinitely as a result of such act."

Freedman v. Beneficial Corp., *supra*, at 924; see *Henis v. Compania Agricola de Guatemala*, 116 F. Supp. 223, 226 (D. Del. 1953); *Park-In Theatres, Inc. v. Paramount-Richards Theatres, Inc.*, 90 F. Supp. 727, 729 (D. Del. 1950); *Glassberg v. Boyd*, 35 Del. Ch. 293, 116 A.2d 711, 717 (1955). Applying the rule to this case, the Court concludes that the statute of limitations precludes the recovery under a conspiracy theory of damages caused by the enactment of the ordinance, as opposed to its enforcement.

C. Legislative Immunity

Blake alleges that defendant Tugend was the mayor and defendants Press, Gicker, Gannon, Harrison and McCarthy were council members when Ordinance 2007 was enforced against him. n39 These defendants, to-

gether with the defendants who adopted the ordinance, contend they are immune [**26] from liability to the plaintiff under the doctrine of legislative immunity.

n39 Complaint, Docket Item 1, par. 19. The defendants denied that McCarthy was a member of the Council in June 1974. Docket Item 5, par. 6. All five of the alleged council members stated that McCarthy did not join the Council until October 1974. Answers to Plaintiff's Interrogatories, Docket Item 43, Answers 3, 5. In response to interrogatories directed to him by the defendants, however, Blake renewed his allegation that McCarthy conspired with the other council members in June 1974 to enforce Ordinance 2007 against him. Docket Item 73, Answer 37. For purposes of the pending summary judgment motion, the Court must consider the evidence and pleadings in the light most favorable to the plaintiff and assume McCarthy was a council member when Blake was arrested. *Long v. Parker*, 390 F.2d 816, 821 (C.A. 3, 1968).

The Supreme Court reviewed the various types of immunity from liability for damages afforded to governmental officials [**27] under 42 U.S.C. § 1983 in *Wood v. Strickland*, 420 U.S. 308, 316-18, 43 L. Ed. 2d 214, 95 S. Ct. 992 (1975). Concerning legislative immunity, the Court noted that in *Tenney v. Brandhove*, 341 U.S. 367, 95 L. Ed. 1019, 71 S. Ct. 783 (1951), it had found

"... no basis for believing that Congress intended [Section 1983] to eliminate the traditional immunity of legislators from civil liability for acts done within their sphere of legislative action. *That immunity*, 'so well grounded in history and reason...' *id.*, at 376, *was absolute and consequently did not depend upon the motivations of the legislators.*" 420 U.S. at 317 (emphasis supplied). n40

Despite the plain meaning of the language emphasized, Blake contends that a legislator is not immune from liability if he

"knew, or reasonably should have known, that the action he took within his sphere of official responsibility would violate the Constitutional rights of a person, or if he [**1201] took the action with the malicious intent to cause deprivation of such Constitutional rights." n41

To support his position the plaintiff cites only *Wood v. Strickland*, [**28] *supra*. Unfortunately, the plaintiff misapprehends the meaning of that case; the Court in *Wood v. Strickland* specifically limited the application of the qualified immunity referred to by the plaintiff to officers of the executive branch of government. 420 U.S. at 317-18.

n40 In Delaware, legislators also enjoy absolute immunity from personal liability at common law for acts performed within the scope of their legislative duties. See *Shellburne, Inc. v. New Castle County*, 293 F. Supp. 237, 242-43 (D. Del. 1968); *Shellburne, Inc. v. Roberts*, 43 Del. Ch. 485, 238 A.2d 331 (Del. Sup. 1967). Therefore, unless otherwise indicated, the analysis of legislative immunity as a defense to the plaintiff's federal claims applies equally to the pendent state law claim.

n41 Docket Item 108, p. 30.

Blake also cites *Cohen v. Maloney*, 428 F. Supp. 1278 (D. Del. 1977), as supporting his contention that legislators enjoy only a qualified immunity. In *Cohen v. Maloney*, Judge Stapleton recognized two [**29] situations where the doctrine of legislative immunity would not protect legislators: (1) where the activities giving rise to the suit are not legitimate legislative activities, and (2) "where no agents [of the legislature] participated in the challenged action and no other remedy was available." 428 F. Supp. at 1281-82. The latter of these two exceptions clearly does not apply to this case. As to the former, the plaintiff has failed to allege that the defendant council members, either collectively or individually, did anything more than bring occasional complaints they received from residents about "junk cars" to the attention of the police department. Indeed, the plaintiff appears to argue that merely because these defendants were on the Council in June 1974, they are responsible for his arrest. n42 In short, there is nothing in the records showing that any of the defendant council members, other than former Mayor Tugend, exceeded the scope of their legislative

authority with respect to any actions which affected Blake. Accordingly, the Court will enter summary judgment in favor of those defendants with respect to the claims asserted against them for their individual actions. [**30]

n42 Docket Item 108, p. 9. Defendant Gicker joined the Council two months before the arrest, and he testified at his deposition that he knew nothing of the enforcement of Ordinance 2007 until after Blake's arrest. Gicker Dep., Docket Item 89, pp. 3, 19-23.

Further, the Court will grant summary judgment for defendants Cruchley, Gannon, Janiszewski, Harrison, Press, Gicker, and McCarthy on the plaintiff's conspiracy claims, because the facts alleged against them, taken in the light most favorable to the plaintiff, fail to establish their participation in the claimed conspiracy. In *La-Rouche v. City of New York*, 369 F. Supp. 565, 567 (S.D.N.Y. 1974), the court held:

"A complaint under § 1983 must set forth more than vague, conclusory allegations charging a defendant's participation in a conspiracy. Plaintiffs must 'allege with some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy.'" (footnote omitted).

Accord, [**31] *Hickey v. New Castle County*, 428 F. Supp. 606, 611 (D. Del. 1977). Here, the only overt acts which the above-named defendants are alleged to have engaged in were actions performed within the scope of their legislative authority. n43 It would be anomalous to subject public officials to potential liability for civil conspiracy under 42 U.S.C. § 1983 for the performance of acts which "are exactly the kind of discretionary conduct which must be taken by public officials, unfettered by the fear of harassing or retributory lawsuits." *Safeguard Mutual Insurance Co. v. Miller*, 333 F. Supp. 822 (E.D.Pa. 1971). To sustain the conspiracy claims against these defendants on the record here would undermine the policy for [**1202] granting legislative immunity in the first place.

n43 The plaintiff has alleged that in 1969 defendant Harrison had him "falsely arrested" for having a broken water pipe and later assaulted Blake at the Delaware City Recreation Club.

Supplemental Answers to Interrogatories Directed to Plaintiff, Docket Item 73, Answer 37. Blake also alleged that several years ago defendant Cruchley drove away one of Blake's customers by making "derogatory and obscene remarks." *Id.* Besides being barred by the statute of limitations, these incidents do not demonstrate that the defendants acted other than as independent actors and are too remote in time to evidence continued participation by Harrison and Cruchley in an ongoing conspiracy.

[**32]

Former Mayor Tugend played a more active role in enforcing Ordinance 2007, however. She has admitted instructing Police Chief Griffin and Sergeant Denick to enforce the ordinance in May 1974. n44 The defendants argue that, to the extent former Mayor Tugend's action was non-legislative, it is *de minimis* and does not rise to the level of a Civil Rights Act violation. This contention raises a disputed issue of material fact which precludes this Court from awarding defendant Tugend summary judgment on the basis of legislative immunity.

n44 Docket Item 48, Answer 12.

D. Official Immunity

Although former Mayor Tugend does not enjoy absolute immunity, she is entitled to a "qualified immunity" from personal liability under 42 U.S.C. § 1983 for the actions she took in her executive capacity. *Scheuer v. Rhodes*, 416 U.S. 232, 247, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974). Four other defendants arguably are entitled to the same type immunity. They are the three members of the Police Advisory Board ("PAB"), [**33] n45 viz., defendants Foraker, Harding and Boyer, and Police Chief Griffin. To avoid liability under the qualified immunity established in *Scheuer* a defendant official must show: (1) that he acted within the scope of his authority; (2) that he acted in good faith; and (3) that his actions were reasonable "at the time and in light of all the circumstances." *Scheuer v. Rhodes*, *supra*, 416 U.S. at 247-48; accord, *Wood v. Strickland*, *supra*, 420 U.S. at 318. The Court will not grant summary judgment on the claims against any of the defendants eligible for official immunity, because genuine issues of material fact exist with respect to the last two of the three criteria for immunity as to each of those defendants. n46

n45 The PAB acts as a liaison between the Mayor and Council, the Police Department and the public, advising each group of the concerns of

the others regarding police matters. Docket Items 44 & 45, Answer 3; Docket Item 48, Answer 9. The members are appointed by the Mayor subject to Council approval. Docket Item 44, Answer 2.

Although it is impossible to characterize the PAB's function as either legislative or executive, it seems most accurate to describe the Board as a quasi-executive body intended to foster more effective law enforcement.

[**34]

n46 Defendants' argument that the members of the PAB did not act "under color of state law" as required by 42 U.S.C. § 1983 (Docket Item 107, p. 17) is totally without merit. See generally C. Antieau, *Federal Civil Rights Acts* § 33 (1971).

For example, it is undisputed that defendants Foraker and Harding accompanied Sergeant Denick on a tour of Delaware City in May 1974 in order to compile a list of the abandoned motor vehicles and the property owners in violation of Ordinance 2007. n47 They identified forty-nine cars, including thirteen located on Blake's property. n48 Blake alleges that defendants Foraker and Harding acted in bad faith and with a malicious intent to "get" him. Similarly, the plaintiff alleges that Police Chief Griffin and former Mayor Tugend acted in bad faith when they decided to enforce Ordinance 2007 and, ultimately, to have Blake arrested.

n47 See Docket Item 107, p. 7; Denick Dep., Docket Item 104, pp. 7-8.

n48 Docket Item 107, p. 7; Denick Dep., Docket Item 104, p. 6.

[**35]

Although a stronger argument has been made for summary judgment in favor of the third PAB member, defendant Boyer, it must be rejected also. Boyer testified at his deposition that he knew nothing about the efforts to enforce Ordinance 2007 until after Blake was arrested. n49 The plaintiff, however, contends that Boyer and the other PAB members "specifically urged enforcement of the statute in May 1974." n50 To support his allegation Blake cites only the [*1203] following statement by former Mayor Tugend in response to an interrogatory: n51

"Myself, Chief Griffin and the Police Advisory Board asked Sgt. Denick to pro-

ceed against the forty or so junk cars on his list of violators. I believe plaintiff's junk cars were on the list."

Because the record contains no other evidence on this point and the evidence, for purposes of this summary judgment motion, must be considered in the light most favorable to the plaintiff, n52 the Court assumes that Boyer recommended enforcement of the ordinance. Since Blake further alleges that Boyer acted in bad faith, the Court must deny the motion for summary judgment in Boyer's favor.

n49 Docket Item 91, pp. 4-5, 11. Baker testified that he never even attended a meeting of the PAB in 1974, because he was working two jobs at the time. *Id.* p. 5.

[**36]

n50 Docket Item 108, p. 9.

n51 Docket Item 48, Answer 15; defendant Tugend also named Boyer as being a member of the PAB at that time. *Id.* Answer 8.

n52 See *Long v. Parker*, 390 F.2d 816, 821 (C.A. 3, 1968).

E. Policeman's Immunity

Finally, the municipal defendants correctly contend that under Section 1983, Police Chief Griffin and Sergeant Denick are entitled to policeman's immunity, that is, the defense of good faith and probable cause. See *Pierson v. Ray*, 386 U.S. 547, 557, 18 L. Ed. 2d 288, 87 S. Ct. 1213 (1967). n53 Once again, however, the plaintiff's allegations of bad faith preclude summary judgment.

n53 Docket Item 107, p. 17. The courts generally characterize the duties of law enforcement as non-discretionary and therefore deny policemen the broader immunity afforded executive officials with discretionary duties under *Scheuer v. Rhodes*, *supra*, and *Wood v. Strickland*, *supra*. See McCormack and Kirkpatrick, *Immunities of State Officials Under Section 1983*, 8 *Rut.-Cam.L.J.* 65, 95 (1976).

[**37]

Although defendants Baker and DeLeo assert a defense of absolute immunity, n54 they enjoy only a qualified immunity roughly equivalent to that available to the defendant police officers. See W. Prosser, *The Law of Torts* § 26, p. 133 & nn. 90-91 (4th ed. 1971). As private citizens who assisted a police officer, at his request, in accomplishing a seizure of personal property incident to an arrest, Baker and DeLeo are immune from liability under Section 1983 if they acted in good faith. See *id.* Since the plaintiff alleges these defendants acted in bad faith, their motion for summary judgment must be denied.

n54 Docket Item 9, Affirmative Defense 2.

Defendants Baker and DeLeo also contend that they acted at all relevant times as independent contractors for Delaware City, and not under color of law. n55 The Court disagrees. In seizing the cars pursuant to an agreement with the police, Baker and DeLeo carried out a function which the police were authorized by law to perform n56 and, thus, acted under [**38] color of law. See *Tedeschi v. Blackwood*, 410 F. Supp. 34, 41-42 (D. Conn. 1976) (three judge court); *DeCarlo v. Joseph Horne & Co.*, 251 F. Supp. 935 (W.D. Pa. 1966). Further, because they allegedly conspired with city officials to violate Blake's civil rights, the fact that Baker and DeLeo are not state officers is no defense to a Section 1983 action. See *Adickes v. Kress & Co.*, 398 U.S. 144, 152, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970); *Phillips v. Trello*, 502 F.2d 1000, 1004 (C.A. 3, 1974).

n55 *Id.* Affirmative Defense 4.

n56 Ordinance 2007, Section 5 (Docket Item 107A, p. 1).

III. Pendent State Law Claim

In addition to asserting claims under federal law, Blake has invoked the Court's pendent jurisdiction to hear a state law claim for conversion of his personal property. n57 There are two prerequisites for the exercise of pendent jurisdiction. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725-27, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966). First, the underlying [**39] federal claim must be sufficiently substantial to support federal jurisdiction. *Id.* at 725. As indicated in Part II. A, *supra*, this Court, by virtue of Blake's claim for damages under the Fourteenth Amendment [**1204] and 28 U.S.C. § 1331 has subject matter jurisdiction with respect to all

the defendants in both their individual and official capacities. *Gagliardi v. Flint*, *supra*, 564 F.2d at 114-116 (slip op. at 4-6); see *Hagans v. Lavine*, 415 U.S. 528, 542-43, 39 L. Ed. 2d 577, 94 S. Ct. 1372 (1974). Second, the state and federal claims must "derive from a common nucleus of operative fact" or be such that a plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers v. Gibbs*, *supra*, 383 U.S. at 715. Reducing the conversion claim to its simplest form, the plaintiff claims that, regardless of whether the seizure of his cars on June 29, 1974 was tortious, the defendants converted those cars by failing to return them after the state courts held Ordinance 2007 unconstitutional. n58 Because the claim relates only to the defendants' failure to return the cars in 1975, the defendants argue that there is no "common nucleus [**40] of operative facts" shared by the conversion claim and the federal claims, which are based primarily on the June 29, 1974 arrest and seizure. n59 Assuming this to be true, the Court nonetheless finds the facts underlying the conversion claim sufficiently related to the plaintiff's other claims that one would expect the state and federal law claims to be tried together in a single judicial proceeding. *Id.* at 725 & n.13. Therefore, the Court has the power to exercise pendent jurisdiction over the conversion claim. *Id.* at 725-27.

n57 Docket Item 1, par. 51.

n58 Docket Item 1, pars. 25, 47, 48, 49.

n59 Docket Item 109, p. 16.

Pendent jurisdiction, however, is a doctrine of discretion; the Court may decline to hear a pendent state claim based on considerations of "judicial economy, convenience and fairness to the litigants." *Id.* at 726. Because the federal claims against the defendant Delaware City and the individual defendants in their official capacities have been dismissed, the Court [**41] will not exercise its pendent jurisdiction to hear the state law claims asserted against those defendants. *United Mine Workers of America v. Gibbs*, *supra*, 383 U.S. at 726. n60 An additional factor prompting dismissal of the pendent claims against Delaware City and its officers in their official capacity is the Court's desire to avoid an unnecessary decision on what constitutes a waiver of sovereign immunity by a municipality under Delaware law -- an issue which has not been definitively settled by the state courts. n61

n60 In *Pitrone v. Mercadante*, 420 F. Supp. 1384, 1391 (E.D.Pa. 1976), the court dismissed the pendent claims against a township in circum-

stances identical to those present in this case. The court in *Pitrone* held that *Aldinger v. Howard*, 427 U.S. 1, 49 L. Ed. 2d 276, 96 S. Ct. 2413 (1976), barred it from adjudicating any state law claims against the township, after it had dismissed the federal claims against the township. 420 F. Supp. at 1391. Although this Court also has decided to dismiss the pendent claims against a municipality, we do not think *Aldinger v. Howard*, *supra*, mandates dismissal. The issue in *Aldinger* was whether a court should exercise "pendent party" jurisdiction "over a party as to whom no independent basis of federal jurisdiction exists." 427 U.S. at 2-3. The plaintiff in *Aldinger* did not assert a cause of action directly under the Fourteenth Amendment. *Id.* at 4 n.3. Compare *id.* with *Gagliardi v. Flint*, *supra*, and *Rosado v. Wyman*, 397 U.S. 397, 405, 25 L. Ed. 2d 442, 90 S. Ct. 1207 (1970).

[**42]

n61 The trend of the law in Delaware is to eliminate sovereign immunity. *Pajewski v. Perry*, 363 A.2d 429, 434 (Del. Sup. 1976). The Delaware City Charter (58 Del. Laws Ch. 588) authorizes the City to "sue and be sued, . . . defend and be defended," and grants it "all powers which, under the Constitution of State, it would be competent for the General Assembly to grant by specific enumeration." The Delaware Courts have held that such language, when it pertains to counties or other state agencies, constitutes a waiver of sovereign immunity. *Wilmington Housing Authority v. Williamson*, 228 A.2d 782, 786-88 (Del. Sup. 1967); *Varity Builders, Inc. v. Polikoff*, 305 A.2d 618, 619 (Del. Sup. 1973). To date, however, the courts have not extended the logic of those cases to cover similar language in the charters of municipalities. Compare *Eastern Union Co. v. Moffatt Tunnel Improvement Dist.*, 178 A. 864, 869 (Del. Super. 1935) with *Wilmington Housing Authority v. Williamson*, *supra*, 228 A.2d at 788.

[*1205] Several factors warrant the exercise of pendent jurisdiction over the [**43] claims against the defendants in their individual capacities, however. Fairness is one factor; for if the Court were to dismiss the conversion claim, the statute of limitations might bar the plaintiff from asserting it in state court. n62 Although it may not be determinative, the unavailability of another judicial forum weighs in favor of the exercise of pendent jurisdiction. See Hart & Wechsler's *The Federal Courts*

and *the Federal System* 925 (2d ed. 1973). In addition, consideration of the state and federal law claims in a single proceeding will conserve judicial energy and avoid duplicitious litigation. On the other side of the scale, the conversion claim does not appear to predominate over the federal claims or to raise difficult or novel questions of state law. Unlike the situation in *Aiello v. City of Wilmington*, 426 F. Supp. 1272, 1295 (D. Del. 1976), upon which the defendants rely in urging dismissal of the conversion claim, the issues presented by the state claims against the defendants in this case in their individual capacities do not necessitate resolution of "knotty issues" of state law with little guidance from the state courts. Finally, the risk of jury [**44] confusion is negligible.

n62 An action for conversion is subject to a three-year statute of limitations in Delaware. 10 Del. C. § 8106; see *Jackson v. Cities Service Co.*, 15 F. Supp. 397 (D. Del. 1936). Although Ordinance 2007 was not held unconstitutional until January 17, 1975, Blake's cause of action for the wrongful seizure of his cars by the defendants accrued, if at all, on the date of seizure, June 29, 1974 -- more than three years ago. See *Mastellone v. Argo Oil Corp.*, 46 Del. 102, 82 A.2d 379, 383-84 (Del. Sup. Ct. 1951); *Wise v. Delaware Steeplechase & Race Ass'n*, 28 Del. Ch. 532, 45 A.2d 547, 552 (Del. Sup. Ct. 1945).

To minimize the potential for jury confusion, the parameters of the conversion claim are discussed below. At the outset, the Court notes that if the jury should find the defendants, or any of them, violated the plaintiff's constitutional rights and either acted in bad faith or were otherwise not immune from liability, it would be unnecessary for them to consider the state law [**45] claim for conversion. This conclusion is based on the assumption that the damages for a violation of Section 1983 in this case would subsume any damages recoverable for conversion. n63 Inversely, a finding that the defendants had not violated Blake's civil rights or that they had acted in good faith would not preclude the imposition of liability for the conversion of his cars. Bad faith or intent to "get" Blake do not have to be shown to establish conversion; the plaintiff must prove only that the defendants intended to exercise dominion and control over the goods inconsistent with Blake's rights in them. W. Prosser, *The Law of Torts* § 15, at 83 (3d ed. 1964). Good faith is not a defense to conversion. See *id.*; 1 F. Harper & F. James, *The Law of Torts* § 2.10, at 126-27 (1st ed. 1956). n64 Defendants Baker and DeLeo admitted that the cars have not been returned. n65 Genuine issues of material fact exist, however, with respect to who, if anyone, is liable

for the defendants' inability to return the cars to Blake n66 and concerning the level of damages. Therefore, the Court must deny the defendants motions for summary judgment on the conversion claim.

n63 The damages recoverable upon proof of conversion are the value of the property at the time of the conversion with interest. *Wyndham, Inc. v. Wilmington Trust Co.*, 44 Del. 324, 59 A.2d 456, 459 (Del. Super. 1948); 2 Wooley on Delaware Practice § 1521 (1906).

[**46]

n64 Although the original seizure might have been privileged as incident to an arrest (*see Restatement Second of Torts § 265 & comment d*), such a privilege would not excuse the failure to return the cars after the charges against Blake were dismissed. *See State, to Use of Henderson v. Clark*, 41 Del. 246, 20 A.2d 127 (Del. Sup. 1941); 1 Harper & James, *supra*, § 2.44, at 207-08 & n.12.

n65 Docket Item 41; *see note 13 supra*.

n66 Docket Item 5, Cross-claims 1, 2, 3 asserted by municipal defendants against Baker and DeLeo; Docket Item 9, Cross-claims 1, 2, 3 asserted by Baker and DeLeo against municipal defendants.

[*1206] Conclusion

The plaintiff has asserted claims arising under both federal and state law against Delaware City and fifteen individual defendants in both their individual and official capacities. The defendants have moved for summary judgment and the Court has disposed of those motions as indicated below. Summary judgment on all claims will be granted in favor of defendant Delaware City and all the individual defendants, except Baker and DeLeo, [**47] to the extent they were sued in their official capacities. Summary judgment on all claims also will be granted in favor of the following defendants on the basis of legislative immunity: Cruchley, Gannon, Janiszewski, Harrison, Press, Gicker, and McCarthy. Summary judgment will be granted with respect to all claims asserted under 42 U.S.C. § 1985 and with respect to all claims for damages resulting from the adoption of Ordinance 2007 in 1971 as opposed to the enforcement of it in 1974. In all other respects defendants' motions for summary judgment will be denied.

An order will be entered in accordance with this opinion. [***none**]

[EDITOR'S NOTE: The following court-provided text does not appear at this cite in 441 F. Supp.]

ORDER

For the reasons set forth in the Court's opinion entered in this case on this date, it is

ORDERED:

1. Summary judgment is granted in favor of all the defendants and against the plaintiff on the conspiracy claim asserted under 42 U.S.C. § 1935, because it fails to state a cause of action.

2. Summary judgment is granted in favor of all the defendants and against the plaintiff on the claims asserted under 42 U.S.C. § 1983 for damages [**48] caused by the adoption of Ordinance 2007 in 1971, because such claims are barred by the statute of limitations.

3. Summary judgment is granted in favor of defendant Delaware City and all the individual defendants (except Baker and DeLeo), in their official capacities as to:

(a) All claims asserted under 42 U.S.C. § 1983, because Section 1983 does not apply to municipalities.

(b) All claims asserted directly under the Fourteenth Amendment, because the Fourteenth Amendment does not give rise to a cause of action for damages against a municipality.

(c) The pendent state law claim for conversion, because all federal claims against these defendants have already been dismissed and the circumstances do not warrant the exercise of pendent jurisdiction.

4. On the basis of legislative immunity and the immunity of a municipality from suit under Section 1983 and the Fourteenth Amendment (par. 3(a), (b), *supra*), summary judgment is granted against the plaintiff and in favor of the following defendants, in both in their individual and official capacities as to all federal and state law claims against them: Cruchley, Gannon, Janiszewski, Harrison, Press, Gicker, and McCarthy.

5. Because [**49] genuine issues of material fact exist concerning whether they acted in good faith and otherwise satisfied the requirements for immunity, summary judgment is denied as to defendants Tugend, Griffin, Denick, Foraker, Harding, Boyer, Baker and DeLeo, in their individual capacities, with respect to:

(a) The individual and conspiracy claims asserted against them under 42 U.S.C. § 1983.

(b) The state law claim for conversion, over which the Court has decided to exercise its pendent jurisdiction.

JAMES L. LATCHUM / Chief Judge

DANIEL BOGAN AND MARILYN RODERICK, PETITIONERS v. JANET SCOTT-HARRIS

No. 96-1569

SUPREME COURT OF THE UNITED STATES

523 U.S. 44; 118 S. Ct. 966; 140 L. Ed. 2d 79; 1998 U.S. LEXIS 1596; 66 U.S.L.W. 4163; 76 Fair Empl. Prac. Cas. (BNA) 147; 72 Empl. Prac. Dec. (CCH) P45,176; 13 I.E.R. Cas. (BNA) 1185; 98 Cal. Daily Op. Service 1474; 98 Daily Journal DAR 2035; 1998 Colo. J. C.A.R. 945; 11 Fla. L. Weekly Fed. S 356

**December 3, 1997, Argued
March 3, 1998, Decided**

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

DISPOSITION: F.3d , reversed.

DECISION:

Legislative actions of city's mayor and city council's vice president in enacting ordinance that eliminated position of city administrator held protected by absolute immunity from liability under *42 USCS 1983*.

SUMMARY:

In 1990, a city agency administrator in Fall River, Massachusetts, received a complaint that an employee had made racial and ethnic slurs. The administrator prepared termination charges against the employee, who allegedly pressed her case with several state and local officials, including the vice president of the city council. The council held a hearing on the charges and ultimately accepted a settlement proposal under which the employee was to be suspended without pay for 60 days. The mayor of Fall River subsequently reduced the punishment. While the charges against the employee were pending, the mayor (1) prepared his budget proposal for the 1992 fiscal year, and (2) proposed eliminating 135 city positions, including that of the administrator. The council's ordinance committee, chaired by the vice president, approved an ordinance eliminating the administrator's agency. The council adopted the ordinance by a vote of 6 to 2, with the vice president among those voting in favor. The mayor signed the ordinance into law. The administrator filed suit under *42 USCS 1983* in the United States District Court for the District of Massachu-

setts against the city, the mayor, the vice president, and several other city officials, in which suit it was alleged that the elimination of the administrator's position was motivated by racial animus and a desire to retaliate against the administrator for exercising her rights under the Federal Constitution's First Amendment in filing the complaint against the employee. The District Court denied motions by the mayor and the vice president to dismiss on the basis of legislative immunity, and the case proceeded to trial. The jury found defendants including the mayor and the vice president liable on the First Amendment claim. On a motion for judgment notwithstanding the verdict, the District Court again denied the mayor's and the vice president's immunity claims, on the ground that the ordinance was an individually targeted administrative act, rather than a neutral and legislative elimination of a position that incidentally resulted in the administrator's termination. The United States Court of Appeals for the First Circuit, affirming the District Court's judgment in pertinent part, reasoned that (1) constitutionally sheltered speech was a substantial or motivating factor underlying the mayor's and the vice president's conduct, and (2) such conduct was administrative rather than legislative in nature (*1997 US App LEXIS 594*).

On certiorari, the United States Supreme Court reversed. In an opinion by Thomas, J., expressing the unanimous view of the court, it was held that (1) local legislators are absolutely immune from suit under 1983 for their legislative activities; and (2) the actions of the mayor and the vice president were protected by such immunity, regardless of the subjective intent motivating such actions, as (a) the actions were legislative in form, and (b) the ordinance was legislative in substance.

LAWYERS' EDITION HEADNOTES:**[***LEdHN1]****CIVIL RIGHTS § 32**

-- immunity -- local legislators

Headnote:[1A][1B][1C]

Local legislators are absolutely immune from suit under *42 USCS 1983* for their legislative activities, as (1) the common law at the time that 1983 was enacted deemed local legislators to be absolutely immune from suit for such activities; (2) the rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators, for (a) regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability, (b) the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace, (c) the threat of liability may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability, and (d) some deterrents to legislative abuse may be greater at the local level than at other levels of government.

[*LEdHN2]****CIVIL RIGHTS § 32**

-- immunity -- city officials -- enactment of ordinance

Headnote:[2A][2B][2C][2D]

With respect to a city ordinance eliminating a city agency and the position of the agency's administrator pursuant to a proposed city budget, the actions of the city council's vice president in voting for the ordinance and the actions of the city's mayor in introducing the budget and signing the ordinance into law are protected by absolute immunity from civil liability under *42 USCS 1983*, regardless of the subjective intent motivating such actions, where (1) the vice president's actions are legislative in form; (2) the mayor's actions also are formally legislative, even though the mayor is an executive official, as such actions are integral steps in the legislative process; and (3) the ordinance is legislative in substance, as (a) the ordinance reflects a discretionary policymaking decision implicating the city's budgetary priorities and the services provided to the city's constituents, (b) the ordinance involves the termination of a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office, and (c) the city council, in eliminating the agency, governs in a field where legislators traditionally have power to act.

[*LEdHN3]****LEGISLATURE § 1**

; United States 9 -- immunity

Headnote:[3]

Federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities.

[*LEdHN4]****MUNICIPAL CORPORATIONS § 2**

-- status -- immunity

Headnote:[4]

Although states and the Federal Government are often protected by sovereign immunity, municipalities can be held liable for federal constitutional violations.

[*LEdHN5]****LEGISLATURE § 1**

-- immunity

Headnote:[5A][5B]

Absolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity; for purposes of immunity, the question whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing the act.

[*LEdHN6]****COURTS § 102**

-- legislators' motives

Headnote:[6]

It is not consonant with the nation's scheme of government for a court to inquire into the motives of legislators.

SYLLABUS: Respondent Scott-Harris filed suit under *42 U.S.C. § 1983* against the city of Fall River, Massachusetts, petitioners Bogan (the city's mayor) and Roderick (the vice president of the city council), and other officials, alleging that the elimination of the city department in which Scott-Harris was the sole employee was motivated by racial animus and a desire to retaliate against her for exercising her First Amendment rights in filing a complaint against another city employee. The District Court twice denied petitioners' motions to dismiss on the ground of absolute immunity from suit. The jury returned a verdict in favor of all defendants on the racial discrimination charge, but found the city and petitioners liable on respondent's First Amendment claim. The First Circuit set aside the verdict against the city but affirmed the judgments against Roderick and Bogan. Although concluding that petitioners have absolute immunity from civil liability for damages arising out of their performance of legitimate legislative activities, that

court held that their conduct in introducing, voting for, and signing the ordinance that eliminated respondent's office was not "legislative." Relying on the jury's finding that respondent's constitutionally sheltered speech was a substantial or motivating factor underlying petitioners' conduct, the court reasoned that the conduct was administrative, rather than legislative, because Roderick and Bogan relied on facts relating to a particular individual, respondent, in the decisionmaking calculus.

Held:

1. Local legislators are entitled to the same absolute immunity from civil liability under § 1983 for their legislative activities as has long been accorded to federal, state, and regional legislators. *See, e.g., Tenney v. Brandhove*, 341 U.S. 367, 372, 372-376, 95 L. Ed. 1019, 71 S. Ct. 783; *Amy v. Supervisors*, 78 U.S. 136, 11 Wall. 136, 138, 20 L. Ed. 101, distinguished. Such immunity finds pervasive support not only in common-law cases and older treatises, but also in reason. *See Tenney*, 341 U.S. at 376. The rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators. Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability. *See, e.g., id.*, at 377. Furthermore, the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace. *See id.*, at 377. And the threat of liability may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability. *See Harlow v. Fitzgerald*, 457 U.S. 800, 827, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (Burger, C. J., dissenting). Moreover, certain deterrents to legislative abuse may be greater at the local level than at other levels of government, including the availability of municipal liability for constitutional violations, *e.g., Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405, n. 29, 59 L. Ed. 2d 401, 99 S. Ct. 1171, and the ultimate check on legislative abuse, the electoral process, *cf. Tenney, supra*, at 378. Indeed, any argument that the rationale for absolute immunity does not extend to local legislators is implicitly foreclosed by *Lake Country Estates, supra*, 440 U.S. 391 at 401-402. Pp. 2-9.

2. Petitioners' actions in this case were protected by absolute immunity, which attaches to all acts taken "in the sphere of legitimate legislative activity." *Tenney*, 341 U.S. at 376. The First Circuit erroneously relied on petitioners' subjective intent in resolving whether their acts so qualified. Whether an act is legislative turns on the nature of the act itself, rather than on the motive or intent

of the official performing it. *Id.*, at 370, 377. This Court has little trouble concluding that, stripped of all considerations of intent and motive, petitioners' actions were legislative. Most evidently, petitioner Roderick's acts of voting for the ordinance eliminating respondent's office were, in form, quintessentially legislative. Petitioner Bogan's introduction of a budget that proposed the elimination of city jobs and his signing the ordinance into law also were formally legislative, even though he was an executive official. Officials outside the legislative branch are entitled to legislative immunity when they perform legislative functions, *see Supreme Court of Va. v. Consumers Union of United States, Inc.*, 446 U.S. 719, 731-734, 64 L. Ed. 2d 641, 100 S. Ct. 1967; Bogan's actions were legislative because they were integral steps in the legislative process. *Cf., e.g., Edwards v. United States*, 286 U.S. 482, 490, 76 L. Ed. 1239, 52 S. Ct. 627. Furthermore, this particular ordinance, in substance, bore all the hallmarks of traditional legislation: It reflected a discretionary, policymaking decision implicating the city's budgetary priorities and its services to constituents; it involved the termination of a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office; and, in eliminating respondent's office, it governed in a field where legislators traditionally have power to act, *Tenney, supra*, 341 U.S. 367 at 379. Pp. 9-12.

F.3d , reversed.

COUNSEL: Charles Rothfeld argued the cause for petitioners.

Harvey A. Schwartz argued the cause for respondents.

JUDGES: THOMAS, J., delivered the opinion for a unanimous Court.

OPINIONBY: THOMAS

OPINION: [***83] [**969] [*46] JUSTICE THOMAS delivered the opinion of the Court.

[***LEdHR1A] [1A] [***LEdHR2A] [2A] [***LEdHR3] [3]It is well established that federal, state, and regional legislators are entitled to absolute immunity from civil liability for their legislative activities. In this case, petitioners argue that they, as local officials performing legislative functions, are entitled to the same protection. They further argue that their acts of introducing, voting for, and signing an ordinance eliminating the government office held by respondent constituted legislative activities. We agree on both counts and therefore reverse the judgment below.

I

Respondent Janet Scott-Harris was administrator of the Department of Health and Human Services (DHHS) [***84] for the city of Fall River, Massachusetts, from 1987 to 1991. In 1990, respondent received a complaint that Dorothy Biltcliffe, an employee serving temporarily under her supervision, had made repeated racial and ethnic slurs about her colleagues. After respondent prepared termination charges against Biltcliffe, Biltcliffe used her political connections to press her case with several state and local officials, including [*47] petitioner Marilyn Roderick, the vice president of the Fall River City Council. The city council held a hearing on the charges against Biltcliffe and ultimately accepted a settlement proposal under which Biltcliffe would be suspended without pay for 60 days. Petitioner Daniel Bogan, the mayor of Fall River, thereafter substantially reduced the punishment.

While the charges against Biltcliffe were pending, Mayor Bogan prepared his budget proposal for the 1992 fiscal year. Anticipating a 5 to 10 percent reduction in state aid, Bogan proposed freezing the salaries of all municipal employees and eliminating 135 city positions. As part of this package, Bogan called for the elimination of DHHS, of which respondent was the sole employee. The City Council Ordinance Committee, which was chaired by Roderick, approved an ordinance eliminating DHHS. The city council thereafter adopted the ordinance by a vote of 6 to 2, with petitioner Roderick among those voting in favor. Bogan signed the ordinance into law.

Respondent then filed suit under Rev. Stat. § 1979, 42 U.S.C. § 1983, against the city, Bogan, Roderick, and several other city officials. She alleged that the elimination of her position was motivated by racial animus and a desire to retaliate against her for exercising her First Amendment rights in filing the complaint against Biltcliffe. The District Court denied Bogan's and Roderick's motions to dismiss on the ground of legislative immunity, and the case proceeded to trial. *Scott-Harris v. City of Fall River, et al.*, Civ. 91-12057-PBS (Mass., Jan. 27, 1995), App. to Pet. for Cert. 1.

The jury returned a verdict in favor of all defendants on the racial discrimination charge, but found the city, Bogan, and Roderick liable on respondent's First Amendment claim, concluding that respondent's constitutionally protected speech was a substantial or motivating factor in the elimination [*48] of her position. n1 On a motion for judgment notwithstanding the verdict, the District Court again denied Bogan's and Roderick's claims of absolute legislative immunity, reasoning that "the ordinance amendment passed by the city council was an individually-targeted administrative act, rather than a neutral, legislative elimination of a position which

incidentally resulted in the termination of plaintiff." *Id.*, at 20.

n1 Respondent dropped several other defendants from the suit, and the District Court directed a verdict in favor of defendant Robert Connors, the Fall River City Administrator. Only the city, Bogan, and Roderick were appellants in the Court of Appeals, and only the latter two are petitioners in this Court.

The United States Court of Appeals for the First Circuit set aside the verdict against the city but affirmed the judgments against Roderick [***85] and Bogan. *Scott-Harris v. City of Fall River*, 134 F.3d 427, 1997 U.S. App. LEXIS 594 (1997). n2 Although the court concluded that petitioners have "absolute immunity from civil liability [***970] for damages arising out of their performance of legitimate legislative activities," *id.*, at *38, it held that their challenged conduct was not "legislative," *id.*, at *24. Relying on the jury's finding that "constitutionally sheltered speech was a substantial or motivating factor" underlying petitioners' conduct, the court reasoned that the conduct was administrative, rather than legislative, because Roderick and Bogan "relied on facts relating to a particular individual [respondent] in the decision-making calculus." *Ibid.* We granted certiorari. 117 S. Ct. 2430, 138 L. Ed. 2d 192 (1997).

n2 The court held that the city was not liable because the jury could reasonably infer unlawful intent only as to two of the city council members, and municipal liability could not rest "on so frail a foundation." 118 S. Ct. 966, 1998 U.S. LEXIS 1596, *1, 140 L. Ed. 2d 79.

II

The principle that legislators are absolutely immune from liability for their legislative activities has long been recognized in Anglo-American law. This privilege "has taproots [*49] in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries" and was "taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney v. Brandhove*, 341 U.S. 367, 372, 95 L. Ed. 1019, 71 S. Ct. 783 (1951). The Federal Constitution, the constitutions of many of the newly independent States, and the common law thus protected legislators from liability for their legislative activities. See U.S. Const., Art. I, § 6; *Tenney v. Brandhove*, *supra*, 341 U.S. 367 at 372-375.

523 U.S. 44, *; 118 S. Ct. 966, **;
140 L. Ed. 2d 79, ***; 1998 U.S. LEXIS 1596

[***LEdHR1B] [1B] Recognizing this venerable tradition, we have held that state and regional legislators are entitled to absolute immunity from liability under § 1983 for their legislative activities. See *Tenney v. Brandhove*, *supra* (state legislators); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 59 L. Ed. 2d 401, 99 S. Ct. 1171 (1979) (regional legislators); n3 see also *Kilbourn v. Thompson*, 103 U.S. 168, 202-204, 26 L. Ed. 377 (1881) (interpreting the federal Speech and Debate Clause, U.S. Const., Art. I, § 6, to provide similar immunity to Members of Congress). We explained that legislators were entitled to absolute immunity from suit at common law and that Congress did not intend the general language of § 1983 to "impinge on a tradition so well grounded in history and reason." *Tenney v. Brandhove*, *supra*, at 376. Because the common law accorded local legislators the same absolute immunity it accorded legislators at other levels of government, and because the rationales for such immunity are fully applicable to local legislators, we now hold that local legislators are likewise absolutely immune from suit under § 1983 for their legislative activities.

n3 The "regional" legislature in *Lake Country Estates* was the governing body of an agency created by a compact between two States to coordinate and regulate development in a region encompassing portions of both States. *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. at 394.

The common law at the time § 1983 was enacted deemed local legislators to be absolutely immune from suit for their legislative activities. New York's highest court, for example, held that municipal aldermen were [***86] immune from suit for [*50] their discretionary decisions. *Wilson v. New York*, 1 Denio 595 (N. Y. 1845). The court explained that when a local legislator exercises discretionary powers, he "is exempt from all responsibility by action for the motives which influence him, and the manner in which such duties are performed. If corrupt, he may be impeached or indicted, but the law will not tolerate an action to redress the individual wrong which may have been done." *Id.*, at 599. n4 These principles, according to the court, were "too familiar and well settled to require illustration or authority." *Id.*, at 599-600.

n4 The court distinguished "discretionary" duties, which were protected absolutely, and "ministerial" duties, which were not. Although the Court described the former as "judicial" in nature, it was merely using the term broadly to en-

compass the "discretionary" acts of officials. See *1 Denio*, at 599 ("If his powers are discretionary, to be exerted or withheld, according to his own view of what is necessary and proper, they are in their nature judicial"). The legislators' actions in *Wilson* were unquestionably legislative in both form and substance. Thus, *Wilson* was widely, and correctly, cited as a leading case regarding legislative immunity. See, e.g., T. Cooley, *Law of Torts* 377, n. 1 (1880) (hereinafter Cooley); F. Mechem, *Law of Public Offices and Officers* § 644, p. 431, n. 1 (1890) (hereinafter Mechem); M. Throop, *Law Relating to Public Officers* § 709, p. 671, n. 1 (1892).

[**971]

Shortly after § 1983 was enacted, the Mississippi Supreme Court reached a similar conclusion, holding that town aldermen could not be held liable under state law for their role in the adoption of an allegedly unlawful ordinance. *Jones v. Loving*, 55 Miss. 109, 30 Am. Rep. 508 (1877). The court explained that "it certainly cannot be argued that the motives of the individual members of a legislative assembly, in voting for a particular law, can be inquired into, and its supporters be made personally liable, upon an allegation that they acted maliciously towards the person aggrieved by the passage of the law." *Id.*, at 111, 30 Am. Rep. at 509. The court thus concluded that "whenever the officers of a municipal corporation are vested with legislative powers, they hold and exercise them for the public good, and are clothed with [*51] all the immunities of government, and are exempt from all liability for their mistaken use." *Ibid.*

Treatises of that era confirm that this was the pervasive view. A leading treatise on municipal corporations explained that "where the *officers of a municipal corporation* are invested with legislative powers, they are exempt from individual liability for the passage of any ordinance within their authority, and their motives in reference thereto will not be inquired into." 1 J. Dillon, *Law of Municipal Corporations* § 313, pp. 326-327 (3d ed. 1881) (emphasis in original). Thomas Cooley likewise noted in his influential treatise on the law of torts that the "rightful exemption" of legislators from liability was "very plain" and applied to members of "inferior legislative bodies, such as boards of supervisors, county commissioners, city councils, and the like." Cooley 376; see also J. Bishop, *Commentaries on the Non-Contract Law* § 744 (1889) (noting that municipal legislators were immune for their legislative functions); Mechem § 644-646 (same); Throop, § 709, *supra* n. 4, at 671, (same).

Even the authorities cited by respondent are consistent with the view that local legislators were absolutely

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immune for their legislative, as distinct from ministerial, duties. In the few cases in which liability did attach, the courts emphasized that the defendant officials lacked discretion, and the duties were thus ministerial. [***87] See, e.g., *Morris v. The People*, 3 Denio 381, 395 (N. Y. 1846) (noting that the duty was "of a ministerial character only"); *Caswell v. Allen*, 7 Johns. 63, 68 (N. Y. 1810) (holding supervisors liable because the act was "mandatory" and "no discretion appeared to [have been] given to the supervisors"). Respondent's heavy reliance on our decision in *Amy v. Supervisors*, 78 U.S. 136, 11 Wall. 136, 20 L. Ed. 101 (1871), is misguided for this very reason. In that case, we held that local legislators could be held liable for violating a court order to levy a tax sufficient to pay a judgment, but only because the court order had created a ministerial duty. *Id.*, at 138 ("The rule is well settled that where the law requires [*52] absolutely a ministerial act to be done by a public officer, and he neglects or refuses to do such act, he may be compelled to respond in damages to the extent of the injury arising from his conduct"). The treatises cited by respondent confirm that this distinction between legislative and ministerial duties was dispositive of the right to absolute immunity. See, e.g., Cooley 377 (stating that local legislators may be held liable only for their "ministerial" duties); Mechem § 647 (same).

Absolute immunity for local legislators under § 1983 finds support not only in history, but also in reason. See *Tenney v. Brandhove*, 341 U.S. at 376 (stating that Congress did not intend for § 1983 to "impinge on a tradition so well grounded in history and reason"). The rationales for according absolute immunity to federal, state, and regional legislators apply with equal force to local legislators. Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability. See *Spallone v. United States*, 493 U.S. 265, 279, 107 L. Ed. 2d 644, 110 S. Ct. 625 (1990) (noting, in the context of addressing local legislative action, that "any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process"); see also *Kilbourn v. Thompson*, 103 U.S. at 201-204 (federal legislators); *Tenney*, *supra*, [***972] at 377 (state legislators); *Lake Country Estates*, 440 U.S. at 405 (regional legislators). Furthermore, the time and energy required to defend against a lawsuit are of particular concern at the local level, where the part-time citizen-legislator remains commonplace. See *Tenney v. Brandhove*, *supra*, at 377 (citing "the cost and inconvenience and distractions of a trial"). And the threat of liability may significantly deter service in local government, where prestige and pecuniary rewards may pale in comparison to the threat of civil liability. See *Harlow v. Fitzgerald*, 457 U.S. 800, 816, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982).

[***LEdHR1C] [1C] [***LEdHR4] [4] [*53] Moreover, certain deterrents to legislative abuse may be greater at the local level than at other levels of government. Municipalities themselves can be held liable for constitutional violations, whereas States and the Federal Government are often protected by sovereign immunity. *Lake Country Estates*, *supra*, at 405, n. 29 (citing *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978)). And, of course, the ultimate check on legislative abuse -- the electoral process -- applies with equal force at the local [***88] level, where legislators are often more closely responsible to the electorate. Cf. *Tenney*, *supra*, at 378 (stating that "self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses").

Any argument that the rationale for absolute immunity does not extend to local legislators is implicitly foreclosed by our opinion in *Lake Country Estates*. There, we held that members of an interstate regional planning agency were entitled to absolute legislative immunity. Bereft of any historical antecedent to the regional agency, we relied almost exclusively on *Tenney's* description of the purposes of legislative immunity and the importance of such immunity in advancing the "public good." Although we expressly noted that local legislators were not at issue in that case, see *Lake Country Estates*, 440 U.S. at 404, n. 26, we considered the regional legislators at issue to be the functional equivalents of local legislators, noting that the regional agency was "comparable to a county or municipality" and that the function of the regional agency, regulation of land use, was "traditionally a function performed by local governments." *Id.*, at 401-402. n5 Thus, we now make explicit what was implicit [*54] in our precedents: Local legislators are entitled to absolute immunity from § 1983 liability for their legislative activities.

n5 It is thus not surprising that several Members of this Court have recognized that the rationale of *Lake Country Estates* essentially settled the question of immunity for local legislators. See *Owen v. Independence*, 445 U.S. 622, 664, n. 6, 63 L. Ed. 2d 673, 100 S. Ct. 1398 (1980) (Powell, J., dissenting); *Lake Country Estates*, 440 U.S. at 407-408 (Marshall, J., dissenting in part); see also *Spallone v. United States*, 493 U.S. 265, 278, 107 L. Ed. 2d 644, 110 S. Ct. 625 (1990) (explaining that the same considerations underlying *Tenney* and *Lake Country Estates* applied to contempt sanctions against local legislators). In fact, the argument for absolute immunity for local legislators may be stronger than for the regional legislators in *Lake Country Estates*, because immunity

was historically granted to local legislators and because the legislators in *Lake Country Estates* were unelected and thus less directly accountable to the public. See *Lake Country Estates, supra*, at 407 (Marshall, J., dissenting in part).

III

[**LEdHR2B] [2B] [**LEdHR5A] [5A] Absolute legislative immunity attaches to all actions taken "in the sphere of legitimate legislative activity." *Tenney, supra*, at 376. The Court of Appeals held that petitioners' conduct in this case was not legislative because their actions were specifically targeted at respondent. Relying on the jury's finding that respondent's constitutionally protected speech was a substantial or motivating factor behind petitioners' conduct, the court concluded that petitioners necessarily "relied on facts relating to a particular individual" and "devised an ordinance that targeted [respondent] and treated her differently from other managers employed by the City." F.3d at . Although the Court of Appeals did not suggest that intent or motive can overcome an immunity defense for activities that are, in [**973] fact, legislative, the court erroneously relied on petitioners' subjective intent in resolving the logically prior question of whether their acts were legislative.

[**LEdHR2C] [2C] [**LEdHR5B] [5B] [**LEdHR6] [6] Whether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it. The privilege of absolute immunity "would be of little value if [legislators] could be [**89] subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives." *Tenney*, [*55] 341 U.S. at 377 (internal quotation marks deleted). Furthermore, it simply is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Ibid*. We therefore held that the defendant in *Tenney* had acted in a legislative capacity even though he allegedly singled out the plaintiff for investigation in order "to intimidate and silence plaintiff and deter and prevent him from effectively exercising his constitutional rights." *Id.*, at 371 (internal quotation marks omitted).

[**LEdHR2D] [2D] This leaves us with the question whether, stripped of all considerations of intent and motive, petitioners' actions were legislative. We have little trouble concluding that they were. Most evidently, petitioner Roderick's acts of voting for an ordinance were, in form, quintessentially legislative. Petitioner Bogan's introduction of a budget and signing into law an ordinance also were formally legislative, even though he was an executive official. We have recognized that officials out-

side the legislative branch are entitled to legislative immunity when they perform legislative functions, see *Supreme Court of Va. v. Consumers Union of United States, Inc.*, 446 U.S. 719, 731-734, 64 L. Ed. 2d 641, 100 S. Ct. 1967 (1980); Bogan's actions were legislative because they were integral steps in the legislative process. Cf. *Edwards v. United States*, 286 U.S. 482, 490, 76 L. Ed. 1239, 52 S. Ct. 627 (1932) (noting "the legislative character of the President's function in approving or disapproving bills"); *Smiley v. Holm*, 285 U.S. 355, 372-373, 76 L. Ed. 795, 52 S. Ct. 397 (1932) (recognizing that a governor's signing or vetoing of a bill constitutes part of the legislative process).

Respondent, however, asks us to look beyond petitioners' formal actions to consider whether the ordinance was legislative in *substance*. We need not determine whether the formally legislative character of petitioners' actions is alone sufficient to entitle petitioners to legislative immunity, because here the ordinance, in substance, bore all the hallmarks of traditional legislation. The ordinance reflected a discretionary, policymaking decision implicating the budgetary priorities [*56] of the city and the services the city provides to its constituents. Moreover, it involved the termination of a position, which, unlike the hiring or firing of a particular employee, may have prospective implications that reach well beyond the particular occupant of the office. And the city council, in eliminating DHHS, certainly governed "in a field where legislators traditionally have power to act." *Tenney, supra*, at 379. Thus, petitioners' activities were undoubtedly legislative.

* * *

For the foregoing reasons, the judgment of the Court of Appeals is reversed. n6

n6 Because of our conclusion that petitioners are entitled to absolute legislative immunity, we need not address the third question on which we granted certiorari: whether petitioners proximately caused an injury cognizable under § 1983.

It is so ordered.

REFERENCES: Return To Full Text Opinion

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15 Am Jur 2d, Civil Rights 268, 269; 63C Am Jur 2d,
Public Officers and Employees 308, 317

42 USCS 1983

L Ed Digest, Civil Rights 32

L Ed Index, Civil Rights and Discrimination; Mayor;
Municipal Corporations and Other Political Subdivisions

Annotation References:

Supreme Court's construction of Civil Rights Act of
1871 (42 USCS 1983) providing private right of action
for violation of federal rights. 43 L Ed 2d 833.

Immunity of public officials from personal liability
in civil rights actions brought by public employees under
42 USCS 1983. 63 ALR Fed 744.

Legislative immunity of state officials from federal
civil suit for injunctive relief brought pursuant to 42
USCS 1983. 57 ALR Fed 504.

**SUPREME COURT OF VIRGINIA ET AL. v. CONSUMERS UNION OF THE
UNITED STATES, INC., ET AL.**

No. 79-198

SUPREME COURT OF THE UNITED STATES

446 U.S. 719; 100 S. Ct. 1967; 64 L. Ed. 2d 641; 1980 U.S. LEXIS 108

February 19, 1980, Argued

June 2, 1980, Decided

PRIOR HISTORY:

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

DISPOSITION:

470 F.Supp. 1055, vacated and remanded.

DECISION:

Virginia Supreme Court held subject to suit under *42 USCS 1983* and to award of attorneys' fees under *42 USCS 1988* in its enforcement capacity as to prohibition against attorney advertising, but immune from suit and not subject to award of fees in its legislative capacity.

SUMMARY:

In connection with preparation of a legal services directory, a consumer organization sought to obtain information, including information as to fee and billing practices, from all attorneys practicing law in one Virginia county. The organization encountered difficulty because lawyers declined to supply the requested information for fear of violating the strict prohibition against advertising in the Virginia Code of Professional Responsibility, promulgated pursuant to statutory authority by the Supreme Court of Virginia. The organization then brought an action in the United States District Court for the Eastern District of Virginia pursuant to *42 USCS 1983* against, among others, the Supreme Court of Virginia, its chief justice, and the state bar, seeking a declaration that the defendants had violated the organization's First and Fourteenth Amendment rights to gather, publish and receive factual information concerning the attorneys involved, and a permanent injunction against the enforcement and operation of the applicable code provision.

Ultimately, after the Virginia Supreme Court declined to amend the code despite the state bar's recommendation to do so and despite the intervening decision in *Bates v State Bar of Arizona* (1977) *433 US 350, 53 L Ed 2d 810, 97 S Ct 2691*, holding that enforcement of a ban on attorney advertising would violate the First and Fourteenth Amendment rights of attorneys seeking to advertise fees charged for certain routine legal services, the three-judge District Court declared the code provision unconstitutional on its face and permanently enjoined the defendants from enforcing it (*470 F Supp 1055*). The District Court also held that the Civil Rights Attorney's Fees Awards Act (*42 USCS 1988*) authorized, in proper circumstances, the award of attorneys' fees against the defendants, and, in such regard, concluded that it would be unjust to award attorneys' fees against the state bar because it had no power to change the code and because it had unsuccessfully sought to persuade the Virginia Supreme Court to amend the code to what it deemed to be constitutional standards, but that no similar circumstances made it unjust to award attorneys' fees against the Virginia Supreme Court and its chief justice in his official capacity because of the court's failure or refusal to amend the code. Subsequently, the District Court denied the defendants' petition for rehearing, in which it was argued for the first time, on judicial immunity grounds, that the Virginia Supreme Court and its chief justice were exempt from having declaratory and injunctive relief entered against them and that, in any event, it was an abuse of discretion to enter the fee award against the Virginia Supreme Court and its chief justice.

On direct appeal, the United States Supreme Court vacated the award of attorneys' fees and remanded. In an opinion by White, J., expressing the unanimous view of the eight participating members of the Court, it was held that (1) in promulgating the Code of Professional Responsibility, the Virginia Supreme Court and its members were acting in their legislative capacity and were

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immune from suit under *42 USCS 1983*, (2) the Virginia Supreme Court and its members were nevertheless proper defendants in the action under *42 USCS 1983* challenging the constitutionality of the state code, since, pursuant to the court's inherent authority and state statutory law, the court had authority to enforce the state code beyond that of adjudicating complaints filed by others and beyond the normal authority of the court to punish attorneys for contempt, and (3) the District Court abused its discretion in premising the award of attorneys' fees against the Virginia Supreme Court and its chief justice upon the court's failure or refusal to amend the code, an action for which the defendants enjoyed absolute legislative immunity.

Powell, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[*LEdHN1]**
RIGHTS § 12.5
state's highest court -- immunity in legislature --
Headnote:[1A][1B][1C]

A state's highest court and its members are acting in their legislative capacity and are immune from suit under *42 USCS 1983* with respect to the issuance of a state code of professional responsibility governing the conduct of attorneys, where the court, claiming inherent power to regulate the bar, exercises the state's entire legislative capacity with respect to regulating the bar, and the court's members are the state's legislators for the purpose of issuing the code.

[*LEdHN2]**
RIGHTS § 12.5
state's highest court -- immunity --
Headnote:[2A][2B]

A state's highest court and its members are proper defendants in an action under *42 USCS 1983* seeking a declaration that a disciplinary rule of the state code of professional responsibility governing the conduct of attorneys violates a consumer organization's First and Fourteenth Amendment rights to gather, publish and receive factual information concerning attorneys and also seeking a permanent injunction against the enforcement and operation of the rule, where, pursuant to its inherent authority and state statutory law, the state court has authority to enforce the state code beyond that of adjudicating complaints filed by others and beyond the normal authority of the courts to punish attorneys for contempt.

[*LEdHN3]**
RIGHTS § 12.5
Attorney's Fees Awards Act -- discretion --

Headnote:[3A][3B]

Upon granting declaratory and injunctive relief in an action under *42 USCS 1983* challenging the constitutionality of a disciplinary rule of a state code of professional responsibility for attorneys issued by a state's highest court and as to which the state court has independent enforcement authority, a Federal District Court abuses its discretion in awarding attorneys' fees under the Civil Rights Attorney's Fees Awards Act (*42 USCS 1988*) against the state court and its chief justice where the District Court premises its award upon the state court's failure or refusal to amend the state code to conform to constitutional requirements--as to which actions the state court enjoys absolute legislative immunity--rather than upon the state court's direct role in enforcing the code.

[*LEdHN4]**
RIGHTS § 12.5
FEES § 33
Attorney's Fees Awards Act -- applicability --
Headnote:[4A][4B]

The Civil Rights Attorney's Fees Awards Act (*42 USCS 1988*) is applicable to a case in which the trial was held and the initial decision rendered five months and two months, respectively, prior to enactment of the Act, Congress having intended for the Act to apply to actions pending when the Act was passed.

[*LEdHN5]**
ERROR § 1340
review -- question for decision --
Headnote:[5]

On direct appeal for the United States Supreme Court to review the decision of a Federal District Court in which the court declared unconstitutional a disciplinary rule of a state code of professional responsibility for attorneys issued by a state's highest court and also enjoined enforcement and operation of the rule, the fact that the District Court referred to issuance of the state code as a judicial function is not conclusive on the Supreme Court for the purpose of deciding whether issuance of the code is a judicial act as to which the state court and its chief justice are entitled to immunity from suit under *42 USCS 1983*; since issuance of the state code is not an act of adjudication but one of rulemaking, the Supreme Court must inquire whether the state's highest court and its chief justice are immune from suit in their legislative capacity.

[*LEdHN6]**
RIGHTS § 12.5
state legislators -- immunity --

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Headnote:[6]

State legislators' common-law immunity from liability for their legislative acts extends to civil rights actions seeking declaratory or injunctive relief under *42 USCS 1983* as well as to actions seeking damages.

[***LEdHN7]

RIGHTS § 12.5

LEGISLATURE § 1

state legislators -- immunity --

Headnote:[7]

Although the separation of powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions, the legislative immunity to which state legislators are entitled under *42 USCS 1983* is equivalent to that accorded Congressmen under the Constitution.

[***LEdHN8]

COURTS § 236.5

state bar disciplinary rules -- case or controversy --

Headnote:[8A][8B]

Although mere enforcement authority does not create a case or controversy with the enforcement official, in the circumstances of an action under *42 USCS 1983* seeking a declaration that a disciplinary rule of a state code of professional responsibility for attorneys violates a consumer organization's First and Fourteenth Amendment rights to gather, publish and receive factual information concerning attorneys, and also seeking a permanent injunction against enforcement and operation of the rule, a sufficiently concrete dispute is as well made out against a state's highest court, which has inherent and statutory authority to enforce the state code, as it is against the state bar itself.

[***LEdHN9]

RIGHTS § 12.5

prosecutor -- immunity --

Headnote:[9]

Prosecutors enjoy absolute immunity from damages liability under *42 USCS 1983*, but they are natural targets for injunctive suits under *42 USCS 1983* since they are the state officers who are threatening to enforce and who are enforcing the law.

[***LEdHN10]

ERROR § 338

Supreme Court review -- three-judge court -- attorneys' fees -- jurisdiction --

Headnote:[10A][10B]

On direct appeal to review the decision of a three-judge Federal District Court in which the District Court declared unconstitutional a disciplinary rule of a state code of professional responsibility for attorneys issued by a state's highest court and also permanently enjoined enforcement and operation of the rule, while awarding attorneys' fees against the state's highest court and its chief justice, the United States Supreme Court has jurisdiction under *28 USCS 1253* to decide whether attorneys' fees were properly awarded under the Civil Rights Attorney's Fees Awards Act (*42 USCS 1988*), where the case is properly before the Court on the question whether the state's highest court and its chief justice were immune from suit for declaratory and injunctive relief under *42 USCS 1983*, although the Supreme Court would not have jurisdiction to decide the attorneys' fees question if that question alone had been appealed.

[***LEdHN11]

RIGHTS § 12.5

FEES § 33

STATES § 93

attorneys' fees -- recovery from state officials --

Headnote:[11]

An award of attorneys' fees authorized by the Civil Rights Attorney's Fees Awards Act (*42 USCS 1988*) may be recovered from state officials who are sued in their official capacities.

[***LEdHN12]

RIGHTS § 12.5

Civil Rights Attorney's Fees Awards Act -- state bar -- fairness --

Headnote:[12]

Upon granting declaratory and injunctive relief in an action under *42 USCS 1983* challenging the constitutionality of a disciplinary rule of a state code of professional responsibility for attorneys, it would not necessarily be unfair for a Federal District Court to award attorneys' fees under the Civil Rights Attorney's Fees Awards Act (*42 USCS 1988*) against the state bar, which by statute is designated as an administrative agency to enforce the state code; merely because the state bar had recommended to the state's highest court that the code be amended to conform to what it deemed to be constitutional standards and because the state court, which had the sole power to change the code, declined or failed to adopt this proposal.

SYLLABUS:

Appellant Virginia Supreme Court, which claims inherent authority to regulate and discipline attorneys,

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also has statutory authority to do so. Pursuant to these powers, the court promulgated the Virginia Code of Professional Responsibility (Code) and organized the Virginia State Bar to act as an administrative agency of the court to report and investigate violations of the Code. The statute reserves to the state courts the sole power to adjudicate alleged violations of the Code, and the Supreme Court and other state courts of record have independent authority on their own to initiate proceedings against attorneys. When one of the appellees sought to prepare a legal services directory, the attorneys who were canvassed refused to supply the requested information for fear of violating the Code's prohibition against attorney advertising (DR 2-102 (A)(6)). Appellees then brought an action in Federal District Court under 42 U. S. C. § 1983 against, *inter alios*, the Virginia Supreme Court and its chief justice (also an appellant) in both his individual and official capacities, seeking a declaration that the defendants had violated appellees' First and Fourteenth Amendment rights to gather, publish, and receive factual information concerning the attorneys involved, and a permanent injunction against the enforcement and operation of DR 2-102 (A)(6). Ultimately, after the Virginia Supreme Court declined to amend DR 2-102 (A)(6) despite the State Bar's recommendation to do so and despite the intervening decision in *Bates v. State Bar of Arizona*, 433 U.S. 350, holding that enforcement of a ban on attorney advertising would violate the First and Fourteenth Amendment rights of attorneys seeking to advertise fees charged for certain routine legal services, the District Court declared DR 2-102 (A)(6) unconstitutional on its face and permanently enjoined defendants from enforcing it. The court further held that the Civil Rights Attorney's Fees Awards Act of 1976, which provides that in any action to enforce 42 U. S. C. § 1983, *inter alia*, a district court, in its discretion, may award the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, authorized in proper circumstances the award of fees against the Virginia Supreme Court and the chief justice in his official capacity, and that here such an award was not unjust because the Supreme Court had denied the State Bar's petition to amend the Code and had also failed to amend it to conform to the holding in *Bates*, *supra*.

Held:

1. In promulgating the Code, the Virginia Supreme Court acts in a legislative capacity, and in that capacity the court and its members are immune from suit. Pp. 731-734.

2. But the court and its chief justice were properly held liable in their enforcement capacities. Since the state statute gives the court independent authority on its own to initiate proceedings against attorneys, the court and its members were proper defendants in a suit for

declaratory and injunctive relief, just as other enforcement officers and agencies are. Pp. 734-737.

3. The District Court abused its discretion in awarding attorney's fees against the Virginia Supreme Court premised on acts or omissions for which appellants enjoy absolute legislative immunity. There is nothing in the legislative history of the Civil Rights Attorney's Fees Awards Act to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute immunity. Pp. 737-739.

COUNSEL:

Marshall Coleman, Attorney General of Virginia, argued the cause for appellants. With him on the briefs were Walter H. Ryland, Chief Deputy Attorney General, and Philip B. Kurland.

Ellen Broadman argued the cause for appellees. With her on the brief were Alan Mark Silbergeld, James W. Benton, Jr., and Michael Pollet. *

* Burt Neuborne, Bruce J. Ennis, Jr., and Stephen Bricker filed a brief for the American Civil Liberties Union et al. as amici curiae urging affirmance.

JUDGES:

WHITE, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the case.

OPINIONBY:

WHITE

OPINION:

[*721] [***646] [**1969]

[***LEdHR1A] [1A] [***LEdHR2A] [2A]
[***LEdHR3A] [3A]MR. JUSTICE WHITE delivered the opinion of the Court.

This case raises questions of whether the Supreme Court of Virginia (Virginia Court) and its chief justice are officially immune from suit in an action brought under 42 U. S. C. § 1983 challenging the Virginia Court's disciplinary rules governing the conduct of attorneys and whether attorney's fees were properly awarded under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, against the [***647] Virginia Court and its chief justice in his official capacity.

I

It will prove helpful at the outset to describe the role of the Virginia Court in regulating and disciplining attorneys. The Virginia Court has firmly held to the view that it has inherent authority to regulate and discipline attorneys. *Button v. Day*, 204 Va. 547, 552-555, 132 S. E. 2d 292, 295-298 (1963). It also has statutory authority to do so. Section 54-48 of the Code of Virginia (1978) authorizes the Virginia Court to "promulgate and amend rules and regulations . . . [prescribing] a code of ethics governing the professional conduct of attorneys-at-law. . . ." n1

n1 "§ 54-48. Rules and regulations defining practice of law and prescribing procedure for practice by law students, codes of ethics and disciplinary procedure. -- The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:

"(a) Defining the practice of law.

"(a1) Prescribing procedure for limited practice of law by third-year law students.

"(b) Prescribing a code of ethics governing the professional conduct of attorneys-at-law including the practice of law or patent law through professional law corporations, professional associations and partnerships, and a code of judicial ethics.

"(c) Prescribing procedure for disciplining, suspending, and disbaring attorneys-at-law."

Pursuant to these powers, the Virginia Court promulgated the Virginia Code of Professional Responsibility (State Bar Code, Bar Code, or Code), the provisions of which were substantially [*722] identical to the American Bar Association's Code of Professional Responsibility. Section 54-48 provides no standards for the Virginia Court to follow in regulating attorneys; it is apparent that insofar as the substantive content of such a code is concerned, the State has vested in the court virtually its entire legislative or regulatory power over the legal profession.

Section 54-48 also authorizes the Virginia Court to prescribe "procedure for disciplining, suspending and disbaring attorneys-at-law"; and § 54-49 authorizes the court to promulgate rules and regulations "organizing and governing the association known as the Virginia State Bar, composed of the attorneys-at-law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting . . . [violations]. . . ." n2 Acting under this authority, the Virginia State Bar (State Bar or Bar) has been organized and its enforce-

ment role vested in an ethics committee and [**1970] in various district committees. Section 54-51 reserves to the courts the sole power to adjudicate alleged violations of the Bar Code, n3 and [***648] hence the role of the State Bar is limited to the [*723] investigation of violations and the filing of appropriate complaints in the proper courts. Under § 54-74, the enforcement procedure involves the filing of a complaint in a court of record, the issuance of a rule to show cause against the charged attorney, the prosecution of the case by the commonwealth attorney, and the hearing of the case by the judge issuing the rule together with two other judges designated by the chief justice of the Virginia Supreme Court. n4 Appeal lies to the Virginia Supreme Court.

n2 "§ 54-49. Organization and government of Virginia State Bar. -- The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys-at-law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under this article for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing."

n3 "§ 54-51. Restrictions as to rules and regulations. -- Notwithstanding the foregoing provisions of this article, the Supreme Court shall not adopt or promulgate rules or regulations prescribing a code of ethics governing the professional conduct of attorneys-at-law, which shall be inconsistent with any statute; nor shall it adopt or promulgate any rule or regulation or method of procedure which shall eliminate the jurisdiction of the Courts to deal with the discipline of attorneys-at-law as provided by law; and in no case shall an attorney, who demands to be tried by a court of competent jurisdiction for the violation of any rule or regulation adopted under this article be tried in any other manner."

n4 "§ 54-74. Procedure for suspension or revocation of license. -- (1) *Issuance of rule*. -- If the Supreme Court of Virginia, or any court of record of this State, observes, or if complaint, verified by affidavit, be made by any person to such court of any malpractice or of any unlawful or dishonest or unworthy or corrupt or unprofessional conduct on the part of any attorney, or that

any person practicing law is not duly licensed to practice in this State, such court shall, if it deems the case a proper one for such action, issue a rule against such attorney or other person to show cause why his license to practice law shall not be revoked or suspended. If the complaint, verified by affidavit, be made by a District Committee of the Virginia State Bar, such court shall issue a rule against such attorney to show cause why his license to practice law shall not be revoked or suspended.

"(2) *Judges hearing case.* -- At the time such rule is issued the court issuing the same shall certify the fact of such issuance and the time and place of the hearing thereon, to the chief justice of the Supreme Court of Virginia, who shall designate two judges, other than the judge of the court issuing the rule, of circuit courts or courts of record of cities of the first class to hear and decide the case in conjunction with the judge issuing the rule, which such two judges shall receive as compensation ten dollars per day and necessary expenses while actually engaged in the performance of their duties, to be paid out of the State treasury, from the appropriation for criminal charges.

"(3) *Duty of Commonwealth's attorney.* -- It shall be the duty of the attorney for the Commonwealth for the county or city in which such case is pending to appear at the hearing and prosecute the case.

"(4) *Action of court.* -- Upon the hearing, if the defendant be found guilty by the court, his license to practice law in this State shall be revoked, or suspended for such time as the court may prescribe; provided, that the court, in lieu of revocation or suspension, may, in its discretion, reprimand such attorney.

"(5) *Appeal.* -- The person or persons making the complaint or the defendant, may, as of right, appeal from the judgment of the court to the Supreme Court of Virginia, by petition based upon a true transcript of the record, which shall be made up and certified as in actions at law. In all such cases where a defendant's license to practice law has been revoked by the judgment of the court, his privilege to practice law shall be suspended pending appeal."

Effective July 1, 1981, the judge issuing the rule to show cause will not participate in disciplinary cases, which are to be heard by three judges designated by the chief justice from any circuit other than the one in which the case is pending.

The courts of Virginia, including the Supreme Court, thus [*724] play an adjudicative role in enforcing the Bar Code similar to their function in enforcing any statute adopted by the Virginia Legislature and similar or identical to the role they would play had the Bar Code been adopted by the state legislature.

The Virginia Court, however, has additional enforcement power. As we have said, it asserts inherent power to discipline attorneys. Also, § 54-74 expressly provides that if the Virginia Court or any other court of record observes any act of unprofessional conduct, it may itself, without any complaint being filed by the State Bar or by any third party, issue a rule to show cause against the offending attorney. Although [**1971] once the rule issues, such cases [***649] would be prosecuted by the commonwealth attorney, it is apparent that the Virginia Court and other courts in Virginia have enforcement authority beyond that of adjudicating complaints filed by others and beyond the normal authority of the courts to punish attorneys for contempt.

II

This case arose when, in 1974, one of the appellees, Consumers Union of the United States, Inc. (Consumers Union), sought to prepare a legal services directory designed to assist consumers in making informed decisions concerning utilization of legal services. Consumers Union sought to canvass all [*725] attorneys practicing law in Arlington County, Va., asking for information concerning each attorney's education, legal activities, areas of specialization, office location, fee and billing practices, business and professional affiliations, and client relations. However, it encountered difficulty because lawyers declined to supply the requested information for fear of violating the Bar Code's strict prohibition against attorney advertising. Rule 2-102 (A)(6) of the Code prohibited lawyers from being included in legal directories listing the kind of legal information that Consumers Union sought to publish. n5

n5 At the time Consumers Union sought to canvass Virginia attorneys, Disciplinary Rule 2-102 (A) of the State Bar Code provided in pertinent part: "A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

....

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(6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. . . . The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular field of law or law practice . . . ; date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented."

On February 27, 1975, Consumers Union and the Virginia Citizens Consumer Council brought an action pursuant to 42 U. S. C. § 1983 against the Virginia Court, the Virginia State Bar, the American Bar Association, and, in both their individual and official capacities, the chief justice of the Virginia Court, the president of the State Bar, and the chairman [*726] of the State Bar's Legal Ethics Committee. With respect to the Virginia Court, the complaint identified its chief justice and alleged only that the court had promulgated the Bar Code. The other defendants were alleged to have authority to enforce the Code. Plaintiffs sought a declaration that defendants had violated their First and Fourteenth Amendment rights to gather, publish, and receive factual information concerning attorneys practicing in Arlington County, and a permanent injunction against the enforcement and operation of DR 2-102 (A)(6).

***650] A three-judge District Court was convened pursuant to 28 U. S. C. § 2281 (1970 ed.). Defendants moved for indefinite continuance of the trial on the grounds that the ABA and the State Bar were preparing amendments to relax the advertising prohibitions contained in DR 2-102 (A)(6). Over plaintiff-appellees' opposition, the District Court granted defendants a continuance until March 25, 1976.

On February 17, 1976, the ABA adopted amendments to its Code of Professional Responsibility which would permit attorneys to advertise office hours, initial consultation fees, and credit arrangements. Defendants

then sought and obtained a further continuance [**1972] to permit the Virginia Court and the State Bar to consider amending the State Bar Code to conform to the ABA amendments. Although the governing body of the State Bar recommended that the Virginia Court adopt the ABA amendments to DR 2-102, on April 20, 1976, the court declined to adopt the amendments on the ground that they would "not serve the best interests of the public or the legal profession."

The action then proceeded to trial on May 17, 1976, and was decided on December 17, 1976. *Consumers Union of United States, Inc. v. American Bar Assn.*, 427 F.Supp. 506 (ED Va. 1976). The three-judge District Court concluded that abstention would be inappropriate in light of defendants' failure to amend the State Bar Code despite continuances based on the speculation that DR 2-102 (A)(6) would be [*727] relaxed. *Id.*, at 513-516. The court declared that DR 2-102 (A)(6) unconstitutionally restricted the right of plaintiff-appellees to receive and gather nonfee information and information concerning initial consultation fees. Defendants were permanently enjoined from enforcing DR 2-102 (A)(6) save for its prohibition against advertising fees for services other than the initial consultation fee. *Id.*, at 523.

***LEdHR4A] [4A]Plaintiff-appellees appealed to this Court, challenging the District Court's refusal to enjoin enforcement of the prohibition of fee advertising. Defendants brought a cross-appeal, arguing that DR 2-102 (A)(6) should have been upheld in its entirety. While these appeals were pending, we decided *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), in which we held that enforcement of a ban on attorney advertising would violate the First and Fourteenth Amendment rights of attorneys seeking to advertise the fees they charged for certain routine legal services. In light of *Bates*, the judgment below was vacated and the case was remanded for further consideration. 433 U.S. 917 (1977).

On remand, defendants agreed that in light of *Bates* DR 2-102 (A)(6) could not constitutionally be enforced to prohibit attorneys from providing plaintiff-appellees with any of the information they sought to publish in their legal services directory. Defendants proposed that a permanent injunction be entered barring them from enforcing DR 2-102 (A)(6) against attorneys providing plaintiff-appellees with information. On May 8, 1979, the District Court declared DR 2-102 (A)(6) unconstitutional on its face and permanently enjoined defendants from enforcing [***651] it. n6

n6 The District Court's final order provided in pertinent part:

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"1. The publication described in plaintiff's complaint, as amended, is declared valid and constitutionally protected;

"2. The Virginia Code of Professional Responsibility Disciplinary Rule 2-102 (A)(6) is declared unconstitutional on its face;

"3. The defendants, their successors in office, their agents and attorneys and all acting in concert therewith are permanently enjoined from enforcement of Virginia Code of Professional Responsibility Disciplinary Rule 2-102 (A)(6)."

[*728] Plaintiff-appellees also moved for costs, including an award of attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988. n7 The defendants objected to any fee award on various grounds, including judicial immunity. They did not object to their paying other costs. Although holding the individual defendants immune from attorney's fees liability in their individual capacities, the District Court held that the Act authorized in proper circumstances the award of fees against the State Bar, the Virginia Court and the individual defendants in their official capacities. *Consumers Union of United States, Inc. v. American Bar Assn.*, 470 F.Supp. 1055, 1059-1061 (ED Va. 1979).

n7

[***LEdHR4B] [4B]The Civil Rights Attorney's Fees Awards Act was enacted into law on October 19, 1976, five months after the trial in this action and two months before the District Court's initial decision. The Act is applicable in this case because Congress intended for the Act to apply to actions that were pending when the Act was passed. *Hutto v. Finney*, 437 U.S. 678, 694-695, n. 23 (1978).

[**1973] The District Court went on to conclude that special circumstances made it unjust to award attorney's fees against the State Bar or against the State Bar officers in their official capacities because it was not these defendants but the Virginia Court that had the power to change the State Bar disciplinary rules and because the State Bar and its officers had unsuccessfully sought to persuade the court to amend the Code to conform to what they deemed to be constitutional standards. There were no similar circumstances making it unjust to award attorney's fees against the Virginia Court and its chief justice in his official capacity. This was because the court had denied the State Bar's petition to amend the Code to conform to what were deemed to be the re-

quirements of *Bigelow v. Virginia*, 421 U.S. 809 (1975), and had also failed to amend the Code to conform to the holding in *Bates v. State Bar of Arizona*, *supra*. Hence, "[it] would hardly be unjust to order the [*729] Supreme Court of Virginia defendants to pay plaintiffs reasonable attorneys fees in light of their continued failure and apparent refusal to amend [the Code] to conform with constitutional requirements." 470 F.Supp., at 1063. The parties were directed to attempt to reach an agreement on a reasonable sum, failing which the court would determine the fee. n8

n8 Judge Warriner dissented on the grounds that legislative immunity barred an award of attorney's fees and that it would be unjust to award attorney's fees against a state supreme court in the absence of a showing of bad faith. 470 F.Supp., at 1063.

On May 23, 1979, defendants filed a petition for rehearing, arguing for [***652] the first time, on judicial immunity grounds, that the Virginia Court and its chief justice were exempt from having declaratory and injunctive relief entered against them. It was also argued that in any event it was an abuse of discretion to enter the fee award against the Virginia Court and its chief justice.

Following denial of rehearing, the Virginia Court and its chief justice appealed, presenting the following questions:

1. Is the Supreme Court of Virginia immune from judgment under the doctrine of judicial immunity?
2. May the Civil Rights Attorney's Fees Awards Act of 1976 be construed to permit an award of attorneys' fees against the Supreme Court of Virginia for its judicial acts?
3. Does the doctrine of judicial immunity preclude the award of attorneys' fees for failure to correct a challenged judicial act which is the subject of litigation?
4. On the facts before it, did the District Court abuse its discretion in awarding fees against the Virginia Court?

Appellees moved to dismiss or affirm, the motion to dismiss urging that the claim of judicial immunity from declaratory or injunctive relief was not properly before the Court because [*730] it had not been timely raised in the District Court and had therefore been waived. We noted probable jurisdiction, 444 U.S. 914 (1979).

III

Title 42 U. S. C. § 1988, as amended by the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, provides in pertinent part:

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The District Court held that in light of the § 1983 judgment that had been entered in favor of appellees, the Act authorized an award of attorney's fees against appellants. Appellants urge that this was error. Their primary contention is that on the grounds of absolute legislative or judicial immunity they should have been excluded from the judgment below and also from liability for [**1974] attorney's fees. Appellees on the other hand assert that neither judicial nor legislative immunity immunized these defendants from declaratory or injunctive relief as distinguished from a damages award; and in any event they insist that the judgment stand against these defendants because the Virginia Court itself shares direct enforcement authority with the State Bar and hence is subject to prospective judgments just as other enforcement officials are. n9

n9 As indicated in the text, the motion to dismiss the appeal rested on the failure of appellants to have raised the immunity issue at an earlier time. We noted probable jurisdiction, and appellees' brief on the merits has not again urged that the claim of immunity was not timely raised either with respect to the fee question alone or with respect to the entry of prospective relief against the Virginia Court and its chief justice. Their arguments, like those of appellants, are centered on the issues of judicial and legislative immunity.

[*731] A

[***653]

[***LEdHR1B] [1B] [***LEdHR5] [5]Appellees sought declaratory and injunctive relief with respect to particular provisions of the State Bar Code propounded by the Virginia Court. Although it is clear that under Virginia law the issuance of the Bar Code was a proper function of the Virginia Court, propounding the Code was not an act of adjudication but one of rulemaking. The District Court below referred to the issuance of the

Code as a judicial function, but this is not conclusive upon us for the purpose of deciding whether issuance of the Code is a judicial act entitled to immunity under § 1983. Judge Warriner, dissenting in the District Court, agreed with a prior District Court holding in *Hirschkop v. Virginia State Bar*, 421 F.Supp. 1137, 1156 (ED Va. 1976), rev'd in part on other grounds *sub nom. Hirschkop v. Snead*, 594 F.2d 356 (CA4 1979), that in promulgating disciplinary rules the Virginia Supreme Court acted in a legislative capacity. Judge Warriner said:

"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." 470 F.Supp., at 1064.

We agree with this analysis and hence must inquire whether the Virginia Court and its chief justice are immune from suit for acts performed in their legislative capacity.

We have already decided that the Speech or Debate Clause immunizes Congressmen from suits for either prospective relief or damages. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502-503 (1975). The purpose of this immunity is to insure that the legislative function may be performed independently without fear of outside interference. *Ibid.* To preserve legislative independence, we have concluded that [*732] "legislators engaged 'in the sphere of legitimate legislative activity,' *Tenney v. Brandhove*, [341 U.S. 367, 376 (1951)], should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

[***LEdHR6] [6] [***LEdHR7] [7]We have also recognized that state legislators enjoy common-law immunity from liability for their legislative acts, an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause. *Tenney v. Brandhove*, 341 U.S. 367 (1951). In *Tenney* we concluded that Congress did not intend § 1983 to abrogate the common-law immunity of state legislators. Although *Tenney* involved an action for damages under § 1983, its holding is equally applicable to § 1983 actions seeking declaratory or [***654] injunctive relief. n10 In holding [**1975] that § 1983 "does not create [*733] civil liability" for acts unknown "in a field where legislators traditionally have power to act," *id.*, at 379, we did

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not distinguish between actions for damages and those for prospective relief. Indeed, we have recognized elsewhere that "a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Eastland v. United States Servicemen's Fund*, *supra*, at 503. Although the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions, *United States v. Gillock*, 445 U.S. 360 (1980), we generally have equated the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution. *Eastland v. United States Servicemen's Fund*, *supra*, at 502-503, 505, 506; *Dombrowski v. Eastland*, *supra*, at 84-85; *United States v. Johnson*, 383 U.S. 169, 180 (1966); *Tenney v. Brandhove*, *supra*, at 377-379. n11 Thus, there is little doubt that if the Virginia Legislature had enacted the State Bar Code and if suit had been brought against the legislature, its committees, or members [***655] for refusing to amend the Code in the wake of our cases indicating that the Code in some respects would be held invalid, the defendants in that suit could [*734] successfully have sought dismissal on the grounds of absolute legislative immunity. n12

n10 This seems to be the view of the Court of Appeals for the Second Circuit in its recent holding in *Star Distributors, Ltd. v. Marino*, 613 F.2d 4 (1980). That court held that the legislative immunity enjoyed by the members of a state legislative committee bars an action for declaratory and injunctive relief just as it bars an action for damages. Understanding that *Tenney* was based on the similarity between common-law immunity and the Speech or Debate Clause, the Second Circuit reasoned that legislative immunity should protect state legislators in a manner similar to the protection afforded Congressmen. The Courts of Appeals for the Fifth and Eighth Circuits have dismissed on immunity grounds suits seeking both damages and injunctive relief but without separately addressing the issue of immunity from prospective relief. *Safety Harbor v. Birchfield*, 529 F.2d 1251 (CA5 1976); *Smith v. Klecker*, 554 F.2d 848 (CA8 1977); *Green v. DeCamp*, 612 F.2d 368 (CA8 1980). The Court of Appeals for the Fourth Circuit, however, takes the contrary view and rejects the notion that the legislative immunity enjoyed by state officials bars suits for prospective relief. *Jordan v. Hutcheson*, 323 F.2d 597 (1963); *Eslinger v. Thomas*, 476 F.2d 225, 230 (1973). Both opinions of the Court of Appeals for the Fourth Circuit, however, were rendered prior to this Court's decision in *Eastland v.*

United States Servicemen's Fund, 421 U.S. 491 (1975). The Court of Appeals for the Ninth Circuit may have a similar view with respect to the immunity enjoyed by officials of a regional body exercising both legislative and executive powers. *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (1977).

n11 Contrary to appellees' suggestion, we do not view *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), as indicating our approval of injunctive relief against a regional legislative body or its officers. No injunctive relief had been awarded when *Lake Country Estates* reached this Court. Although it is not entirely clear, the Court of Appeals in that case seemed to believe that immunity would not bar a suit for equitable relief against officials of the Tahoe Regional Planning Agency (TRPA). The court did not specify whether equitable relief could be founded on acts for which the officials would otherwise enjoy legislative immunity, and this Court did not have occasion to express any view on this question because the TRPA never challenged this aspect of the Court of Appeals' decision. We simply affirmed the Court of Appeals' holding that TRPA officials could not be held liable in damages for their legislative acts.

n12 Of course, legislators sued for enacting a state bar code might also succeed in obtaining dismissals at the outset on grounds other than legislative immunity, such as the lack of a case or controversy.

[***LEdHR1C] [1C]Appellees submit that whatever may be true of state legislators, the Virginia Court and its members should not be accorded the same immunity where they are merely exercising a delegated power to make rules in the same manner that many executive and agency officials wield authority to make rules in a wide variety of circumstances. All of such officials, it is urged, are not [**1976] absolutely immune from civil suit. As much could be conceded, but it would not follow that, as appellees would have it, in *no* circumstances do those who exercise delegated legislative power enjoy legislative immunity. In any event, in this case the Virginia Court claims inherent power to regulate the Bar, and as the dissenting judge below indicated, the Virginia Court is exercising the State's entire legislative power with respect to regulating the Bar, and its members are

the State's legislators for the purpose of issuing the Bar Code. Thus the Virginia Court and its members are immune from suit when acting in their legislative capacity.

B

If the sole basis for appellees' § 1983 action against the Virginia Court and its chief justice were the issuance of, or failure to amend, the challenged rules, legislative immunity would foreclose suit against appellants. As has been pointed out, however, the Virginia Court performs more than a legislative role with respect to the State Bar Code. It also hears appeals from lower court decisions in disciplinary cases, a traditional adjudicative task; and in addition, it has independent enforcement authority of its own.

Adhering to the doctrine of *Bradley v. Fisher*, 13 Wall. 335 (1872), we have held that judges defending against § 1983 [*735] actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities. *Pierson v. Ray*, 386 U.S. 547 (1967); *Stump v. Sparkman*, 435 U.S. 349 (1978). However, we have never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts. The Courts of Appeals appear to be divided on the question whether judicial immunity bars declaratory or injunctive relief; n13 we have not addressed the [***656] question. n14

n13 The Courts of Appeals for the Second, Fourth, and Seventh Circuits are of the view that judicial immunity does not extend to declaratory and injunctive relief. *Heimbach v. Village of Lyons*, 597 F.2d 344, 347 (CA2 1979); *Timmerman v. Brown*, 528 F.2d 811, 814 (CA4 1975); *Fowler v. Alexander*, 478 F.2d 694, 696 (CA4 1973); *Harris v. Harvey*, 605 F.2d 330, 335, n. 7 (CA7 1979); *Hansen v. Ahlgrimm*, 520 F.2d 768, 769 (CA7 1975); *Jacobson v. Schaefer*, 441 F.2d 127, 130 (CA7 1971). Three other Courts of Appeals, the Eighth, Ninth, and District of Columbia Circuits seem to agree. *Kelsey v. Fitzgerald*, 574 F.2d 443, 444 (CA8 1978); *Williams v. Williams*, 532 F.2d 120, 121-122 (CA8 1976); *Shipp v. Todd*, 568 F.2d 133, 134 (CA9 1978); *Briggs v. Goodwin*, 186 U. S. App. D. C. 179, 184, n. 4, 569 F.2d 10, 15, n. 4 (1977). It is rare, however, that any kind of relief has been entered against judges in actions brought under § 1983 and seeking to restrain or otherwise control or affect the future performance of their adjudicative role. Such suits have been recurrently dismissed for a variety of reasons other than immunity. Hence, the question of awarding attorney's fees against judges will not often arise.

n14 Although we did not address the issue, a state judge was among the defendants in *Mitchum v. Foster*, 407 U.S. 225 (1972), where the Court held that § 1983 served to pierce the shield of 28 U. S. C. § 2283 against a federal court enjoining state-court proceedings. The Court did say, quoting from *Ex parte Virginia*, 100 U.S. 339, 346 (1880), to this effect, that § 1983 was designed to enforce the provisions of the Fourteenth Amendment against all state action, whether that action be executive, legislative, or *judicial*. The Court also noted that the proponents of § 1983 at the time it was enacted insisted that state courts were being used to harass and injure citizens, perhaps because they were powerless to stop deprivations or were in league with those who were bent upon abrogating federally protected rights. 407 U.S., at 242.

In *Boyle v. Landry*, 401 U.S. 77 (1971), and *O'Shea v. Littleton*, 414 U.S. 488 (1974), lower courts had entered injunctions against state officials including state-court judges. In each case, we reversed on the grounds that no case or controversy had been made out against any of the appellants in this Court; and in *O'Shea*, we concluded that even assuming that there was a case or controversy, insufficient grounds for equitable relief had been presented. We did not suggest, however, that judges were immune from suit in their judicial capacity.

Gerstein v. Pugh, 420 U.S. 103 (1975), involved a judgment against state-court judges and a prosecuting official declaring unconstitutional and enjoining the enforcement of certain state statutes. The prosecutor brought the case to this Court. We affirmed the declaration that the Florida procedures at issue were unconstitutional and held that *Younger v. Harris*, 401 U.S. 37 (1971), did not bar injunctive relief in the circumstances of the case. No issue of absolute immunity was raised or addressed.

[*736] [**1977]

[***LEdHR2B] [2B] [***LEdHR8A] [8A] We need not decide whether judicial immunity would bar prospective relief, for we believe that the Virginia Court and its chief justice properly were held liable in their enforcement capacities. As already indicated, § 54-74 gives the Virginia Court independent authority of its own to initiate proceedings against attorneys. For this reason the

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Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were. n15

n15

[***LEdHR8B] [8B]Of course, as *Boyle v. Landry, supra*, and *O'Shea v. Littleton, supra*, indicate, mere enforcement authority does not create a case or controversy with the enforcement official; but in the circumstances of this case, a sufficiently concrete dispute is as well made out against the Virginia Court as an enforcer as against the State Bar itself. See *Person v. Association of the Bar of New York*, 554 F.2d 534, 536-537 (CA2 1977).

[***LEdHR9] [9] [***LEdHR10A] [10A]Prosecutors enjoy absolute immunity from damages liability, *Imbler v. Pachtman*, 424 U.S. 409 (1976), but they are natural targets for § 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law. *Gerstein v. Pugh*, 420 U.S. 103 (1975), [*737] is only one of a myriad of such cases since *Ex parte Young*, 209 U.S. 123 (1908), decided that suits against state officials in federal courts are not barred by the Eleventh Amendment. If prosecutors and law enforcement personnel cannot be proceeded against for declaratory relief, putative plaintiffs would have to await the institution of state-court proceedings [***657] against them in order to assert their federal constitutional claims. This is not the way the law has developed, and, because of its own inherent and statutory enforcement powers, immunity does not shield the Virginia Court and its chief justice from suit in this case. n16

n16

[***LEdHR10B] [10B]Although appellants argued below that the Virginia Court as an entity is not a "person" suable under § 1983, they have not raised this issue before this Court. In any event, prospective relief was properly awarded against the chief justice in his official capacity; and absent a valid claim of immunity, the question remains whether the District Court's award of attorney's fees was proper. Although we would not have appellate jurisdiction under 28 U. S. C. § 1253 to decide the attorney's fees question had it alone been appealed, because the case is properly here on the § 1983 issue we have jurisdiction to

decide the attorney's fees issue. Cf. *Rosado v. Wyman*, 397 U.S. 397, 404-405 (1970).

IV

[***LEdHR11] [11]Because appellees properly prevailed in their § 1983 action, the Civil Rights Attorney's Fees Awards Act, 42 U. S. C. § 1988, authorized the District Court, "in its discretion," to award them "a reasonable attorney's fee," which may be recovered from state officials sued in their official capacities. *Hutto v. Finney*, 437 U.S. 678, 694 (1978). Applying the standard of *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968), the District Court indicated that attorney's fees should ordinarily be awarded "unless special circumstances would render such an award unjust." 470 F.Supp., at 1061. n17 [*738] Accordingly, enforcement authorities against whom § 1983 judgments have been entered would ordinarily be charged with attorney's fees. The District Court nevertheless considered it unjust to require the State Bar defendants to pay attorney's fees because they had recommended that the State Bar Code be amended to conform to what the Bar thought our cases required and because the Virginia Court declined or failed to [**1978] adopt this proposal. No similar circumstances excused the Virginia Court, the court held, for it was the very authority that had propounded and failed to amend the challenged provisions of the Bar Code.

n17 The District Court derived this standard from the Senate Committee Report on the Civil Rights Attorney's Fees Awards Act, which stated:

"It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by [the Act], if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)." S. Rep. No. 94-1011, p. 4 (1976).

[***LEdHR3B] [3B]We are unable to agree that attorney's fees should have been awarded for the reasons relied on by the District Court. Although the Virginia Court and its chief justice were subject to suit in their direct enforcement role, they were immune in their legislative roles. Yet the District Court's award of attorney's fees in this case was premised on acts or omissions for

446 U.S. 719, *; 100 S. Ct. 1967, **;
64 L. Ed. 2d 641, ***; 1980 U.S. LEXIS 108

which appellants enjoyed absolute legislative immunity. This was error.

We held in *Hutto v. Finney*, *supra*, that Congress intended to waive whatever Eleventh Amendment immunity would otherwise bar an award of attorney's fees against [***658] state officers, but our holding was based on express legislative history indicating that Congress intended the Act to abrogate Eleventh Amendment immunity. There is no similar indication in the legislative history of the Act to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute legislative immunity. The House Committee Report on the Act indicates that Congress intended to permit attorney's fees awards in cases in which prospective relief was properly [*739] awarded against defendants who would be immune from damages awards, H. R. Rep. No. 94-1558, p. 9 (1976), but there is no indication that Congress intended to permit an award of attorney's fees to be premised on acts that themselves would be insulated from even prospective relief. Because the Virginia Court is immune from suit with respect to its legislative functions, it runs counter to that immunity for a district court's discretion in allowing fees to be guided by considerations centering on the exercise or nonexercise of the state court's legislative powers.

[***LEdHR12] [12]This is not to say that absent some special circumstances in addition to what is disclosed in this record, a fee award should not have been made in this case. We are not convinced that it would be unfair to award fees against the State Bar, which by statute is designated as an administrative agency to help enforce the State Bar Code. Fee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a lawsuit or for an injunction. Nor would we disagree had the District Court awarded fees not only against the Bar but also against the Virginia Court because of its own direct enforcement role. However, we hold that it was an abuse of discretion to award fees because the Virginia Court failed to exercise its rulemaking authority in a manner that satisfied the District Court. We therefore vacate the award of attorney's fees and remand for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

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42 USCS 1983, 1988

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Annotation References:

Construction and application of speech or debate clause of United States Constitution (Art I, 6, cl 1). *60 L Ed 2d 1166*.

Supreme Court's views as to civil liability of judges. *55 L Ed 2d 850*.

Supreme Court's construction of Civil Rights Act of 1871 (*42 USCS 1983*) providing private right of action for violation of federal rights. *43 L Ed 2d 833*.

What issues will the Supreme Court consider, though not, or not properly, raised by the parties. *42 L Ed 2d 946*.

Supreme Court's view as to what is a "case or controversy" within the meaning of Article III of the Federal Constitution or an "actual controversy" within the meaning of the Declaratory Judgment Act (*28 USCS 2201*). *40 L Ed 2d 783*.

Construction and application of *28 USCS 1253* permitting direct appeal to Supreme Court from order of three-judge District Court granting or denying injunction. *26 L Ed 2d 947*.

Prevailing party's right to recover counsel fees in federal courts. *8 L Ed 2d 894*.

Construction and application of Civil Rights Attorney's Fees Awards Act (amending *42 USCS 1988*), providing that court may allow prevailing party, other than United States, reasonable attorney's fee in certain civil rights actions. *43 ALR Fed 243*.

**PHYLLIS CARVER; THOMAS FOX; APRIL MOORE; ROBERTA RUDOLPH v.
TOM FOERSTER, an individual and Chairman, Allegheny County Commissioners;
COUNTY OF ALLEGHENY, Appellants.**

No. 96-3008

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

102 F.3d 96; 1996 U.S. App. LEXIS 32631

**September 17, 1996, Argued
December 12, 1996, Filed**

PRIOR HISTORY: **[**1]** On Appeal from the United States District Court for the Western District of Pennsylvania. (D.C. Civil Action No. 93-cv-00912).

DISPOSITION: Affirmed

COUNSEL: Paul D. Boas, Esq. (Argued), Mark D. Lancaster, Esq. Berlin, Boas & Isaacson, Pittsburgh, PA, Attorneys for Appellees.

Mark R. Hornak, Esq. (Argued), Gregory A. Miller, Esq. Buchanan Ingersoll Professional Corporation, Pittsburgh, PA, Attorneys for Appellants.

JUDGES: Before: BECKER, NYGAARD and ROTH, Circuit Judges.

OPINIONBY: ROTH

OPINION: **[*97]** OPINION OF THE COURT

Roth, Circuit Judge:

Plaintiffs brought suit under *42 U.S.C. § 1983* against Allegheny County and Tom Foerster, Chairman of the Board of Commissioners of Allegheny County and a member of the Allegheny County Salary Board, charging that Foerster had eliminated their jobs with Allegheny County because they supported Joe Brimmeier in the Democratic primary for Prothonotary. Allegheny County and Foerster moved for summary judgment based on absolute legislative immunity because plaintiffs' positions had been eliminated by a vote of the Salary Board. Foerster also claimed qualified immunity for his actions as a member of the Salary Board. The district court denied the motions on the ground **[**2]** that Foerster was not entitled to absolute or qualified immunity

for his pre-vote activities and that municipalities do not enjoy legislative immunity from Section 1983 suits. **n1** Both defendants appeal the denial of absolute legislative immunity. We agree with the district court's reasoning and will affirm.

n1 Because the claims against Foerster in his official capacity are in fact claims against the County, we will refer to the official capacity claims and the county claims collectively as those against "the County." See *Kentucky v. Graham*, *473 U.S. 159, 165, 105 S. Ct. 3099, 3104, 87 L. Ed. 2d 114 (1985)*.

I. Facts

Tom Foerster was Chairman of the County Board of Commissioners and a member of the Salary Board throughout the time the events in question took place. The Allegheny Salary Board is composed of four members: three County Commissioners and the County Controller. The Board sets the maximum and minimum salary range for County jobs. It is also the only entity within the County with the power to create or **[**3]** eliminate positions.

In May 1991, Joe Brimmeier, a former aide to Foerster, ran in the Democratic primary for the position of Prothonotary of Allegheny County. Foerster vocally opposed Brimmeier's candidacy. The four plaintiffs actively supported Brimmeier in the primary election. Brimmeier lost.

[*98] Foerster was re-elected Commissioner in November, 1991. Following the election, James Dodaro, the County Solicitor, notified Foerster of his plan to re-

sign at the end of the year. Foerster appointed Ira Weiss to replace Dodaro as of January 6, 1992. On January 3, three days before his appointment was effective, Weiss fired plaintiffs, Roberta Rudolph and April Moore, and told them that their positions as administrative assistant and Risk Manager were being eliminated. When Dodaro intervened to ask Weiss to keep Rudolph and Moore, Weiss reportedly replied, "No, they want them out now." Rudolph and Moore were offered alternate positions as typists at approximately half their salaries. They rejected these positions. On January 8, 1992, five days after notifying Rudolph and Moore that their jobs were eliminated, Weiss signed a request asking the Salary Board to eliminate nine positions, including [**4] those held by Rudolph and Moore. On January 16, 1992, the Salary Board unanimously approved the request.

Plaintiffs Phyllis Carver and Thomas Fox held positions in the Department of Development. Carver was a planning and evaluation specialist, and Fox was manager of marketing. Shortly after Brimmeier's candidacy for Prothonotary failed, Foerster allegedly had Wayne Fusaro, one of his Executive Aides, compile a "hit list" of Brimmeier supporters. The list reportedly included Carver and Fox.

On June 19, 1992, George Braun, the Director of Development, notified Carver and Fox that he was eliminating their positions because of budgetary concerns. Two other positions within the Department of Development were eliminated at the same time. Braun submitted his request for Salary Board action on June 12, and the Salary Board unanimously approved his recommendation for termination on June 18. Neither Fox nor Carver were offered positions elsewhere in county government.

According to the defendants, Braun's elimination of the positions was spurred by a Federal Housing and Urban Development audit, which had found excessive administration expenses by the department. The defendants assert that [**5] the positions were eliminated as part of a larger attempt to keep down administrative costs. The defendants further contend that at the same two sessions that the plaintiffs lost their positions, the Salary Board took additional actions affecting 19 other county departments, resulting in the elimination of twenty two other positions. In her Report and Recommendation, however, the magistrate judge noted that about the time Fox and Carver's positions were eliminated, three new positions were created in the Department of Development and other employees received raises.

The plaintiffs assert that the Salary Board would automatically approve any proposal to eliminate jobs without independent consideration and that once Foerster made it known that he wanted plaintiffs' positions eliminated, the vote of the Salary Board was a mere formality.

On June 9, 1993, the plaintiffs filed suit against Allegheny County and against Foerster, individually and in his official capacity as Chairman of the Allegheny County Board of Commissioners. After extensive discovery, defendants filed for summary judgment. The magistrate judge denied defendants' motion. The District Court adopted the magistrate judge's [**6] report and recommendation. Defendants have appealed that portion of the District Court's decision relating to absolute legislative immunity, as well as those defenses "inextricably intertwined" with their immunity claims.

II. Jurisdiction and Standard of Review

Ordinarily, this court does not have jurisdiction to review a lower court's denial of summary judgment since a denial of summary judgment does not constitute a "final decision" within the meaning of 28 U.S.C. 1291. See *In re City of Philadelphia Litigation*, 49 F.3d 945, 956 (3d Cir.), cert. denied, 133 L. Ed. 2d 116, 116 S. Ct. 176 (1995). When the summary judgment motion is premised on absolute immunity, however, the district court's denial is immediately appealable because it falls within the collateral order doctrine: "that small class [of orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent [**9] of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 1225-26, 93 L. Ed. 1528 (1949).

Absolute [**7] immunity is an issue of law, separable from the merits of the case, which once denied cannot effectively be preserved for later review by an appellate court. "The denial of a substantial claim of absolute immunity is an order appealable before final judgment, for the essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985) (ruling on qualified immunity immediately appealable). See also *Nixon v. Fitzgerald*, 457 U.S. 731, 741-43, 102 S. Ct. 2690, 2697-98, 73 L. Ed. 2d 349 (denial of presidential immunity immediately reviewable on appeal) and *Acierno v. Cloutier*, 40 F.3d 597, 606 (3d Cir. 1994): "The Nixon case makes clear that we have appellate jurisdiction to consider whether the former members of the County Council are entitled to absolute legislative immunity."

A district court's denial of summary judgment, premised on absolute legislative immunity, is therefore immediately appealable. For this reason, we have jurisdiction to consider the district court's denial of summary judgment with regard to the immunity claims. Moreover, because

[**8] absolute immunity is a purely legal question, we exercise plenary review over the district court's decision. *Acierno*, 40 F.3d at 609, citing *Donivan v. Dallastown Borough*, 835 F.2d 486, 487 (3d Cir. 1987) cert. denied 485 U.S. 1035, 108 S. Ct. 1596, 99 L. Ed. 2d 910 (1988).

III. Foerster's Individual Claim to Legislative Immunity

According to Foerster, he is entitled in his individual capacity to absolute legislative immunity from suit because of his membership on the Salary Board, the governing body that ultimately approved the elimination of the plaintiffs' positions with the County. Plaintiffs respond that their complaint does not concern Foerster's vote as a member of the Salary Board but is directed at the actions he took prior to and independent of that vote in order to persuade his department heads to bring about the elimination of their positions. The parties focussed a great deal of their argument on the question whether the Salary Board acted legislatively or administratively when it voted to do away with the plaintiffs' positions. We do not find, however, that the status of the Salary Board is the dispositive question of individual immunity in this case. Rather, the [**9] issue is whether Tom Foerster's pre-vote actions as a Commissioner can be separated from his vote as a Salary Board member.

We will start our analysis with an examination of the general principles of legislative immunity and how it applies to local legislators in § 1983 cases. Under 42 U.S.C. § 1983, "Every person who, under color of any statute, ordinance, regulation, custom, or usage ... subjects, or causes to be subjected any citizen ... or other person ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." The term "persons" includes local and state officers acting under color of state law. See *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). The Supreme Court has recognized, however, that public officials, sued in their individual capacities, may under certain circumstances enjoy immunity from § 1983 suits. In *Tenney v. Brandhove*, 341 U.S. 367, 71 S. Ct. 783, 95 L. Ed. 1019 (1951), the Supreme Court held that the doctrine of legislative immunity, as applied to state legislators, survived the enactment of § 1983. In [**10] *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S. Ct. 1171, 59 L. Ed. 2d 401 (1971), the Court extended the doctrine of absolute legislative immunity to members of a regional legislature. Finally, in *Aitchison v. Raffiani*, 708 F.2d 96 (3d Cir. 1983), this circuit, following the example of our sister circuits, held that local legislators enjoyed absolute immunity from personal liability

under 42 U.S.C. § 1983 for acts taken in their legislative capacities.

[*100] In *Aitchison*, we considered whether a mayor and borough attorney were entitled to immunity for the passage of an ordinance, which abolished the position of building inspector. We recognized in *Aitchison* that executive officials might exercise legislative power along with their administrative duties, and we adopted a functional approach to the question of when immunity should apply. "In appraising the mayor's need for absolute immunity, we look to the function the individual performs rather than his location within a particular branch of government." *Aitchison*, 708 F.2d at 99. Using this functional approach, we found that the mayor was entitled to absolute immunity for the *act* of voting for an [**11] ordinance that resulted in the abolition of an employment position. Because the *complaint* sought compensation for the mayor's *vote* and established "active participation by the mayor in the legislative process," the mayor was immune from liability for damages under Section 1983. *Id.*

Since *Aitchison*, we have repeatedly stated that a public official's legislative immunity from suit attaches only to those acts undertaken in a legislative capacity. "It is only with respect to the legislative powers delegated to them by the state legislatures that the members of local governing boards are entitled to absolute immunity." *Ryan v. Burlington County, New Jersey*, 889 F.2d 1286 (3d Cir. 1989); *Acierno*, 40 F.3d at 610. In *Ryan*, 889 F.2d at 1290-91, we devised a two-pronged test for determining whether or not a municipal body's action was "legislative" or "administrative" in character. To be legislative, the act must be (1) substantively legislative, such as "policy-making of a general purpose" or "line-drawing"; and (2) procedurally legislative, such that it is "passed by means of established legislative procedures". We refined the first prong of this test in *Acierno* [**12] when we held that although the number of persons affected by a given decision might be an important factor in the two-part immunity analysis, it was not dispositive.

Using this same approach, we conclude that Tom Foerster is not entitled to legislative immunity for any non-legislative actions he took to abolish the plaintiffs' positions. In coming to this conclusion, we will assume, without deciding, that the Salary Board's vote to eliminate plaintiffs' positions was "legislative" in nature. In addition, we will assume that a legislative body's decision to eliminate a government position, in contrast to the mere termination of a person's employment, is legislative activity. See *Rateree v. Rockett*, 852 F.2d 946 (7th Cir. 1988). Nevertheless, we do not think that such legislative activity by the Salary Board shields Tom Foerster from liability. As a County Commissioner, Foerster acted in various capacities -- legislative, executive and admin-

istrative. In giving a unilateral order to have Brimmeier supporters fired, Foerster would not be engaging in policy-making of general application regarding the expenditure of County funds, but would be making either an executive decision on [**13] how the anticipated cut-back should be implemented or an administrative decision that certain individuals should be fired. Actions taken in a executive or administrative capacity are not entitled to absolute immunity.

Plaintiffs have not named the Salary Board in their complaint; neither do they cite Foerster's vote as a Salary Board member as part of their claim. Rather, they seek restitution for the course of conduct -- harassment, threats, and retaliation -- in which Foerster allegedly engaged prior to and independent of the Salary Board's vote. Even if the Salary Board's decision was part of a policy to cut waste from the county government, Foerster's conduct, if proven, constituted retaliatory conduct targeted at specific individuals because of their support for a political adversary. If Tom Foerster used his position as Commissioner to "punish" county workers for their support of Brimmeier, that abuse of power for personal ends cannot be made "legislative" simply by eliminating plaintiffs' positions instead of firing them outright. Were the Salary Board nonexistent and Tom Foerster able to eliminate County positions without any legislative approval whatsoever, we have no doubt [**14] that he could be held liable under Section 1983. n2

n2 See e.g. *Dwyer v. Regan*, 777 F.2d 825 (2d Cir. 1985) (employee brought suit against state comptroller for wrongful elimination of position); *Laskaris v. Thornburgh*, 733 F.2d 260 (3d Cir. 1984) (governor and secretary of transportation, sued for politically motivated elimination of employment positions).

These cases do not address the issue of legislative immunity per se, presumably because the defendants never raised it as a defense. Nevertheless, they illustrate that a single official's elimination of a position of employment, without more, will not insulate him from liability for constitutional violations.

[*101] In addition, we do not think Foerster's actions are necessarily rendered "legislative" by the Salary Board's ultimate vote in favor of eliminating plaintiffs' jobs. An unconstitutional or illegal course of conduct by county government does not fall within the doctrine of absolute immunity merely because it is connected to or followed by a vote [**15] of a county board. For example, in *Bartholomew v. Fischl*, 782 F.2d 1148 (3d Cir. 1986), we held that the director of a health bureau cre-

ated by the cities of Allentown and Bethlehem could maintain an action against the mayor of Allentown for persuading the two city councils to dissolve the health bureau and thereby eliminate the director's position. Bartholomew brought suit for his dismissal against both the City of Allentown and the mayor. In reversing the district court's dismissal of the case, we stated that the mayor's persuasion of the city council constituted "official city policy" and was sufficient to sustain a claim against the city under Section 1983.

"Indeed, as Mayor Fischl was powerless to discharge Bartholomew himself, the Mayor's only available means of effecting appellant's termination was to persuade the city council of Allentown, the city's official lawmakers, to dissolve the BiCity Board of Health and the Bureau altogether, thereby eliminating Bartholomew's position. It is this course of conduct that Bartholomew refers to [in his complaint]"

Bartholomew, 782 F.2d at 1153. In recognizing Bartholomew's claim against the city, we specifically [**16] noted the mayor's role in securing his release, concluding, "Defendant Fischl, as Mayor of Allentown, was certainly a government official with policy-making powers"Id. Despite our awareness of Fischl's position as mayor, we did not dismiss Bartholomew's suit against him. n3 Although our holding may not address the question of absolute immunity, it nevertheless supports the principle that an official's executive or administrative actions are separable from actions taken in a legislative capacity. See also *Meding v. Hurd*, 607 F. Supp. 1088, 1110 n. 28 (D.Del. 1985) (actions of Town Council in terminating the police chief are not legislative merely because termination was achieved by a vote of the council).

n3 To the contrary, we resuscitated Bartholomew's claim against Fischl. The District Court had dismissed Bartholomew's claim against the mayor as time-barred under Section 1983, applying Pennsylvania's one-year statute of limitations for defamation actions. Subsequent to the district court's decision, the Supreme Court held in *Wilson v. Garcia*, 471 U.S. 261, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985) that Section 1983 suits were governed by the state's personal injury statute of limitations, which in this case was two years. We applied *Wilson* retroactively and vacated the district court's grant of summary judgment for Fischl, thus allowing Bartholomew to maintain an action against the mayor. See *Bartholomew*, 782 F.2d at 1154-56.

[**17]

Moreover, we reject defendant's assertion that Foerster is entitled to immunity because he could not have caused the plaintiffs to lose their positions without the support of at least two of the three other members of the Allegheny Salary Board. Causation is not an issue in this case at this time. Causation relates to the merits of plaintiffs' claims, not to the question of absolute immunity. The issue of causation is a fact-driven inquiry, requiring the district court to make findings about the role both of Foerster and of the Salary Board in eliminating the plaintiffs' positions. At this stage in the litigation, we lack jurisdiction to consider a factor, such as causation, which goes to the merits of plaintiffs' claims. See *Johnson v. Jones*, 132 L. Ed. 2d 238, 115 S. Ct. 2151 (1995). Although defendant's causation argument may have some bite at a later stage, it has no bearing on the issue of absolute legislative immunity for Foerster's pre-vote activities. n4

n4 We also note that defendants' causation argument, as applied to Allegheny County, is beyond our jurisdiction at this stage of the litigation. Moreover, we do not think the causation issue -- as applied to either defendant -- is "inextricably intertwined" with the immunity question, as defendants would have us hold. The Supreme Court does not take the exercise of "pendent" appellate jurisdiction lightly, see *Swint v. Chambers County Commission*, 514 U.S. 35, 131 L. Ed. 2d 60, 115 S. Ct. 1203 (1995) and we see no reason to apply the doctrine here.

[**18]

[*102] Finally, we are satisfied that our rejection of absolute immunity as applied to Foerster will not, as defendants suggest, open the floodgates for future plaintiffs wishing to attack legislators for their votes on controversial budgeting matters. We hold only that the doctrine of absolute immunity, as it pertains to local legislators, does not shield executive officials from liability for a course of conduct taken prior to and independent of legislative action, even if those officials were simultaneously members of the local legislative body that ratified the conduct. In a situation similar to the one we considered in Aitchison, disgruntled constituents cannot pursue government officials simply because budgetary constraints or organizational efficiencies have dictated the elimination of a job. A specific employee can, however, challenge a county executive who misuses public office to get rid of that employee's job because the employee's political activities have displeased the county executive.

IV. The County's Claim to Legislative Immunity

The district court also held that the Allegheny County and Tom Foerster in his official capacity were not entitled to legislative [**19] immunity from suit under Section 1983. For the reasons set forth below, we will affirm this holding as well.

Our resolution of this issue necessarily begins with the Supreme Court's decision in *Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). In *Monell*, the Court overruled a portion of *Monroe v. Pape*, 365 U.S. 167, 81 S. Ct. 473, 5 L. Ed. 2d 492 (1961), to find municipalities liable as "persons" under Section 1983. "It is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Section 1983." *Monell*, 436 U.S. at 694, 98 S. Ct. at 2037-38 (emphasis supplied). The phrase "made by its lawmakers," practically forecloses the argument that the Court meant to leave open the possibility that local governments were entitled to legislative immunity under Section 1983. In addition, the Court rejected the municipality's argument that it was entitled to absolute immunity "lest our decision that such bodies are subject to suit under § 1983 be drained of meaning." [**20] *Monell*, 436 U.S. at 701, 98 S. Ct. at 2041, quoting *Scheuer v. Rhodes*, 416 U.S. 232, 248, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974). The Court in *Monell* stopped short of imposing respondeat superior liability on local governments. Its subsequent decisions have, however, steadfastly adhered to the general principle that local governments will be held responsible under § 1983 for their violations of constitutional and federal rights. n5 As long ago as 1979, the Court in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 99 S. Ct. 1171, 59 L. Ed. 2d 401 (1979) extended legislative immunity to regional legislators. More important for our purposes, the Court also implied in *Lake County Estates* that the regional governing body had no such immunity, stating: "If the respondents have enacted unconstitutional legislation, there is no reason why relief against TRPA itself [the Tahoe Regional Planning Agency] should not adequately vindicate petitioners' interests." *Id.* at 405, 99 S. Ct. at 1179 n. 29 (citations omitted). This statement alone calls defendants' argument into serious doubt.

n5 But Cf. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S. Ct. 2748, 69 L. Ed. 2d 616 (1981) (municipality not liable for punitive damages under § 1983).

[**21]

Shortly thereafter, in *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398, 63 L. Ed. 2d 673 (1980), the Court held that municipalities lacked qualified immunity under Section 1983. Justice Brennan's reasoning in the majority opinion in *Owen* bears on our resolution of this case. First, Brennan noted the language of § 1983, which makes no mention of immunities or any exceptions to the scope of liability. "Its language is absolute and unqualified; no mention is made of any [*103] privileges, immunities, or defenses that may be asserted." *Owen*, 445 U.S. at 635, 100 S. Ct. at 1398. Nevertheless, the Court conceded, some common law immunities were so fully entrenched at the time the Civil Rights Act was passed in 1871, that they were implicitly incorporated into the Act.

The Court then considered whether any type of immunity protected local governments in 1871 and found two. The first, the distinction between governmental and proprietary acts, was ruled out as a basis of immunity under § 1983 because it was a form of sovereign immunity, abrogated by Congress, "the supreme sovereign on matters of federal law," when it included local governments as "persons" within the Civil Rights Act's [**22] scope of liability. *Id.*, at 647-48, 100 S. Ct. at 1413. The second doctrine of immunity, which protected municipalities for "discretionary" activities of a public or legislative nature, was equally inapplicable because "a municipality has no 'discretion' to violate the Federal Constitution; its dictates are absolute and imperative." *Id.* at 649, 100 S. Ct. at 1414. Thus, neither doctrine of immunity supported the City's claim of qualified immunity under § 1983. The Supreme Court further increased municipal exposure to liability in *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986), when it held that a single decision of a municipality's "properly constituted legislative body" could subject it to liability under § 1983. *Id.* at 480, 106 S. Ct. at 1298. *Pembaur* leaves little, if any room, for the argument that the Court meant to "preserve" municipal legislative immunity.

Recently, in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, the Supreme Court reinforced its expansive interpretation of § 1983 liability when it rejected a district court's heightened pleading standard for suits brought against local governments. [**23] Referring to *Owen* and *Monell*, the Court declared, "These decisions make it quite clear that, unlike various government officials, municipalities do not enjoy immunity from suit - either absolute or qualified - under § 1983." *Leatherman*, 507 U.S. 163, 113 S. Ct. 1160, at 1162, 122 L. Ed. 2d 517.

The Supreme Court's past treatment of local governments under Section 1983 compels our decision today that Al-

leghey County is not entitled to legislative immunity in this case. Were we to hold in defendants' favor, we fear this doctrine of "legislative immunity" would cut away the core principle of *Monell* and *Owen*: Local governments, unlike individual legislators, should be held liable for the losses they cause. Moreover, a doctrine of legislative immunity for local governments might have the undesirable effect of encouraging a county council to adopt all of its policies through a series of legislative actions passed by a newly created "Board" or "Council".

Other policy concerns also support our analysis. First, we do not believe local governments face the same mix of perverse incentives as individual legislators when sued or threatened with a lawsuit. When a legislator considers a piece of legislation, [**24] we expect him to consider the best interests of the people he serves, not the size of his own wallet. As the Supreme Court has recognized, "In many contexts, government officials are expected to make decisions that are impartial or imaginative, and that above all are informed by considerations other than the personal interests of the decisionmaker." *Forrester*, 484 U.S. 219, at 223, 108 S. Ct. 538, at 542, 98 L. Ed. 2d 555. If the legislator is held personally liable for suit, however, even the most conscientious public officer will be encouraged to vote against legislation that may be beneficial for the community at large for fear that personal liability will outweigh his genuine interest in helping his constituents. The public officer will think less about the needs of the city or the county, in order to protect his own monetary and personal interests. Or, he may even decide to forgo public office altogether. See *Wood v. Strickland*, 420 U.S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 (1975). In sum, the result of personal liability is the chilling of potentially beneficial legislative activity and the distraction of public officials from community matters. "In this way, exposing government officials to the same legal hazards [**25] faced by [*104] other citizens may detract from the rule of law instead of contributing to it." *Id.*

The same concerns do not arise when local governments are held liable for violations under § 1983. First, city or county liability for constitutional violations only adds to the collective risk of loss that the legislator already should be considering when he decides whether or not to enact a new piece of legislation. If a county policy causes a constitutional wrong, the county should be made to bear the losses caused by that violation. As Justice Brennan explained in *Owen*, the central purpose of the Civil Rights Act was to provide citizens with a remedy against those who had abused state power. "It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby. Indeed Congress enacted § 1983 precisely to provide a remedy for such

abuses of official power." *Owen*, 445 U.S. at 654, 100 S. Ct. at 1417.

In addition, liability on the part of the local governing body may deter future unconstitutional legislation, thereby contributing to the enforcement of constitutional norms within our society. [**26] "The knowledge that a municipality will be liable for all of its injurious conduct ... should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Id.* at 651-52, 100 S. Ct. at 1416. Efforts to enact legislation that causes harm to the community (including the compensation paid for violation of constitutional rights) should be chilled.

Finally, because a legislator's own money is not at risk, county liability does not distract the legislator from his job of serving the community's interests. True, the legislator must contend with lawsuits brought against the county, but that distraction is borne equally by the local populace as a whole (at least in tax dollars) and not by any particular individual. If a county council forgoes enactment of legislation because it fears potential liability for the county under § 1983, its decision reflects a rational calculation that, whatever a given policy's benefits, its risk of liability outweighs its collective benefit to the community. This is *exactly* the type of reckoning we want to encourage our legislators to make. [**27]

Defendants argue, however, that legislative immunity for the county is necessary to protect legislators from judicial inquiry into their motives in enacting legislation. This argument lacks weight given the intent-based inquiry of certain doctrines of Constitutional law. "Developments in federal law over the last 30 years have tied the constitutionality of many types of municipal legislation directly to the purpose and motive of the legislation." *Goldberg v. Town of Rocky Hill*, 973 F.2d 70, 75 (2d Cir. 1992) (citing cases). For better or worse, lawsuits concerning constitutional matters such as equal protection, the First Amendment, and substantive due process all require judicial inquiry of the legislator's motive. See *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (proof of discriminatory motive necessary to show violation of Equal Protection Clause); *Bello v. Walker*, 840 F.2d 1124, 1129 (3d Cir. 1988), cert. denied, 488 U.S. 851, 109 S. Ct. 134, 102 L. Ed. 2d 107 (1988) (deliberate and arbitrary government decision, including one "tainted by improper motive," violated developer's substantive due process rights) and *Grant v. City of Pittsburgh*, 98 F.3d 116, (3d Cir. 1996)(evidence of officer's intent admissible when intent is integral element of underlying constitutional violation). These cases illustrate that judicial inquiry of legislative motive is not per se forbidden. We therefore

will not undercut core doctrines of Constitutional law by applying legislative immunity to municipalities under § 1983.

Finally, we note the uniform manner in which our sister circuits have dealt with this issue. See *Berkley v. Common Council of City of Charleston*, 63 F.3d 295 (4th Cir. 1995), cert. denied, 133 L. Ed. 2d 727, 116 S. Ct. 775 (1996); *Goldberg*, 973 F.2d at 70; *Reed v. Village of Shorewood*, 704 F.2d 943; *Kuzinich v. County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982); *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. Unit A May 1981), cert. denied, 455 U.S. 907, 102 S. Ct. 1251, 71 L. Ed. 2d 444 (1982). [*105] We know of no circuit that currently accepts the doctrine of municipal legislative immunity under Section 1983.

IV. Conclusion

For the reasons stated above, we will affirm the district court's judgment against the defendants insofar as it holds that neither Tom Foerster, in his individual or official [**29] capacity, nor Allegheny County are entitled to legislative immunity in this case.

Phyllis Carver; Thomas Fox; April Moore; Roberta Rudolph v. Tom Foerster, an individual and Chairman, Allegheny County Commissioners; County of Allegheny, Appellants, No. 96-3008.

CONCURBY: BECKER

CONCUR: BECKER, Circuit Judge, concurring.

I.

In 1976, over a strong dissent by Justice Powell, the Supreme Court announced its decision in *Elrod v. Burns*, 427 U.S. 347, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976), holding that the First and Fourteenth Amendments prohibit the dismissal of certain government employees on the basis of political affiliation. n6 In *Branti v. Finkel*, 445 U.S. 507, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (1980), over a similar Powell dissent, n7 the Court clarified *Elrod* by making clear that: (1) *Elrod* prohibits dismissal on the basis of party affiliation even if the discharged employee cannot show that he or she was coerced into changing his or her political allegiance; and (2) government employees can be dismissed for their party affiliation only when the government can show that certain political beliefs are necessary to carry out the duties of those offices. Then, in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 111 L. Ed. 2d 52, 110 S. Ct. 2729 (1990), the Court [**30] extended the *Elrod* principle to include hiring as well as firing. But Justice Scalia, undaunted by a decade and a half of *Elrod*'s hegemony, wrote a powerful dissent, building upon the words of Justice Powell, and assailing the *Elrod-Branti-Rutan* tril-

ogy as not only amounting to bad constitutional law, but also as reflecting a deep misunderstanding of the essential role that the patronage system has played in American history and political tradition. n8

n6 Justice Powell was joined in dissent by Chief Justice Burger and Justice Rehnquist.

n7 Justice Powell was joined in dissent by Justice Rehnquist. Justice Stewart also dissented, but on narrower grounds.

n8 Justice Scalia was joined in dissent by Chief Justice Rehnquist, and Justices O'Connor and Kennedy.

As this recitation suggests, the view that the Elrod-Branti-Rutan trilogy was a serious mistake will not die. That it will not is, I suspect, because of the compelling logic of the Powell and Scalia arguments, described *infra*, [**31] as well as the fact that the total domination of election campaigns by money and special interests that we have seen in recent years not only adds fuel to the fire of the Powell and Scalia arguments, but renders them prophetic. The need to reexamine the trilogy, which is what I will argue for, is thus counseled by new developments in the years since the trilogy was complete. The need is doubled in spades by the extreme result in the present case. n9

n9 I recognize that, as the majority opinion has noted, we cannot reach the merits at this juncture. But since this case appears to be proceeding apace to a merits consideration, I think it appropriate to speak out now about the wisdom of the patronage jurisprudence.

The "extreme result" is that the majority has been led by the Elrod trilogy to rule, in effect, that any political leader who advises his political associates to discharge a political opponent may be subject to suit under 42 U.S.C. § 1983 for a First Amendment violation. Although the present [**32] defendant, "Boss" Foerster, is a public official and a member of the Salary Board, under the majority's logic, Foerster would be liable as a § 1983 co-conspirator if he were a private citizen-political boss who gave the same "orders" he is charged with giving here, to me a quite startling proposition. This result causes me to question whether there is now any limit to examination in the courts or under the aegis of the courts (through depositions and interrogatories) of any government personnel or procurement decision that goes the ox of someone who can claim political foul. And, query

whether there is any limit to the judicial examination of the mental processes and conversations of defendants in such cases. If there is not, the fundamental premise of representative government -- that [*106] it is our public officials who are held accountable for their actions at the ballot box rather than their political "bosses" -- seems not only challenged, but also undermined. n10

n10 The majority's opinion is, of course, controlled by the law of legislative immunity, and the result reached would be the correct one in any case brought against a political "boss" under § 1983, e.g., for an equal protection violation involving race or gender bias. The views that I express in this concurrence are limited to my concerns about subjecting political leaders and public officials to liability for politically motivated employment decisions only.

[**33]

The 1996 election campaigns were startling in the extent to which the influence of money and special interest groups so clearly dwarfed the role of the political parties in affecting the outcomes. But this is the very specter that loomed so large in the sights of Justice Powell when he decried the results in *Branti*:

Particularly in a time of growing reliance upon expensive television advertisements, a candidate who is neither independently wealthy nor capable of attracting substantial contributions must rely upon party workers to bring his message to the voters. In contests for less visible offices, a candidate may have no efficient method of appealing to the voters unless he enlists the efforts of persons who seek reward through the patronage system. Insofar as the Court's decision today limits the ability of candidates to present their views to the electorate, our democratic process surely is weakened.

Branti, 445 U.S. at 528-29, 63 L. Ed. 2d 574, 100 S. Ct. 1287 (Powell, J., dissenting). As the foregoing comments suggest (and as I will elaborate), I see the trilogy as extremely deleterious to the national polity. That is because it has seriously undermined certain traditions that have helped [**34] our democracy to flourish.

I recognize that I am a judge of an inferior court, but that does not preclude me from expressing an opinion

where I feel strongly that the Supreme Court has gone down a dangerous path it ought to reconsider. *U.S. v. Kennerley*, 209 F. 119, 120 (S.D.N.Y. 1913) (Hand, J.) ("While, therefore, the demurrer must be overruled, I hope it is not improper for me to say that the rule as laid down, however consonant it may be with mid-Victorian morals, does not seem to me to answer to the understanding and morality of the present time.").

Thus, although I am constrained by the Supreme Court's jurisprudence to concur in the present opinion and judgment, and therefore do so, I write separately to express my dismay about the way in which the First Amendment patronage jurisprudence has evolved. This opinion is energized by the scenario of the case at bar and the recent developments to which I have adverted.

II.

I begin with a description of the problem clearly identified by the Powell and Scalia dissents. In essence, the patronage system historically has been critical to the survival and strength of political parties by allowing party leaders to reward their party [**35] faithful. Strong parties have, in turn, played a crucial democratizing role: they have stimulated political activity and encouraged meaningful political debate; they have enabled local candidates for office to attract attention to their candidacies and galvanize grass-roots organizing; and they have facilitated the political participation of historically excluded groups, see *Rutan*, 497 U.S. at 108 (Scalia, J., dissenting) ("By supporting and ultimately dominating a particular party 'machine,' racial and ethnic minorities have -- on the basis of their politics rather than their race or ethnicity -- acquired the patronage awards the machine had to confer."). n11

n11 Justice Scalia continued: "No one disputes the historical accuracy of this observation, and there is no reason to think that patronage can no longer serve that function." *Rutan*, 497 U.S. at 108.

Moreover, as Justice Scalia noted in *Rutan*, the "patronage system does not . . . merely foster political parties in general; it fosters the two-party [**36] system in particular." *Id.* at 106. If patronage jobs are available to workers who have chosen a winning candidate, campaign workers are more likely to choose a party with a chance of prevailing, rather than one with non-mainstream views. This tends to foster [*107] the preservation of the two-party system, as parties must ensure that their message has wide appeal to attract rank-and-file members.

As I see it, the Elrod trilogy has deprived parties of one of the most effective tools for building party unity: prospect of future political jobs for a job well done. The blow that this has dealt patronage systems has contributed to the need of political candidates to rely almost exclusively on media and money-intensive campaigns to succeed. That politics has come to be dominated by money, and hence large contributors and political action committees (PACs) have achieved a significant sway, has been true for a number of years now, but it surely cannot be doubted in the wake of the 1996 election campaigns. This effect has been felt most significantly at the local level, where candidates, particularly challengers who have no PAC money to draw on, can generate little support. Without personal [**37] wealth, such candidates are doomed to failure. See *Branti*, 445 U.S. at 528-29 (Powell, J., dissenting). I, of course, do not mean to suggest that the trilogy is the only reason for the massive influence of money in election campaigns, nor could I credibly do so given the ascendancy of the mass media over so many aspects of national life, and the high cost of media advertising. But, it is at least a significant contributing factor.

Additionally, although the rise of modern, media-intensive campaigns has surely benefitted the democratic process by allowing some candidates to make broad-based appeals to the entire public, access to the media is limited to those candidates who can afford it, a terrible state of affairs. Moreover, the nature of modern campaigns has not rendered obsolete the crucial work done by individual party workers, particularly in local races. "Certainly they have not made personal contacts unnecessary in campaigns for the lower level offices that are the foundations of party strength, nor have they replaced the myriad functions performed by party regulars not directly related to campaigning. And to the extent such techniques have replaced older methods [**38] of campaigning (partly in response to the limitations the Court has placed on patronage), the political system is not clearly better off." *Rutan*, 497 U.S. at 105 (Scalia, J., dissenting).

The decline of the patronage system has had other significant consequences for the character of the electoral process. The weakening of the party system affects the ability of voters to make educated choices among candidates, as voters with little information about candidates historically have looked to their party for cues. "With the decline in party stability, voters are less able to blame or credit a party for the performance of its elected officials. Our national party system is predicated upon the assumption that political parties sponsor, and are responsible for, the performance of the persons they nominate for office." *Branti*, 445 U.S. at 531 (Powell, J., dissenting). Weaker parties also adversely affect citizen participation in the

democratic process. Contrast the appalling national turnout of 48% in the 1996 presidential election, notwithstanding the vaunted impact of motor-voter registration laws, with the much higher turnout in years past when the political parties were stronger. [**39] That in itself is an ominous sign.

The deleterious impact of special interest money does not lessen after election day, as has often been noted. According to Justice Scalia, "the replacement of a system firmly based in party discipline with one in which each officeholder comes to his own accommodation with competing interest groups produces 'a dispersion of political influence that may inhibit a political party from enacting its programs into law.'" *Rutan*, 497 U.S. at 107-08 (Scalia, J., dissenting) (quoting *Branti*, 445 U.S. at 531 (Powell, J., dissenting)). Additionally, as the decline in party strength hastens the rise of special interest groups, which are necessarily focused on narrow issues, government suffers because "candidates and officeholders are forced to be more responsive to the narrow concerns of unrepresentative special interest groups than to overarching issues of domestic and foreign policy." *Branti*, 445 U.S. at 532 (Powell, J., dissenting). Such ills, fostered [**108] by the dominance of money in elections, can only grow more significant, as each election brings more expensive campaigns.

In a similar vein, Justice Powell explained that "strong political parties [**40] aid effective governance after election campaigns end. Elected officials depend upon appointees who hold similar views to carry out their policies and administer their programs. Patronage . . . serves the public interest by facilitating the implementation of policies endorsed by the electorate." *Id.* at 529.

It is also clear to me that the premise of *Branti* -that the accountability of elected officials to the voters is satisfied by exempting policy making officials from Elrod scrutiny -- is not sound. Anyone with experience in government knows that officials of lower rank can undermine the policies of an administration just as effectively as higher ranking persons.

Indeed, commentators have recognized that the Supreme Court has drawn a distinction between "partisan" patronage employees and "politically-neutral" civil servants.

According to one article, "there is no empirical basis for this distinction. Highly protected career bureaucrats, who have strong ideological attachments to political causes or policies may also be motivated by partisan objectives, and these objectives can be inconsistent with the goals of elected officials. In reaching its conclusion, the [**41] Court ignores the agency problems faced by politicians in securing the compliance of government workers in molding and administering policy." Ronald

N. Johnson & Gary D. Libecap, Courts, a Protected Bureaucracy, and Reinventing Government, 37 *Ariz. L. Rev.* 791, 820-21 (1995) (footnotes omitted).

At the same time, the regime of the trilogy has created widespread uncertainty among government officials as to the legality of hiring and firing certain government employees. The line between who can be discharged for political affiliation and who cannot under *Branti* is less than pellucid, to say the least. n12 This has required time-consuming and ongoing training of management-level government employees lest they run afoul of its precepts. In my view, Justice Powell was right when he said that "[a] constitutional standard that is both uncertain in its application and impervious to legislative change will now control selection and removal of key government personnel. Federal judges will now be the final arbiters as to who federal, state, and local governments may employ. . . . The Court is not justified in removing decisions so essential to responsible and efficient governance [**42] from the discretion of legislative and executive officials." *Branti*, 445 U.S. at 525-26 (Powell, J., dissenting). n13

n12 In *Rutan*, Justice Scalia explained the legal morass into which public officials must wade, citing several circuit and district court opinions:

A city cannot fire a deputy sheriff because of his political affiliation, but then perhaps he can, especially if he is called the "police captain." A county cannot fire on that basis its attorney for the department of social services, nor its assistant attorney for family court, but a city can fire its solicitor and his assistants, or its assistant city attorney, or its assistant state's attorney, or its corporation counsel. A city cannot discharge its deputy court clerk for his political affiliation, but it can fire its legal assistant to the clerk on that basis. Firing a juvenile court bailiff seems impermissible, but it may be permissible if he is assigned permanently to a single judge. A city cannot fire on partisan grounds its director of roads, but it can fire the second in command of the water department. A government cannot discharge for political reasons the senior vice president of its development bank, but it can discharge the regional director of its rural housing administration.

Rutan, 497 U.S. at 111-12 (footnotes omitted).

[**43]

n13 This exercise is especially frustrating when the plaintiff has been the beneficiary of the same partisan political largesse that he or she now decries, see *Elrod*, 427 U.S. at 380 (Powell, J., dissenting) ("Beneficiaries of a patronage system may not be heard to challenge it when it comes their turn to be replaced."). In this regard, it is important to note that these plaintiffs do not have a property interest-based interest in keeping their jobs, see *Perry v. Sindermann*, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972), but rather only a Pickering-like claim based on *Elrod*, see *Pickering v. Board of Educ. of Township High School Dist.*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968).

I acknowledge, of course, that I have not made an empirical study of the impact of the *Elrod* trilogy, but a survey of the literature [*109] reveals no satisfactory data. n14 On a matter such as this, I believe that seasoned judgment of those with experience in the political process is the best guide. Moreover, I share Justice Scalia's view that to "oppose our *Elrod-Branti* jurisprudence, one [*44] need not believe that the patronage system is necessarily desirable; nor even that it is always and everywhere arguably desirable; but merely that it is a political arrangement that may sometimes be a reasonable choice, and should therefore be left to the judgment of the people's elected representatives." *Rutan*, 497 U.S. at 110 (Scalia, J., dissenting).

n14 Several studies have concluded that the many arguments in favor of patronage are misguided. See, e.g., Cynthia Grant Bowman, "We Don't Want Anybody Anybody Sent": The Death of Patronage Hiring in Chicago, 86 *Nw. U. L. Rev.* 57 (1991); Anne Freedman, *Patronage: An American Tradition 178-83* (1994). These studies, however, are not supported by persuasive social science research, in my view. They are generally limited to big-city or historically famous political machines, see Bowman, *supra*, or to samples that are too small to support generalized conclusions, see *Rutan*, 497 U.S. at 105 (Scalia, J., dissenting) (noting that the Court relies on a single study about a rural Pennsylvania county -- Sorauf, *Patronage and Party*, 3 *Midwest J. Pol. Sci.* 115 (1959) -- which is "more persuasive about the ineffectuality of Democratic leaders in Centre County than about the generalizability of [its] findings"). Moreover, notably absent from the work of these commentators are detailed in-

terviews with politically experienced party workers, who are trying to run their organizations without patronage, about the effects of the *Elrod* trilogy. In the absence of social science research that clearly refutes the arguments in favor of patronage and in the face of some evidence that these arguments are correct, we should be careful not to disregard a political system that has historically been widely used and accepted.

I note in this regard that several commentators have drawn on the trilogy dissents and have expressed varied concerns about the demise of patronage along the lines that I have argued. See, e.g., Ronald N. Johnson & Gary D. Libecap, *Courts, a Protected*

Bureaucracy, and Reinventing Government, 37 *Ariz. L. Rev.* 791 (1995); Susan Lorde Martin, *Patronage Employment Decisions After Rutan*, 23 *U. Tol. L. Rev.* 63 (1991); George F. Will, *The Benefits of Patronage*, *Wash. Post*, June 28, 1990, at A25.

[**45]

III.

I do not claim that the patronage system is without flaw. The abuses of the system have been well documented over the years. But while patronage systems have their faults, the damage that the *Elrod* trilogy has done to the polity weighs, on balance, in favor of permitting elected officials to hire and fire based on political affiliation. Moreover, what is too often forgotten is that most patronage appointees--whether maintenance employees of municipalities, county clerks, or federal judges--perform honorably and well. And when they do, they bring credit upon the party that had them appointed and justify support therefor. While a distinction is often made between patronage and merit appointment, patronage employees are, far more often than not, true merit employees. The problems of the patronage system can be dealt with, and historically have been dealt with, through civil service reform and other measures, rather than through constitutional litigation.

Turning to that aspect of the matter, as Justice Powell noted in his *Elrod* dissent, the "judgment today unnecessarily constitutionalizes another element of American life -- an element certainly not without its faults [*46] but one which generations have accepted on balance as having merit." *Elrod*, 427 U.S. at 389 (Powell, J., dissenting). I am also concerned by the proliferation of *Elrod*-generated litigation (an on-line review reflects that *Elrod* has now been cited 1249 times by federal courts alone), which is now extending rapidly to procurement

decisions, such as the award of towing contracts, in addition to personnel decisions. See *O'Hare Truck Serv., Inc. v. City of Northlake*, 116 S. Ct. 2553 (1996). The growing number of Elrod-based cases has imposed a burden on federal trial and appellate courts, embroiling them in the time-consuming and often quite difficult exercise of divining where a duty is sufficiently policy oriented to except an employee from Elrod scrutiny.

In sum, given the sea change in politics, even since Rutan, characterized primarily by the decline of political parties and the dominance of elections by money, I submit that it is time for the Supreme Court to revisit this area of the law.

[*110] It seems that the import of the majority's discussion on causation is that, if the fact-finder determines that the Salary Board would have itself decided to eliminate [**47] plaintiffs' positions, Foerster must be absolved. n15 Perhaps I am incorrect. At all events, the plaintiffs' claim should really be cut off at the pass, i.e. now. I lament that it cannot be, but hope that the Supreme Court will accept Justices Powell and Scalia's wisdom. As Justice Frankfurter once stated, "Wisdom too often never comes, and so one ought not to reject it

merely because it comes late." *Henslee v. Union Planters Bank*, 335 U.S. 595, 600, 93 L. Ed. 259, 69 S. Ct. 290 (1949) (Frankfurter, J., dissenting).

n15 I note in this regard that antitrust law provides useful insight into the causation question. Discussing the Supreme Court's refusal in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961), to impose Sherman Act liability on private parties who sought to influence legislation, Professors Areeda and Hovenkamp explained that "private parties may have influenced or persuaded the government to act, but the government's decision to act reflects an independent governmental choice, constituting a supervening 'cause' that breaks the link between a private party's request and the plaintiff's injury." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 201 (Supp. 1996).

[**48]

Samuel Crosby, Plaintiff-Appellant, v. The City of Chicago, Defendant-Appellee

No. 56526

Appellate Court of Illinois, First District, First Division

11 Ill. App. 3d 625; 298 N.E.2d 719; 1973 Ill. App. LEXIS 2957

June 4, 1973, Filed

SUBSEQUENT HISTORY: [1]**

11 Ill. App. 3d 625 at 629.

PRIOR HISTORY:

Original Opinion of April 16, 1973, Reported at 11 Ill. App. 3d 625.

DISPOSITION:

Judgment reversed and cause remanded with directions.

COUNSEL:

Thomas P. Stillman and David N. Cook, both of Mandel Clinic -- Legal Aid Bureau, of Chicago, for appellant.

Richard L. Curry, Corporation Counsel, of Chicago, (William R. Quinlan and Richard F. Friedman, Assistant Corporation Counsel, of counsel,) for appellee.

JUDGES: Mr. JUSTICE GOLDBERG delivered the opinion of the court. BURKE, P. J., and EGAN, J., concur.

OPINIONBY: GOLDBERG

OPINION:

[*629] SUPPLEMENTAL OPINION

In a petition for rehearing, defendant has urged that we apply the rule in *Jeffrey v. Chicago Transit Authority*, 37 Ill.App.2d 327, 336, 185 N.E.2d 384, and deny nominal damages. The argument is raised that allowance of nominal damages would bring us back to the old distinction between the ancient forms of trespass and trespass on the case. In support of this position, defendant cites *Kane v. Nomad Mobile Homes, Inc.*, 84 Ill.App.2d 17, 228 N.E.2d 207, to the effect that an action cannot be

maintained for an injury without damage. *Kane* involved application of section 50(2) of the Civil Practice [**2] Act (Ill. Rev. Stat. 1971, ch. 110, par. [*630] 50(2)) to a case in which a jury returned a verdict of no damages as to Count I of a complaint involving breach of contract and allowed substantial damages on Count II involving a tort action against other defendants for procuring a breach of the contract. This court held that the verdict of no damages without the entry of judgment did not constitute a valid judgment so that the case remained pending as to Count I. The decision is not applicable here.

After careful consideration, we adhere to the allowance of nominal damages. We do this not because of any desire to maintain or preserve ancient forms. We find it practical and desirable as well as progressive to preserve the distinction between torts involving negligence, as in *Jeffrey*, and intentional torts as reflected in the case at bar. It seems fair and proper to vindicate plaintiff's property rights in a valuable and useful chattel against intentional violation thereof even though plaintiff failed to introduce proper evidence of actual damages. We would classify a citizen's right to use, possession and enjoyment of his automobile against intentional interference in [**3] the same important category as his right to maintain his real estate from intentional trespass as in *Wetmore v. Ladies of Loretto, Wheaton*, 73 Ill.App.2d 454, 467, 220 N.E.2d 491, or his reputation from intentional destruction as in *Lorillard v. Field Enterprises, Inc.*, 65 Ill.App.2d 65, 78, 213 N.E.2d 1. In all of these instances, the law should grant protection and vindication by allowance of nominal damages. The distinction lies in the infliction of intentional wrong by the tort-feasor not present in *Jeffrey* but apparent in the case at bar. Consequently, we will not modify the result reached in the original opinion. The petition for rehearing is denied.

Judgment reversed and cause remanded with directions.

Samuel Crosby, Plaintiff-Appellant, v. The City of Chicago, Defendant-Appellee

No. 56526

Appellate Court of Illinois, First District, First Division

11 Ill. App. 3d 625; 298 N.E.2d 719; 1973 Ill. App. LEXIS 2912

June 4, 1973, Filed

SUBSEQUENT HISTORY: [1]**

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PRIOR HISTORY:

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[*629] SUPPLEMENTAL OPINION

In a petition for rehearing, defendant has urged that we apply the rule in *Jeffrey v. Chicago Transit Authority*, 37 Ill.App.2d 327, 336, 185 N.E.2d 384, and deny nominal damages. The argument is raised that allowance of nominal damages would bring us back to the old distinction between the ancient forms of trespass and trespass on the case. In support of this position, defendant cites *Kane v. Nomad Mobile Homes, Inc.*, 84 Ill.App.2d 17, 228 N.E.2d 207, to the effect that an action cannot be

maintained for an injury without damage. *Kane* involved application of section 50(2) of the Civil Practice [**2] Act (Ill. Rev. Stat. 1971, ch. 110, par. [*630] 50(2)) to a case in which a jury returned a verdict of no damages as to Count I of a complaint involving breach of contract and allowed substantial damages on Count II involving a tort action against other defendants for procuring a breach of the contract. This court held that the verdict of no damages without the entry of judgment did not constitute a valid judgment so that the case remained pending as to Count I. The decision is not applicable here.

After careful consideration, we adhere to the allowance of nominal damages. We do this not because of any desire to maintain or preserve ancient forms. We find it practical and desirable as well as progressive to preserve the distinction between torts involving negligence, as in *Jeffrey*, and intentional torts as reflected in the case at bar. It seems fair and proper to vindicate plaintiff's property rights in a valuable and useful chattel against intentional violation thereof even though plaintiff failed to introduce proper evidence of actual damages. We would classify a citizen's right to use, possession and enjoyment of his automobile against intentional interference in [**3] the same important category as his right to maintain his real estate from intentional trespass as in *Wetmore v. Ladies of Loretto, Wheaton*, 73 Ill.App.2d 454, 467, 220 N.E.2d 491, or his reputation from intentional destruction as in *Lorillard v. Field Enterprises, Inc.*, 65 Ill.App.2d 65, 78, 213 N.E.2d 1. In all of these instances, the law should grant protection and vindication by allowance of nominal damages. The distinction lies in the infliction of intentional wrong by the tort-feasor not present in *Jeffrey* but apparent in the case at bar. Consequently, we will not modify the result reached in the original opinion. The petition for rehearing is denied.

Judgment reversed and cause remanded with directions.

Samuel Crosby, Plaintiff-Appellant, v. The City of Chicago, Defendant-Appellee

No. 56526

Appellate Court of Illinois, First District, First Division

11 Ill. App. 3d 625; 298 N.E.2d 719; 1973 Ill. App. LEXIS 2483

April 16, 1973 April 16, 1973, Filed

SUBSEQUENT HISTORY: [***1]

Supplemental opinion upon denial of rehearing *June 4, 1973, Reported at 11 Ill. App. 3d 625 at 629.*

PRIOR HISTORY:

APPEAL from the Circuit Court of Cook County; the Hon. WALLACE KARGMAN, Judge, presiding.

DISPOSITION:

Reversed and remanded.

COUNSEL:

Thomas P. Stillman and David N. Cook, both of Mandel Clinic -- Legal Aid Bureau, of Chicago, for appellant.

Richard L. Curry, Corporation Counsel, of Chicago, (William R. Quinlan and Richard F. Friedman, Assistant Corporation Counsel, of counsel,) for appellee.

JUDGES:

Mr. Justice Goldberg delivered the opinion of the court. BURKE, P.J., and Egan, J., concur.

OPINIONBY:

GOLDBERG

OPINION:

[*626] [**720] In this action for damages for an allegedly unlawful detention of an automobile, [**721] Samuel Crosby (plaintiff) appeals from a judgment entered in favor of the City of Chicago (defendant) after trial by the court. After the filing of plaintiff's amended complaint, alleging wrongful detention of the car, the City filed an answer in which it admitted that plaintiff [*627] was the lawful owner of the automobile; denied that plaintiff was damaged by loss of earnings of \$ 25 per

day or by assessment of towing and storage charges as he had alleged and [***2] denied that the detention was wrongful. The answer also averred that the automobile had been released by the City to the sheriff of Cook County on November 30, 1971, pursuant to section 36 -- 1 of the Criminal Code. Ill. Rev. Stat. 1969, ch. 38, par. 36 -- 1.

Plaintiff filed a motion for judgment on the pleadings as to the issue of liability. However, the court denied this motion; and, after hearing the evidence, found defendant not guilty.

Plaintiff urges that his vehicle was wrongfully detained because the police violated the applicable statute and also that the statute in question is unconstitutional. The City contends that plaintiff failed to prove the amount of his damages and that the constitutional objections to the statute have been decided contrary to plaintiff's contentions and are of no relevance. In his reply brief, plaintiff urges that he is entitled at least to nominal damages and that actual damages were properly proved.

The evidence, which comes before us by virtue of a stipulated bystander's report of proceedings, showed that on September 22, 1970, plaintiff's automobile was seized by the City Police Department. It has been identified by license number and [***3] physical description as having been used in an armed robbery. Plaintiff made numerous unsuccessful attempts to obtain return of the vehicle from the police. Plaintiff was never arrested and was never charged with any crime in connection with the incident. On September 29, 1970, plaintiff received a letter from the police advising that he could obtain his automobile if he paid a towing fee of \$ 20 and a storage charge of \$ 2 per day. Plaintiff went to the automobile pound and offered to pay the charges but was told that the car could not be released. The evidence does not disclose if plaintiff ever received return of the automobile.

The vehicle was seized by the police on September 22, 1970. Under the applicable statute, it was their duty

11 Ill. App. 3d 625, *; 298 N.E.2d 719, **;
1973 Ill. App. LEXIS 2483, ***

to deliver it "forthwith" to the sheriff of Cook County. The sheriff would then be obliged to notify the State's Attorney of Cook County concerning this seizure within 15 days. Upon such notice, the State's Attorney would have investigated the facts and then would either have returned the automobile to plaintiff or filed a forfeiture action for seizure and confiscation of the vehicle in the circuit court. (Ill. Rev. Stat. 1971, ch. 38, par. [***4] 36 -- 1, 36 -- 2.) The vehicle here was simply held by the police and not delivered to the sheriff. In view of this violation of the statute, the detention was unlawful.

The sole remaining issue on the merits of the case is whether or not [*628] plaintiff has properly proved damages resulting from the wrongful detention.

It is the law of Illinois that in a case of this type, where plaintiff's claim is for detention of a chattel, the proper measure of damages is " * * * the reasonable value of the use during the period of wrongful detention." (*Cottrell v. Gerson*, 371 Ill. 174, 182, 20 N.E.2d 74.) See also *National Contract Purchase Corp. v. McCormick*, 264 Ill.App. 63, where this court, in an automobile detention case, allowed plaintiff only the net or excess amount by which the actual cost of hiring a substitute vehicle exceeded plaintiff's cost of driving the detained car. There is no evidence here that plaintiff ever hired another vehicle and no evidence of the fair and reasonable cost of doing so. The proper measure of damages is thus not alleged in the amended complaint and not established by any proof.

[**722] The amended complaint alleges as elements of plaintiff's [***5] damages only a loss of earnings and billing of storage and towing charges to him. The matter of loss of earnings is not within the scope of the measure of damages for this tort and no special circumstances appear which would cause such loss to be germane. In addition, the evidence regarding this element raised an issue of fact. Plaintiff testified that he was employed by a life insurance company as a salesman and collector. This job paid him \$ 125 per week. He further testified that he attempted to continue his employment by using taxicabs and public transportation but was unable to do so. Therefore, he left his employment after two weeks and was unable to find other work until the end of November. On the contrary, there is evidence by a police officer that plaintiff told him he was unemployed and looking for work on the date of the robbery which was September 10, 1970. Plaintiff denied this statement. A finding by the court that this evidence was insufficient proof of claimed damages was not contrary to the manifest weight of the evidence. *Cook Electric Co. v. Kolodny*, 1 Ill.App.3d 181, 183, 273 N.E.2d 674.

As regards the alleged charges for towing and storage, there was [***6] no evidence that plaintiff ever paid these charges. Plaintiff's attorney was told that plaintiff would be billed for these amounts and at one time a tender of charges by plaintiff to the police was rejected. There is no evidence that any charges were ever paid by plaintiff or by any other person. Consequently, we are in accord with the result reached by the trial court that there was a complete failure of proof as regards damages to plaintiff.

However, counsel for plaintiff urges that his client is entitled to nominal damages without the need of proof. In the early days of the law, the principle became fixed that, "The law infers damage from every [*629] infringement of a right." (*McConnel v. Kibbe*, 33 Ill. 175, 178.) Learned text writers followed this same principle. In the fourth edition of Sutherland on Damages, volume 1 at page 36, we find the following rule expounded:

"The principle that for the violation of every legal right nominal damages at least will be allowed applies to all actions, whether for tort or breach of contract, and whether the right is personal or relates to property."

This rule has been expressly abandoned in Illinois in actions predicated [***7] upon negligence. It is presently the law of Illinois that a plaintiff must prove actual damage in a negligence case before he can recover. See *Jeffrey [**723] v. Chicago Transit Authority*, 37 Ill.App.2d 327, 336, 185 N.E.2d 384, and note especially the concise statement of the old principle in 37 Ill.App.2d at page 330. The most recent authority which we find upon this subject states that where there was no proof of actual damage in a case involving trespass upon real estate, the court should award nominal damages. (*Wetmore v. Ladies of Loretto, Wheaton*, 73 Ill.App.2d 454, 467.) We will follow this rule in the case at bar. We will reverse the judgment in favor of defendant and remand the cause to the trial court with directions for the entry of judgment in favor of plaintiff and against defendant for nominal damages.

We state expressly that we are not passing upon any of the constitutional questions raised by plaintiff. Such issues should not be entertained where the cause can be determined on other grounds, as in the case at bar. *People v. Fleming*, 50 Ill.2d 141, 144, 277 N.E.2d 872; *Stigler v. City of Chicago*, 48 Ill.2d 20, 22, 268 N.E.2d 26.

Judgment reversed and cause [***8] remanded with directions.

MRS. BRENT QUINTON DOWNS for herself as Executrix of the **ESTATE OF BRENT QUINTON DOWNS**, and as guardian and next friend of **ANDREW ARTHUR DOWNS** and **BRENT Q. DOWNS, II**, minors, and **MAJOR** and **MRS. JOSEPH S. LAKICH** as legal guardian and next friend of **SUSAN GERMAINE GIFFE**, and **BIG BROTHER AIRCRAFT, INC.**, a Tennessee Corporation, Plaintiffs-Appellants, v. **UNITED STATES OF AMERICA**, Defendant-Appellee

No. 74-1660

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

522 F.2d 990; 1975 U.S. App. LEXIS 13229; 36 A.L.R. Fed. 219

August 8, 1975

PRIOR HISTORY: [**1]

APPEAL from the United States District Court for the Middle District of Tennessee.

JUDGES:

Phillips, Chief Circuit Judge, and Celebrezze and Miller, Circuit Judges.

OPINIONBY:

CELEBREZZE

OPINION:

[*994] CELEBREZZE, Circuit Judge,

This appeal presents two basic questions concerning the United States' liability for actions of FBI agents resulting in the death of innocent victims of a hijacking. These issues are the applicability of the "discretionary function" exception to the Federal Tort Claims Act n1 and the existence of negligence under Florida law on the facts of this case.

n1 28 U.S.C. § § 1346(b), 2671-2680 (1970).

This action arose out of the hijacking of a small passenger airplane in Nashville, Tennessee. Inside the aircraft were the hijacker, an associate, the hijacker's estranged wife, a pilot, and a co-pilot. The hijacker ordered the aircraft flown to Freeport, Bahamas, with a refueling stop in Jacksonville, Florida. After the plane landed in

Jacksonville, FBI agents refused [**2] to allow refueling, despite the pilot's signals that the hijacker was armed and dangerous and that in his opinion the agents' intervention would prove disastrous. The hijacker allowed the co-pilot, and, later, an associate to deplane to bargain for fuel. The FBI agents took them both into custody. Moments later the agents used rifle fire to disable one of the aircraft's engines and attempted, unsuccessfully, to deflate the aircraft's tires. This attack provoked the hijacker to shoot and kill his wife, the pilot, and himself.

The survivors of the hijacker's victims sued the United States under the Federal Tort Claims Act, alleging that the chief FBI agent had been negligent in handling the situation and had thereby caused the two victims' deaths. The aircraft's owner sued for damage to the plane. The Government defended, asserting that the "discretionary function" exception to the Act barred jurisdiction over the complaint and, in any event, that the agent had not been negligent.

The District Court, sitting without a jury, held that the "discretionary function" exception to the Federal Tort Claims Act did not bar the action. It found, however, that under Florida law the FBI agent [**3] had not been negligent. Accordingly, it entered judgment for the United States.

The first issue we face is whether this action is barred by the "discretionary function" exception to the Federal Tort Claims Act. The Government argues that the District Court erred in deciding that this exception did not apply and urges that the Judgment be affirmed on this ground, contending that law enforcement is the type of activity for which the United States may not be held liable.

The Federal Tort Claims Act constitutes a broad waiver of the United States' sovereign immunity from tort liability. [*995] The Act gives federal courts jurisdiction to hear actions

for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
n2

n2 28 U.S.C. § 1346(b).

[**4]

Before the Act's passage, victims of torts committed by federal employees had to pursue the cumbersome route of seeking a private relief bill from Congress. The Act's basic purpose was to relieve Congress of the burden of considering these bills and to entrust their consideration to the courts. *United States v. Muniz*, 374 U.S. 150, 153-54, 10 L. Ed. 2d 805, 83 S. Ct. 1850 (1963); *Dalehite v. United States* 346 U.S. 15, 24-25, 97 L. Ed. 1427, 73 S. Ct. 956 (1953); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 703-704, 93 L. Ed. 1628, 69 S. Ct. 1457 (1949). Enacted as part of the Legislative Reorganization Act of 1946, the Act was meant "to provide for increased efficiency in the legislative branch of the Government." n3

n3 Chapter 753, 60 Stat. 812 (1946).

Certain exceptions were provided, however, which limited the waiver of immunity. Among these was the "discretionary function" exception, which the Government contends is applicable. It reasons [**5] that the FBI agent in charge of handling the hijacking had the "discretion to make an on-the-scene judgment as to the best course of action during the hijacking." Since there was "room for policy judgment," Appellee argues, the agent's actions fall within the discretionary function exception.

We recognize that the agent was called upon to use judgment in dealing with the hijacking. Judgment is ex-

ercised in almost every human endeavor. It is not the mere exercise of judgment, however, which immunizes the United States from liability for the torts of its employees. n4 Driving an automobile was frequently cited in the congressional reports leading to the Act as an example of "non-discretionary" activity which would be outside the discretionary function exception. *Dalehite v. United States* 346 U.S. 15, 29-30, 97 L. Ed. 1427, 73 S. Ct. 956 (1953). Driving an automobile involves judgment. The failure to signal a turn, for example, may be said to represent an exercise of judgment, albeit a poor one. Yet, the automobile accident caused by a federal employee while on the job is the archetypal claim which Congress sought to place in the courts. If exercise of judgment were [**6] the standard for applying the discretionary function exception, a host of cases have been wrongly decided. These cases would include *Indian Towing Co., Inc. v. United States*, 350 U.S. 61, 100 L. Ed. 48, 76 S. Ct. 122 (1955) (failure to replace a burned-out lamp in a lighthouse); *Rayonier, Incorporated v. United States*, 352 U.S. 315, 1 L. Ed. 2d 354, 77 S. Ct. 374 (1957) (failure completely to extinguish intermitently smoldering matter following a forest fire); *Underwood v. United States*, 356 F.2d 92 (5th Cir. 1966) (decision of psychiatrists to release airman from mental hospital and to provide him access to weapons), and *Fair v. United States*, 234 F.2d 288 (5th Cir. 1956) (decision to release homicidal patient).

n4 See generally 2 F. Harper & F. James, *The Law of Torts* 1658 (1956).

A review of the language of the exception, the provision's legislative history, and the application of this section by the courts offers guidance in applying [**7] the exception.

The discretionary function provision is one part of an exception to the Tort Claims Act embodied in 28 U.S.C. § 2680 (a). The text of that section reads as follows:

[*996] The provisions of this chapter and section 1346(b) of this title shall not apply to -

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or

performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

In our view, the first part of this section immunizes the Government from liability for the actions of a Government employee who is exercising due care in implementing a government policy as set forth in a statute or regulation. The second part of the provision, the discretionary function exception, immunizes Government employees while they are formulating policy.

The limited legislative history of the section supports this reading. A paragraph n5 discussing [**8] the provision, excerpted from testimony given in 1942 before the House Committee on the Judiciary by an Assistant Attorney General, states that liability should not arise "out of an authorized activity, such as a flood-control or irrigation project." The exception was "designed to preclude application of the bill to a claim against a regulatory agency, such as the Federal Trade Commission or the Securities and Exchange Commission, based upon an alleged abuse of discretionary authority by an officer or employee." Claims arising out of "an allegedly negligent exercise by the Treasury Department of the blacklisting or freezing powers are also intended to be excepted." Congressional reports indicate that the regulatory functions of the FTC and SEC were the types of activity to be exempted by this exception. n6 The functions which this sparse legislative history indicates were to be excepted are those involving policy formulation, as distinguished from the day-to-day activities of persons not engaged in determining the general nature of the Government's business.

n5 See *Dalehite v. United States*, 346 U.S. 15, 29-30 n. 21, 97 L. Ed. 1427, 73 S. Ct. 956 (1953), for text of paragraph.

[**9]

n6 H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942); S. Rep. No. 1196, 77th Cong., 2d Sess. 7 (1942).

Supreme Court decisions have not extensively analyzed the exception. In *Dalehite v. United States*, 346 U.S. 15, 97 L. Ed. 1427, 73 S. Ct. 956 (1953), the Supreme Court first discussed the discretionary function

provision. The 4-3 majority opinion concluded that immunized discretion "includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. [Footnote omitted] Where there is room for policy judgment and decision there is discretion." 346 U.S. at 35-36. Later opinions have suggested a more restrictive view of the exception, without setting forth clear guideposts for decision. See *Rayonier, Incorporated v. United States*, 352 U.S. 315, 77 S. Ct. 374, 1 L. Ed. 2d 354 (1957); *Indian Towing Co., Inc. v. United States*, 350 U.S. 61, 100 L. Ed. 48, 76 S. Ct. 122 (1955).

Numerous Circuit and District Courts have struggled to mold the sparse legislative history and [**10] the language of *Dalehite* into a precise standard, often seizing upon the planning level - operational level distinction as a ready solution to the problem. See, e.g., *United States v. State of Washington*, 351 F.2d 913 (9th Cir. 1965); *White v. United States*, 317 F.2d 13 (4th Cir. 1963); *Mahler v. United States*, 306 F.2d 713 (3d Cir.), cert. denied, 371 U.S. 923, 9 L. Ed. 2d 231, 83 S. Ct. 290 (1962); *United States v. Gregory*, 300 F.2d 11 (10th Cir. 1962); *Dahlstrom v. United States*, 228 F.2d 819 (8th Cir. 1956); *Eastern Air Lines, Inc. v. Union Trust Company*, 95 U.S. App. D.C. 189, 221 F.2d 62, aff'd sub nom. *United States v. Union Trust Company*, 350 U.S. 907 [**997] (1955). Courts taking this approach have regarded discretionary acts of officials at the planning level as within the discretionary function exception and discretionary acts of operational level officials as outside the exception. This distinction is based on the status of the official making a judgment. While offering some general guidance, it is not a sufficient [**11] test for determining whether a Government employee's actions are within the exception. Cf. *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339, 1345 (2d Cir. 1972); *Barr v. Matteo*, 360 U.S. 564, 572-73, 3 L. Ed. 2d 1434, 79 S. Ct. 1335 (1959).

We believe that the basic question concerning the exception is whether the judgments of a Government employee are of "the nature and quality" which Congress intended to put beyond judicial review. See *Smith v. United States*, 375 F.2d 243, 246 (5th Cir.), cert. denied, 389 U.S. 841, 19 L. Ed. 2d 106, 88 S. Ct. 76 (1967). Congress intended "discretionary functions" to encompass those activities which entail the formulation of governmental policy, whatever the rank of those so engaged. We agree with a commentator's analysis of the provision:

It would seem that the justifications for the exception do not necessitate a broader application than to those decisions which are arrived at through an administrator's

exercise of a quasi-legislative or quasi-judicial function. n7

n7 Developments in the Law - Remedies against the United States and its Officials, 70 *Harv. L. Rev.* 827, 896 (1957).

[**12]

In this case, the FBI agents were not involved in formulating governmental policy. Rather, the chief agent was engaged in directing the actions of other Government agents in the handling of a particular situation. FBI hijacking policy was not being set as an *ad hoc* or exemplary matter since it had been formulated before this hijacking. Hijacking policy had previously been promulgated in the FBI Handbook and in a memorandum jointly issued by the Departments of Transportation and Justice. While the Government's guidelines for dealing with hijackings are secret and must remain so, we note that Special Agent O'Connor was not making policy in responding to this particular situation.

The Government argues that *United States v. Faneca*, 332 F.2d 872 (5th Cir. 1964), cert. denied, 380 U.S. 971, 14 L. Ed. 2d 268, 85 S. Ct. 1327 (1965), supports its position that a law enforcement officer choosing among various available methods of enforcing the law in a given situation is performing a discretionary function under the Act. *Faneca* involved decisions made by Deputy Attorney General Katzenbach and James P. McShane, Chief of the Executive Office of the [**13] United States Marshals, in effecting the safe enrollment of a black student at the University of Mississippi. During the early 1960's Government efforts were underway to integrate colleges and universities throughout the nation. The policy formulated by Katzenbach and McShane was meant to influence and did inevitably serve to guide the actions of other government officials faced with similar situations. The *Faneca* Court recognized that in responding to this particular situation, the Government employees were performing a "discretionary function," as they were determining law enforcement policy.

When a response to a particular situation does not have the policy overtones involved in *Faneca*, however, courts have scrutinized the day-to-day activities of law enforcement officers. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974); *Monroe v. Pape*, 365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961); *Howell v. Cataldi*, 464 F.2d 272 (3d Cir. 1972); *Jones v. Perrigan*, 459 F.2d 81 (6th Cir. 1972); *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339 (2d Cir.

1972); [**14] n8 *Carter v. [**998] Carlson*, 144 U.S. App. D.C. 388, 447 F.2d 358 (1971), rev'd on other grounds, 409 U.S. 418, 93 S. Ct. 602, 34 L. Ed. 2d 613 (1972), is instructive in this regard. In *Carter* a policeman was sued for making an arrest without probable cause. The District of Columbia Court of Appeals concluded that the officer was not subject to suit if he was performing a "discretionary" rather than "ministerial" function. The Court noted that the exercise of "discretion" by the officer in the sense of choosing among alternative courses of action does not automatically trigger official immunity:

The proper approach is to consider the precise function at issue, and to determine whether an officer is likely to be unduly inhibited in the performance of that function by the threat of liability for tortious conduct. 447 F.2d at 362.

n8 As Professor Jaffe has written, "There are areas, notably actions against police officers for false arrest, battery, and trespass, and actions for summary destruction of property and improper collection of taxes, where recovery has long been allowed, despite the exercise by the officers of more than a 'merely ministerial' function. This is particularly clear in the case of police officers, who are called upon to make extremely difficult factual choices, and important, if unarticulated, policy decisions." Jaffe, "Suits against Governments and Officers: Damage Actions," 77 *Harv. L. Rev.* 209, 218-19 (1963).

[**15]

It is clear that making an arrest involves the exercise of discretion. For purposes of official immunity, however, the fiction that making an arrest is not "discretionary" is maintained because protection of personal liberties is thought to outweigh the danger of less effective law enforcement out of fear of personal tort liability. *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339, 1346 (2d Cir. 1972).

The prospect of governmental liability for the actions of law enforcement officers should not cause those officers less vigorously to enforce the law. n9 The need for compensation to citizens injured by the torts of government employees outweighs whatever slight effect vicarious government liability might have on law enforcement efforts.

n9 See 2 F. Harper & F. James, *The Law of Torts* 1661-65 (1956).

We believe that Congress intended that this action be tried in the courts, not in the halls of Congress. To decide otherwise would be to ignore the "sweeping language" of the Act, the "general [**16] trend toward increasing the scope of the waiver," and the need to avoid "whittling it down by refinements." *United States v. Yellow Cab Co.*, 340 U.S. 543, 547, 550, 95 L. Ed. 523, 71 S. Ct. 399 (1951). We agree with the District Court, for these reasons, that the discretionary function exception does not apply, and we affirm the District Court's findings on this point.

The second issue presented is whether the District Court erred in finding that the FBI agent in charge of handling the hijacking was not negligent. This question has two aspects - whether the District Court used the proper test for negligence and whether its ultimate finding was correct.

The District Court properly looked to Florida law for the standard of negligence to be applied, since Florida is where the allegedly negligent acts occurred. 28 U.S.C. § 1346(b); *Freeman v. United States*, 509 F.2d 626, 629 (6th Cir. 1975); *Bibler v. Young*, 492 F.2d 1351 (6th Cir.), cert. denied, 419 U.S. 996, 42 L. Ed. 2d 269, 95 S. Ct. 309 (1974).

Florida law, the District Court determined, holds FBI agents to the standard of conduct [**17] of "the reasonable FBI agent" in the same circumstances:

To recover in this case plaintiffs must . . . show that Agent James O'Connor's decisions, upon which liability is sought to be predicated, exposed their decedents to a risk of harm which was unreasonable under the circumstances and which could have been expected to and did come to pass. The risk must have been an appreciable one at the time and under the existing circumstances, and it is not enough that in retrospect O'Connor's conduct [*999] can be viewed as unreasonable in light of subsequent events. The law, as set forth in the *Restatement (Second), Torts* § 289, requires O'Connor to have recognized that his conduct involved an unreasonable risk of harm to innocent persons aboard the hijacked aircraft if a reasonable man would have done so while exercising (a) such attention, perception of the circumstances, memory, knowledge of

other pertinent matters, intelligence, and judgment as a reasonable man would have; and (b) such superior attention, perception, memory, knowledge, intelligence and judgment as the actor himself has. [Footnote omitted] Thus, the standard in this case is of a reasonable *FBI agent*. 382 *F. Supp. at 751-752.* [**18]

Our review of Florida law convinces us that the District Court's standard was correct. See *Cleveland v. City of Miami*, 263 So. 2d 573, 578 (Fla. 1972); *Holland v. Mayes*, 155 Fla. 129, 19 So. 2d 709, 711 (1944); *Miriam Mascheck, Inc. v. Mausner*, 264 So. 2d 859, 861 (Fla. App. 1972).

Appellants contend that the District Court erred in applying this standard. They argue that we are free to draw our own conclusions as to whether the record requires a finding of negligence. The rule in this Circuit is, however, that a finding of negligence or the absence thereof will not be set aside unless the District Court's determination is "clearly erroneous," under *Rule 52, Fed. R. Civ. P.* *Gowdy v. United States*, 412 F.2d 525, 532-33 (6th Cir.), cert. denied, 396 U.S. 960, 24 L. Ed. 2d 425, 90 S. Ct. 437 (1969), reh. denied, 396 U.S. 1063, 90 S. Ct. 750, 24 L. Ed. 2d 756 (1970). Thus, we may not set aside the District Court's finding that the FBI agent in charge of handling the hijacking was not negligent unless "on the entire evidence [we are] left with the definite and firm conviction [**19] that a mistake was committed." *Parmer v. National Cash Register Co.*, 503 F.2d 275, 277 (6th Cir. 1974), quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 92 L. Ed. 746, 68 S. Ct. 525 (1948).

To determine whether it is clear that the FBI Agent who handled the hijacking did not meet the standard of the reasonable FBI agent in the same circumstances, as Appellants argue, we must reconstruct the situation as seen through the eyes of Special Agent O'Connor. While we need not repeat the thorough summary of facts in the District Court's opinion, a summary of what O'Connor knew and what actions he took based on his knowledge is necessary to determine whether the District Court's ultimate finding must be overturned.

James J. O'Connor served as the Assistant Special Agent at the FBI's Jacksonville regional office and was second in command of that office's 78 agents at the time of the hijacking. O'Connor had been an FBI agent for 21 years and had been at the Jacksonville office about seven years.

At approximately 4:05 a.m., on October 4, 1971, O'Connor was awakened at his home by a call from Spe-

cial Agent Russell J. Pardee, the night duty agent [**20] at the Jacksonville FBI Office. O'Connor was informed that a private plane had been forcibly hijacked from Nashville, Tennessee, and would likely be landing at Jacksonville International Airport at approximately 5:00 a.m. O'Connor instructed Pardee to notify various FBI personnel with skills necessary for handling a hijacking and to have them report to the airport.

At 4:15 a.m. Pardee informed O'Connor that the hijacked airplane was now expected to arrive at approximately 5:15 a.m. and would be directed to the private aircraft storage area (Air Kaman) at the airport. O'Connor then left for the airport in his family car, which was not equipped with a two-way radio, and arrived at the airport at approximately 4:50 a.m.

Familiar with the layout of the airport by virtue of an earlier tour of its facilities in preparation for such an eventuality, O'Connor drove directly to the Air Kaman hangar. Seeing no other agents on the scene, he placed a third call to the Jacksonville FBI office. Pardee told [*1000] O'Connor that the pilot had radioed the Jacksonville tower requesting fuel, equipment to restart his plane, and various other items including maps and flotation gear for a flight [**21] to Freeport, Bahamas.

Shortly after 5:00 a.m., Special Agent George H. Murphy arrived at Air Kaman in a Bureau car and rendezvoused with O'Connor. Special Agent Francis A. Burns, Jr., had ridden to the airport with Murphy and had positioned himself in the flight control tower to handle radio communication with the hijacked airplane. O'Connor was able to use the two-way radio in Murphy's Bureau car to communicate with Burns and with the Jacksonville FBI office. O'Connor could not, however, monitor the conversations between Burns and the airplane.

At approximately 5:10 a.m., Burns notified O'Connor that the hijacked plane was landing. At about the same time Pardee told O'Connor that apparently two armed men had hijacked the airplane and had dragged a woman aboard the aircraft who reportedly was the wife of one of the subjects, and that the hijacker and his wife apparently had a long history of marital difficulties.

Upon hearing that the hijacked plane was landing, Murphy and O'Connor drove to the corner of the private airplane storage ramp to the southwest of Air Kaman and turned out the automobile's lights. At approximately 5:15 a.m. the hijacked airplane taxied into the storage [**22] area, made a 180-degree turn to face back down the taxiway toward the runway, and came to a stop with the engines still running.

While the plane was taxiing toward the storage ramp, Special Agents Mayo and McBride arrived at the airport and stationed themselves behind some gasoline

trucks about 200 yards from the airplane. Apparently the radio exchange between Burns and Mayo and McBride alerted O'Connor to the arrival of the latter two agents. O'Connor ordered them to hold their position.

While O'Connor was communicating with Mayo and McBride, Burns took the tower microphone and contacted the hijacked aircraft stating, "This is the FBI speaking. Cut your engines." The pilot responded that he was the Captain and that he was going to cut his engines, but that he needed fuel, and he requested that the area be cleared of personnel.

Burns then notified O'Connor that he had radio contact with the pilot of the airplane. Burns told O'Connor that the pilot had repeated his requests for fuel and a starter. O'Connor told Burns that there would be no fuel or starter provided. Burns relayed the no fuel message to the pilot. During this conversation the pilot informed Burns and Burns told O'Connor [**23] that the hijacker had 12.5 pounds of plastic explosives aboard. n10 [*1001] O'Connor told Burns, Mayo, and McBride that he thought the airplane might attempt to take off.

n10 The following is taken from the FAA transcript of the conversation between Agent Burns in the tower (T) and the pilot of the hijacked airplane (P):

P: 58 November. This is the captain speaking. We're going to cut the engines and we're gonna need some fuel but I request that everyone stay away.

T: 58 November. Advise when your engines have been cut.

T: 58 November?

P: This is 58 November. Uh, this gentleman has about 12.5 pounds of plastic explosives back here, and (pause) uh, I got no (pause) uh, yen to join it right now so I would please expr, uh, appreciate it if you would stay away from this airplane.

T: That's a roger, 58 November. Are your engines cut?

P: Negative.

T: Standby.

P: Where's the fuel truck?

T: 58 November?

P: 58 November. Go ahead.

T: This is the FBI. There will be no fuel. Repeat. There will be no fuel. There will be no starter. Have you cut your engines.

P: Uh, look, I don't think this fellow's kiddin' - I wish you'd get the fuel truck out here.

T: 58 November. There will be no fuel. I repeat. There will be no fuel.

P: This is 58 November. You are endangering lives by doing this, and uh, we have no other choice but to go along, and uh, uh, for the sake of some lives we request some fuel out here, please.

T: 58 November. What is the status of your passengers?

P: Ah, uh, well, they're okay, if that's what you mean.

T: Are they monitoring this conversation?

P: Yes, they are.

T: Do you have two passengers aboard?

T: 58 November. What's your present fuel status on that aircraft?

P: We're down to about thirty minutes.

T: 58 November. The decision will be no fuel for that aircraft. No starter. Run it out, any way you want it. Passengers, if you are listening - the only alternative in this aircraft is to depart the aircraft, to depart the aircraft.

[**24]

It was now 5:20 a.m. Burns radioed O'Connor to tell him that he had relayed the message. O'Connor told Burns, Mayo, and McBride that the situation appeared to be a "waiting game" and that no one was to move until he gave an order. O'Connor also stated that the hijacker was armed and that only a pilot and two passengers were known to be on the aircraft.

At this point, the left engine of the hijacked airplane was shut down to allow an individual to leave the plane. O'Connor and Murphy got out of their car and identified themselves to the individual, who turned out to be co-pilot Randall Crump. Crump had been sent to negotiate for fuel. O'Connor testified that Crump stated that there were two armed men aboard, that one of the armed men was in possession of an explosive device, that the woman was calm now but had been hysterical, and that the hijacker had been drinking and might force the airplane to take off without refueling. Crump, on the other hand, testified that O'Connor elicited very little information from him. Crump also stated that when told that explosives were aboard, O'Connor said that was a "bunch of malarkey." The District Court found "that O'Connor did not attempt to [**25] solicit information descriptive of the mental state of Giffe or his supposed accomplice." *382 F. Supp. at 725.*

Three or four minutes after Crump deplaned, Bobby Wayne Wallace, the hijacker's associate, exited the airplane. O'Connor and Murphy quickly took Wallace into custody. Wallace indicated that the hijacker was upset and that he had been sent out to bargain for fuel. Wallace, who had a cocked, loaded pistol tucked into his trousers, was disarmed and placed under arrest for air piracy and, consistent with FBI regulations, was not questioned further after his arrest.

At this point, fifteen minutes after the plane had come to a stop, O'Connor decided to employ forcible intervention in order to prevent the plane from departing. O'Connor ordered Mayo and McBride to move their car to block the plane's route back down the taxiway and ordered Murphy to shoot out the plane's right rear tire. Two shots failed to deflate the tire. O'Connor then approached the plane, identified himself, and ordered all the occupants to leave the plane. Two shots were fired from inside the plane in O'Connor's direction. O'Connor attempted unsuccessfully to deflate the left rear tire with pistol [**26] fire. O'Connor then ordered McBride to shoot out the right engine. When the engine was silenced, O'Connor heard moaning, looked into the plane, and discovered the two dead hostages and the fatally wounded hijacker.

The District Court concluded that O'Connor's actions throughout the incident did not amount to negligence. Although moved by the tragic outcome of the FBI's response to the hijacking, the District Court made this ultimate finding:

In conclusion the court finds that O'Connor's challenged decisions were not an unreasonable response under all the circumstances. In traditional negligence terms, O'Connor was under a duty to

choose a course of action which would maximize the hostages' safety, and to attempt a capture of the hijacker only if possible by means compatible with the greater interest. [*1002] While the FBI obviously cannot undertake to guarantee the safety of persons in this situation, the means employed to effect any capture should be consonant with that which would provide the maximum assurance possible that hostages would not be harmed as a result. This duty was breached unless there reasonably appeared a better-suited alternative to protecting the hostages' [*27] well-being. To the court it seems obvious that the proper decision in this situation is a matter on which reasonable minds could differ; but viewed objectively and without the benefit of hindsight, the court is unable to conclude that the alternatives chosen by Agent O'Connor were unreasonable. 382 F. Supp. at 755.

We are convinced that this finding is clearly erroneous. There did exist, from foresight, "a better-suited alternative to protecting the hostages' well-being." That choice was not to intervene forcibly but to continue the "waiting game."

We recognize that law enforcement officers must make split-second, difficult decisions when confronted with emergency situations. As the District Court pointed out, however, the extent to which "an actor will be excused for errors in judgment under [emergency] circumstances is qualified by training and experience he may have, or be expected to have, in coping with the danger or emergency with which he is confronted." 382 F. Supp. at 752.

Agent O'Connor was trained to handle dangerous situations. He must be held to the standard of the reasonable FBI agent with training in handling such affairs. Indeed, [*28] although O'Connor himself had not previously been involved in handling a hijacking, he was familiar with the FBI Handbook's guidelines and the Jacksonville intra-office memorandum on hijackings. While these documents must be kept secret, it is significant that they place a far greater emphasis on hostage safety and pilot cooperation than O'Connor did in confronting his problem. As the District Court stated, "O'Connor's actions did not strictly comply with FBI guidelines." 382 F. Supp. at 755. Indeed, our review of O'Connor's actions convinces us that O'Connor violated FBI policy and disregarded the substance of the Guidelines, thereby directly resulting in the deaths of the pilot and the hijacker's estranged wife.

While we agree with the District Court that the failure to comply with FBI policy is not a basis for a finding of negligence per se, 382 F. Supp. at 755, we are less willing than the District Court to diminish the importance of the fact that O'Connor failed to act in accordance with procedures intended to maximize hostage safety, short of complying with unreasonable hijacker demands.

We find, furthermore, that O'Connor was clearly unreasonable [*29] in turning what had been a successful "waiting game," during which two persons safely left the plane, into a "shooting match," which left three persons dead.

O'Connor's reasons for choosing force rather than continued delay were confused and contradictory. O'Connor reasoned that when the hijacker released his associate he demonstrated a rational state of mind and might at that point have been expected to respond reasonably to the agents' disabling of the plane. Yet, O'Connor also concluded that the hijacker would react in an irrational and violent manner to continued delay.

Another of O'Connor's stated reasons for disabling the plane's right engine was to facilitate communication. Yet, up to that point O'Connor had experienced no difficulty communicating with his fellow agents or with the control tower.

O'Connor's basic fear was that the airplane would depart, with what he had heard was less than thirty minutes of fuel left. He reasoned that the hostages would have had a better chance of surviving an on-the-ground assault than "continued flight into the unknown," as [*1003] the District Court described it. 382 F. Supp. at 754. Yet, the plane had made no movement [*30] away from its landing berth, and if delay had continued for a while longer, the plane might have run out of fuel while on the ground, thus accomplishing the purpose of the armed assault without provoking an irrational reaction from the hijacker. In addition, the hijacker had said, "Let's get out of here," upon first hearing the no fuel decision, but the pilot had not complied with the request and the hijacker instead let both the co-pilot and an apparent accomplice leave the plane to bargain for fuel. Thus, the hijacker himself had decided to participate in the "waiting game," and there was no reason to suppose that the plane was about to depart when O'Connor ordered the aircraft forcibly disabled.

The District Court framed only two action alternatives as having been available to O'Connor: (1) the forcible termination chosen by O'Connor or (2) acquiescence in the aircraft's departure. We believe that additional delay and an attempt to reason with the hijacker were other options which were open to O'Connor, and these options were particularly proper in view of the pilot's

insistence that armed intervention would result in disaster. We believe a reasonable FBI agent would have tried [**31] additional delay and would have ordered an attempt to reason with the hijacker. By the timing of his decisions, O'Connor backed the hijacker into a corner. Force or immediate surrender became the hijacker's only options. Special Agent O'Connor grossly miscalculated in assuming the hijacker would respond peacefully to a show of force.

Where one trained in the field of law enforcement is called upon to make a judgment which may result in the death of innocent persons, he is required to exercise the highest degree of care commensurate with all facts within his knowledge. Such care must be exercised in order to ensure that undue loss of life does not occur. We believe that Agent O'Connor failed to exercise such care.

Accordingly, we are firmly convinced that the District Court was in error in finding that Special Agent O'Connor was not negligent in handling the hijacking. We hold that the District Court's conclusion as to negligence was clearly erroneous and must be reversed.

This conclusion applies not only to the wrongful death claims of the victims' survivors, but also to the claim of the aircraft's owner, who sued for property damage inflicted during the agents' assault. BBAI's [**32] claim was based on the theory of trespass rather than negligence, as it involved the allegation that the intentional shooting of the plane was not privileged by the agents' conduct. See *Hatahley v. United States*, 351 U.S. 173, 181, 100 L. Ed. 1065, 76 S. Ct. 745 (1956). The rule for determining whether the agents' trespass was privileged is found in the *Restatement (Second), Torts* § 265:

One is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion if he is acting in discharge of a duty or authority created by law to preserve the public safety, health, peace, or other public interest, and his act is reasonably necessary to the performance of his duty or the exercise of his authority.

See *Rodriguez v. Jones*, 473 F.2d 599 (5th Cir.), cert. denied, 412 U.S. 953, 37 L. Ed. 2d 1007, 93 S. Ct. 3023 (1973); *Whirl v. Kern*, 407 F.2d 781 (5th Cir.), cert. denied, 396 U.S. 901, 24 L. Ed. 2d 177, 90 S. Ct. 210 (1969); *Foster v. United States*, 296 F.2d 65 (5th Cir. 1961); *Giacona v. United States*, 257 F.2d 450 (5th [**33] Cir.), cert. denied, 358 U.S. 873, 3 L. Ed. 2d 104, 79 S. Ct. 113 (1958).

As a comment to the Restatement makes clear, a law enforcement officer is privileged to commit a trespass if he is exercising his lawful authority *and* if he "exercises it in a reasonable manner, causing no unnecessary harm." n11 A further comment states,

[*1004] The rule . . . is applicable . . . to one acting in a reasonable effort to prevent the commission of a crime or to detain a dangerous lunatic, where the intermeddling is reasonably necessary to effect the exercise of such privilege, duty, or authority. n12

If Agent O'Connor had acted reasonably in deciding forcibly to disable the plane, his trespass would clearly have been privileged. See *Rodriguez, Foster, and Giacona, supra*. Since we have held that his decision to disable the plane was unreasonable, it follows that the trespass was not "reasonably necessary" to perform his duty and his authority was not exercised "in a reasonable manner." Thus, his trespass was wrongful and was not shielded by privilege. n13 See *Hatahley v. United States*, 351 U.S. 173, 181, 100 L. Ed. 1065, 76 S. Ct. 745 (1956). [**34] BBAI's claim for damage to the aircraft must be allowed.

n11 *Restatement (Second), Torts* (1965), comment (a) to § 265, at 500.

n12 *Id.*, comment (e) to § 265, at 500.

n13 In a similar context, the *Restatement (Second), Torts* § 204, comment (g), at 383 (1965), states, "Since the privilege [to enter another's land to make an arrest] is ancillary to the privilege to make an arrest, it cannot exist unless the arrest made or sought to be made is itself privileged."

Ordinarily, our consideration would end here, as a remand would be necessary to compute the damages to be awarded. The District Court, however, took the unusual step of computing damages, so that in the event of reversal Appellants' relief would not be delayed for reasons of judicial administration. Given the importance of this case and the need to compensate the victims' relatives promptly if relief were found appropriate on appeal, we applaud the District Court's diligence in not disposing of the case on a piecemeal basis.

The District [**35] Court determined that, if liability existed, Mrs. Downs, the pilot's widow, for herself and her children was entitled to \$269,441; Major and Mrs. Lakich, as legal guardians of the daughter of the hijacker's wife, were entitled to \$56,958; and Big Brother Aircraft, Inc. (BBAI), the owner of the airplane, was entitled to \$62,131.98.

The Downs survivors cite as error (1) awarding damages in the amount of the present value of lost future support rather than the present value of decedent's future earnings; (2) reducing the award by the amount of decedent's estimated future federal income tax liability; and (3) failing to take into account likely increases in decedent's annual earnings. The Lakich Appellants argue that the first two alleged errors were also present in the computation of their award.

Appellants' first contention is that since Mrs. Downs brought her action jointly as widow and administratrix of decedent's estate, her recovery should be the higher amount allowed an administratrix under Florida law, rather than the amount due her as a widow. Mrs. Downs, however, amended her complaint to bring her suit as Downs' widow, and the District Court held her to that status. In any [**36] event, the District Court would have had to dismiss Mrs. Downs' suit as administratrix because Mrs. Downs as widow would have had a higher priority of claim. *Benoit v. Miami Beach Electric Co.*, 85 Fla. 396, 96 So. 158 (1923).

The Florida Wrongful Death Act was completely revised in 1972. The new act went into effect on July 1, 1972, and does not apply to deaths occurring before that date. Actions based on deaths occurring prior to July 1, 1972, are governed by Florida Statutes § § 768.01-.03 (1971), the former wrongful death statute. *McKibben v. Mallory*, 293 So. 2d 48 (Fla. 1974). The deaths in this case occurred on October 4, 1971, and the old wrongful death statute is thus controlling.

The former statute based damages for wrongful death on a hierarchy of categories depending on relationship to the deceased, beginning with surviving spouse as the highest, then minor children, persons dependent upon the deceased for support, and finally the administrator or [**1005] executor of the decedent's estate. A wrongful death action could only be brought by the individual or individuals in the highest category. The individuals bringing suit could recover [**37] only for their own loss of support, and indirect recovery on behalf of others was not permitted. *W. B. Harbeson Lumber Co. v. Anderson*, 102 Fla. 731, 136 So. 557 (1931). The effect of the former statute is succinctly stated at 9A Fla. Jur. 448:

The existence of any class of persons authorized to sue under the statute bars other classes from any right of action or from participation in the recovery of the preferred class, in most cases. * Thus, an administrator cannot maintain an action on behalf of the estate of the decedent, unless there is no surviving spouse, minor child, or dependent.

* [Footnote omitted]

The exception to this rule was that the existence and number of minor children could be considered when awarding damages to a widow. *Slaughter v. Cook*, 195 So. 2d 6 (Fla. App. 1967).

Under the wrongful death statute as it existed in 1971, a surviving widow or dependent child was entitled to recover for lost care and support, based upon the husband's or father's probable future earnings and other acquisitions, and the station in life he would probably have reached. *Seaboard Air Line R.R. v. Martin*, 56 So. 2d 509 (Fla. 1952), [**38] overruled on other grounds, *Loftin v. Nolin*, 86 So. 2d 161 (Fla. 1956); *Florida Cent. & P. R.R. v. Foxworth*, 41 Fla. 1, 25 So. 338 (1899). The former wrongful death statute allowed an administrator to recover the full value of the loss to the prospective estate of the deceased. *Ellis v. Brown*, 77 So. 2d 845 (Fla. 1955).

Because of the priority of claims established by former Fla. Stat. § 768.02, Mrs. Downs, as widow, was limited to recovering the present value of lost support. This reasoning likewise requires rejection of the Lakich Appellants' argument on this point. We affirm the District Court's holding in this regard.

Appellants next assert that the District Court erred in reducing the damage awards by the amount of decedent's future federal income tax liability, citing *St. Johns River Terminal Co. v. Vaden*, 190 So. 2d 40 (Fla. App. 1966). The *Vaden* Court concluded that a trial judge should not instruct the jury that its damage award in a wrongful death action is subject to reduction by projected federal income taxes. Among the reasons given for this position was the Court's belief that interjection [**39] of tax computations would unduly confuse the jury.

When a District Court is sitting without a jury, the rationale behind *Vaden* is of little force. Florida courts have not squarely addressed the precise issue raised here, however, and there is a split of authority in other jurisdictions. n14 The District Court concluded that if wrongful death awards were proper in this case, they should be

based on "actual support" which would have been received, so that the award had to be reduced by decedents' estimated tax liability. The new Florida Wrongful Death Act requires that taxes be deducted. *Fla. Stat. § 768.18(5)* (1972). Accordingly, we do not believe that the District Court erred in reducing damage awards based on actual lost support by the amounts of decedents' projected Federal income tax liability.

n14 Tax should not be considered:

Cunningham v. Rederiet Vindeggen A/S, 333 F.2d 308 (2d Cir. 1964) (applying New York law); *Bonner v. United States*, 339 F. Supp. 640 (E.D. La. 1972); *Plourd v. Southern Pacific Transportation Co.*, 266 Ore. 666, 513 P.2d 1140 (1973); *Hinzman v. Palmanteer*, 81 Wash 2d 327, 501 P.2d 1228 (1972).

Tax should be considered:

Runyon v. District of Columbia, 150 U.S. App. D.C. 228, 463 F.2d 1319 (1972) (applying District of Columbia law); *O'Connor v. United States*, 269 F.2d 578 (2d Cir. 1959) (applying Oklahoma law); *Adams v. Deur*, 173 N.W. 2d 100 (Ia. 1969).

[**40]

Finally, Appellants contend that the District Court erred by not taking into account likely substantial increases [*1006] in Downs' annual earnings. The District Court noted that at the time of his death Downs had gross

annual earnings of \$9600 and a net after-tax income of \$7200. In determining Downs' future income for purposes of computing damages the Court based its computations on an annual after-tax income of \$9600. Thus, the Court took into account a sizeable increase in Downs' future earnings, noting that such an increase was reasonable considering Downs' age, health, and industry.

Although the manner in which the District Court allowed for an increase in Downs' earnings is not based on precise or scientific calculations, the amount representing the increase appears to be within the range of reason. The general Florida rule on reviewing damage awards is stated in *Schmidt v. Tracey*, 150 So. 2d 275 (Fla. App. 1963), cert. denied, 159 So. 2d 645 (Fla. 1964):

The test [in determining the adequacy of damages on appeal] is not what amount [the appellate court] would have allowed had it tried the case, but whether the jury, as [**41] reasonable men, could have found the verdict which they did. 150 So. 2d at 276.

See also *Sebold v. Bushman*, 230 So. 2d 198 (Fla. App. 1970). The rule is no different when a judge acts as the finder of fact, as the District Court did here.

The District Court's computation of damages spanned ten pages. 382 F. Supp. at 734-743. We conclude that the District Court was not only reasonable but admirably thorough and precise in its formulation of damages in this complicated situation, and we affirm the amounts as found below.

Although we must reverse the District Court's ultimate holdings, we commend the District Judge for his sensitive handling of the case and his thorough statement of findings and conclusions. The Judgment is reversed and the cause remanded to the District Court for entry of judgment for Appellants.

GORE v. DAVIS

No. 34437

Supreme Court of Georgia

243 Ga. 634; 256 S.E.2d 329; 1979 Ga. LEXIS 1015

January 12, 1979, Submitted

April 18, 1979, Decided

SUBSEQUENT HISTORY: [***1]

Rehearing Denied May 29, 1979.

PRIOR HISTORY:

Action for damages; constitutional question. Gwinnett State Court. Before Judge Harrison.

DISPOSITION:

Judgment affirmed in part and reversed in part.

COUNSEL:

Robert W. Mock, Sr., for appellant.

Tennant, Andersen & Davidson, Gerald Davidson, Jr., for appellee.

Arthur K. Bolton, Attorney General, Gerald W. Bowling, Assistant Attorney General, amicus curiae.

JUDGES:

Undercofler, Presiding Justice. All the Justices concur, except Jordan and Hill, JJ., who dissent.

OPINIONBY:

UNDERCOFLER

OPINION:

[*634] [**330] Gore attacks the constitutionality of the Abandoned Motor Vehicles Act, Code Ann. § 68-2301 et seq. (Ga. L. 1972, p. 342; 1975, p. 913; 1977, p. 253) contending the due process requirements of the Georgia and United States Constitutions are offended because nowhere in the statute is there provision for judicial supervision, proper notice or for a hearing prior to or after the deprivation of property under a sale authorized by the Act. He claims the trial court erred in grant-

ing summary judgment to the appellee in an action for wrongful conversion. We need look no further than the Georgia Constitution to find Ga. L. 1972, p. 342, [***2] as amended (Code Ann. Ch. 68-23) repugnant as lacking due process protections, unconstitutional and void. Art. I, Sec. I, Par. I, Ga. Const., 1976 (Code Ann. § 2-101).

1. "[I]t is fundamental in our law that no one shall be deprived of his life, liberty or property without due process of law . . ." *Southern R. Co. v. Town of Temple*, 209 Ga. 722, 724 (75 S.E.2d 554) (1953). "Due process of law . . . includes notice and hearing as a matter of right . . . where one's property rights are involved." (Emphasis supplied.) *Sikes v. Pierce*, 212 Ga. 567 (94 S.E.2d 427) (1956). "Where, as here, a party is being divested of property rights by a proceeding instituted by an opposite party to the cause, nothing short of notice of the proceeding and an opportunity to be heard in opposition thereto will satisfy the due process clauses of the Constitutions of this State . . . This ought to be and is elementary." *Murphy v. Murphy*, 214 Ga. 602, 605 (106 S.E.2d 280) (1958).

In 1972, the General Assembly enacted into law a statutory procedure entitled the Abandoned Motor Vehicles Act as a proper exercise of the police power to resolve the problem caused by abandonment of automobiles by [***3] owners or others on the streets, highways or private premises. Code Ann. Ch. 68-23 et seq.; 21 EGL, Abandoned Motor Vehicle Act, Ch. VII, § § 112-120, pp. 96-99 (1978 Rev.). Code Ann. § 68-2301 defines an abandoned motor vehicle as one left by an owner with a repair service operator over 60 days after the time agreed [*635] upon and over 60 days from time of delivery where no agreement exists, or within 60 days after completion of repairs. Code Ann. § 68-2302 places a duty upon the person seeking to remove or store such a vehicle to make a good faith effort to diligently seek out and identify the owner and notify him the automobile is to be removed. This section provides for advertisement if the owner cannot be found and for sending

243 Ga. 634, *; 256 S.E.2d 329, **;
1979 Ga. LEXIS 1015, ***

a description of the vehicle, with its identification number, to the Department of Public Safety. Code Ann. § 68-2304 specifically provides that an abandoned motor vehicle may be sold at public auction by any repair service owner and upon payment of the sales price, the purchaser is entitled to a bill of sale. Upon delivery of a certified copy of this instrument to the Revenue Department, the purchaser is entitled to a new certificate of title, [***4] free and clear of all liens, encumbrances, and other claims of former owners and lienholders. Finally, Code Ann. § 68-2305 requires notice of the sale to be by registered mail at least 20 days prior to the sale to the person or legal entity to whom the vehicle is registered and to all persons claiming a lien on the vehicle as shown on the records of the State Revenue Department or corresponding agencies of the state. This section also requires notice of time and place of the sale to be advertised once per week for two weeks in a newspaper of general circulation in the county where the repairman has his fixed place of business. This requirement also must be at least 20 days prior to sale. It must include a complete description of the automobile, and the date and place the vehicle was first taken into possession. After deducting the cost of repairs, towing and storage, the remaining balance, if any, is deposited with the clerk of the superior court and if no claim thereto is made within 12 months it is remitted to local governments. Code Ann. § 68-2308. These statutes, therefore, require notice prior to sale, but they make no provision for a judicial hearing as a matter of right [***5] on issues in controversy either prior to or following the sale of the vehicle. Due process does not permit such procedure. See *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N. Y. 2d 152 (379 NE2d 1169) (1978). Cf. *Gillam v. Landriew*, 455 FSupp. 1030 (1978).

[*636] 2. We need not reach appellee's contention that a Fourteenth Amendment claim does not exist here. See *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (98 S. Ct. 1729, 56 L. Ed. 2d 185) (1978).

3. The trial court did not err in denying plaintiffs' motion for summary judgment since there are issues of fact to be decided. Appellant argues he is entitled to a partial summary judgment as to Davis' counterclaim but

we find no such motion in the record. But see *King v. Pate*, 215 Ga. 593 (112 S.E.2d 589) (1960).

Judgment affirmed in part and reversed in part.

DISSENTBY:

JORDAN

DISSENT:

Jordan, Justice, dissenting.

In my opinion the majority opinion overlooks the manifest intent of the statute. Its provisions apply only when the *owner* of the repaired or stored vehicle cannot be ascertained. The statute requires that the person removing or storing the vehicle "shall diligently seek the identity of the owner and shall notify [***6] such owner of the vehicle." Code Ann. § 68-2302. The statute provides that "if the owner cannot be ascertained, the person impounding" can *then* proceed with the advertising and sale of the vehicle and disposition of the proceeds of the sale as provided in the statute.

Clearly, then, if the owner has been ascertained or comes forward to claim the vehicle, the vehicle is no longer an "abandoned" vehicle and the person holding the vehicle cannot proceed under the terms of the statute but must take recourse against the owner as provided by the [*637] lien statutes or other available remedies which provide the owner with notice and hearing to comport with due process.

[**331] It was clearly held in *Miller v. Self*, 137 Ga. App. 717 (224 S.E.2d 823) (1976) that once the owner makes a claim to the vehicle or takes some action to show the vehicle is not abandoned, the vehicle is not an "abandoned automobile" as defined by the statute and that a sale is unauthorized under the provisions of the Act. Therefore, no deprivation of due process can result to "an owner" under the provisions of the Act.

In my opinion the Act is constitutional, and I respectfully dissent.

I am authorized [***7] to state that Justice Hill joins in this dissent.

**DELBERT HEIMBERGER, Plaintiff-Appellee, v. THE VILLAGE OF CHEBANSE
et al., Defendants-Appellants**

No. 3-83-0172

Appellate Court of Illinois, Third District

124 Ill. App. 3d 310; 463 N.E.2d 1368; 1984 Ill. App. LEXIS 1840; 79 Ill. Dec. 593

May 22, 1984, Filed

PRIOR HISTORY: [***1]

Appeal from the Circuit Court of Kankakee County; the Hon. Edward A. McIntire, Judge, presiding.

DISPOSITION:

Affirmed in part and remanded.

COUNSEL:

Ronald J. Dusenbury, Ltd., of Kankakee, for appellants.

Thomas E. McClure and Roger C. Elliott, both of McClure & Elliott, of Bourbonnais, for appellee.

JUDGES:

JUSTICE ALLOY delivered the opinion of the court. BARRY, J., concurs. PRESIDING JUSTICE STOUDEER, concurring in part and dissenting in part.

OPINIONBY:

ALLOY

OPINION:

[*311] [**1369] The village of Chebanse and the individual members of the village board of trustees appeal from the judgment of the circuit court, after a bench trial, finding them guilty of conversion and assessing damages in the amount of \$ 7,150. The defendants also appeal from an award of attorney fees to plaintiff, Delbert Heimberger, in the amount of \$ 3,500.

The record reveals the following pertinent facts. Plaintiff Heimberger leased a portion of property, located in Chebanse, from the Illinois Central Gulf Railroad. He used the property to store equipment and supplies in his business of recycling pallets. Based upon complaints about the condition of plaintiff Heimberger's property,

the village, in [***2] September, 1979, sent him a letter. The letter, from the village clerk, informed him that his property needed to be cleaned up, as it violated various portions of the village municipal code. Another letter followed in December 1979, in which the clerk requested that Heimberger attend a meeting of the board of trustees. Although plaintiff did not attend the meeting, he did take steps to remedy the problem on his property. In the village's March 1980, letter to Heimberger, [*312] the clerk expressed the village's appreciation that Heimberger had cut weeds and removed old vehicles. The letter also indicated that the pallet business continued to be in violation of the code, although unspecific on what provision, and inquired as to his plans "about the building." The March 1980 letter closed by asking Heimberger to either attend the next board meeting or reply by mail. Plaintiff responded by mail, indicating that the building would be torn down by June 1 and that he intended to continue to use the property as a storage yard, although rebuilding plans had been abandoned. The board next responded by letter, dated May 14, 1980, in which a copy of their first letter, of September [***3] 1979, was enclosed, and in which the village requested that the violations be cleared up by June 1. Again, the plaintiff responded by taking some action to clean up his property, for the village board's July 31, 1980, letter again expressed the board's appreciation for Heimberger's efforts. The letter also stated that the board "would like to know if you would remove the old machinery as you promised and finish stacking, straightening, etc. soon." Another letter was sent on September 5, 1980, citing Heimberger's lack of response to the July 31 letter, and asking him to "please have the premises of your pallet business cleaned and straightened by October 1, 1980, or Village employees will do this work and you will be billed for same." No further correspondence or action was taken from September to the following spring by the village board.

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The board's next correspondence with Heimberger is of May 8, 1981, and asks him to "please continue to clean up the premises of your pallet business. Some junk machinery still remains, the pallets are still stacked too high, the grass and weeds must be kept mowed, etc." The letter asked Heimberger to respond before June 1, 1981, concerning his [***4] intentions about finishing the clean-up job.

The record also contains the minutes of the August 3, 1981, meeting of the village's board of trustees, the individual defendants herein. The minutes indicate that the [**1370] issue of plaintiff's property was addressed at the meeting and that there had been no response to requests for clean up, indicating "so our people [the village's] will do it. Norton will be contacted to take the junk and Paul Behrends will be contacted to clean up the pallets and debris [*sic*]."

On August 6, 1981, plaintiff Heimberger went to his property and found that a number of items stored on and at the premises had been removed, including saw blades, several saws, a Ford tractor, two power units for a saw-mill, three electric motors, various small tools, two logs, a number of pallets, a flatbed trailer, and other assorted items. Heimberger testified at trial that his visit to the property on [*313] the evening of August 6 was the result of a prior telephone conversation between him and Richard Yohnka, mayor and president of the board of trustees of the village. Yohnka had called him earlier in the day and informed him that the [***5] village had cleaned the property up. Yohnka also indicated that he had contacted Heimberger's son, Delbert, and Delbert was supposed to have gotten in touch with him about it. The son had not contacted plaintiff Heimberger, nor had Heimberger received any other prior notice, oral or written, concerning the board's intentions to remove the personal property from the premises of his pallet business at that time. He had never been given notice of any hearing on the proposed action. It is to be noted that the last written correspondence from the board was the letter of May 8, 1981, in which Heimberger was asked to inform the board of his plans. Nothing in the letter set a hearing date for the matter or informed Heimberger that the property would be confiscated and removed if he did not act.

When Heimberger, through counsel, requested the return of the property from the village, he was informed that the village did not have the property. Evidence at trial indicated that the value of the personal property removed from the premises totaled \$ 7,150. Other testimony on behalf of plaintiff came from his son and his wife. The son testified that the mayor, Yohnka, had contacted him on [***6] August 4, 1981, and informed him that the board had voted to clean up the property. The son, who did not live with his father, told Yohnka to con-

tact his father about the matter, and attempted to give Yohnka the phone number. Yohnka hung up. Heimberger's son also testified that he did attempt to contact his father, to relay the news, but was unsuccessful until after the removal had been accomplished. Heimberger's wife also testified, stating that she received a phone call from Yohnka at about 6 p.m. on the night of August 6. Yohnka told her that the village had voted to give the machinery away, by having someone come and take it. Yohnka also informed Mrs. Heimberger that the persons had already taken the machinery and the pallets would also be taken unless they were removed. He indicated that the equipment had been given to a farmer. Mrs. Heimberger testified that she had never received any notice of a hearing or notice that the property would be taken.

The defendants' sole witness was Ralph Yohnka, who testified that he had called plaintiff's son and had also talked to plaintiff's wife. Yohnka stated that he had gone to the premises on August 6 and saw that the property [***7] had been removed. When questioned about the August 3 board meeting, he stated that he "didn't believe" any [*314] board action was taken concerning plaintiff's property at the August 3, 1981, meeting. He also testified that the board had not taken any "active steps" to remove anything from the property on August 6, 1981. He also stated that he had never personally removed anything from the property. On cross-examination, faced with the minutes of the August 3 board meeting, Yohnka admitted that the matter was discussed, but stated that no motion had been made concerning the property.

After proofs and argument, the court found for the plaintiff and entered judgment in the amount of \$ 7,150, based upon evidence as to the value of the personal property removed from plaintiff's premises. Plaintiff's complaint sounded in two counts, one for conversion, and the other [**1371] for violation of civil rights (42 U.S.C. sec. 1983 (1982)), specifically plaintiff's right to due process prior to being deprived of his property. Subsequent to judgment, the court, on plaintiff's motion, also awarded attorney fees, which are available under the section 1983 count, in the [***8] amount of \$ 3,500. From the judgment, judgment award and attorney fees award the defendants appeal.

Quite remarkably, the defendants' first argument on appeal is that there is no evidence in the record that the defendants "took any active part to take or cause to be taken the plaintiff's property." The argument is contrary to the record. On appeal, we are required to view all of the evidence and inferences therefrom in its light most favorable to the verdict winner. (*Walling v. Lingelbach* (1976), 65 Ill. 2d 244, 357 N.E.2d 530; *Fleming v. Fleming* (1980), 85 Ill. App. 3d 532, 539, 406 N.E.2d 879.)

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There is more than sufficient evidence for the trial court to conclude that the plaintiff's property was taken by persons acting at the direction of, and with the consent and apparent authority of, the village board. The minutes of the August 3 board meeting clearly indicated that outside persons would be contacted to remove the personal property. Yohnka informed plaintiff Heimberger that the village had cleaned the property up. Yohnka had informed plaintiff's son on August 4 of the village's intention to take action to remove the personal property if it was not cleaned up. [***9] He told Heimberger's son that the board had voted to take the action. In a phone conversation with Mrs. Heimberger, Yohnka told her that the village had voted to give the machinery away by having someone come and take it. He indicated that the machinery had been given to a farmer. In light of this evidence, we reject counsel's suggestion that the village had no part in the removal of the plaintiff's personal property. What happened appears very clear in the record. The village got tired of prodding Heimberger to clean up his premises and so they contacted [*315] outside persons and told them they could have the property if they removed it. Those persons, with the consent and authority of the village, and at its direction, then took the property. We have no difficulty, on these facts, in concluding that the village board and its members exercised unauthorized control over the property of plaintiff, such as to deprive him of the property. The board's actions in "giving" the plaintiff's personal property to others were actions of unauthorized control over the property. The fact that village personnel did not actually remove the property, but that it was done by third parties [***10] contacted by the village, does not alter or affect the conclusion that the village directed the action and represented that it had authority to so dispose of the property. The court's findings that the village had caused the plaintiff's personal property to be removed from his premises is amply supported in the record. The judgment of the trial court is not against the manifest weight of the evidence. Nor do we find the verdict excessive. As regards the award of damages, such assessment is within the discretion of the fact finder, here the trial judge. In the instant case, the evidence in the record supports his conclusions as to damages, and we find no basis to alter the award.

The defense next contends that certain matters in defense, not raised before the trial court, preclude its liability in this case. They rely now upon section 11 -- 20 -- 13 of the Illinois Municipal Code (Ill. Rev. Stat. 1981, ch. 24, par. 11 -- 20 -- 13), respecting municipal authority to remove garbage and debris, and upon a municipality's common law power to abate a nuisance. As noted, however, these defenses and theories were not raised in the trial court. It is incumbent upon counsel to set forth, [***11] before the trial court, those matters and issues in defense, if they are to be relied upon on review. Under

established rules of appellate review, those matters not raised below are waived. *Kaufman & Broad Homes, Inc. v. Allied Homes, Inc.* (1980), 86 Ill. App. 3d 498, 408 N.E.2d 91.

[**1372] Finally, we turn to the issue of attorney fees. The defendants contend that the award of fees must be reversed because there was no express finding that the plaintiff had prevailed on his section 1983 claim. While it may be inferred from the record that the basis of the fees award was the court's finding that a civil rights violation had been proven, the judgment order does not indicate the basis for the award. Accordingly, we will remand to the trial court for the purpose of having the court specifically indicate the basis for the fees award.

In the interests of avoiding another appeal, however, we will address the issue, briefed by the parties, of whether the evidence is sufficient to sustain a finding of a section 1983 violation. We find [*316] the record sufficient to support that finding. Due process requirements are clear. As this court recently stated: [***12]

"Due process is not an inflexible standard and 'does not require a trial-type hearing in every conceivable case of government impairment of private interest.' [Citation.] Nonetheless, due process requires that 'at a minimum * * * deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' [Citation.] The notice must be reasonably calculated to convey the necessary information and to afford the interested parties a reasonable time for a hearing. [Citation.] Those parties must be given notice and an opportunity before the deprivation takes place, unless there exists extraordinary circumstances requiring immediate action to protect a valid governmental interest. [Citations.]" (*Valdez v. City of Ottawa* (1982), 105 Ill. App. 3d 972, 975.)

In the instant case, plaintiff was never given an opportunity to be heard on the question of taking, either before or after the village took action. The village's reliance upon its prior correspondence with the plaintiff in seeking to show notice is woefully lacking. The last letter received by Heimberger from the village, that of May 8, 1981, [***13] requested that he inform them of his plans. Previous letters had included gratitude and appreciation for his continuing efforts. The May 8 letter said nothing about what specifically the village was objecting to, nor did it state that there would be a hearing on the matter at which the village's seizure and disposal of the

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personal property would be addressed and at which Heimberger could attend and present his viewpoint and position. He was never informed at any time significant to the actions of the village herein that he was facing the seizure and disposal of his property should he not clean up the property. Nor can the informal telephone call to his son, two days before the action, satisfy the requirements of reasonable notice. Even if the village had given Heimberger sufficient notice of its intentions, he was never afforded an opportunity to be heard about the situation after being informed of the specific charges against him and the proposed action by the village. The record supports a finding that the village and these defendants violated Heimberger's due process rights in the matter in which they proceeded.

The judgment of the circuit court of Kankakee County is affirmed, [***14] except the award of fees, and we remand for the purpose of having the court specify the basis for that award.

[*317] Affirmed in part and remanded with directions.

CONCURBY:

STOUDER (In Part)

DISSENTBY:

STOUDER (In Part)

DISSENT:

PRESIDING JUSTICE STOUDER, concurring in part and dissenting in part:

I concur with the majority that the judgment of the trial court on the conversion claim was not against the manifest weight of the evidence and that the award of damages was not excessive, but I must disagree with the majority on the issue of whether attorney fees were properly awarded. As the majority states, the [**1373] award of attorney fees must be based upon a finding by the trial court that a violation of section 1983 of the Civil Rights Act occurred. I do not agree with the majority that the trial judge could ever have found the village of Chebanse guilty of a violation of section 1983 upon which to base his award of attorney fees. I base my be-

lief upon the United States Supreme Court's decision in *Parratt v. Taylor* (1981), 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908, where the Supreme Court found a conversion by State prison officials who were not acting as [***15] a result of an established State procedure did not require a predeprivation hearing and, therefore, that no section 1983 violation could be maintained against the State. The Supreme Court reasons that an adequate remedy existed under State law and a post-deprivation hearing was all that was required. Like prison officials in *Parratt*, who confiscated an inmate's hobby materials, the village board of Chebanse was not acting under the authority of any municipal ordinance or State law or procedure. As the United States Supreme Court stated in *Parratt v. Taylor* (1981), 451 U.S. 527, 543, 68 L. Ed. 2d 420, 434, 101 S. Ct. 1908, 1917:

"Indeed the deprivation occurred as a result of the unauthorized failure of agents of the State to follow established State procedure. There is no contention that the procedures themselves were inadequate * * * Moreover, the State of Nebraska has provided respondent with the means by which he can receive redress for the deprivation."

Here the State of Illinois provided adequate redress. It is often said due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner." However, the United States Supreme court [***16] has clearly rejected the proposition that this hearing must necessarily take place prior to the deprivation. I do not believe that this situation mandated a predeprivation hearing both because of the distinction made by the Supreme Court in *Parratt* and the adequate [*318] conversion remedy provided by Illinois. This plaintiff has had all the process which is due him, and no section 1983 claim can now stand. It has long been the law in this State that attorney fees cannot be taxed as costs absent statutory authority. (14 Ill. L. & Prac. *Costs* sec. 54 (1968).) Therefore, I would not have remanded this case but instead I would have reversed the award of attorney fees outright.

In the Matter of 1969 CHEVROLET, 2-DOOR, I.D. NO. 136379K430353, LICENSE NO. PSH 616. Carl MOORE, Petitioner/Appellee, v. STATE of Arizona, Respondent/Appellant

No. 1 CA-CIV 5654

Court of Appeals of Arizona, Division One, Department B

134 Ariz. 357; 656 P.2d 646; 1982 Ariz. App. LEXIS 581

December 7, 1982

PRIOR HISTORY: [***1]

Appeal from the Superior Court of Maricopa County
Cause No. C-336320
The Honorable Jeffrey S. Cates, Judge

DISPOSITION:

Judgment affirmed.

COUNSEL:

Robert K. Corbin, Atty. Gen. by Robert F. Ellig,
Asst. Atty. Gen., Phoenix, for respondent/appellant.

Community Legal Services by Deedra Sparling,
Phoenix, for petitioner/appellee.

JUDGES:

Greer, Judge. Froeb, P.J., and Grant, J., concur.

OPINIONBY:

GREER

OPINION:

[*358] [**647] OPINION

In this appeal we determine the measure of damages an individual is entitled to when his automobile has been unlawfully forfeited to and sold by the State of Arizona. The facts necessary to our determination are as follows.

On July 7, 1976, Arizona Department of Public Safety Officer Hughes and Phoenix Police Department Officer Ryan were notified by police radio that petitioner, Carl Moore, had been indicted for selling heroin and was to be arrested. A short while later the two offi-

cers saw Moore driving his [*359] [**648] automobile, the 1969 Chevrolet which is the subject of this action. The officers stopped Moore and arrested him. Officer Ryan thereafter conducted an inventory search of Moore's car and found a balloon of heroin on the floor. [***2] Moore was again arrested, this time for possession of heroin, and his car seized.

On July 26, 1976, Officer Hughes initiated forfeiture proceedings on behalf of the Department of Public Safety and State of Arizona, pursuant to A.R.S. § 36-1043. n1 On February 24, 1977, the trial court ordered the automobile forfeited to the State of Arizona and vested all right, title and interest therein to the state. Carl Moore appealed the court's judgment of forfeiture on March 15, 1977. The car was thereafter sold at a Sheriff's auction on May 17, 1977, for \$ 255.00. Of the \$ 255.00 received, \$ 111.50 was deducted for sheriff and county attorney fees, and the balance of \$ 143.50 paid to the Arizona State Treasurer for deposit in the State General Fund.

n1 All references to the forfeiture statutes are prior to the recent amendments.

On February 27, 1979, this court reversed the judgment of forfeiture and remanded the matter with directions to order the vehicle returned to Mr. Moore. *In re One 1969 Chevrolet 2-door*, [***3] I.D. No. 136379 K430353, License No. PSH-616, 121 Ariz. 532, 591 P.2d 1309 (App.1979). Due to the fact that his car had been sold, Moore filed a motion requesting the court to join Maricopa County and to determine whether the State of Arizona or Maricopa County was liable to Moore and in what amount. Finally, on September 19, 1980, judgment was entered against the State of Arizona in the amount of

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\$ 600.00, fixed by the court as the fair market value of Moore's car at the time of seizure.

From this judgment the state makes two arguments on appeal. First, that the State of Arizona was never made a party to this action, and therefore, the court did not have "sufficient jurisdiction" to grant a judgment against the state. Second, that Mr. Moore is only entitled to the amount by which the state was unjustly enriched.

With regard to the state's first argument, the assistant attorney general contends that the forfeiture petition, although filed in the name of the State of Arizona, was nevertheless instituted on behalf of Maricopa County. Thus, because the state was never a party to the action, he argues, it never had an opportunity to present its case to the court. He buttresses [***4] this argument by pointing out that the Maricopa County Attorney's Office prosecuted the forfeiture proceeding, and that although the action was instituted by the Arizona Department of Public Safety, a state agency, an attorney for the state never authorized the action.

We disagree. The state's argument stems, in part, from a misunderstanding of the concordant roles of the State Attorney General's Office and the numerous county attorney offices. It is clear that the two offices coordinate their efforts at law enforcement; a county attorney often represents the State of Arizona, and the State Attorney General's Office may represent the various Arizona counties. See *A.R.S. § 41-101(A)(8)* and *A.R.S. § 11-532*.

The County Attorney's Office is charged with the duty of prosecuting forfeitures accruing to the State of Arizona. *A.R.S. § 11-532(A)(4)*. *A.R.S. § 36-1041 et seq.* clearly indicates that the forfeiture of Mr. Moore's car accrued to the State of Arizona. Thus, although the Maricopa County Attorney's Office prosecuted the forfeiture action, it did so on behalf of the State of Arizona. This should become clear when it is recognized that all profits from the sale of the [***5] forfeited item are distributed to the State Treasurer. *A.R.S. § 36-1047(A)(2)*. Therefore, the state was indeed a party to the action and was fully represented by the Maricopa County Attorney's Office.

The state's contention that Officer Hughes did not have authority to initiate the forfeiture petition, and that "there is no evidence that he was instructed to initiate the action by an attorney representing the [*360] [**649] State of Arizona," is not persuasive. *A.R.S. § 36-1043* requires an officer who seizes a vehicle transporting narcotics to file a notice of seizure and intent to institute forfeiture proceedings. There is no requirement that the State Attorney General's Office must first authorize the petition. We would point out, however, that a deputy county attorney did in fact sign the petition herein.

Turning to the state's second argument, it does not contend that it is in any way immune from liability. n2 Instead, it objects to the method by which damages were calculated. The state relies on the *Restatement of Restitution*, § 1, in arguing that Moore is entitled only to that amount by which the state has been unjustly enriched. It would calculate that [***6] amount as follows:

\$ 255.00 (Amount vehicle sold for at auction)
61.00 (Sheriff's fees)

\$ 193.50
50.00 (County Attorney fees)

\$ 143.50 (Amount deposited in State Treasury)

n2 It is clear that the state may be responsible for tortuous wrongdoings. *State v. Superior Court of Maricopa County*, 123 Ariz. 324, 599 P.2d 777 (1979).

Although not raised as an issue by the state, in order to dispel any concern that the trial court lacked jurisdiction because Moore did not comply with the statutory provisions for suing the state, *A.R.S. § 12-821*, we would point out that

that statute is inapplicable to the instant situation. *A.R.S. § 12-821 -- 12-826* applies only to negligence and contract claims against the state. The instant case involves neither. This does not mean Moore is without a remedy. Our supreme court has held that "since Art. 2, section 17 of the Constitution of the State of Arizona prohibiting the taking or damaging of private property without just compensation is self-executing, an injured party must be compensated even though the Legislature has not established a specific procedure

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therefor." *State v. Leeson*, 84 Ariz. 44, 47, 323 P.2d 692, 695 (1958); *City of Yuma v. Lattie*, 117 Ariz. 280, 572 P.2d 108 (1977). Thus, because the forfeiture issue was already properly before the trial court, we are of the opinion the court had jurisdiction to go one step further and order restitution upon learning that Moore's car had been sold.

[***7]

Section one of the *Restatement* applies to those situations where the transferee of the chattel is guilty of no wrongdoing. The state contends that it could not have been guilty of any wrongdoing because it was acting under color of law. It relies heavily on *Kamienska v. County of Westchester*, 39 Misc.2d 750, 241 N.Y.S.2d 814 (1963) to support its position. In *Kamienska*, the New York District Attorney's Office seized currency alleged to be gambling monies in the course of a gambling raid. Following arrest and prior to acquittal, the defendant filed an action alleging that the state had illegally converted his money, and demanded its return. In discussing the seizure of the money the court stated:

Since the Deputy Sheriffs and Assistant District Attorney were then acting under claim or color of authority in the course of enforcement of the penal laws . . . , and there is no showing . . . that they were acting wholly without legal justification, the taking was not tortious and no cause of action in conversion then accrued to the plaintiffs.

....

. . . Continued detention thereafter does not thereby become a conversion, where the original taking [***8] and possession were lawful

Id., 241 N.Y.S.2d at 818-819 (emphasis added).

The fatal distinction between the instant case and *Kamienska* is the New York court's finding that the original taking and possession were lawful. In the case at bar, this court has already held that the search and seizure upon which the forfeiture was based was unlawful. *One 1969 Chevrolet 2-door*, *supra*. Thus, the officer's seizure, although in good faith, was nevertheless wrongful. Accordingly, it is our opinion that section one of the *Restatement of Restitution* is inapplicable to the instant case.

Section 74 of the *Restatement of Restitution* contemplates a situation similar to the case at bar:

A person who has conferred a benefit upon another in compliance with a judgment, or whose property has been taken thereunder, is entitled to restitution if [*361] [**650] the judgment is reversed or set aside

And, section 154 of the *Restatement of Restitution* sets forth what we think is the proper measure of damages in the instant case:

Where a person is entitled to restitution from another because of an innocent conversion, the measure of recovery [***9] for the benefit thus received is, at the election of the claimant, the value of property, (a) at the time of the conversion

It is well settled in Arizona that the tort of conversion consists of "any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein." *Shartzer v. Ulmer*, 85 Ariz. 179, 184, 333 P.2d 1084, 1088 (1959); *Scott v. Allstate Insurance Company*, 27 Ariz.App. 236, 553 P.2d 1221 (1976); *Western Coach Corporation v. Kincheloe*, 24 Ariz.App. 55, 535 P.2d 1059 (1975). Furthermore, the intent required is not necessarily a matter of conscious wrongdoing. *Sterling Boat Company, Inc. v. Arizona Marine, Inc.*, 134 Ariz. 55, 653 P.2d 703 (App.1982). It is rather an intent to exercise a dominion or control over the goods which is in fact inconsistent with plaintiff's rights. *Id.* We hold that the State of Arizona's conduct constituted a conversion of Mr. Moore's car. Thus, under the *Restatement* rule, Moore is entitled to restitution equal to the fair market value of his car at the time of taking.

This method of calculating damages is consistent with prior Arizona case law. In *United [***10] Producers and Consumers Cooperative, Inc. v. O'Malley*, 103 Ariz. 26, 436 P.2d 575 (1968), the plaintiff successfully prosecuted an action for replevin of a cotton picker pursuant to A.R.S. § 12-1301 *et seq.* The issue on appeal was the proper measure of damages. The supreme court pointed out that under A.R.S. § 12-1310 the usual measure of damages in a replevin action is the value of the article at the time of trial, plus damages for its wrongful detention. The court went on to reason that, "[w]here . . . the property is not in the possession of the defendant at the time of trial, the rule becomes inapplicable and the value must be measured as of the wrongful taking or detention." *Id.* at 27, 436 P.2d at 576.

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Accordingly, we hold that the trial court correctly entered judgment against the state for the fair market value of the automobile at the time of its seizure. n3

n3 Moore did not raise, and we do not address, the issue of whether he would be entitled to incidental damages.

Finally, we must [***11] deny Moore's request for attorney fees pursuant to Rule 25, Ariz.Rules

Civ.App.Proc. That rule provides for the imposition of attorney's fees where the appeal is frivolous or taken solely for the purpose of delay. Although we question the advisability of pursuing this appeal in light of the nominal amount of money involved, it did raise an issue of concern to the state under the forfeiture statutes. Thus, we cannot classify the appeal as spurious or frivolous, and must therefore deny the request. *Allstate Insurance Company v. Industrial Commission*, 126 Ariz. 425, 616 P.2d 100 (App.1980).

For the foregoing reasons, the judgment is affirmed.

LAKE COUNTRY ESTATES, INC., ET AL. v. TAHOE REGIONAL PLANNING
AGENCY ET AL.

No. 77-1327

SUPREME COURT OF THE UNITED STATES

440 U.S. 391; 99 S. Ct. 1171; 59 L. Ed. 2d 401; 1979 U.S. LEXIS 68; 12 ERC
(BNA) 1881

December 4, 1978, Argued
March 5, 1979, Decided

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT.

DISPOSITION:

566 F.2d 1353, reversed in part and affirmed in
part.

DECISION:

Bi-state regional planning agency, held not entitled
to Eleventh Amendment immunity; members of agency's
governing body, held entitled to absolute immunity for
legislative activity.

SUMMARY:

California and Nevada entered into a compact, later
consented to by Congress (83 Stat 360), to create the
Tahoe Regional Planning Agency and to authorize the
agency to adopt and to enforce a regional plan for land
use, transportation, conservation, recreation, and public
services in the Lake Tahoe Basin resort area. Several
Basin property owners, alleging that the agency, the in-
dividual members of its governing board, and its execu-
tive officer had adopted a land use plan, and had engaged
in other conduct, that destroyed the economic value of
the property owners land, thereby taking their property
without due process of law and without just compensa-
tion in violation of the Fifth and Fourteenth Amend-
ments, filed a complaint in the United States District
Court for the Eastern District of California. The District
Court dismissed the complaint, holding, among other
things, that the individual defendants were immune from
liability for the exercise of the discretionary functions
alleged in the complaint. On appeal, the United States

Court of Appeals for the Ninth Circuit affirmed the dis-
missal of the planning agency, but reinstated the com-
plaint against the individuals, finding, among other
things, that the Eleventh Amendment immunized the
agency from suit in a federal court, and that, with respect
to the individuals, absolute immunity should be afforded
for conduct of a legislative character and qualified im-
munity afforded for executive action (566 F2d 1353).

On certiorari, the United States Supreme Court re-
versed in part and affirmed in part. In an opinion by Ste-
vens, J., joined by Burger, Ch. J., and Stewart, White,
Powell, and Rehnquist, JJ., it was held that (1) the
agency was not entitled to the Eleventh Amendment im-
munity provided to the compacting states and was there-
fore subject to "the judicial power of the United States"
within the meaning of the Amendment, and (2) the indi-
vidual members of the agency's governing body were
entitled to absolute immunity from federal damage liabil-
ity to the extent that they acted in a capacity comparable
to that of members of a state legislature.

Brennan, J., dissented in part, expressing the view
that the United States Supreme Court should not have
reached the question, discussed in dicta, whether con-
tracting states can create an agency protected by Elev-
enth Amendment immunity.

Marshall, J., dissenting in part, expressed the view
that absolute immunity should not have been extended to
nonelected regional officials for their legislative acts.

Blackmun, J., joined in part (as to point (1) below)
by Brennan, J., dissented in part, expressing the view that
(1) the agency members were not entitled to absolute
immunity for their legislative acts, but only to a qualified
immunity for their executive acts, and (2) the issue
whether the speech or debate clause of the Federal Con-
stitution (Art I, 6) has application to state legislatures

should not have been decided, since it had not been presented to the United States Supreme Court.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

STATES § 88

bi-state planning agency -- immunity from suit --

Headnote:[1A][1B]

A regional planning agency, created by compact between two states, is not entitled to the immunity that the Eleventh Amendment provides to the compacting states, and is thus subject to the "Judicial power of the United States" within the meaning of that Amendment, where both states disclaim any intent to confer immunity on the agency, the terms of the compact indicate that the agency is to be regarded as a political subdivision rather than as an arm of the state, and the actual operations of the agency involve the regulation of land use.

[***LEdHN2]

LEGISLATURE § 1

members of bi-state planning agency -- immunity for legislative activity --

Headnote:[2A][2B]

The individual members of the governing body of a regional planning agency, created by compact between two states, are entitled to absolute immunity from federal damage liability to the extent that they act in a capacity comparable to that of members of a state legislature. (Marshall, Blackmun, and Brennan, JJ., dissented from this holding.)

[***LEdHN3]

ERROR § 1211

United States Supreme Court -- dismissal -- want of jurisdiction --

Headnote:[3]

The United States Supreme Court will not dismiss for want of federal court jurisdiction, where the arguments presented to the Supreme Court alleging defects in jurisdiction are not directed at jurisdiction itself, but rather at the existence of a remedy for an alleged violation of federal rights, and where, even if the lack of a cause of action were considered a jurisdictional effect, the record discloses that federal jurisdiction exists on other grounds.

[***LEdHN4]

ERROR § 1087.5(1)

review on certiorari -- issues addressed --

Headnote:[4]

The United States Supreme Court will not address issues other than those fairly comprised within the questions presented by the petition for certiorari and any cross-petitions, but an exception to the rule is the question of jurisdiction; even if not raised by the parties, the United States Supreme Court cannot ignore the absence of federal jurisdiction.

[***LEdHN5]

RIGHTS § 12.5

bi-state planning agency -- actions as "under color of state law" --

Headnote:[5A][5B]

Alleged conduct of a regional planning agency (created by compact between two states) and its officers is adequately characterized as "under color of state law" within the meaning of *42 USCS 1983*, notwithstanding that the compact requires congressional consent to be effective, where the compact is part of the statutory law of both states, the actual implementation of the agency depends upon the appointment of governing members and executives by the two states and their subdivisions and upon mandatory financing from counties, the appointees, in discharging their duties as officials of the agency, necessarily also serve the interest of the political unions that appoint them, federal involvement is limited to the appointment of one nonvoting member to the governing board, and each state retains an absolute right to withdraw from the compact.

[***LEdHN6]

STATUTES § 207

Civil Rights Act of 1871 -- liberal construction --

Headnote:[6]

The Civil Rights Act of 1871 (*42 USCS 1983*) must be given a liberal construction.

[***LEdHN7]

STATES § 88

immunity from suit --

Headnote:[7]

The Eleventh Amendment does not prescribe a rule that immunity should be extended to every bi-state agency created by compact between states unless that immunity is expressly waived.

[***LEdHN8]

STATES § 9

Constitution -- speech and debate clause -- applicability to states --

Headnote:[8]

The speech or debate clause of the United States Constitution (Art I, 6) is not applicable to members of state legislatures or to members of a regional planning agency created by compact between states.

[**LEdHN9]

LEGISLATURE § 1

STATES § 9

legislative immunity --

Headnote:[9]

The rule that legislators are immune from deterrence to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good, is equally applicable to federal, state, and regional legislators.

SYLLABUS:

California and Nevada entered into a Compact, later consented to by Congress, to create respondent Tahoe Regional Planning Agency (TRPA) to coordinate and regulate development in the Lake Tahoe Basin resort area and to conserve its natural resources. The Compact authorized TRPA to adopt and enforce a regional plan for land use, transportation, conservation, recreation, and public services. Petitioners, Basin property owners, brought suit in Federal District Court alleging that TRPA and its individual members and executive officer (also respondents) had adopted a land-use ordinance that destroyed the value of petitioners' property in violation of the Fifth and Fourteenth Amendments, and seeking monetary and equitable relief. To support their federal claim, petitioners asserted, *inter alia*, that respondents had acted under color of state law and that therefore their cause of action was authorized by 42 U. S. C. § 1983, and jurisdiction was provided by 28 U. S. C. § 1343. The District Court dismissed the complaint, holding that although a cause of action for "inverse condemnation" was sufficiently alleged, the action could not be maintained against TRPA because it had no authority to condemn property and that the individual respondents were immune from liability. The Court of Appeals, while reinstating the complaint against the individual respondents on other grounds, rejected petitioners' claims based on § § 1983 and 1343, holding that congressional approval had transformed the Compact into federal law with the result that respondents had acted pursuant to federal authority rather than under color of state law. The court further held that TRPA was immune from suit under the Eleventh Amendment and that with respect to the individual respondents they should be absolutely immune for conduct of a legislative character and qualifiedly immune for executive action. *Held:*

1. Petitioners stated a cause of action under § 1983 and hence properly invoked federal jurisdiction under § 1343. The requirement of federal approval of the Compact did not foreclose a finding that respondents' conduct was "under color of state law" within the meaning of § 1983. The facts with respect to TRPA's operation -- such as that its implementation depended upon the appointment of members by both States and their subdivisions and upon financing by counties; that the appointees, in discharging their duties as TRPA officials, also serve the interests of the appointing units; that federal involvement is limited to the appointment of one nonvoting member; and that each State has an absolute right to withdraw from the Compact -- adequately characterize respondents' alleged actions as "under color of state law." Pp. 398-400.

2. TRPA is not immune from liability under the Eleventh Amendment. The States' intention in creating TRPA, the terms of the Compact, and TRPA's actual operation make clear that nothing short of an absolute rule would allow TRPA to claim sovereign immunity, and because the Eleventh Amendment prescribes no such rule, TRPA is subject to "the judicial power of the United States" within the meaning of that Amendment. Pp. 400-402.

3. To the extent that the evidence discloses that the individual respondents were acting in a legislative capacity, they are entitled to absolute immunity from federal damages liability. "Legislators are immune from deterrence to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good," *Tenney v. Brandhove*, 341 U.S. 367, 377, and this reasoning is equally applicable to federal, state, and regional legislators. Whatever potential damages liability regional legislators may face as a matter of state law, petitioners' federal claims do not encompass the recovery of damages from TRPA members acting in a legislative capacity. Pp. 402-406.

COUNSEL:

John J. Bartko argued the cause for petitioners. With him on the briefs were Gary H. Moore, James B. Lewis, John S. Burd, and Joseph M. Lynn.

Kenneth C. Rollston argued the cause and filed a brief for respondents Tahoe Regional Planning Agency et al. E. Clement Shute, Jr., Assistant Attorney General, argued the cause for respondent State of California. With him on the brief were Evelle J. Younger, Attorney General, and Leonard M. Sperry, Jr., Deputy Attorney General. Robert Frank List, Attorney General, and James H. Thompson, Chief Deputy Attorney General, filed a brief for respondent State of Nevada. Reginald Littrell filed a brief for respondents Henry et al.

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JUDGES:

STEVENS, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., joined, and in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined in part. BRENNAN, J., post, p. 406, and MARSHALL, J., post, p. 406, filed opinions dissenting in part. BLACKMUN, J., filed an opinion dissenting in part, in Part I of which BRENNAN, J., joined, post, p. 408.

OPINIONBY:

STEVENS

OPINION:

[*393] [***405] [**1173] MR. JUSTICE STEVENS delivered the opinion of the Court.

[***LEdHR1A] [1A] [***LEdHR2A] [2A]We granted certiorari to decide whether the Tahoe Regional Planning Agency, an entity created by Compact between California and Nevada, is entitled to the immunity that the Eleventh Amendment provides to the compacting States themselves. n1 *436 U.S. 943*. The case also presents the question whether the individual members of the Agency's governing body are entitled to absolute immunity from federal damages claims when acting in a legislative capacity.

n1 See *Edelman v. Jordan*, *415 U.S. 651*. The Eleventh Amendment provides:

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Lake Tahoe, a unique mountain lake, is located partly in California and partly in Nevada. The Lake Tahoe Basin, an area comprising 500 square miles, is a popular resort area that has grown rapidly in recent years. n2

n2 The Senate Report on the Compact describes the lake and its background as follows:

"Lake Tahoe, a High Sierra Mountain lake, is famed for its scenic beauty and pristine clarity. Of recent geologic origin, the 190-square-mile lake bore little evidence of even natural aging processes when it was discovered by John Fre-

mont in 1844. Because of its size, its 1,645-foot depth and its physical features, Lake Tahoe was able to resist pollution even when human activity began accelerating as a result of settlement and early logging operations. Even by 1962 its waters were still so transparent that a metal disc 20 centimeters in diameter reportedly could be seen at a depth of 136 feet and a light transmittance to a depth of nearly 500 feet as detected with hydrophotometer.

"Only two other sizable lakes in the world are of comparable quality -- Crater Lake in Oregon, which is protected as part of the Crater Lake National Park, and Lake Baikal in the Soviet Union. Only Lake Tahoe, however, is so readily accessible from large metropolitan centers and is so adaptable to urban development." S. Rep. No. 91-510, pp. 3-4 (1969).

[*394] In 1968, the States of California and Nevada agreed to create a single agency to coordinate and regulate development in the Basin and to [***406] conserve its natural resources. As required by the Constitution, n3 in 1969 Congress gave its consent to the Compact, and the Tahoe Regional Planning Agency (TRPA) was organized. n4 The Compact authorized TRPA to adopt and to enforce a regional plan for land use, transportation, conservation, recreation, and public services. n5

n3 Article I, § 10, cl. 3, of the Constitution provides:

"No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."

n4 See Tahoe Regional Planning Compact, 83 Stat. 360, *Cal. Gov't Code Ann. § § 66800-66801* (West Supp. 1977), *Nev. Rev. Stat. § § 277.190-277.230* (1973) (hereinafter cited as Compact).

n5 Compact, Arts. V and VI.

Petitioners own property in the Lake Tahoe Basin. In 1973, they filed a complaint [**1174] in the United States District Court for the Eastern District of California alleging that TRPA, the individual members of its governing body, and its executive officer had adopted a

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land-use ordinance and general plan, and engaged in other conduct, that destroyed the economic value of petitioners' property. n6 Petitioners alleged that respondents had thereby taken their property without due process of law and without just compensation in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. They sought monetary and equitable relief.

n6 The States of California and Nevada and the county of El Dorado were originally named as defendants but either were not properly served or have been dismissed as parties.

Petitioners advanced alternative theories to support their [*395] federal claim. First, they asserted that the alleged violations of the Fifth and Fourteenth Amendments gave rise to an implied cause of action, comparable to the claim based on an alleged violation of the Fourth Amendment recognized in *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, and that jurisdiction could be predicated on 28 U. S. C. § 1331. n7 Second, they claimed that respondents had acted under color of state law and therefore their cause of action was authorized by 42 U. S. C. § 1983 n8 and jurisdiction was provided by 28 U. S. C. § 1343. n9

n7 The amount in controversy exceeds \$ 10,000. Title 28 U. S. C. § 1331, the general federal-question jurisdiction statute, provides in part:

"The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of \$ 10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency, thereof, or any officer or employee thereof in his official capacity."

n8 Title 42 U. S. C. § 1983 provides:

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

n9 Title 28 U. S. C. § 1343 provides in part:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

....

"(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

The [***407] District Court dismissed the complaint. Although it concluded that the complaint sufficiently alleged a cause of [*396] action for "inverse condemnation," n10 it held that such an action could not be brought against TRPA because that agency did not have the authority to condemn property. The court also held that the individual defendants were immune from liability for the exercise of the discretionary functions alleged in the complaint.

n10 See 2 P. Nichols, *Eminent Domain* § 6.21 (rev. 3d ed. 1976).

On appeal, the Court of Appeals for the Ninth Circuit affirmed the dismissal of TRPA, but reinstated the complaint against the individual respondents. 566 F.2d 1353. Addressing first the questions of cause of action and jurisdiction, the Court of Appeals rejected petitioners' claims based on § § 1983 and 1343. The court held that congressional approval had transformed the Compact between the States into federal law. As a result, the respondents were acting pursuant to federal authority, rather than under color of state law, and § § 1983 and 1343 could not be invoked to provide a cause of action and federal jurisdiction. But the court accepted petitioners' alternative argument: It held that they had alleged a deprivation of due process in violation of the Fifth and Fourteenth Amendments, that an implied remedy comparable to that upheld in *Bivens, supra*, was available, and that federal jurisdiction was provided by § 1331.

[**1175] Having found a cause of action and a basis for federal jurisdiction, the court turned to the immunity questions. Although the point had not been argued, the Court of Appeals decided that the Eleventh Amendment immunized TRPA from suit in a federal court. With respect to the individual respondents, the Court of

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Appeals held that absolute immunity should be afforded for conduct of a legislative character and qualified immunity for executive action. Since the record did not adequately disclose whether the challenged conduct was legislative or executive, the court remanded for a hearing.

Petitioners ask this Court to hold that TRPA is not entitled to Eleventh Amendment immunity and that the individual [*397] respondents are not entitled to absolute immunity when acting in a legislative capacity. Because none of the respondents filed a cross-petition for certiorari, we have no occasion to review the Court of Appeals' additional holding that a violation of the Due Process Clause was adequately alleged. n11 For [***408] purposes of our decision, we assume the sufficiency of those allegations.

n11 The issue we do not address is clearly stated in the following footnote to the Court of Appeals opinion:

"Under the strict standard of pleading called for by *Pacific States Box & Basket Co. v. White*, 296 U.S. 176 . . . (1935), none of the complaints in any of the cases on appeal would withstand a motion to dismiss. They lack specific factual allegations which, if proved, would rebut the presumption of constitutionality that the *Pacific States* Court accorded acts of administrative and legislative bodies.

"Although *Pacific States* has never been explicitly overruled, we do not believe that it represents the present state of the law because it was decided two years before the promulgation of the Federal Rules of Civil Procedure. We find no precedent in the Ninth Circuit applying *Pacific States* to an analogous case since the Rules took effect.

"In *Conley v. Gibson*, 355 U.S. 41 . . . (1957), the Supreme Court explained the modern philosophy of pleading:

"[All] the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiffs claim is and the grounds upon which it rests. . . . The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'

" *Id.*, at 47-48, . . . (citations omitted).

"Thus a complaint should not be dismissed for insufficiency unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim. 2A J. Moore, *Federal Practice* para. 12.08 (1975).

"The allegations of 'taking,' even though phrased in terms of inverse condemnation, are sufficient to show that appellants complained that the TRPA exercised its police powers improperly, and that they relied on the due process clauses of the Fifth and Fourteenth Amendments." 566 *F.2d*, at 1359 n. 9.

[*398] I

[***LEdHR3] [3]Before addressing the immunity issues, we must consider whether petitioners properly invoked the jurisdiction of a federal court. While respondents did not cross petition for certiorari, they now argue that the *Bivens* rationale does not apply to a claim based on the deprivation of property rather than liberty, and therefore the Court of Appeals' jurisdictional analysis was defective.

[***LEdHR4] [4]We do not normally address any issues other than those fairly comprised within the questions presented by the petition for certiorari and any cross petitions. An exception to this rule is the question of jurisdiction: even if not raised by the parties, we cannot ignore the absence of federal jurisdiction. In this case, however, respondents' attack on the Court of Appeals' *Bivens* holding fails to support dismissal for want of jurisdiction for two reasons.

First, respondents' 'jurisdictional' arguments are not squarely directed at jurisdiction itself, but rather at the existence of a remedy for the alleged violation of their federal rights. Faced with a similar claim in *Mt. Healthy Board of Ed. v. Doyle*, 429 U.S. 274, we found that the cause-of-action argument was "not of the jurisdictional sort which the [**1176] Court raises on its own motion." *Id.*, at 279. Since the petitioners in *Mt. Healthy* had "failed to preserve the issue whether the complaint stated a claim upon which relief could be granted," *id.*, at 281, the Court simply assumed, without deciding, that the suit could properly be brought.

Second, even if the lack of a cause of action were considered a jurisdictional defect in a suit brought under § 1331, n12 we may not dismiss for that reason if the record discloses that federal jurisdiction does in fact exist. In this case, we need not even reach the *Bivens* question to conclude that there is both a cause of action and federal jurisdiction.

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n12 See *University of California Regents v. Bakke*, 438 U.S. 265, 380 (WHITE, J.); *United States v. Griffin*, 303 U.S. 226, 229.

[*399]

[***LEdHR5A] [5A]Section 1983 provides a remedy [***409] for individuals alleging deprivations of their constitutional rights by action taken "under color of state law." The Court of Appeals incorrectly assumed that the requirement of federal approval of the interstate Compact foreclosed the possibility that the conduct of TRPA and its officers could be found to be "under color of state law" within the meaning of § 1983. n13

n13

[***LEdHR5B] [5B]The fact that the Compact at issue here required congressional consent to be effective clearly does not itself mean that action taken pursuant to it does not qualify as being "under color of state law." This Court has, in the past, accepted that state regulations are properly considered "state law" even though they required federal approval prior to their implementation. See *Rosado v. Wyman*, 397 U.S. 397; *King v. Smith*, 392 U.S. 309.

The Compact had its genesis in the actions of the compacting States, and it remains part of the statutory law of both States. n14 The actual implementation of TRPA, after federal approval was obtained, depended upon the appointment of governing members and executives by the two States and their subdivisions and upon mandatory financing secured, by the terms of the Compact, from the counties. n15 In discharging their duties as officials of TRPA, the state and county appointees necessarily have also served the interests of the political units that appointed them. The federal involvement, by contrast, is limited to the appointment of one nonvoting member to the governing board. n16 While congressional consent to the original Compact was required, the States may confer additional powers and duties on TRPA without further congressional action. And each State retains an absolute right to withdraw from the Compact.

n14 See n. 4, *supra*.

n15 Compact, Arts. III (a), VII (a).

n16 § 3, 83 Stat. 369. Section 6, 83 Stat. 369, also reserves to Congress the right to require

TRPA to furnish information and data that it considers appropriate.

[***LEdHR6] [6]Even if it were not well settled that § 1983 must be given [*400] a liberal construction, n17 these facts adequately characterize the alleged actions of the respondents as "under color of state law" within the meaning of that statute. Federal jurisdiction therefore rests on § 1343, and there is no need to address the question whether there is an implied remedy for violation of the Fifth or the Fourteenth Amendment.

n17 Section 1983 originated as § 1 of the Civil Rights Act of 1871. In introducing that Act in Congress, Representative Shellabarger pointed out:

"This act is remedial and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed . . . the largest latitude consistent with the words employed is uniformly given in construing such statutes." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871).

II

[***LEdHR1B] [1B]The Court of Appeals held that California and Nevada had delegated authority ordinarily residing in each of those States to TRPA. Because "the bi-state Authority [***1177] serves as an agency of the participant states, exercising a specially aggregated slice of state power," the court concluded "that the TRPA is protected by sovereign immunity, preserved for the states by the Eleventh Amendment." 566 F.2d, at 1359-1360.

[***410] The reasoning of the Court of Appeals would extend Eleventh Amendment immunity to every bistate agency unless that immunity were expressly waived. TRPA argues that the propriety of this result is evidenced by the special constitutional requirement of congressional approval of any interstate compact. Any agency that is so important that it could not even be created by the States without a special Act of Congress should receive the same immunity that is accorded to the States themselves.

We cannot accept such an expansive reading of the Eleventh Amendment. By its terms, the protection afforded by that Amendment is only available to "one of the United States." It is true, of course, that some agencies exercising [*401] state power have been permitted

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to invoke the Amendment in order to protect the state treasury from liability that would have had essentially the same practical consequences as a judgment against the State itself. n18 But the Court has consistently refused to construe the Amendment to afford protection to political subdivisions such as counties and municipalities, even though such entities exercise a "slice of state power." n19

n18 See *Edelman v. Jordan*, 415 U.S. 651; *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459.

n19 See *Mt. Healthy Board of Ed. v. Doyle*, 429 U.S. 274; *Moor v. County of Alameda*, 411 U.S. 693, 717-721; *Lincoln County v. Luning*, 133 U.S. 529, 530; Compact, Art. VIII (b).

If an interstate compact discloses that the compacting States created an agency comparable to a county or municipality, which has no Eleventh Amendment immunity, the Amendment should not be construed to immunize such an entity. Unless there is good reason to believe that the States structured the new agency to enable it to enjoy the special constitutional protection of the States themselves, and that Congress concurred in that purpose, there would appear to be no justification for reading additional meaning into the limited language of the Amendment.

California and Nevada have both filed briefs in this Court disclaiming any intent to confer immunity on TRPA. They point to provisions of their Compact that indicate that TRPA is to be regarded as a political subdivision rather than an arm of the State. Thus TRPA is described in Art. III (a) as a "separate legal entity" and in Art. VI (a) as a "political subdivision." Under the terms of the Compact, 6 of the 10 governing members of TRPA are appointed by counties and cities, and only 4 by the 2 States. n20 Funding under the [*402] Compact must be provided by the counties, not the States. n21 Finally, instead of the state treasury being directly responsible for judgments against TRPA, Art. VII (f) expressly provides that obligations of TRPA shall *not* be binding on either State.

n20 Compact, Art. III (a). In addition, 10 of the 17 members of the Advisory Planning Commission established by the Compact are to be associated with local agencies, 4 others are to be residents of the region, and only 1 is from state government. Compact, Art. III (h).

n21 Compact, Art. VII (a).

The regulation of land use is traditionally a function performed by local governments. Concern with the [***411] proper performance of that function in the bistate area was a primary motivation for the creation of TRPA itself, and gave rise to the specific controversy at issue in this litigation. Moreover, while TRPA, like cities, towns, and counties, was originally created by the States, its authority to make rules within its jurisdiction is not subject to veto at the state level. Indeed, that TRPA is not in fact an arm of the State subject to its [**1178] control is perhaps most forcefully demonstrated by the fact that California has resorted to litigation in an unsuccessful attempt to impose its will on TRPA. n22

n22 See *California v. TRPA*, 516 F.2d 215 (CA9 1975).

[***LEdHR7] [7]The intentions of Nevada and California, the terms of the Compact, and the actual operation of TRPA make clear that nothing short of an absolute rule, such as that implicit in the holding of the Court of Appeals, would allow TRPA to claim the sovereign immunity provided by the Constitution to Nevada and California. Because the Eleventh Amendment prescribes no such rule, we hold that TRPA is subject to "the judicial power of the United States" within the meaning of that Amendment. n23

n23 Because of our disposition of this question, we need not address petitioners' argument that, even assuming that TRPA might be entitled to Eleventh Amendment immunity, such protection was affirmatively waived by the compacting States. See *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275.

III

[***LEdHR2B] [2B]We turn, finally, to petitioners' challenge to the Court of Appeals' holding that the individual respondents are absolutely [*403] immune from federal damages liability for actions taken in their legislative capacities.

The immunity of legislators from civil suit for what they do or say as legislators has its roots in the parlia-

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mentary struggles of 16th- and 17th-century England; such immunity was consistently recognized in the common law and was taken as a matter of course by our Nation's founders. n24 In *Tenney v. Brandhove*, 341 U.S. 367, this Court reasoned that Congress, in enacting § 1983 as part of the Civil Rights Act of 1871, could not have intended "to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Governments here." 341 U.S., at 376. It therefore held that state legislators are absolutely immune from suit under § 1983 for actions "in the sphere of legitimate legislative activity." 341 U.S., at 376.

n24 See *Tenney v. Brandhove*, 341 U.S. 367, 372-375; *Scheuer v. Rhodes*, 416 U.S. 232, 239 n. 4; *Developments in the Law -- Section 1983 and Federalism*, 90 *Harv. L. Rev.* 1133, 1200 (1977) (legislative immunity "enjoys a unique historical position").

Petitioners do not challenge the validity of the holding in *Tenney*, or of the decisions recognizing the absolute immunity of federal legislators. n25 Rather, their claim is that absolute immunity should be limited to the federal and state levels, and should not extend to individuals acting in a legislative capacity at a [***412] regional level. In support of this proposed distinction, petitioners argue that the source of immunity for state legislators is found in constitutional provisions, such as the Speech or Debate Clause, which have no application to a body such as TRPA. In addition, they point out that because state legislatures have effective means of disciplining their members that TRPA does not have, the threat of possible [*404] personal liability is necessary to deter lawless conduct by the governing members of TRPA. n26

n25 See *Doe v. McMillan*, 412 U.S. 306; *Kilbourn v. Thompson*, 103 U.S. 168.

n26 In support of these arguments, petitioners invoke decisions of the Courts of Appeals denying absolute immunity to subordinate officials such as county supervisors and members of a park district board. *Williams v. Anderson*, 562 F.2d 1081, 1101 (CA8 1977) (school board members); *Jones v. Diamond*, 519 F.2d 1090, 1101 (CA5 1975) (county supervisors); *Curry v. Gillette*, 461 F.2d 1003, 1005 (CA6 1972), cert. denied *sub nom.* *Marsh v. Curry*, 409 U.S. 1042 (alderman); *Progress Development Corp. v. Mitchell*, 286 F.2d 222, 231 (CA7 1961) (mem-

bers of park district board and village board of trustees); *Nelson v. Knox*, 256 F.2d 312, 314-315 (CA6 1958) (city commissioners); *Cobb v. Malden*, 202 F.2d 701, 706-707 (CA1 1953) (McGruder, C. J., concurring) (city councilmen). Respondents, on the other hand, contend that in most, if not all, of the cases in which absolute immunity has been denied, the individuals were not in fact acting in a legislative capacity. We need not resolve this dispute. Whether individuals performing legislative functions at the purely local level, as opposed to the regional level, should be afforded absolute immunity from federal damages claims is a question not presented in this case.

[**1179]

[***LEdHR8] [8] [***LEdHR9] [9] We find these arguments unpersuasive. The Speech or Debate Clause of the United States Constitution n27 is no more applicable to the members of state legislatures than to the members of TRPA. The States are, of course, free to adopt similar clauses in their own constitutions, and many have in fact done so. n28 These clauses reflect the central importance attached to legislative freedom in our Nation. But the absolute immunity for state legislators recognized in *Tenney* reflected the Court's interpretation of federal law; the decision did not depend on the presence of a speech or debate clause in the constitution of any State, or on any particular set of state rules or procedures available to discipline erring legislators. Rather, the rule of that case recognizes the need for [*405] immunity to protect the "public good." As Mr. Justice Frankfurter pointed out:

"Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher v. Peck*, 6 *Cranch* 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." 341 U.S., at 377.

n27 Article I, § 6, of the United States Constitution provides in part that "for any Speech or Debate in either House, [the Senators and Repre-

440 U.S. 391, *; 99 S. Ct. 1171, **;
59 L. Ed. 2d 401, ***; 1979 U.S. LEXIS 68

sentatives] shall not be questioned in any other Place."

n28 See *Tenney v. Brandhove*, *supra*, at 375.

[***413] This reasoning is equally applicable to federal, state, and regional legislators. n29 Whatever potential damages liability regional legislators may face as a matter of state law, we hold that petitioners' federal claims do not encompass the recovery of damages from the members of TRPA acting in a legislative capacity. n30

n29 There is no allegation in this complaint that any members of TRPA's governing board profited personally from the performance of any legislative act. App. 8-12. If the respondents have enacted unconstitutional legislation, there is no reason why relief against TRPA itself should not adequately vindicate petitioners' interests. See *Monell v. New York City Dept. of Social Services*, 436 U.S. 658.

n30 This holding is supported by the analysis in *Butz v. Economou*, 438 U.S. 478, which recognized absolute immunity for individuals performing judicial and prosecutorial functions within the Department of Agriculture. In that case, we rejected the argument that absolute immunity should be denied because the individuals were employed in the Executive Branch, reasoning that "[judges] have absolute immunity not because of their particular location within the Government but because of the special nature of their responsibilities." *Id.*, at 511. This reasoning also applies to legislators.

[*406] Like the Court of Appeals, we are unable to determine from the record the extent to which petitioners seek to impose liability upon the individual respondents for the performance of their legislative duties. We agree, however, that to the extent the evidence discloses that these individuals were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damages liability.

The judgment of the Court of Appeals is reversed in part and affirmed in part.

It is so ordered.

DISSENTBY:

BRENNAN (In Part); MARSHALL (In Part); BLACKMUN (In Part)

DISSENT:

MR. JUSTICE BRENNAN, dissenting in part.

I join Part I of MR. JUSTICE BLACKMUN's opinion dissenting in part. In addition [**1180] I would not reach the question, which the Court discusses in dicta, *ante*, at 401, whether compacting States can create an agency protected by Eleventh Amendment immunity. In all other respects I join the Court's opinion.

MR. JUSTICE MARSHALL, dissenting in part.

The Court today extends absolute immunity to nonelected regional officials for their legislative acts. Because extension of such extraordinary protection is without support in either precedent or policy, I cannot join Part III of the Court's opinion.

In *Tenney v. Brandhove*, 341 U.S. 367 (1951), this Court declined to construe 42 U. S. C. § 1983 as abrogating state legislators' unqualified immunity from suits that arise out of their legislative activity. Underlying the decision in *Tenney* was a recognition of the unique status of the legislative privilege, maintained for several centuries at common law and enshrined in the Federal Constitution, Art. I, § 6, as well as in all but seven of the States' constitutions. 341 U.S., at 372-375. [***414] Absent evidence of explicit congressional intent, [*407] the Court was unwilling to strip state legislators of a protection so long enjoyed when there remained power in the voters to "[discourage] or [correct]" abuses by their elected representatives. *Id.*, at 378.

Neither of the premises on which *Tenney* rested can sustain today's holding. Immunity for appointed regional officials is without common-law antecedents or state constitutional status. Even the Compact does not purport to confer immunity on TRPA officials, and neither California nor Nevada has claimed any such intent in the briefs filed in the instant case. More significantly, none of TRPA's 10-member governing board is elected. Six are appointed by county and city governments in the area, two are appointed by the Governors of California and Nevada respectively, and two are members by virtue of their offices in state natural resource agencies. Compact, Art. III (a). Thus, no member of the board is directly accountable to the public for his legislative acts. To cloak these officials with absolute protection where control by the electorate is so attenuated subverts the very system of checks and balances that the doctrine of legislative privilege was designed to secure. Insulating appointed officials from liability, no matter how egregious their "legislative" misconduct, is unlikely to enhance the integrity of the decisional process. Nor will

public support for the outcome of such processes be fostered by a scheme placing these decisionmakers beyond constitutional constraints.

Equally troubling is the majority's refusal to confront the logical implications of its analysis. To be sure, the Court expressly reserves the question whether individuals performing legislative functions at the local level should be afforded absolute immunity from federal damages claims. *Ante*, at 404 n. 26. But the majority's reasoning in this case leaves little room to argue that municipal legislators stand on a different footing than their regional counterparts. Surely the Court's supposition that the "cost and inconvenience and distractions [*408] of a trial" will impede officials in the "uninhibited discharge of their legislative duty," *ante*, at 405, quoting *Tenney v. Brandhove*, *supra*, at 377, applies with equal force whether the officials occupy local or regional positions. Moreover, the Court implies that the test for conferring unqualified immunity is purely functional. *Ante*, at 405 n. 30. If the sole inquiry under that test is the nature of the officials' responsibilities, see *ibid.*, not the common-law and constitutional underpinnings of the privilege itself or the wisdom of extending it to nonelected officials, then presumably any appointed member of a municipal government can claim absolute protection for his legislative acts.

[**1181] A doctrine that denies redress for constitutional wrongs should, in my judgment, be narrowly confined to those contexts where history and public policy compel its acceptance. Today's decision both expands the scope of immunity beyond such limits and lays the groundwork for further extension.

I respectfully dissent.

[***415] MR. JUSTICE BLACKMUN, with whom MR. JUSTICE BRENNAN joins as to Part I, dissenting in part.

I

I cannot conclude so easily, as the Court does, *ante*, at 405-406, that the members of TRPA are absolutely immune from liability from federal claims for what ultimately may be determined to be legislative acts. Nor do I know what the Court means by a "regional legislator" -- other than its conclusion that members of TRPA are such -- or where the line is now to be drawn between a "regional legislator" and a member of a public body somewhat farther down the scale of entities in our varied political structures.

It is difficult for me to associate the members of TRPA with federal or state legislators. Their duties are not solely legislative; they possess some executive powers. They are not in equipoise with other branches of government, and the concept [*409] of separation of

powers has no relevance to them. They are not subject to the responsibility and the brake of the electoral process. And there is no provision for discipline within the body, as the Houses of Congress and the state legislatures possess.

I therefore am not now prepared to agree that the members of TRPA enjoy absolute immunity, against federal claims, for their "legislative" acts. I think they are entitled to qualified immunity within the limitations outlined in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), and *Butz v. Economou*, 438 U.S. 478 (1978). Those cases, it seems to me, set forth the guidelines appropriate for this one, and I would follow them in the present context.

II

I also do not join the Court in its flat ruling, *ante*, at 404, that the Speech or Debate Clause of our Federal Constitution, Art. I, § 6, has no application to state legislatures. That may well be, but some federal courts have ruled otherwise, *Eslinger v. Thomas*, 476 F.2d 225, 228 (CA4 1973) (holding the Clause to be applicable); *In re Grand Jury Proceedings*, 563 F.2d 577, 582-583 (CA3 1977), and *United States v. Gillock*, 587 F.2d 284, 286 (CA6 1978) (both recognizing a federal common-law speech or debate privilege for state legislators based in part on the federal Speech or Debate Clause), and the controversy on this point remains a live one. See *United States v. Craig*, 528 F.2d 773, 776 (CA7), opinion on rehearing en banc, 537 F.2d 957, cert. denied *sub nom. Markert v. United States*, 429 U.S. 999 (1976). Because the issue of application of the Clause to state legislatures (as distinguished from TRPA) is not presented here, I would not decide it with a passing fiat.

REFERENCES: Return To Full Text Opinion

72 *Am Jur 2d, States, Territories, and Dependencies* 55, 103, 104

USCS, Constitution, 11th Amendment

US L Ed Digest, Legislature 1; States 88

L Ed Index to Annos, Legislature; States

ALR Quick Index, Legislature; States

Federal Quick Index, Immunity From Prosecution; Legislature; States

Annotation References:

440 U.S. 391, *; 99 S. Ct. 1171, **;
59 L. Ed. 2d 401, ***; 1979 U.S. LEXIS 68

Supreme Court's construction of Eleventh Amendment restricting federal judicial power to entertain suits against a state. *50 L Ed 2d 928*.

Supreme Court's construction of Civil Rights Act of 1871 (*42 USCS 1983*) providing private right of action for violation of federal rights. *43 L Ed 2d 833*.

What issues will the Supreme Court consider, though not, or not properly, raised by the parties. *42 L Ed 2d 946*.

DANIEL W. LEE; and REVEREND CHARLES LEE and ELEASE LEE, individually and on behalf of ALISHA LEE and JASON CANNON, Plaintiffs, v. TROOPER P. RADULOVIC, No. 3847; TROOPER A. J. HOOP, No. 4338; TROOPER J. CREEDON, No. 4215; TROOPER M. WASHINGTON, No. 2569; TROOPER M. HINCKS, No. 4441, JOHN DOE, and RICHARD DOE, in their individual capacities, Defendants.

94 C 930

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

1994 U.S. Dist. LEXIS 9871

**July 19, 1994, Decided
July 20, 1994, Docketed**

JUDGES: [*1] Kocoras

OPINIONBY: CHARLES P. KOCORAS

OPINION:

MEMORANDUM OPINION

CHARLES P. KOCORAS, District Judge:

This matter is before the Court on two motions to dismiss: one brought by the defendants against several counts of the plaintiffs' complaint and one brought by the plaintiffs against all counts of the defendants' counterclaim. For the reasons stated below, the defendants' motion is granted in part and denied in part and the plaintiffs' motion is granted in full.

BACKGROUND

This is a civil rights and tort claim case stemming from the events of August 18, 1993. The plaintiffs are the Reverend Charles Lee ("Charles"), his wife Elease Lee ("Elease"), their son Daniel W. Lee ("Daniel"), their daughter Alisha Lee ("Alisha"), and their nephew Jason Cannon ("Jason"). All of the plaintiffs reside at a house in Dolton, Illinois. Charles is the pastor of the Way of Truth Church-Baptist. Each of the plaintiffs is African-American.

All of the named defendants are Illinois State Troopers. Troopers P. Radulovic ("Radulovic"), A.J. Hoop ("Hoop"), J. Creedon ("Creedon"), M. Washington ("Washington"), and M. Hincks ("Hincks") are named in the Complaint. Four of these named defendants are

white. There are two [*2] "Doe" defendants listed as well.

According to the plaintiffs' Complaint, Jason was driving on Interstate 94 at about 12:20 a.m. on August 18 and Daniel was a passenger in the car. Defendant Radulovic, dressed in plain clothes and driving his personal, unmarked car, allegedly cut into Jason's lane, causing Jason to brake and to flash his headlights at Radulovic's car. After Jason changed lanes, Radulovic allegedly cut him off again, and then pulled over to the side of the road. Jason passed Radulovic and exited the highway onto Sibley Avenue.

According to the Complaint, Radulovic followed Jason's car on the exit ramp and through the streets of Dolton for at least half an hour. At about 1:00 a.m., Jason drove to the family's home, parked the car on the street, and entered the house with Daniel.

About 15 minutes later, Charles was awakened by lights outside of his house. Someone ordered him out of the house. The plaintiffs allege that Radulovic was standing at the back door, pointing a gun at Charles' face, and ordering him to put his hands up and leave the house. Someone ordered the other family members out of the house also. All of the plaintiffs were in their night clothes.

The Complaint [*3] further states that the street was blocked off by at least five Illinois State Trooper cars with flashing lights. Spot lights were shone on the house, and the house was surrounded by uniformed state troopers with flashlights. According to the Complaint, one of the troopers entered the house and conducted a search without a warrant or permission. The troopers then asked

Charles about the car that Jason had been driving and told Charles that the driver had been flashing his headlights at a state trooper. One or more of the troopers then searched the car.

One of the troopers questioned Daniel inside a squad car and two troopers questioned Jason in another car. Jason was cited with improper use of flashing headlights and unauthorized operation of a motor vehicle, for driving after midnight with only a learner's permit. Daniel, who is 19, was cited for permitting an unauthorized person to drive. A trial was held on these charges on November 9, 1993. The charges were dismissed after trial.

The plaintiffs now bring this lawsuit. The nine-count Complaint alleges violations of 42 U.S.C. § 1983 based on unlawful search, excessive force, unlawful seizure, [*4] and an equal protection violation; trespass; assault by Radulovic on the highway and assault by all defendants at the home; malicious prosecution by Radulovic; and violation of the Illinois Hate Crime Statute.

The defendants move to dismiss the state law tort claims on jurisdictional grounds and move to dismiss some of the claims on the grounds that they fail to state a claim upon which relief can be granted.

The defendants have filed a four-count Counterclaim, alleging slander, abuse of process, conspiracy to commit slander, and conspiracy to commit abuse of process. The plaintiffs move to dismiss the entire Counterclaim on the grounds that it fails to state a claim. The defendants' and the plaintiffs' motions to dismiss will be discussed in turn below.

I. THE DEFENDANTS' RULE 12(b)(1) MOTION TO DISMISS

The defendants move to dismiss Counts IV, VII, and VIII for lack of subject matter jurisdiction. Each of these counts purport to state tort law claims. The defendants assert that the counts are essentially brought against the State of Illinois and thus, pursuant to statute, the Illinois Court of Claims has exclusive jurisdiction over them. See 745 ILCS 5/1; 705 ILCS 505/8. [*5]

The question of whether a claim is brought against the State turns not on the formal identification of the parties in the complaint, but rather on the issues involved and the relief sought. *Healy v. Vaupel*, 133 Ill. 2d 295, 549 N.E.2d 1240, 1247, 140 Ill. Dec. 368 (Ill. 1990) (citing cases). When the issue involves the conduct of a State employee, the nature of the complained-of conduct must be analyzed. *Currie v. Lao*, 148 Ill. 2d 151, 592 N.E.2d 977, 982, 170 Ill. Dec. 297 (Ill. 1992). Where the employee's actions occurred by virtue of his State employment, sovereign immunity will bar the claims in fora other than the Court of Claims. *Id.* However, sovereign

immunity will not apply where the complaint alleges that the State employee acted beyond his authority or in violation of statutory or constitutional law. *Healy*, 549 N.E.2d at 1247. We will apply these principles to each of the three tort law counts.

Count IV alleges trespass by all defendants, based on their actions of entering Charles and Eleasa's [*6] home and vehicle. Paragraphs incorporated by reference into Count IV allege that the searches of the home and vehicle were unconstitutional in light of the Fourth Amendment, as applied to the states via the Fourteenth Amendment. See PP 33-39. Thus, Count IV alleges that the defendants violated constitutional law, and therefore, based on the Healy rule set forth above, we find that sovereign immunity is not a bar to this action in federal court.

We now turn to Count VII, which alleges assault by Radulovic against Daniel and Jason, based on Radulovic's alleged actions of following the plaintiffs' vehicle and cutting in front of the plaintiffs' vehicle. Plaintiffs argue that the result of *Currie v. Lao*, *supra*, controls here. In *Currie*, the plaintiff alleged that a state trooper's negligent driving caused him personal injuries and damage to his vehicle. The Court held that sovereign immunity did not bar the suit in the circuit court, because the duty to use due care while driving is a duty owed to others generally and did not stem from the trooper's State employment. *Currie*, 592 N.E.2d at 981. [*7]

In the instant case, Trooper Radulovic is not charged with negligence; thus, the duty analysis from *Currie* is not applicable. We will instead examine the tests set forth in *Healy*. Three tests are used to determine whether sovereign immunity applies: (1) does the complaint allege that the State employee acted beyond the scope of his authority by committing wrongful acts? (2) does the complaint allege that the State employee acted in violation of statutory or constitutional law? and (3) were the complained-of actions outside of the employee's normal and official job functions? *Healy*, 549 N.E.2d at 1247, citing *Robb v. Sutton*, 147 Ill. App. 3d 710, 498 N.E.2d 267, 101 Ill. Dec. 85 (Ill. App. Ct. 1986). Where some or all of these questions are answered in the affirmative, sovereign immunity will not bar an action outside of the Court of Claims.

While following cars is a part of a state trooper's normal job duties, the allegations of the Complaint state that Radulovic was driving his own vehicle which did not bear markings indicating that he was a state trooper. [*8] He was off-duty at the time of the alleged chase, was not wearing a uniform and, according to the Complaint, gave no indication to the driver or passenger that he was a state trooper. Further, the complaint alleges that Radulovic's conduct was "without legal justification or

authority." P 64. We conclude that Count VII, as pled, may be brought in this Court. We will analyze below whether this Count states a cause of action.

Finally, Count VIII alleges that all defendants committed assault against the plaintiffs. This count is devoid of detail, but we presume that it refers to actions at the house. The Complaint in other paragraphs alleges that Radulovic pointed a gun at Charles' face and that, "at all times, at least one of the troopers had a gun in his hand." PP 20, 23. As to this count, we answer the Healy tests in the negative. The troopers other than Radulovic were on duty, in full uniform, and driving marked state trooper cars. P 22. According to the Complaint, they were responding to an "officer needs assistance" call. P 18. Responding to a call for assistance while on duty is part of a trooper's normal job duties and the acts alleged were not, of themselves, wrongful. Therefore, [*9] we conclude that sovereign immunity bars the maintenance of this count here and that the Illinois Court of Claims has exclusive jurisdiction over the cause of action alleged in this Court. For this reason, Count VIII is dismissed.

In summary, we have concluded that we have subject matter jurisdiction over two of the challenged counts, Counts IV and VII, but lack jurisdiction over Count VIII. For this reason, Count VIII is dismissed. We now turn to the defendants' motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim.

II. THE DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS

The defendants seek the dismissal of Counts II, IV, V, VI, and VII of the Complaint, arguing that these counts fail to state a claim upon which relief can be granted. Before examining the defendants' arguments, we consider the legal standard to be applied to Rule 12(b)(6) motions.

The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the sufficiency of the complaint, not to decide the merits of the case. Defendants must meet a high standard to have a complaint dismissed for failure to state a claim upon which relief may be granted since, in ruling on a motion to dismiss, the [*10] court must construe the complaint's allegations in the light most favorable to the plaintiff. *Ed Miniati, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732, 733 (7th Cir. 1986), cert. denied, 482 U.S. 915, 96 L. Ed. 2d 676, 107 S. Ct. 3188 (1987). All well-pleaded facts and allegations in the plaintiff's complaint must be taken as true. *Id.* Dismissal is improper under the "notice pleading" standard of the Federal Rules of Civil Procedure "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78

S. Ct. 99 (1957). However, to withstand a motion to dismiss, a complaint must allege facts sufficiently setting forth the essential elements of the cause of action. *Gray v. County of Dane*, 854 F.2d 179, 182 (7th Cir. 1988). We turn to the motion before us with these principles in mind.

We will first examine Count II, an excessive force claim. Defendants urge that it should [*11] be dismissed because it merely states in conclusory fashion that the defendants used excessive force, without identifying what force was used. Defendants cite *East v. City of Chicago*, 719 F. Supp. 683 (N.D. Ill. 1989) for the proposition that mere conclusions will not suffice for this type of claim. *Id.* at 689.

While it is true that Count II is devoid of any mention of forceful actions, it is also true that Count II incorporates by reference all of the previous paragraphs of the Complaint. One of those previous paragraphs alleges that Radulovic pointed a gun at Charles' face. See P 20. The act of pointing a gun at an unarmed person can be an act of excessive force when that individual is not under arrest or suspected of a crime. See *McDonald v. Haskins*, 966 F.2d 292, 294 (7th Cir. 1992). Charles was not placed under arrest and there are no allegations that he was suspected of a crime. Thus, under the analysis from *McDonald*, Charles may have a claim. Therefore, Count II will not be dismissed.

Count IV purports to allege a trespass. Trespass is defined as entry onto another's land without [*12] permission. Defendants challenge this count on the grounds that their actions in this case were privileged and thus, did not constitute a trespass. An officer's entry onto another's land may be privileged if the officer is exercising his lawful authority in a reasonable manner. *Downs v. United States*, 522 F.2d 990, 1003 (6th Cir. 1975); *Restatement (Second) of Torts* § 265.

Here, plaintiffs have alleged a prima facie case of trespass. See P 53. Thus, the count will not be dismissed unless it is clear that the defendants' actions were privileged and thus, that the plaintiffs could prove no set of facts entitling them to relief. See *Conley*, 355 U.S. at 45-46. The plaintiffs have alleged that one of the defendants, without a warrant or permission, entered the Lee home. P 23. Taking this as true, as we are required to do, would defeat the defendants' claim of privilege. Moreover, the claim of privilege is in the nature of an affirmative defense, and thus, the defendants bear the burden of proof on it. They cannot succeed in having this claim dismissed by merely alleging that their acts were [*13] privileged. For these reasons, we will not dismiss Count IV.

It is appropriate to now consider Count VII and set aside for the moment Counts V and VI. Count VII, styled

assault, alleges that Radulovic's actions while driving placed Daniel and Jason in reasonable apprehension of immediate harm. Radulovic urges that the acts alleged -- cutting in front of the plaintiffs' vehicle and following the plaintiffs' vehicle -- cannot constitute an assault. Radulovic offers no precedent for such a rule, and we do not believe that such a broad rule is warranted. Keeping in mind the liberality of notice pleading in federal court, which dictates that a complaint should not be dismissed "unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley*, 355 U.S. at 45-46, we find that Count VII should not be dismissed.

We now turn to Count V, which alleges that the defendants violated the Illinois Hate Crimes Statute, 720 ILCS 5/12-7.1. As an initial matter, we note that the statute expressly provides a private right of action to any person suffering personal [*14] injury or property damage as a result of a hate crime, irrespective of any criminal prosecution. *Id.* at 5/12-7.1(c). The statute defines certain other crimes as hate crimes if they are committed because of another's race or color (or other protected characteristics not implicated in this case). Among the underlying crimes are criminal assault and criminal trespass to real property. *Id.* at 5/12-7.1(a).

Defendants argue that the plaintiffs' Complaint fails to state causes of action for criminal assault and criminal trespass and therefore, fails to state a claim for hate crimes based on those crimes. It is true that the viability of this count is tied to the viability of the counts alleging assault and trespass. Although we dismissed one of the assault counts (Count VIII), the assault count against Radulovic (Count VII) and the trespass count (Count IV) remain viable. n1 The plaintiffs have alleged both the requisite underlying offenses and racial animus; thus, they have stated a prima facie case and we will not dismiss Count V in its entirety. However, because of our decision to dismiss Count VIII, the scope of Count V must be pared down. Accordingly, we will dismiss the portion [*15] of Count V concerning assault as to all defendants except Radulovic.

n1 We note, of course, that the plaintiffs allege tortious assault and trespass, not criminal assault and trespass.

Finally, we reach Count VI, which purports to state a section 1983 claim grounded on a denial of equal protection. Defendants urge that we dismiss this Count, because it fails to allege that the plaintiffs were treated differently from similarly situated individuals. Such an allegation is a sine qua non of an equal protection claim. See *McCrimmon v. Kane County*, 606 F. Supp. 216, 220

(N.D. Ill. 1985). As the Seventh Circuit has stated, "the gravamen of equal protection lies not in the fact of deprivation of a right but in the invidious classification of persons aggrieved by the State's action." *Briscoe v. Kuser*, 435 F.2d 1046, 1052 (7th Cir. 1970). Without an allegation of deliberate disparate treatment, a plaintiff fails to state an equal protection claim. *McCrimmon*, 606 F. Supp. at 220. [*16]

We agree with the defendants that the Complaint here fails to allege intentional disparate treatment, and accordingly, we must dismiss Count VI. In reaching this conclusion, we considered the cases cited by the plaintiffs, *Bohen v. East Chicago*, 799 F.2d 1180 (7th Cir. 1986), and *O'Leary v. Luongo*, 692 F. Supp. 893 (N.D. Ill. 1988). Those cases hold that a plaintiff "need not prove a discriminatory policy against an entire class; discrimination against the plaintiff because of her membership in the class is [sufficient]." *Bohen*, 799 F.2d at 1187. However, the cases do not excuse a plaintiff from pleading that he was treated differently from similarly situated persons or classes of persons. In fact, the case we cited above, *McCrimmon*, recognizes that "an individual . . . may constitute a 'class' of one for equal protection purposes." *McCrimmon*, 606 F. Supp. at 220. Thus, the cases cited by the plaintiffs are not inconsistent with the case upon which we rely. Count VI is dismissed.

We determined above that Count VIII is not within our subject matter jurisdiction; [*17] thus, it must be dismissed and no discussion of it under Rule 12(b)(6) standards is necessary or appropriate.

In sum, we determined in Section I above that we lack subject matter jurisdiction over Count VIII and accordingly, that count is dismissed. Because we are dismissing Count VIII, we must dismiss the portion of Count V concerning assault as to all defendants except Radulovic. We also concluded that Count VI fails to state a claim upon which relief can be granted. Accordingly, we dismiss these counts.

III. THE PLAINTIFFS' MOTION TO DISMISS THE DEFENDANTS' COUNTERCLAIMS

The second motion we evaluate today is the plaintiffs' motion to dismiss the defendants' four counterclaims. The counterclaims allege defamation, abuse of process, conspiracy to commit defamation, and conspiracy to commit abuse of process. We will first examine the defamation claim.

In Count I, defendant Hoop alleges that Jason Cannon and Daniel Lee told David Walker their version of the events of August 18, 1993 and Hoop's role therein. See Counterclaim (hereinafter "CC") Count I P 2. Hoop further alleges that the statements were false, that they constituted an attack on his ability to perform his job,

[*18] and that they were made for the purpose of injuring his reputation and employment status. CC Count I PP 4, 5. Hoop alleges that the statements were made intentionally, willfully, wantonly, and maliciously. CC Count I PP 2, 8.

Plaintiffs move to dismiss this counterclaim on several grounds. First, they urge that Hoop was required to plead actual malice and failed to do so. We agree. Public officials must prove actual malice to recover for defamation. *New York Times v. Sullivan*, 376 U.S. 254, 280, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964). A police officer is a public official. *Reed v. Northwestern Publishing Co.*, 124 Ill. 2d 495, 530 N.E.2d 474, 480, 125 Ill. Dec. 316 (Ill. 1988), cert. denied, 489 U.S. 1067, 103 L. Ed. 2d 813, 109 S. Ct. 1344 (1989). Thus, Trooper Hoop is a public official and must plead actual malice. Actual malice is defined as knowledge on the part of the speaker that the statement is false or reckless disregard for the truth or falsity of the statement. *New York Times*, 376 U.S. at 280. [*19]

In evaluating Hoop's claim, we note that nowhere does he allege that Cannon and Lee knew that the statements were false or that they acted with reckless disregard for the truth or falsity of their statements to Walker. Merely alleging that the speaker's action was willful, wanton, and malicious is insufficient to plead actual malice. *Vantassell-Matin v. Nelson*, 741 F. Supp. 698, 706 (N.D. Ill. 1990). Instead, the complainant must plead specific facts from which the inference of actual malice can be drawn. *American Pet Motels, Inc. v. Chicago Veterinary Medical Ass'n*, 106 Ill. App. 3d 626, 435 N.E.2d 1297, 1302, 62 Ill. Dec. 325 (Ill. App. Ct. 1982). Here, Hoop has failed to do so and thus, has failed to state a claim for defamation. n2 Accordingly, we dismiss Count I of the Counterclaim.

n2 Hoop cites *Colson v. Stieg*, 86 Ill. App. 3d 993, 408 N.E.2d 431, 42 Ill. Dec. 53 (Ill. App. Ct. 1980). However, his allegations are insufficient even under the standard applied there, as made clear in the Illinois Supreme Court opinion in the case. See *Colson v. Stieg*, 89 Ill. 2d 205, 433 N.E.2d 246, 60 Ill. Dec. 449 (Ill. 1982). There, the Court held that as a minimum, the complaint must allege that the statement was false and that the speaker knew of the falsity or acted with reckless disregard for the truth or falsity of the statement. *Id.* at 250.

[*20]

Count III alleges a conspiracy to defame Hoop. Since the underlying defamation claim has been dis-

missed, this count also fails. See *Illinois Traffic Court Driver Improv. Educ. Found. v. Peoria Journal Star, Inc.*, 144 Ill. App. 3d 555, 494 N.E.2d 939, 944, 98 Ill. Dec. 817 (Ill. App. Ct. 1986). Accordingly, we dismiss Count III.

We now turn to Count II, which alleges abuse of process. In this count, Hoop alleges that Cannon and the Lees commenced this action against him and obtained a summons maliciously and without proper cause, for the purpose of injuring Hoop's reputation. CC Count III PP 2, 3. Plaintiffs move to dismiss this count for failure to state a cause of action.

Plaintiffs cite *Evans v. West*, 935 F.2d 922 (7th Cir. 1991), which states that an abuse of process claim requires both "an ulterior purpose or motive for the use of regular court process" and "an act in the use of process not proper in the regular prosecution of a suit." *Id.* at 923, quoting *McGrew v. Heinold Commodities, Inc.*, 147 Ill. App. 3d 104, 497 N.E.2d 424, 429, 100 Ill. Dec. 446 (Ill. App. Ct. 1986). [*21] The "mere institution of proceedings does not in and of itself constitute abuse of process." *Id.*, quoting *Withall v. Capitol Federal Savings of America*, 155 Ill. App. 3d 537, 508 N.E.2d 363, 368, 108 Ill. Dec. 202 (Ill. App. Ct. 1987) (further citations omitted). Hoop makes no response to the plaintiffs' arguments. We find that the plaintiffs have correctly stated the law and that under the law, Count II is deficient and should be dismissed. Moreover, in this instance, Hoop's complete failure to respond to the plaintiffs' attacks on Count II amounts to a concession of their validity. For these reasons, we dismiss Count II of the Counterclaim.

Count IV must also be dismissed. It alleges a conspiracy to abuse process. Since abuse of process was not adequately pled, neither is the conspiracy to abuse process adequately pled. Accordingly, we dismiss Count IV of the Counterclaim as well.

For the reasons stated above, all four counts of the Counterclaim must be dismissed.

CONCLUSION

For the reasons stated above, the defendants' motion to dismiss is granted in part and denied in part. Specifically, Counts VI, VIII, and the [*22] portion of Count V concerning assault as to all defendants except Radulovic, are dismissed. The plaintiffs' motion to dismiss the Counterclaim is granted.

Charles P. Kocoras

United States District Judge

Dated: July 19, 1994

OWEN v. CITY OF INDEPENDENCE, MISSOURI, ET AL.

No. 78-1779

SUPREME COURT OF THE UNITED STATES

445 U.S. 622; 100 S. Ct. 1398; 63 L. Ed. 2d 673; 1980 U.S. LEXIS 14

January 8, 1980, Argued

April 16, 1980, Decided

SUBSEQUENT HISTORY:

Petition for Rehearing Denied June 2, 1980.

PRIOR HISTORY:

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

DISPOSITION:

589 F.2d 335, reversed.

DECISION:

Municipalities sued under *42 USCS 1983*, held not entitled to qualified immunity from liability by asserting good faith of municipal officials as defense to 1983 violation.

SUMMARY:

Following the passage of a motion by the city council of Independence, Missouri, that the reports of an investigation of the city's police department be released to the news media and turned over to a prosecutor for presentation to the grand jury, and that the city manager take action against persons involved in illegal, wrongful, or inefficient activities brought out in the investigative reports, the city manager discharged the city's chief of police, giving no reason for the dismissal, but merely sending the chief a notice stating that his employment was terminated under the provisions of the city's charter giving the city manager sole authority to remove city employees "when deemed necessary for the good of the service." The discharged police chief then brought an action in the United States District Court for the Western District of Missouri under *42 USCS 1983* for violation of federally protected rights, naming as defendants the City of Independence, the city manager who had discharged him, and the members of the city council in their official

capacities, and alleging that he had been discharged without notice of reasons and without a hearing in violation of his constitutional rights to procedural and substantive due process under the Fourteenth Amendment. The District Court entered judgment for the defendants (*421 F Supp 1110*), and ultimately, the United States Court of Appeals for the Eighth Circuit affirmed, ruling that even though the discharged police chief's constitutional rights had been infringed in violation of *42 USCS 1983*, all of the defendants were entitled to immunity from liability, including the city, since its officials acted in good faith and without malice (*589 F2d 335*).

On certiorari, the United States Supreme Court reversed. In an opinion by Brennan, J., joined by White, Marshall, Blackmun, and Stevens, JJ., it was held that in view of the developments of the common law surrounding the immunity of municipalities from suit, the history surrounding *42 USCS 1983*, and considerations of public policy, a municipality which is sued under *42 USCS 1983* for violation of federally protected rights is not entitled to qualified immunity from liability by asserting the good faith of municipal officials as a defense to the violation.

Powell, J., joined by Burger, Ch. J., and Stewart and Rehnquist, JJ., dissenting, expressed the view that interpreting *42 USCS 1983* to impose strict liability on municipalities for constitutional violations was not supported by the language of 1983 and conflicted with the intent of its drafters, with the common law of municipal tort liability, and with the current state law of municipal immunities.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]
RIGHTS § 12.5

municipality -- qualified immunity -- good faith of municipal officials as defense --

Headnote:[1A][1B][1C]

In an action brought against a municipality under *42 USCS 1983* for depriving a person of federally protected rights, the municipality is not entitled to qualified immunity from liability by asserting the good faith of its officers or agents as a defense to liability under 1983. (Powell, J., Burger, Ch. J., Stewart, J., and Rehnquist, J., dissented from this holding.)

[***LEdHN2]

LAW § 745

due process -- deprivation of liberty -- city's discharge of police chief --

Headnote:[2A][2B]

An individual employed by a city as its police chief is deprived of liberty without due process of law by the city when the city, through the unanimous resolution of its council, releases to the public an allegedly false statement impugning the individual's honesty and integrity, and then discharges the individual the next day after twice refusing the individual's request that he be given written specifications of the charges against him and an opportunity to clear his name. (Powell, J., Burger, Ch. J., Stewart, J., and Rehnquist, J., dissented from this holding.)

[***LEdHN3]

STATUTES § 164

civil rights law -- municipality's immunity -- law's language as starting point --

Headnote:[3]

The starting point in analyzing whether a municipality is entitled to immunity from liability under *42 USCS 1983* for violating a person's federally protected rights is the language of 1983 itself.

[***LEdHN4]

COURTS § 909

governing law -- defenses of municipality -- federal right of action --

Headnote:[4A][4B]

Defenses by a municipality to a federal right of action, including a municipality's assertion of sovereign immunity as a defense, are controlled by federal law, rather than state law.

[***LEdHN5]

CORPORATIONS § 17

discretion -- violation of Federal Constitution --

Headnote:[5]

A municipality has no discretion to violate the Federal Constitution, the dictates of which are absolute and imperative.

[***LEdHN6]

RIGHTS § 12.5

action against municipality -- court's approach --

Headnote:[6]

When a court passes judgment on the conduct of a municipality in an action brought under *42 USCS 1983* for violation of federally protected rights, the court does not seek to second-guess the reasonableness of the municipality's decision nor to interfere with the local government's resolution of competing policy considerations, but rather, the court looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes; when there is a substantial showing that the exertion of state power has overridden private rights secured by the Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression.

SYLLABUS:

After the City Council of respondent city moved that reports of an investigation of the city police department be released to the news media and turned over to the prosecutor for presentation to the grand jury and that the City Manager take appropriate action against the persons involved in the wrongful activities brought out in the investigative reports, the City Manager discharged petitioner from his position as Chief of Police. No reason was given for the dismissal and petitioner received only a written notice stating that the dismissal was made pursuant to a specified provision of the city charter. Subsequently, petitioner brought suit in Federal District Court under *42 U. S. C. § 1983* against the city, the respondent City Manager, and the respondent members of the City Council in their official capacities, alleging that he was discharged without notice of reasons and without a hearing in violation of his constitutional rights to procedural and substantive due process, and seeking declaratory and injunctive relief. The District Court, after a bench trial, entered judgment for respondents. The Court of Appeals ultimately affirmed, holding that although the city had violated petitioner's rights under the Fourteenth Amendment, nevertheless all the respondents, including the city, were entitled to qualified immunity from liability based on the good faith of the city officials involved.

Held: A municipality has no immunity from liability under § 1983 flowing from its constitutional violations and may not assert the good faith of its officers as a defense to such liability. Pp. 635-658.

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(a) By its terms, § 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler v. Pachtman*, 424 U.S. 409, 417. Its language is absolute and unqualified, and no mention is made of any privileges, immunities, or defenses that may be asserted. Rather, the statute imposes liability upon "every person" (held in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, to encompass municipal corporations) who, under color of state law or custom, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." And this expansive sweep of § 1983's language is confirmed by its legislative history. Pp. 635-636.

(b) Where an immunity was well established at common law and where its rationale was compatible with the purposes of § 1983, the statute has been construed to incorporate that immunity. But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify the qualified immunity accorded respondent city by the Court of Appeals. Pp. 637-644.

(c) The application and rationale underlying both the doctrine whereby a municipality was held immune from tort liability with respect to its "governmental" functions but not for its "proprietary" functions, and the doctrine whereby a municipality was immunized for its "discretionary" or "legislative" activities but not for those which were "ministerial" in nature, demonstrate that neither of these common-law doctrines could have been intended to limit a municipality's liability under § 1983. The principle of sovereign immunity from which a municipality's immunity for "governmental" functions derives cannot serve as the basis for the qualified privilege respondent city claims under § 1983, since sovereign immunity insulates a municipality from unconsented suits altogether, the presence or absence of good faith being irrelevant, and since the municipality's "governmental" immunity is abrogated by the sovereign's enactment of a statute such as § 1983 making it amenable to suit. And the doctrine granting a municipality immunity for "discretionary" functions, which doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality, cannot serve as the foundation for a good-faith immunity under § 1983, since a municipality has no "discretion" to violate the Federal Constitution. Pp. 644-650.

(d) Rejection of a construction of § 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations is compelled both by the purpose of § 1983 to provide protection to those persons wronged by the abuse of governmental authority and to deter future constitutional violations, and by considerations of public policy. In view of the qualified

immunity enjoyed by most government officials, many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. The concerns that justified decisions conferring qualified immunities on various government officials -- the injustice, particularly in the absence of bad faith, of subjecting the official to liability, and the danger that the threat of such liability would deter the official's willingness to execute his office effectively -- are less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue. Pp. 650-656.

COUNSEL:

Irving Achtenberg argued the cause for petitioner. With him on the briefs was David Achtenberg.

Richard G. Carlisle argued the cause and filed a brief for respondents. *

* Briefs of amici curiae urging reversal were filed by Bruce J. Ennis, Oscar G. Chase, and Nancy Stearns for the American Civil Liberties Union et al.; and by Michael H. Gottesman, Robert M. Weinberg, David Rubin, William E. Caldwell, John B. Jones, Jr., Norman Redlich, William L. Robinson, and Norman Chachkin for the National Education Association et al.

JUDGES:

BRENNAN, J., delivered the opinion of the Court, in which WHITE, MARSHALL, BLACKMUN, and STEVENS, JJ., joined. POWELL, J., filed a dissenting opinion, in which BURGER, C. J., and STEWART and REHNQUIST, JJ., joined, post, p. 658.

OPINION BY:

BRENNAN

OPINION:

[*624] [***677] [**1402] MR. JUSTICE BRENNAN delivered the opinion of the Court.

Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), overruled *Monroe v. Pape*, 365 U.S. 167 (1961), insofar as *Monroe* held that local governments were not among the "persons" to whom 42 U. S. C. § 1983 applies and were therefore wholly immune from suit under the statute. n1 *Monell* reserved decision, however, on the question whether local governments, although not entitled to an absolute immunity, should be afforded some form of official immunity in § 1983 suits. 436 U.S., at 701. In this action brought by petitioner in the District Court for the Western District of Missouri,

the Court of Appeals for the Eighth Circuit held that respondent city of Independence, Mo., "is entitled to qualified immunity from liability" based on the good faith [*625] of its officials: "We extend the limited immunity the district court applied to the individual defendants to cover the City as well, because its officials acted in good faith and without malice." *589 F.2d 335, 337-338 (1978)*. We granted certiorari. *444 U.S. 822 (1979)*. We reverse.

n1 Title 42 U. S. C. § 1983 provides:

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

I

The events giving rise to this suit are detailed in the District Court's findings of fact, *421 F.Supp. 1110 (1976)*. On February 20, 1967, Robert L. Broucek, then City Manager of respondent city of Independence, Mo., appointed petitioner George D. Owen to an indefinite term as Chief of Police. n2 In 1972, Owen and a new City Manager, Lyle W. Alberg, engaged in a dispute over petitioner's administration of the Police Department's property room. In March of that year, a handgun, which the records of the Department's property room stated had been destroyed, turned up in Kansas City in the possession of a felon. This discovery prompted Alberg to initiate an investigation of the management of the property room. Although the probe was initially directed [***678] by petitioner, Alberg soon transferred responsibility for the investigation to the city's Department of Law, instructing the City Counselor to supervise its conduct and to inform him directly of its findings.

n2 Under § 3.3(1) of the city's charter, the City Manager has sole authority to "[appoint,] and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all directors, or heads, of administrative departments and all other administrative officers and employees of the city. . . ."

Sometime in early April 1972, Alberg received a written report on the investigation's progress, along with copies of confidential witness statements. Although the

City Auditor found that the Police Department's records were insufficient to permit an adequate accounting of the goods contained in the property room, the City Counselor concluded that there was no evidence of any criminal acts or of any violation of [*626] state or municipal law in the administration of the property room. Alberg discussed the results of the investigation at an informal meeting with several City Council members and advised them that he would take action at an appropriate time to correct any problems in the administration of the Police Department.

On April 10, Alberg asked petitioner to resign as Chief of Police and to accept [**1403] another position within the Department, citing dissatisfaction with the manner in which petitioner had managed the Department, particularly his inadequate supervision of the property room. Alberg warned that if petitioner refused to take another position in the Department his employment would be terminated, to which petitioner responded that he did not intend to resign.

On April 13, Alberg issued a public statement addressed to the Mayor and the City Council concerning the results of the investigation. After referring to "discrepancies" found in the administration, handling, and security of public property, the release concluded that "[there] appears to be no evidence to substantiate any allegations of a criminal nature" and offered assurances that "[steps] have been initiated on an administrative level to correct these discrepancies." *Id., at 1115*. Although Alberg apparently had decided by this time to replace petitioner as Police Chief, he took no formal action to that end and left for a brief vacation without informing the City Council of his decision. n3

n3 Alberg returned from his vacation on the morning of April 17, and immediately met informally with four members of the City Council. Although the investigation of the Police Department was discussed, and although Alberg testified that he had found a replacement for petitioner by that time, he did not inform the Council members of his intention to discharge petitioner.

While Alberg was away on the weekend of April 15 and 16, two developments occurred. Petitioner, having consulted with counsel, sent Alberg a letter demanding written notice of the charges against him and a public hearing with a reasonable [*627] opportunity to respond to those charges. n4 At approximately the same [***679] time, City Councilman Paul L. Roberts asked for a copy of the investigative report on the Police Department property room. Although petitioner's appeal received no immediate response, the Acting City Man-

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ager complied with Roberts' request and supplied him with the audit report and witness statements.

n4 The letter, dated April 15, 1972, stated in part:

"My counsel . . . have advised me that even though the City Charter may give you authority to relieve me, they also say you cannot do so without granting me my constitutional rights of due process, which includes a written charge and specifications, together with a right to a public hearing and to be represented by counsel and to cross-examine those who may appear against me.

....

"In spite of your recent investigation and your public statement given to the public press, your relief and discharge of me without a full public hearing upon written charges will leave in the minds of the public and those who might desire to have my services, a stigma of personal wrongdoing on my part.

"Such action by you would be in violation of my civil rights as granted by the Constitution and Congress of the United States and you would be liable in damages to me. Further it would be in violation of the Missouri Administrative Procedure Act.

"May I have an expression from you that you do not intend to relieve me or in the alternative give me a written charge and specifications of your basis for your grounds of intention to relieve me and to grant me a public hearing with a reasonable opportunity to respond to the charge and a right to be represented by counsel."

City Manager Alberg stated that he did not receive the letter until after petitioner's discharge.

On the evening of April 17, 1972, the City Council held its regularly scheduled meeting. After completion of the planned agenda, Councilman Roberts read a statement he had prepared on the investigation. n5 [**1404] Among other allegations, [*628] Roberts charged that petitioner had misappropriated Police Department property for his own use, that narcotics and money had "mysteriously disappeared" from his office, that traffic tickets had been manipulated, that high ranking police officials had made "inappropriate" requests affecting the police court, and that "things have occurred causing the unusual release of felons." At the close of his statement, Roberts moved that the investigative reports be released to the news media and turned over to the

prosecutor for presentation to the grand jury, and that the City Manager "take all direct [*629] and appropriate action" against those persons "involved in illegal, wrongful, or gross inefficient activities brought out in the investigative [***680] reports." After some discussion, the City Council passed Roberts' motion with no dissents and one abstention. n6

n5 Roberts' statement, which is reproduced in full in *421 F.Supp. 1110, 1116, n. 2 (1976)*, in part recited:

"On April 2, 1972, the City Council was notified of the existence of an investigative report concerning the activities of the Chief of Police of the City of Independence, certain police officers and activities of one or more other City officials. On Saturday, April 15th for the first time I was able to see these 27 voluminous reports. The contents of these reports are astoundingly shocking and virtually unbelievable. They deal with the disappearance of 2 or more television sets from the police department and signed statement that they were taken by the Chief of Police for his own personal use.

"The reports show that numerous firearms properly in the police department custody found their way into the hands of others including undesirables and were later found by other law enforcement agencies.

"Reports whow [sic] that narcotics held by the Independence Missouri Chief of Police have mysteriously disappeared. Reports also indicate money has mysteriously disappeared. Reports show that traffic tickets have been manipulated. The reports show inappropriate requests affecting the police court have come from high ranking police officials. Reports indicate that things have occurred causing the unusual release of felons. The reports show gross inefficiencies on the part of a few of the high ranking officers of the police department.

"In view of the contents of these reports, I feel that the information in the reports backed up by signed statements taken by investigators is so bad that the council should immediately make available to the news media access to copies of all of these 27 voluminous investigative reports so the public can be told what has been going on in Independence. I further believe that copies of these reports should be turned over and referred to the prosecuting attorney of Jackson County, Missouri for consideration and presentation to the

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next Grand Jury. I further insist that the City Manager immediately take direct and appropriate action, permitted under the Charter, against such persons as are shown by the investigation to have been involved."

n6 Ironically, the official minutes of the City Council meeting indicate that concern was expressed by some members about possible adverse legal consequences that could flow from their release of the reports to the media. The City Counselor assured the Council that although an action might be maintained against any witnesses who made unfounded accusations, "the City does have governmental immunity in this area . . . and neither the Council nor the City as a municipal corporation can be held liable for libelous slander." App. 20-23.

City Manager Alberg discharged petitioner the very next day. Petitioner was not given any reason for his dismissal; he received only a written notice stating that his employment as Chief of Police was "[terminated] under the provisions of Section 3.3 (1) of the City Charter." n7 Petitioner's earlier demand for a specification of charges and a public hearing was ignored, and a subsequent request by his attorney for an appeal of the discharge decision was denied by the city on the grounds that "there is no appellate procedure or forum provided by the Charter or ordinances of the City of Independence, Missouri, relating to the dismissal of Mr. Owen." App. 26-27.

n7 See n. 2, *supra*.

The local press gave prominent coverage both to the City Council's action and petitioner's dismissal, linking the discharge to the investigation. n8 As instructed by the City Council, Alberg referred the investigative reports and witness statements to the Prosecuting Attorney of Jackson County, Mo., [*630] for consideration by a grand jury. The results of the audit and investigation were never released to the public, however. The grand jury subsequently returned a "no true bill," and no further action was taken by either the City Council or City Manager Alberg.

n8 The investigation and its culmination in petitioner's firing received front-page attention in the local press. See, e. g., "Lid Off Probe, Coun-

cil Seeks Action," Independence Examiner, Apr. 18, 1972, Tr. 24-25; "Independence Accusation. Police Probe Demanded," Kansas City Times, Apr. 18, 1972, Tr. 25; "Probe Culminates in Chief's Dismissal," Independence Examiner, Apr. 19, 1972, Tr. 26; "Police Probe Continues; Chief Ousted," Community Observer, Apr. 20, 1972, Tr. 26.

II

Petitioner named the city of Independence, City Manager Alberg, and the present members of the City Council in their official [**1405] capacities as defendants in this suit. n9 Alleging that he was discharged without notice of reasons and without a hearing in violation of his constitutional rights to procedural and substantive due process, petitioner sought declaratory and injunctive relief, including a hearing on his discharge, backpay from the date of discharge, and attorney's fees. The District Court, after a bench trial, entered judgment for respondents. 421 F.Supp. 1110 (1976). n10

n9 Petitioner did not join former Councilman Roberts in the instant litigation. A separate action seeking defamation damages was brought in state court against Roberts and Alberg in their individual capacities. Petitioner dismissed the state suit against Alberg and reached a financial settlement with Roberts. See 560 F.2d 925, 930 (CA8 1977).

n10 The District Court, relying on *Monroe v. Pape*, 365 U.S. 167 (1961), and *City of Kenosha v. Bruno*, 412 U.S. 507 (1973), held that § 1983 did not create a cause of action against the city, but that petitioner could base his claim for relief directly on the Fourteenth Amendment. On the merits, however, the court determined that petitioner's discharge did not deprive him of any constitutionally protected property interest because, as an untenured employee, he possessed neither a contractual nor a *de facto* right to continued employment as Chief of Police. Similarly, the court found that the circumstances of petitioner's dismissal did not impose a stigma of illegal or immoral conduct on his professional reputation, and hence did not deprive him of any liberty interest.

The District Court offered three reasons to support its conclusion: First, because the actual discharge notice stated only that petitioner was "[terminated] under the provisions of Section 3.3 (1) of the City Charter," nothing in his official record imputed any stigmatizing conduct to him.

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Second, the court found that the City Council's actions had no causal connection to petitioner's discharge, for City Manager Alberg had apparently made his decision to hire a new Police Chief before the Council's April 17th meeting. Lastly, the District Court determined that petitioner was "completely exonerated" from any charges of illegal or immoral conduct by the City Counselor's investigative report, Alberg's public statements, and the grand jury's return of a "no true bill." 421 F.Supp., at 1121-1122.

As an alternative ground for denying relief, the District Court ruled that the city was entitled to assert, and had in fact established, a qualified immunity against liability based on the good faith of the individual defendants who acted as its agents: "[Defendants] have clearly shown by a preponderance of the evidence that neither they, nor their predecessors, were aware in April 1972, that, under the circumstances, the Fourteenth Amendment accorded plaintiff the procedural rights of notice and a hearing at the time of his discharge. Defendants have further proven that they cannot reasonably be charged with constructive notice of such rights since plaintiff was discharged prior to the publication of the Supreme Court decisions in *Roth v. Board of Regents*, [408 U.S. 564 (1972)], and *Perry v. Sindermann*, [408 U.S. 593 (1972)]." *Id.*, at 1123.

[*631] The [***681] Court of Appeals initially reversed the District Court. 560 F.2d 925 (1977). n11 Although it agreed with the District Court that under Missouri law petitioner possessed no property interest in continued employment as Police Chief, the Court of Appeals concluded that the city's allegedly false public accusations had blackened petitioner's name and reputation, thus depriving him of liberty without due process of law. That the stigmatizing charges did not come from the City Manager and were not included in the official discharge notice was, in the court's view, immaterial. What was important, [*632] the court explained, was that "the official actions of the city council released charges against [petitioner] contemporaneous and, in the eyes of the public, connected with that discharge." *Id.*, at 937. n12

n11 Both parties had appealed from the District Court's decision. On respondents' challenge to the court's assumption of subject-matter jurisdiction under 28 U. S. C. § 1331, the Court of Appeals held that the city was subject to suit for reinstatement and backpay under an implied right

of action arising directly from the Fourteenth Amendment. 560 F.2d, at 932-934. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). Because the Court of Appeals concluded that petitioner's claim could rest directly on the Fourteenth Amendment, it saw no need to decide whether he could recover backpay under § 1983 from the individual defendants in their official capacities as part of general equitable relief, even though the award would be paid by the city. 560 F.2d, at 932.

n12 As compensation for the denial of his constitutional rights, the Court of Appeals awarded petitioner damages in lieu of backpay. The court explained that petitioner's termination without a hearing must be considered a nullity, and that ordinarily he ought to remain on the payroll and receive wages until a hearing is held and a proper determination on his retention is made. But because petitioner had reached the mandatory retirement age during the course of the litigation, he could not be reinstated to his former position. Thus the compensatory award was to be measured by the amount of money petitioner would likely have earned to retirement had he not been deprived of his good name by the city's actions, subject to mitigation by the amounts actually earned, as well as by the recovery from Councilman Roberts in the state defamation suit.

The Court of Appeals rejected the municipality's assertion of a good-faith defense, relying upon a footnote in *Wood v. Strickland*, 420 U.S. 308, 314-315, n. 6 (1975) ("immunity from damages does not ordinarily bar equitable relief as well"), and two of its own precedents awarding backpay in § 1983 actions against school boards. See *Wellner v. Minnesota State Jr. College Bd.*, 487 F.2d 153 (CA8 1973); *Cooley v. Board of Educ. of Forrest City School Dist.*, 453 F.2d 282 (CA8 1972). The court concluded that the primary justification for a qualified immunity -- the fear that public officials might hesitate to discharge their duties if faced with the prospect of personal monetary liability -- simply did not exist where the relief would be borne by a governmental unit rather than the individual officeholder. In addition, the Court of Appeals seemed to take issue with the District Court's finding of good faith on the part of the City Council: "The city officials may have acted in good faith in refusing the hearing, but lack of good faith is evidenced by the nature of the unfair attack made upon the appellant

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by Roberts in the official conduct of the City's business. The District Court did not address the good faith defense in light of Roberts' defamatory remarks." 560 F.2d, at 941.

[**1406] Respondents [***682] petitioned for review of the Court of Appeals' decision. Certiorari was granted, and the case was remanded for further consideration in light of our supervening decision in

[***LEdHR1A] [1A] *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978). 438 U.S. 902 (1978). The Court of Appeals [*633] on the remand reaffirmed its original determination that the city had violated petitioner's rights under the Fourteenth Amendment, but held that all respondents, including the city, were entitled to qualified immunity from liability. 589 F.2d 335 (1978).

[***LEdHR2A] [2A] *Monell* held that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." 436 U.S., at 694. The Court of Appeals held in the instant case that the municipality's official policy was responsible for the deprivation of petitioner's constitutional rights: "[The] stigma attached to [petitioner] in connection with his discharge was caused by the official conduct of the City's lawmakers, or by those whose acts may fairly be said to represent official policy. Such conduct amounted to official policy causing the infringement of [petitioner's] constitutional rights, in violation of section 1983." 589 F.2d, at 337. n13

[***LEdHR2B] [2B]

n13 Although respondents did not cross petition on this issue, they have raised a belated challenge to the Court of Appeals' ruling that petitioner was deprived of a protected "liberty" interest. See Brief for Respondents 45-46. We find no merit in their contention, however, and decline to disturb the determination of the court below.

Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971), held that "[where] a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." In *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972), we explained that the dismissal of a

government employee accompanied by a "charge against him that might seriously damage his standing and associations in his community" would qualify as something "the government is doing to him," so as to trigger the due process right to a hearing at which the employee could refute the charges and publicly clear his name. In the present case, the city -- through the unanimous resolution of the City Council -- released to the public an allegedly false statement impugning petitioner's honesty and integrity. Petitioner was discharged the next day. The Council's accusations received extensive coverage in the press, and even if they did not in point of fact "cause" petitioner's discharge, the defamatory and stigmatizing charges certainly "[occurred] in the course of the termination of employment." Cf. *Paul v. Davis*, 424 U.S. 693, 710 (1976). Yet the city twice refused petitioner's request that he be given written specification of the charges against him and an opportunity to clear his name. Under the circumstances, we have no doubt that the Court of Appeals correctly concluded that the city's actions deprived petitioner of liberty without due process of law.

[*634] [**1407] [***683] Nevertheless, the Court of Appeals affirmed the judgment of the District Court denying petitioner any relief against the respondent city, stating:

"The Supreme Court's decisions in *Board of Regents v. Roth*, 408 U.S. 564 . . . (1972), and *Perry v. Sindermann*, 408 U.S. 593 . . . (1972), crystallized the rule establishing the right to a name-clearing hearing for a government employee allegedly stigmatized in the course of his discharge. The Court decided those two cases two months after the discharge in the instant case. Thus, officials of the City of Independence could not have been aware of [petitioner's] right to a name-clearing hearing in connection with the discharge. The City of Independence should not be charged with predicting the future course of constitutional law. We extend the limited immunity the district court applied to the individual defendants to cover the City as well, because its officials acted in good faith and without malice. We hold the City not liable for actions it could not reasonably have known violated [petitioner's] constitutional rights." *Id.*, at 338 (footnote and citations omitted). n14

[*635] We turn now to the reasons for our disagreement with this holding. n15

n14 Cf. *Wood v. Strickland*, 420 U.S. 308, 322 (1975) ("Therefore, in the specific context of

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school discipline, we hold that a school board member is not immune from liability for damages under § 1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student").

n15 The Courts of Appeals are divided on the question whether local governmental units are entitled to a qualified immunity based on the good faith of their officials. Compare *Bertot v. School Dist. No. 1*, 613 F.2d 245 (CA10 1979) (en banc), *Hostrop v. Board of Junior College Dist. No. 515*, 523 F.2d 569 (CA7 1975), and *Hander v. San Jacinto Jr. College*, 519 F.2d 273 (CA5), rehearing denied, 522 F.2d 204 (1975), all refusing to extend a qualified immunity to the governmental entity, with *Paxman v. Campbell*, 612 F.2d 848 (CA4 1980) (en banc), and *Sala v. County of Suffolk*, 604 F.2d 207 (CA2 1979), granting defendants a "good-faith" immunity.

III

[***LEdHR3] [3]Because the question of the scope of a municipality's immunity from liability under § 1983 is essentially one of statutory construction, see *Wood v. Strickland*, 420 U.S. 308, 314, 316 (1975); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), the starting point in our analysis must be the language of the statute itself. *Andrus v. Allard*, 444 U.S. 51, 56 (1979); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) [***684] (POWELL, J., concurring). By its terms, § 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976). Its language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted. Rather, the Act imposes liability upon "every person" who, under color of state law or custom, "subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." n16 And *Monell* held that these words were intended to encompass municipal corporations as well as natural "persons."

n16 See n. 1, *supra*.

[**1408] Moreover, the congressional debates surrounding the passage of § 1 of the Civil Rights Act of 1871, 17 Stat. 13 -- the forerunner of § 1983 -- confirm

the expansive sweep of the statutory [*636] language. Representative Shellabarger, the author and manager of the bill in the House, explained in his introductory remarks the breadth of construction that the Act was to receive:

"I have a single remark to make in regard to the rule of interpretation of those provisions of the Constitution under which all the sections of the bill are framed. This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people." Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871) (hereinafter Globe App.).

Similar views of the Act's broad remedy for violations of federally protected rights were voiced by its supporters in both Houses of Congress. See *Monell v. New York City Dept. of Social Services*, 436 U.S., at 683-687. n17

n17 As we noted in *Monell v. New York City Dept. of Social Services*, see 436 U.S., at 685-686, n. 45, even the opponents of § 1 acknowledged that its language conferred upon the federal courts the entire power that Congress possessed to remedy constitutional violations. The remarks of Senator Thurman are illustrative:

"[This section's] whole effect is to give to the Federal Judiciary that which now does not belong to it -- a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it. It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal courts, and that without any limit whatsoever as to the amount in controversy. . . .

. . . .

". . . That is the language of this bill. Whether it is the intent or not I know not, but it is the language of the bill; for there is no limitation

whatsoever upon the terms that are employed, and they are as comprehensive as can be used." Globe App. 216-217.

[*637] However, notwithstanding § 1983's expansive language and the absence [***685] of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that "Congress would have specifically so provided had it wished to abolish the doctrine." *Pierson v. Ray*, 386 U.S. 547, 555 (1967). Thus in *Tenney v. Brandhove*, *supra*, after tracing the development of an absolute legislative privilege from its source in 16th-century England to its inclusion in the Federal and State Constitutions, we concluded that Congress "would [not] impinge on a tradition so well grounded in history and reason by covert inclusion in the general language" of § 1983. 341 U.S., at 376.

Subsequent cases have required that we consider the personal liability of various other types of government officials. Noting that "[few] doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction," *Pierson v. Ray*, *supra*, at 553-554, held that the absolute immunity traditionally accorded judges was preserved under § 1983. In that same case, local police officers were held to enjoy a "good faith and probable cause" defense to § 1983 suits similar to that which existed in false arrest actions at common law. 386 U.S., at 555-557. Several more recent decisions have found immunities of varying scope appropriate for different state and local officials sued under § 1983. See *Procunier v. Navarette*, 434 U.S. 555 [**1409] (1978) (qualified immunity [*638] for prison officials and officers); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity for prosecutors in initiating and presenting the State's case); *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (qualified immunity for superintendent of state hospital); *Wood v. Strickland*, 420 U.S. 308 (1975) (qualified immunity for local school board members); *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (qualified "good-faith" immunity for state Governor and other executive officers for discretionary acts performed in the course of official conduct).

[***LEdHR1B] [1B]In each of these cases, our finding of § 1983 immunity "was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler v. Pachtman*, *supra*, at 421. 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. But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify the qualified immunity accorded the city of Independence by the Court of Appeals. We hold, therefore, that the municipality may not assert the good faith of its officers [***686] or agents as a defense to liability under § 1983. n18

n18 The governmental immunity at issue in the present case differs significantly from the official immunities involved in our previous decisions. In those cases, various government officers had been sued in their individual capacities, and the immunity served to insulate them from personal liability for damages. Here, in contrast, only the liability of the municipality itself is at issue, not that of its officers, and in the absence of an immunity, any recovery would come from public funds.

A

Since colonial times, a distinct feature of our Nation's system of governance has been the conferral of political power upon public and municipal corporations for the management of matters of local concern. As *Monell* recounted, by 1871, [*639] municipalities -- like private corporations -- were treated as natural persons for virtually all purposes of constitutional and statutory analysis. In particular, they were routinely sued in both federal and state courts. See 436 U.S., at 687-688. Cf. *Cowles v. Mercer County*, 7 Wall. 118 (1869). Local governmental units were regularly held to answer in damages for a wide range of statutory and constitutional violations, as well as for common-law actions for breach of contract. n19 And although, as we [**1410] discuss below, n20 a municipality [*640] was not subject to suit for all manner of tortious conduct, it is clear that at the time § 1983 was enacted, local governmental bodies did not enjoy the sort of "good-faith" qualified immunity extended to them by the Court of Appeals.

n19 Primary among the constitutional suits heard in federal court were those based on a municipality's violation of the Contract Clause, and the courts' enforcement efforts often included "various forms of 'positive' relief, such as ordering that taxes be levied and collected to discharge federal-court judgments, once a constitutional infraction was found." *Monell v. New York City Dept. of Social Services*, 436 U.S., at 681. Damages actions against municipalities for federal

statutory violations were also entertained. See, e. g., *Levy Court v. Coroner*, 2 Wall. 501 (1865); *Corporation of New York v. Ransom*, 23 How. 487 (1860); *Bliss v. Brooklyn*, 3 F. Cas. 706 (No. 1,544) (CC EDNY 1871). In addition, state constitutions and statutes, as well as municipal charters, imposed many obligations upon the local governments, the violation of which typically gave rise to damages actions against the city. See generally Note, *Streets, Change of Grade, Liability of Cities for*, 30 Am. St. Rep. 835 (1893), and cases cited therein. With respect to authorized contracts -- and even unauthorized contracts that are later ratified by the corporation -- municipalities were liable in the same manner as individuals for their breaches. See generally 1 J. Dillon, *Law of Municipal Corporations* § § 385, 394 (2d ed. 1873) (hereinafter Dillon). Of particular relevance to the instant case, included within the class of contract actions brought against a city were those for the wrongful discharge of a municipal employee, and where the claim was adjudged meritorious, damages in the nature of backpay were regularly awarded. See, e. g., *Richardson v. School Dist. No. 10*, 38 Vt. 602 (1866); *Paul v. School Dist. No. 2*, 28 Vt. 575 (1856); *Inhabitants of Searsmont v. Farwell*, 3 Me. *450 (1825); see generally F. Burke, *A Treatise on the Law of Public Schools* 81-85 (1880). The most frequently litigated "breach of contract" suits, however, at least in federal court, were those for failure to pay interest on municipal bonds. See, e. g., *The Supervisors v. Durant*, 9 Wall. 415 (1870); *Commissioners of Knox County v. Aspinwall*, 21 How. 539 (1859).

n20 See *infra*, at 644-650.

As a general rule, it was understood that a municipality's tort liability in damages was identical to that of private corporations and individuals:

"There is nothing in the character of a municipal corporation [***687] which entitles it to an immunity from liability for such malfeasances as private corporations or individuals would be liable for in a civil action. A municipal corporation is liable to the same extent as an individual for any act done by the express authority of the corporation, or of a branch of its government, empowered to act for it upon the subject to which the particular act relates, and for any act which, after it has been done, has been lawfully ratified by the corporation." T. Shearman & A. Redfield, *A Treatise on the Law of Neg-*

ligence § 120, p. 139 (1869) (hereinafter *Shearman & Redfield*).

Accord, 2 Dillon § 764, at 875 ("But as respects *municipal corporations proper*, . . . it is, we think, universally considered, even in the absence of statute giving the action, that they are liable for acts of *misfeasance* positively injurious to individuals, done by their authorized agents or officers, in the course of the performance of corporate powers constitutionally conferred, or in the execution of corporate duties") (emphasis in original). See 18 E. McQuillin, *Municipal Corporations* § 53.02 (3d rev. ed. 1977) (hereinafter *McQuillin*). Under this general theory of liability, a municipality was deemed responsible for any private losses generated through a wide variety of its operations and functions, from personal injuries due to its defective sewers, thoroughfares, and public utilities, to property damage caused by its trespasses and uncompensated takings. n21

n21 See generally C. Rhyne, *Municipal Law* 729-789 (1957); *Shearman & Redfield* § § 143-152; W. Williams, *Liability of Municipal Corporations for Tort* (1901) (hereinafter *Williams*).

[*641] Yet in the hundreds of cases from that era awarding damages against municipal governments for wrongs committed by them, one searches in vain for much mention of a qualified immunity based on the good faith of municipal officers. Indeed, where the issue was discussed at all, the courts had rejected the proposition that a municipality should be privileged where it reasonably believed its actions to be lawful. In the leading case of *Thayer v. Boston*, 36 Mass. 511, 515-516 (1837), for example, Chief Justice Shaw explained:

"There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done, whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the acts thus done."

[**1411] The *Thayer* principle was later reiterated by courts in several jurisdictions, [***688] and numerous

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decisions awarded damages against municipalities for violations expressly found to have been committed in good faith. See, e. g., *Town Council of Akron v. McComb*, 18 Ohio 229, 230-231 (1849); *Horton v. Inhabitants of Ipswich*, 66 Mass. 488, 489, 492 (1853); *Elliot v. Concord*, 27 N. H. 204 (1853); *Hurley v. Town of Texas*, 20 Wis. 634, 637-638 (1866); *Lee v. Village of Sandy Hill*, 40 N. Y. [*642] 442, 448-451 (1869); *Billings v. Worcester*, 102 Mass. 329, 332-333 (1869); *Squiers v. Village of Neenah*, 24 Wis. 588, 593 (1869); *Hawks v. Charlemont*, 107 Mass. 414, 417-418 (1871).
n22

n22 Accord, *Bunker v. City of Hudson*, 122 Wis. 43, 54, 99 N. W. 448, 452 (1904); *Oklahoma City v. Hill Bros.*, 6 Okla. 114, 137-139, 50 P. 242, 249-250 (1897); *Schussler v. Board of Comm'rs of Hennepin County*, 67 Minn. 412, 417, 70 N. W. 6, 7 (1897); *McGraw v. Town of Marion*, 98 Ky. 673, 680-683, 34 S. W. 18, 20-21 (1896). See generally Note, Liability of Cities for the Negligence and Other Misconduct of their Officers and Agents, 30 Am. St. Rep. 376, 405-411 (1893).

Even in England, where the doctrine of official immunity followed by the American courts was first established, no immunity was granted where the damages award was to come from the public treasury. As Baron Bramwell stated in *Ruck v. Williams*, 3 H. & N. 308, 320, 157 Eng. Rep. 488, 493 (Exch. 1858):

"I can well understand if a person undertakes the office or duty of a Commissioner, and there are no means of indemnifying him against the consequences of a slip, it is reasonable to hold that he should not be responsible for it. I can also understand that, if one of several Commissioners does something not within the scope of his authority, the Commissioners as a body are not liable. But where Commissioners, who are a quasi corporate body, are not affected [*i. e.*, personally] by the result of an action, inasmuch as they are authorized by act of parliament to raise a fund for payment of the damages, on what principle is it that, if an individual member of the public suffers from an act bona fide but erroneously done, he is not to be compensated? It seems to me inconsistent with actual justice, and not warranted by any principle of law."

See generally Shearman & Redfield § § 133, 178.

That municipal corporations were commonly held liable for damages in tort was also recognized by the 42d Congress. See *Monell v. New York City Dept. of Social Services*, 436 U.S., at 688. For example, Senator Stevenson, in opposing the Sherman amendment's creation of a municipal liability for the riotous acts of its inhabitants, stated the prevailing law: "Numberless cases are to be found where a statutory liability has been created against municipal corporations for injuries resulting from a neglect of corporate duty." Cong. [*643] Globe, 42d Cong., 1st Sess., 762 (hereinafter Globe). n23 Nowhere in the debates, however, is there a suggestion that the common law excused a city from liability on account of the good faith of its authorized agents, much less an indication of a congressional intent to incorporate such an immunity into the [***689] Civil Rights Act. n24 The absence of any allusion to a municipal immunity assumes added significance in light of the objections [**1412] raised by the opponents of § 1 of the Act that its unqualified language could be interpreted to abolish the traditional good-faith immunities enjoyed by legislators, judges, governors, sheriffs, and other public officers. n25 Had [*644] there been a similar common-law immunity for municipalities, the bill's opponents doubtless would have raised the specter of its destruction, as well.

n23 Senator Stevenson proceeded to read from the decision in *Prather v. Lexington*, 52 Ky. 559, 560-562 (1852):

"Where a particular act, operating injuriously to an individual, is authorized by a municipal corporation, by a delegation of power either general or special, it will be liable for the injury in its corporate capacity, where the acts done would warrant a like action against an individual. But as a general rule a corporation is not responsible for the unauthorized and unlawful acts of its officers, although done under the color of their office; to render it liable it must appear that it expressly authorized the acts to be done by them, or that they were done in pursuance of a general authority to act for the corporation, on the subject to which they relate. (*Thayer v. Boston*, 19 Pick., 511.) It has also been held that cities are responsible to the same extent, and in the same manner, as natural persons for injuries occasioned by the negligence or unskillfulness of their agents in the construction of works for their benefit." Globe 762.

n24 At one point in the debates, Senator Stevenson did protest that the Sherman amendment would, for the first time, "create a corporate liability for personal injury which no prudence or foresight could have prevented." *Ibid.* As his later remarks made clear, however, Stevenson's objection went only to the novelty of the amendment's creation of vicarious municipal liability for the unlawful acts of private individuals, "even if a municipality did not know of an impending or ensuing riot or did not have the wherewithal to do anything about it." *Monell v. New York City Dept. of Social Services*, 436 U.S., at 692-693, n. 57.

n25 See, e. g., Globe 365 (remarks of Rep. Arthur) ("But if the Legislature enacts a law, if the Governor enforces it, if the judge upon the bench renders a judgment, if the sheriff levy an execution, execute a writ, serve a summons, or make an arrest, all acting under a solemn, official oath, though as pure in duty as a saint and as immaculate as a seraph, for a mere error in judgment, they are liable. . ."); *id.*, at 385 (remarks of Rep. Lewis); Globe App. 217 (remarks of Sen. Thurman).

To be sure, there were two doctrines that afforded municipal corporations some measure of protection from tort liability. The first sought to distinguish between a municipality's "governmental" and "proprietary" functions; as to the former, the city was held immune, whereas in its exercise of the latter, the city was held to the same standards of liability as any private corporation. The second doctrine immunized a municipality for its "discretionary" or "legislative" activities, but not for those which were "ministerial" in nature. A brief examination of the application and the rationale underlying each of these doctrines demonstrates that Congress could not have intended them to limit a municipality's liability under § 1983.

The governmental-proprietary distinction n26 owed its existence to the dual nature of the municipal corporation. On [*645] the one hand, the municipality was a corporate body, capable of performing the same "proprietary" functions as any private corporation, and liable for its torts in the same manner and to the same extent, as well. On the other hand, the municipality was an arm of the State, and when acting in that "governmental" or "public" capacity, it shared the immunity traditionally [***690] accorded the sovereign. n27 But the principle of sovereign immunity -- itself a somewhat arid fountainhead for municipal immunity n28 -- is [**1413] necessarily nullified when the [*646] State expressly or impliedly allows itself, or its creation, to be sued. Municipalities were therefore liable not only for their "pro-

proprietary" acts, but also for those "governmental" functions as to which the State had withdrawn their immunity. And, by the end of the 19th century, courts regularly held that in imposing a specific duty on the municipality either in its charter or by statute, the State had impliedly withdrawn the city's immunity from liability for the nonperformance or misperformance of its obligation. See, e. g., *Weightman v. The Corporation of Washington*, 1 Black 39, 50-52 (1862); *Providence v. Clapp*, 17 How. 161, 167-169 (1855). See generally Shearman & Redfield § § 122-126; Note, Liability of Cities for the [***691] Negligence and Other Misconduct of their Officers and Agents, 30 Am. St. Rep. 376, 385 (1893). Thus, despite the nominal existence of an immunity for "governmental" functions, municipalities were found [*647] liable in damages in a multitude of cases involving such activities.

n26 In actuality, the distinction between a municipality's governmental and proprietary functions is better characterized not as a line, but as a succession of points. In efforts to avoid the often-harsh results occasioned by a literal application of the test, courts frequently created highly artificial and elusive distinctions of their own. The result was that the very same activity might be considered "governmental" in one jurisdiction, and "proprietary" in another. See 18 McQuillin § 53.02, at 105. See also W. Prosser, Law of Torts § 131, p. 979 (4th ed. 1971) (hereinafter Prosser). As this Court stated, in reference to the "nongovernmental-'governmental' quagmire that has long plagued the law of municipal corporations":

"A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound." *Indian Towing Co. v. United States*, 350 U.S. 61, 65 (1955) (on rehearing).

n27 "While acting in their governmental capacity, municipal corporations proper are given the benefit of that same rule which is applied to the sovereign power itself, and are afforded complete immunity from civil responsibility for acts done or omitted, unless such responsibility is expressly created by statute. When, however, they are not acting in the exercise of their purely governmental functions, but are performing duties

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that pertain to the exercise of those private franchises, powers, and privileges which belong to them for their own corporate benefit, or are dealing with property held by them for their own corporate gain or emolument, then a different rule of liability is applied and they are generally held responsible for injuries arising from their negligent acts or their omissions to the same extent as a private corporation under like circumstances." Williams § 4, at 9. See generally 18 McQuillin § 53.02, 53.04, 53.24; Prosser § 131, at 977-983; James, Tort Liability of Governmental Units and Their Officers, 22 *U. Chi. L. Rev.* 610, 611-612, 622-629 (1955).

n28 Although it has never been understood how the doctrine of sovereign immunity came to be adopted in the American democracy, it apparently stems from the personal immunity of the English Monarch as expressed in the maxim, "The King can do no wrong." It has been suggested, however, that the meaning traditionally ascribed to this phrase is an ironic perversion of its original intent: "The maxim merely meant that the King was not privileged to do wrong. If his acts were against the law, they were *injuriae* (wrongs). Bracton, while ambiguous in his several statements as to the relation between the King and the law, did not intend to convey the idea that he was incapable of committing a legal wrong." Borchard, Government Liability in Tort, 34 *Yale L. J.* 1, 2, n. 2 (1924). See also Kates & Kouba, Liability of Public Entities Under Section 1983 of the Civil Rights Act, 45 *S. Cal. L. Rev.* 131, 142 (1972).

In this country, "[the] sovereign or governmental immunity doctrine, holding that the state, its subdivisions and municipal entities, may not be held liable for tortious acts, was never completely accepted by the courts, its underlying principle being deemed contrary to the basic concept of the law of torts that liability follows negligence, as well as foreign to the spirit of the constitutional guarantee that every person is entitled to a legal remedy for injuries he may receive in his person or property. As a result, the trend of judicial decisions was always to restrict, rather than to expand, the doctrine of municipal immunity." 18 McQuillin § 53.02, at 104 (footnotes omitted). See also Prosser § 131, at 984 ("For well over a century the immunity of both the state and the local governments for their torts has been subjected to vigorous criticism, which at length has begun to have its effect"). The seminal opinion of the Florida Supreme Court in *Hargrove v.*

Town of Cocoa Beach, 96 So. 2d 130 (1957), has spawned "a minor avalanche of decisions repudiating municipal immunity," Prosser § 131, at 985, which, in conjunction with legislative abrogation of sovereign immunity, has resulted in the consequence that only a handful of States still cling to the old common-law rule of immunity for governmental functions. See K. Davis, Administrative Law of the Seventies § 25.00 (1976 and Supp. 1977) (only two States adhere to the traditional common-law immunity from torts in the exercise of governmental functions); Harley & Wasinger, Government Immunity: Despotism or Creature of Necessity, 16 *Washburn L. J.* 12, 34-53 (1976).

[***LEdHR4A] [4A] That the municipality's common-law immunity for "governmental" functions derives from the principle of sovereign immunity also explains why that doctrine could not have served as the basis for the qualified privilege respondent city claims under § 1983. First, because sovereign immunity insulates the municipality from unconsented suits altogether, the presence or absence of good faith is simply irrelevant. The critical issue is whether injury occurred while the city was exercising governmental, as opposed to proprietary, powers or obligations -- not whether its agents reasonably believed they were acting lawfully in so conducting themselves. n29 More fundamentally, however, the municipality's "governmental" immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit. Section 1983 was just such a statute. By including municipalities within the class of "persons" subject to liability for violations of the Federal Constitution and laws, Congress -- the supreme sovereign on matters of federal law n30 -- abolished whatever vestige [*648] of the [**1414] State's sovereign immunity the municipality possessed.

n29 The common-law immunity for governmental functions is thus more comparable to an absolute immunity from liability for conduct of a certain character, which defeats a suit at the outset, than to a qualified immunity, which "depends upon the circumstances and motivations of [the official's] actions, as established by the evidence at trial." *Imbler v. Pachtman*, 424 U.S. 409, 419, n. 13 (1976).

[***LEdHR4B] [4B]

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n30 Municipal defenses -- including an assertion of sovereign immunity -- to a federal right of action are, of course, controlled by federal law. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455-456 (1976); *Hampton v. Chicago*, 484 F.2d 602, 607 (CA7 1973) (Stevens, J.) ("Conduct by persons acting under color of state law which is wrongful under 42 U. S. C. § 1983 or § 1985 (3) cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the supremacy clause of the Constitution insures that the proper construction may be enforced").

The second common-law distinction between municipal functions -- that protecting the city from suits challenging "discretionary" decisions -- was grounded not on the principle of sovereign immunity, but on a concern for separation of powers. A large part of the municipality's responsibilities involved broad discretionary decisions on issues of public policy -- decisions that affected large numbers of persons and called for a delicate balancing of competing considerations. For a court or jury, in the guise of a tort suit, to review the reasonableness of the city's judgment on these matters would be an infringement upon the powers properly vested in a coordinate and coequal branch of government. See *Johnson v. State*, 69 Cal. 2d 782, 794, n. 8, 447 P. 2d 352, 361, n. 8 (1968) (en banc) ("Immunity for 'discretionary' activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government"). In order to ensure against any invasion into the legitimate sphere of the municipality's policymaking processes, courts therefore [***692] refused to entertain suits against the city "either for the non-exercise of, or for the manner in which in good faith it exercises, *discretionary powers* of a public or legislative character." 2 Dillon § 753, at 862. n31

n31 See generally 18 McQuillin § 53.04a; Shearman & Redfield § § 127-130; Williams § 6, at 15-16. Like the governmental/proprietary distinction, a clear line between the municipality's "discretionary" and "ministerial" functions was often hard to discern, a difficulty which has been mirrored in the federal courts' attempts to draw a similar distinction under the Federal Tort Claims Act, 28 U. S. C. § 2680(a). See generally 3 K. Davis, Administrative Law Treatise § 25.08 (1958 and Supp. 1970).

Although many, if not all, of a municipality's activities would seem to involve at least some measure of discretion, the influence of this doctrine on the city's liability was not as significant as might be expected. For just as the courts [*649] implied an exception to the municipality's immunity for its "governmental" functions, here, too, a distinction was made that had the effect of subjecting the city to liability for much of its tortious conduct. While the city retained its immunity for decisions as to whether the public interest required acting in one manner or another, once any particular decision was made, the city was fully liable for any injuries incurred in the execution of its judgment. See, e. g., *Hill v. Boston*, 122 Mass. 344, 358-359 (1877) (dicta) (municipality would be immune from liability for damages resulting from its decision where to construct sewers, since that involved a discretionary judgment as to the general public interest; but city would be liable for neglect in the construction or repair of any particular sewer, as such activity is ministerial in nature). See generally C. Rhyne, Municipal Law § 30.4, pp. 736-737 (1957); Williams § 7. Thus municipalities remained liable in damages for a broad range of conduct implementing their discretionary decisions.

[***LEdHR5] [5] [***LEdHR6] [6]Once again, an understanding of the rationale underlying the common-law immunity for "discretionary" functions explains why that doctrine cannot serve as the foundation for a good-faith immunity under § 1983. That common-law doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to [**1415] second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes. As was stated in *Sterling v. Constantin*, 287 U.S. 378, 398 (1932): "When there is a substantial showing that the exertion of state power has [*650] overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression."

In sum, we can discern no "tradition so well grounded in history and reason" that would warrant the conclusion that in enacting § 1 of the [***693] Civil Rights Act, the 42d Congress *sub silentio* extended to municipalities a qualified immunity based on the good faith of their officers. Absent any clearer indication that Congress intended so to limit the reach of a statute ex-

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pressly designed to provide a "broad remedy for violations of federally protected civil rights," *Monell v. New York City Dept. of Social Services*, 436 U.S., at 685, we are unwilling to suppose that injuries occasioned by a municipality's unconstitutional conduct were not also meant to be fully redressable through its sweep. n32

n32 Cf. P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart and Wechsler's The Federal Courts and the Federal System* 336 (2d ed. 1973) ("[Where] constitutional rights are at stake the courts are properly astute, in construing statutes, to avoid the conclusion that Congress intended to use the privilege of immunity . . . in order to defeat them").

B

Our rejection of a construction of § 1983 that would accord municipalities a qualified immunity for their good-faith constitutional violations is compelled both by the legislative purpose in enacting the statute and by considerations of public policy. The central aim of the Civil Rights Act was to provide protection to those persons wronged by the "[misuse] of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *Monroe v. Pape*, 365 U.S., at 184 (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)). By creating an express federal remedy, Congress sought to "enforce provisions of the Fourteenth Amendment against those [*651] who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." *Monroe v. Pape*, *supra*, at 172.

How "uniquely amiss" it would be, therefore, if the government itself -- "the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct" -- were permitted to disavow liability for the injury it has begotten. See *Adickes v. Kress & Co.*, 398 U.S. 144, 190 (1970) (opinion of BRENNAN, J.). A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed. Yet owing to the qualified immunity enjoyed by most government officials, see *Scheuer v. Rhodes*, 416 U.S. 232 (1974), many victims of municipal malfeasance would be left remediless if the city were also allowed to assert a good-faith defense. Unless countervailing considerations counsel otherwise, the injustice of such a result should not be tolerated. n33

n33 The absence of any damages remedy for violations of all but the most "clearly established" constitutional rights, see *Wood v. Strickland*, 420 U.S., at 322, could also have the deleterious effect of freezing constitutional law in its current state of development, for without a meaningful remedy aggrieved individuals will have little incentive to seek vindication of those constitutional deprivations that have not previously been clearly defined.

[**694] [**1416] Moreover, § 1983 was intended not only to provide compensation to the victims of past abuses, but to serve as a deterrent against future constitutional deprivations, as well. See *Robertson v. Wegmann*, 436 U.S. 584, 590-591 (1978); *Carey v. Phipps*, 435 U.S. 247, 256-257 (1978). The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create [*652] an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. n34 Furthermore, the threat that damages might be levied against the city may encourage those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. n35 Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith. Cf. Note, *Developments in the Law: Section 1983 and Federalism*, 90 *Harv. L. Rev.* 1133, 1218-1219 (1977). n36

n34 For example, given the discussion that preceded the Independence City Council's adoption of the allegedly slanderous resolution impugning petitioner's integrity, see n. 6, *supra*, one must wonder whether this entire litigation would have been necessary had the Council members thought that the city might be liable for their misconduct.

n35 Cf. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975): "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that [provides] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to elimi-

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nate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' *United States v. N. L. Industries, Inc.*, 479 F.2d 354, 379 (CA8 1973)."

n36 In addition, the threat of liability against the city ought to increase the attentiveness with which officials at the higher levels of government supervise the conduct of their subordinates. The need to institute systemwide measures in order to increase the vigilance with which otherwise indifferent municipal officials protect citizens' constitutional rights is, of course, particularly acute where the frontline officers are judgment-proof in their individual capacities.

Our previous decisions conferring qualified immunities on various government officials, see *supra*, at 637-638, are not to [*653] be read as derogating the significance of the societal interest in compensating the innocent victims of governmental misconduct. Rather, in each case we concluded that overriding considerations of public policy nonetheless demanded that the official be given a measure of protection from personal liability. The concerns that justified those decisions, however, are less compelling, if not wholly inapplicable, when the liability of the municipal entity is at issue. n37

n37 On at least two previous occasions, this Court has expressly recognized that different considerations come into play when governmental rather than personal liability is threatened. *Hutto v. Finney*, 437 U.S. 678 (1978), affirmed an award of attorney's fees out of state funds for a deprivation of constitutional rights, holding that such an assessment would not contravene the Eleventh Amendment. In response to the suggestion, adopted by the dissent, that any award should be borne by the government officials personally, the Court noted that such an allocation would not only be "manifestly unfair," but would "[defy] this Court's insistence in a related context that imposing personal liability in the absence of bad faith may cause state officers to 'exercise their discretion with undue timidity.' *Wood v. Strickland*, 420 U.S. 308, 321." *Id.*, at 699, n. 32. The Court thus acknowledged that imposing personal liability on public officials could have an undue chilling effect on the exercise of their decision-making responsibilities, but that no such pernicious consequences were likely to flow from the possibility of a recovery from public funds.

Our decision in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391

(1979), also recognized that the justifications for immunizing officials from personal liability have little force when suit is brought against the governmental entity itself. Petitioners in that case had sought damages under § 1983 from a regional planning agency and the individual members of its governing agency. Relying on *Tenney v. Brandhove*, 341 U.S. 367 (1951), the Court concluded that "to the extent the evidence discloses that these individuals were acting in a capacity comparable to that of members of a state legislature, they are entitled to absolute immunity from federal damages liability." 440 U.S., at 406. At the same time, however, we cautioned: "If the respondents have enacted unconstitutional legislation, there is no reason why relief against TRPA itself should not adequately vindicate petitioners' interests. See *Monell v. New York City Dept. of Social Services*, 436 U.S. 658." *Id.*, at 405, n. 29.

[*654] [***695] [**1417] In *Scheuer v. Rhodes*, *supra*, at 240, THE CHIEF JUSTICE identified the two "mutually dependent rationales" on which the doctrine of official immunity rested:

"(1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." n38

n38 *Wood v. Strickland*, 420 U.S. 308 (1975), mentioned a third justification for extending a qualified immunity to public officials: the fear that the threat of personal liability might deter citizens from holding public office. See *id.*, at 320 ("The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources from monetary liability were a likely prospect during their tenure"). Such fears are totally unwarranted, of course, once the threat of personal liability is eliminated.

The first consideration is simply not implicated when the damages award comes not from the official's pocket, but from the public treasury. It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby. Indeed, Congress en-

acted § 1983 precisely to provide a remedy for such abuses of official power. See *Monroe v. Pape*, 365 U.S., at 171-172. Elemental notions of fairness dictate that one who causes a loss should bear the loss.

It has been argued, however, that revenue raised by taxation for public use should not be diverted to the benefit of a single or discrete group of taxpayers, particularly where the municipality has at all times acted in good faith. On the contrary, the accepted view is that stated in *Thayer v. Boston* -- "that the city, in its corporate capacity, should be liable to make good the damage sustained by an [unlucky] individual, [*655] [***696] in consequence of the acts thus done." 36 Mass., at 515. After all, it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration. Thus, even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated. See generally 3 K. Davis, *Administrative Law Treatise* § 25.17 (1958 and Supp. 1970); Prosser § 131, at 978; Michelman, *Property, Utility, and Fairness: Some Thoughts on the Ethical Foundations of "Just Compensation"* *Law, 80 Harv. L. Rev. 1165 (1967)*. n39

n39 *Monell v. New York City Dept. of Social Services* indicated that the principle of loss-spreading was an insufficient justification for holding the municipality liable under § 1983 on a *respondeat superior* theory. 436 U.S., at 693-694. Here, of course, quite a different situation is presented. Petitioner does not seek to hold the city responsible for the unconstitutional actions of an individual official "solely because it employs a tortfeasor." *Id.*, at 691. Rather, liability is predicated on a determination that "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." *Id.*, at 690. In this circumstance -- when it is the local government itself that is responsible for the constitutional deprivation -- it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government, rather than to let the entire burden fall on the injured individual.

[**1418] The second rationale mentioned in *Scheuer* also loses its force when it is the municipality, in contrast to the official, whose liability is at issue. At the

heart of this justification for a qualified immunity for the individual official is the concern that the threat of *personal* monetary liability will introduce an unwarranted and unconscionable consideration into the decisionmaking process, thus paralyzing the governing official's decisiveness and distorting his judgment on matters [*656] of public policy. n40 The inhibiting effect is significantly reduced, if not eliminated, however, when the threat of personal liability is removed. First, as an empirical matter, it is questionable whether the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties; city officials routinely make decisions that either require a large expenditure of municipal funds or involve a substantial risk of depleting the public fisc. See *Kostka v. Hogg*, 560 F.2d 37, 41 (CA1 1977). More important, though, is the realization that consideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one commentator aptly put it: "Whatever other concerns [***697] should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions. To criticize section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's *raisons d'etre*." n41

n40 "The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decisionmaker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interest of the school and the students." *Wood v. Strickland*, *supra*, at 319-320.

n41 Note, *Developments in the Law: Section 1983 and Federalism*, 90 *Harv. L. Rev. 1133, 1224 (1977)*. See also *Johnson v. State*, 69 *Cal. 2d 782, 792-793, 447 P. 2d 352, 359-360 (1968)*:

"Nor do we deem an employee's concern over the potential liability of his employer, the governmental unit, a justification for an expansive definition of 'discretionary,' and hence immune, acts. As a threshold matter, we consider it unlikely that the possibility of government liability will be a serious deterrent to the fearless exer-

cise of judgment by the employee. In any event, however, to the extent that such a deterrent effect takes hold, it may be wholesome. An employee in a private enterprise naturally gives some consideration to the potential liability of his employer, and this attention unquestionably promotes careful work; the potential liability of a governmental entity, to the extent that it affects primary conduct at all, will similarly influence public employees." (Citation and footnote omitted.)

[*657] IV

[***LEdHRIC] [1C]In sum, our decision holding that municipalities have no immunity from damages liability flowing from their constitutional violations harmonizes well with developments in the common law and our own pronouncements on official immunities under § 1983. Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution. No longer is individual "blameworthiness" the acid test of liability; the principle of equitable loss-spreading has joined fault as a factor in distributing the costs of official misconduct.

We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals [**1419] in the scenario of the § 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public, as represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy." [*658] *Monell v. New York City Dept. of Social Services*, 436 U.S., at 694.

Reversed.

DISSENTBY:

POWELL

DISSENT:

MR. JUSTICE POWELL, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, dissenting.

The Court today holds that the city of Independence may be liable in damages for violating a constitutional right that was unknown when [***698] the events in this case occurred. It finds a denial of due process in the city's failure to grant petitioner a hearing to clear his name after he was discharged. But his dismissal involved only the proper exercise of discretionary powers according to prevailing constitutional doctrine. The city imposed no stigma on petitioner that would require a "name clearing" hearing under the Due Process Clause.

On the basis of this alleged deprivation of rights, the Court interprets 42 U. S. C. § 1983 to impose strict liability on municipalities for constitutional violations. This strict liability approach inexplicably departs from this Court's prior decisions under § 1983 and runs counter to the concerns of the 42d Congress when it enacted the statute. The Court's ruling also ignores the vast weight of common-law precedent as well as the current state law of municipal immunity. For these reasons, and because this decision will hamper local governments unnecessarily, I dissent.

I

The Court does not question the District Court's statement of the facts surrounding Owen's dismissal. *Ante*, at 625. It nevertheless rejects the District Court's conclusion that no due process hearing was necessary because "the circumstances of [Owen's] discharge did not impose a stigma of illegal or immoral conduct on his professional reputation." 421 F.Supp. 1110, 1122 (WD Mo. 1976); see *ante*, at 633-634, n. 13. [*659] Careful analysis of the record supports the District Court's view that Owen suffered no constitutional deprivation.

A

From 1967 to 1972, petitioner Owen served as Chief of the Independence Police Department at the pleasure of the City Manager. n1 Friction between Owen and City Manager Alberg flared openly in early 1972, when charges surfaced that the Police Department's property room was mismanaged. The City Manager initiated a full internal investigation.

n1 Under § 3.3 (1) of the Independence City Charter in effect in 1972, the City Manager had the power to "[appoint], and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all directors, or heads, of administrative departments. . . ." Section 3.8 of that Charter stated that the Chief of Police is the "di-

rector" of the Police Department. Charter of the City of Independence, Mo. (Dec. 5, 1961) (hereinafter cited as Charter).

In early April, the City Auditor reported that the records in the property room were so sparse that he could not conduct an audit. The City Counselor reported that "there was no evidence of any criminal acts, or violation of any state law or municipal ordinances, in the administration of the property room." 560 F.2d 925, 928 (CA8 [**1420] 1977). In a telephone call on April 10, the City Manager asked Owen to resign and offered him another position in the Department. The two met on the following day. Alberg expressed his unhappiness over the property room situation and again requested that [***699] Owen step down. When Owen refused, the City Manager responded that he would be fired. 421 F.Supp., at 1114-1115.

On April 13, the City Manager asked Lieutenant Cook of the Police Department if he would be willing to take over as Chief. Alberg also released the following statement to the public:

"At my direction, the City Counselor's office, [in] conjunction with the City Auditor [has] completed a routine audit of the police property room.

[*660] "Discrepancies were found in the administration, handling and security of recovered property. There appears to be no evidence to substantiate any allegations of a criminal nature. . . ." 560 F.2d, at 928-929.

The District Court found that the City Manager decided on Saturday, April 15, to replace Owen with Lieutenant Cook as Chief of Police. 421 F.Supp., at 1115. Before the decision was announced, however, City Council Member Paul Roberts obtained the internal reports on the property room. At the April 17 Council meeting, Roberts read a prepared statement that accused police officials of "gross inefficiencies" and various "inappropriate" actions. *Id.*, at 1116, n. 2. He then moved that the Council release the reports to the public, refer them to the Prosecuting Attorney of Jackson County for presentation to a grand jury, and recommend to the City Manager that he "take all direct and appropriate action permitted under the Charter. . . ." *Ibid.* The Council unanimously approved the resolution.

On April 18, Alberg "implemented his prior decision to discharge [Owen] as Chief of Police." 560 F.2d, at 929. The notice of termination stated simply that Owen's employment was "[terminated] under the provisions of Section 3.3 (1) of the City Charter." App. 17. That charter provision grants the City Manager complete authority to remove "directors" of administrative departments "when deemed necessary for the good of the service."

Owen's lawyer requested a hearing on his client's termination. The Assistant City Counselor responded that "there is no appellate procedure or forum provided by the Charter or ordinances of the City of Independence, Missouri, relating to the dismissal of Mr. Owen." *Id.*, at 27.

The City Manager referred to the Prosecuting Attorney all reports on the property room. The grand jury returned a "no true bill," and there has been no further official action on the matter. Owen filed a state lawsuit against Councilman [*661] Roberts and City Manager Alberg, asking for damages for libel, slander, and malicious prosecution. Alberg won a dismissal of the state-law claims against him, and Councilman Roberts reached a settlement with Owen. n2

n2 In its answer to Owen's complaint in this action, the city cited the state-court action as *Owen v. Roberts and Alberg*, Case No. 778,640 (Jackson County, Mo., Circuit Ct.). App. 15.

This federal action was filed in 1976. Owen alleged that he was denied his liberty interest in his professional reputation when he was [***700] dismissed without formal charges or a hearing. *Id.*, at 8, 10. n3

n3 Owen initially claimed that his property interests in the job also were violated. The Court of Appeals affirmed the District Court's rejection of that contention, 560 F.2d 925, 937 (CA8 1977), and petitioner has not challenged that ruling in this Court.

The Court suggests that the city should have presented a cross-petition for certiorari in order to argue that Owen has no cause of action. *Ante*, at 633, n. 13. It is well settled that a respondent "may make any argument presented below that supports the judgment of the lower court." *Hankerson v. North Carolina*, 432 U.S. 233, 240, n. 6 (1977); see *Massachusetts Mutual Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480-481 (1976), citing *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924). The judgment of the Court of Appeals in the instant case was to "[deny] Owen any relief . . ." by finding that the defendants were immune from suit. 589 F.2d 335, 338 (1979). Since the same judgment would result from a finding that Owen has no cause of action under the statute, respondents' failure to present a cross-petition does not prevent them from pressing the issue before this Court.

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[**1421] B

Due process requires a hearing on the discharge of a government employee "if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination. . . ." *Codd v. Velger*, 429 U.S. 624, 628 (1977) (*per curiam*). This principle was first announced in *Board of Regents v. Roth*, 408 U.S. 564 (1972), which was decided in June 1972, 10 weeks *after* Owen was discharged. The pivotal question after *Roth* is whether the circumstances of the discharge so blackened the employee's [*662] name as to impair his liberty interest in his professional reputation. *Id.*, at 572-575.

The events surrounding Owen's dismissal "were prominently reported in local newspapers." 560 F.2d, at 930. Doubtless, the public received a negative impression of Owen's abilities and performance. But a "name clearing" hearing is not necessary unless the employer makes a public statement that "might seriously damage [the employee's] standing and associations in his community." *Board of Regents v. Roth*, *supra*, at 573. No hearing is required after the "discharge of a public employee whose position is terminable at the will of the employer when there is no public disclosure of the reasons for the discharge." *Bishop v. Wood*, 426 U.S. 341, 348 (1976).

The City Manager gave no specific reason for dismissing Owen. Instead, he relied on his discretionary authority to discharge top administrators "for the good of the service." Alberg did not suggest that Owen "had been guilty of dishonesty, or immorality." *Board of Regents v. Roth*, *supra*, at 573. Indeed, in his "property room" statement of April 13, Alberg said that there was "no evidence to substantiate any allegations of a criminal nature." This exoneration was reinforced by the grand jury's refusal to initiate a prosecution in the matter. Thus, nothing in the actual firing cast such a stigma on Owen's professional reputation that his liberty was infringed.

The Court does not address directly the question whether any [***701] stigma was imposed by the discharge. Rather, it relies on the Court of Appeals' finding that stigma derived from events "connected with" the firing. *Ante*, at 633; 589 F.2d, at 337. That court attached great significance to the resolution adopted by the City Council at its April 17 meeting. But the resolution merely recommended that Alberg take "appropriate action," and the District Court found no "causal connection" between events in the City Council and the firing of Owen. 421 F.Supp., at 1121. Two days [*663] before the Council met, Alberg already had decided to dismiss Owen. Indeed, Councilman Roberts stated at the meet-

ing that the City Manager had asked for Owen's resignation. *Id.*, at 1116, n. 2. n4

n4 The City Charter prohibits any involvement of Council members in the City Manager's personnel decisions. Section 2.11 of the Charter states that Council members may not "participate in any manner in the appointment or removal of officers and employees of the city." Violation of § 2.11 is a misdemeanor that may be punished by ejection from office.

Even if the Council resolution is viewed as part of the discharge process, Owen has demonstrated no denial of his liberty. Neither the City Manager nor the Council cast any aspersions on Owen's character. Alberg absolved all connected with the property room of any illegal activity, while the Council resolution alleged no wrongdoing. That events focused public attention upon Owen's dismissal is undeniable; such attention is a condition of employment -- and of discharge -- for high government officials. Nevertheless, nothing in the actions of the City Manager or the City Council triggered [**1422] a constitutional right to a name-clearing hearing. n5

n5 The Court suggests somewhat cryptically that stigma was imposed on Owen when "the city -- through the unanimous resolution of the City Council -- released to the public an allegedly false statement impugning petitioner's honesty and integrity." *Ante*, at 633, n. 13. The Court fails, however, to identify any "allegedly false statement." The resolution did call for public disclosure of the reports on the property room situation, but those reports were never released. *Ante*, at 630. Indeed, petitioner's complaint alleged that the failure to release those reports left "a cloud or suspicion of misconduct" over him. App. 8. The resolution also referred the reports to the prosecutor and called on the City Manager to take appropriate action. Neither event could constitute the public release of an "allegedly false statement" mentioned by the Court.

The statements by Councilman Roberts were neither measured nor benign, but they provide no basis for this action against the city of Independence. Under *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691 (1978), the city cannot be held liable for Roberts' statements on a theory of respondeat superior. That case held that § 1983 [*664] makes municipalities liable for constitutional deprivations only if the challenged action

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was taken "pursuant to official municipal policy of some nature. . . ." As the Court noted, "a municipality cannot be held liable *solely* because it employs a tortfeasor. . . ." 436 U.S., at 691 (emphasis in original). The statements of a single councilman scarcely rise to the level of municipal policy. n6

n6 Roberts himself enjoyed absolute immunity from § 1983 suits for acts taken in his legislative capacity. *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402-406 (1979). Owen did sue him in state court for libel and slander, and reached an out-of-court settlement. See *supra*, at 660-661.

As the District Court concluded, [***702] "[at] most, the circumstances . . . suggested that, as Chief of Police, [Owen] had been an inefficient administrator." 421 F.Supp., at 1122. This Court now finds unconstitutional stigma in the interaction of unobjectionable official acts with the unauthorized statements of a lone councilman who had no direct role in the discharge process. The notoriety that attended Owen's firing resulted not from any city policy, but solely from public misapprehension of the reasons for a purely discretionary dismissal. There was no constitutional injury; there should be no liability. n7

n7 This case bears some resemblance to *Martinez v. California*, 444 U.S. 277 (1980), which involved a § 1983 suit against state parole officials for injuries caused by a paroled prisoner. We found that the plaintiffs had no cause of action because they could not show a causal relationship between their injuries and the actions of the defendants. 444 U.S., at 285. That relationship also is absent in this case. Any injury to Owen's reputation was the result of the Roberts statement, not the policies of the city of Independence.

II

Having constructed a constitutional deprivation from the valid exercise of governmental authority, the Court holds that municipalities are strictly liable for their constitutional torts. Until two years ago, municipal corporations enjoyed absolute immunity from § 1983 claims. *Monroe v. Pape*, 365 U.S. [**665] 167 (1961). But *Monell v. New York City Dept. of Social Services*, *supra*, held that local governments are "persons" within the meaning of the statute, and thus are liable in damages for constitutional violations inflicted by municipal policies.

436 U.S., at 690. *Monell* did not address the question whether municipalities might enjoy a qualified immunity or good-faith defense against § 1983 actions. 436 U.S., at 695, 701; *id.*, at 713-714 (POWELL, J., concurring).

After today's decision, municipalities will have gone in two short years from absolute immunity under § 1983 to strict liability. As a policy matter, I believe that strict municipal liability unreasonably subjects [**1423] local governments to damages judgments for actions that were reasonable when performed. It converts municipal governance into a hazardous slalom through constitutional obstacles that often are unknown and unknowable.

The Court's decision also impinges seriously on the prerogatives of municipal entities created and regulated primarily by the States. At the very least, this Court should not initiate a federal intrusion of this magnitude in the absence of explicit congressional action. Yet today's decision is supported by nothing in the text of § 1983. Indeed, it conflicts with the apparent intent of the drafters of the statute, with the common law of municipal tort liability, and with the current state law of municipal immunities.

A

1

Section 1983 provides a private right of action against "[every] person" acting under color of state law who imposes or causes to be imposed [***703] a deprivation of constitutional rights. n8 [**666] Although the statute does not refer to immunities, this Court has held that the law "is to be read in harmony with general principles of tort immunities and defenses rather than in derogation of them." *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976); see *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

n8 "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 . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ." 42 U. S. C. § 1983.

This approach reflects several concerns. First, the common-law traditions of immunity for public officials could not have been repealed by the "general language" of § 1983. *Tenney v. Brandhove*, *supra*, at 376; see *Imbler v. Pachtman*, *supra*, at 421-424; *Pierson v. Ray*, 386 U.S. 547, 554-555 (1967). In addition, "the public interest requires decisions and action to enforce laws for the

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protection of the public." *Scheuer v. Rhodes*, 416 U.S. 232, 241 (1974). Because public officials will err at times, "[the] concept of immunity assumes . . . that it is better to risk some error and possibly injury from such error than not to decide or act at all." *Id.*, at 242; see *Wood v. Strickland*, 420 U.S. 308, 319-320 (1975). By granting some immunity to governmental actors, the Court has attempted to ensure that public decisions will not be dominated by fears of liability for actions that may turn out to be unconstitutional. Public officials "cannot be expected to predict the future course of constitutional law. . . ." *Procunier v. Navarette*, 434 U.S. 555, 562 (1978).

In response to these considerations, the Court has found absolute immunity from § 1983 suits for state legislators, *Tenney v. Brandhove*, *supra*, judges, *Pierson v. Ray*, *supra*, at 553-555, and prosecutors in their role as advocates for the State, *Imbler v. Pachtman*, *supra*. Other officials have been granted a qualified immunity that protects them when in good faith they have implemented policies that reasonably were thought to be constitutional. This limited immunity extends to police officers, *Pierson v. Ray*, *supra*, at 555-558, state executive officers, *Scheuer v. Rhodes*, *supra*, local school board members, *Wood v. Strickland*, *supra*, the superintendent [*667] of a state hospital, *O'Connor v. Donaldson*, 422 U.S. 563, 576-577 (1975), and prison officials, *Procunier v. Navarette*, *supra*.

The Court today abandons any attempt to harmonize § 1983 with traditional tort law. It points out that municipal immunity may be abrogated by legislation. Thus, according to [*1424] to the Court, Congress "abolished" municipal immunity when it included municipalities "within the class of 'persons' subject to liability" under § 1983. *Ante*, at 647.

***704] This reasoning flies in the face of our prior decisions under this statute. We have held repeatedly that "immunities 'well grounded in history and reason' [were not] abrogated 'by covert inclusion in the general language' of § 1983." *Imbler v. Pachtman*, *supra*, at 418, quoting *Tenney v. Brandhove*, *supra*, at 376. See *Scheuer v. Rhodes*, *supra*, at 243-244; *Pierson v. Ray*, *supra*, at 554. The peculiar nature of the Court's position emerges when the status of executive officers under § 1983 is compared with that of local governments. State and local executives are personally liable for bad-faith or unreasonable constitutional torts. Although Congress had the power to make those individuals liable for all such torts, this Court has refused to find an abrogation of traditional immunity in a statute that does not mention immunities. Yet the Court now views the enactment of § 1983 as a direct abolition of traditional municipal immunities. Unless the Court is overruling its previous immunity decisions, the silence in § 1983 must mean that the

42d Congress mutely accepted the immunity of executive officers, but silently rejected common-law municipal immunity. I find this interpretation of the statute singularly implausible.

2

Important public policies support the extension of qualified immunity to local governments. First, as recognized by the doctrine of separation of powers, some governmental decisions should be at least presumptively insulated from judicial review. [*668] Mr. Chief Justice Marshall wrote in *Marbury v. Madison*, 1 Cranch 137, 170 (1803), that "[the] province of the court is . . . not to inquire how the executive, or executive officers, perform duties in which they have a discretion." Marshall stressed the caution with which courts must approach "[questions], in their nature political, or which are, by the constitution and laws, submitted to the executive." The allocation of public resources and the operational policies of the government itself are activities that lie peculiarly within the competence of executive and legislative bodies. When charting those policies, a local official should not have to gauge his employer's possible liability under § 1983 if he incorrectly -- though reasonably and in good faith -- forecasts the course of constitutional law. Excessive judicial intrusion into such decisions can only distort municipal decisionmaking and discredit the courts. Qualified immunity would provide presumptive protection for discretionary acts, while still leaving the municipality liable for bad faith or unreasonable constitutional deprivations.

Because today's decision will inject constant consideration of § 1983 liability into local decisionmaking, it may restrict the independence of local governments and their ability to respond to the needs of their communities. Only this Term, we noted that the "point" of immunity under § 1983 "is to forestall an atmosphere of intimidation that would conflict with [officials'] resolve to perform their designated functions in a principled fashion." *Ferri v. Ackerman*, 444 U.S. 193, 203-204 [*705] (1979).

The Court now argues that local officials might modify their actions unduly if they face personal liability under § 1983, but that they are unlikely to do so when the locality itself will be held liable. *Ante*, at 655-656. This contention denigrates the sense of responsibility of municipal officers, and misunderstands the political process. Responsible local officials will be concerned about potential judgments against [*669] their municipalities for alleged constitutional torts. Moreover, they will be accountable within the political system for subjecting the municipality to adverse judgments. If officials must look over their shoulders at strict municipal liability for unknowable constitutional deprivations, the

resulting degree of governmental paralysis will be little different from that caused by fear of **[**1425]** personal liability. Cf. *Wood v. Strickland*, 420 U.S., at 319-320; *Scheuer v. Rhodes*, 416 U.S., at 242. n9

n9 The Court's argument is not only unpersuasive, but also is internally inconsistent. The Court contends that strict liability is necessary to "create an incentive for officials . . . to err on the side of protecting citizens' constitutional rights." *Ante*, at 651-652. Yet the Court later assures us that such liability will not distort municipal decisionmaking because "[the] inhibiting effect is significantly reduced, if not eliminated, . . . when the threat of personal liability is removed." *Ante*, at 656. Thus, the Court apparently believes that strict municipal liability is needed to modify public policies, but will not have any impact on those policies anyway.

In addition, basic fairness requires a qualified immunity for municipalities. The good-faith defense recognized under § 1983 authorizes liability only when officials acted with malicious intent or when they "knew or should have known that their conduct violated the constitutional norm." *Procunier v. Navarette*, 434 U.S., at 562. The standard incorporates the idea that liability should not attach unless there was notice that a constitutional right was at risk. This idea applies to governmental entities and individual officials alike. Constitutional law is what the courts say it is, and -- as demonstrated by today's decision and its precursor, *Monell* -- even the most prescient lawyer would hesitate to give a firm opinion on matters not plainly settled. Municipalities, often acting in the utmost good faith, may not know or anticipate when their action or inaction will be deemed a constitutional violation. n10

n10 The Court implies that unless municipalities are strictly liable under § 1983, constitutional law could be frozen "in its current state of development." *Ante*, at 651, n. 33. I find this a curious notion. This could be the first time that the period between 1961, when *Monroe* declared local governments absolutely immune from § 1983 suits, and 1978, when *Monell* overruled *Monroe*, has been described as one of static constitutional standards.

[*670] The Court nevertheless suggests that, as a matter of social justice, municipal corporations should be strictly liable even if they could not have known that a

particular action would violate the Constitution. After all, the Court urges, local governments can "spread" the costs of any judgment across the local population. *Ante*, at 655. The Court neglects, however, the fact that many local governments lack the resources to withstand **[***706]** substantial unanticipated liability under § 1983. Even enthusiastic proponents of municipal liability have conceded that ruinous judgments under the statute could imperil local governments. *E. g.*, Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 *Harv. L. Rev.* 922, 958 (1976). n11 By simplistically applying the theorems of welfare economics and ignoring the reality of municipal finance, the Court imposes strict liability on the level of government least able to bear it. n12 For some municipalities, the result could be a severe limitation on their ability to serve the public.

n11 For example, in a recent case in Alaska, a jury awarded almost \$ 500,000 to a policeman who was accused of "racism and brutality" and removed from duty without notice and an opportunity to be heard. *Wayson v. City of Fairbanks*, 22 ATLA L. Rep. 222 (Alaska Fourth Dist. Super. Ct. 1979).

n12 Ironically, the State and Federal Governments cannot be held liable for constitutional deprivations. The Federal Government has not waived its sovereign immunity against such claims, and the States are protected by the Eleventh Amendment.

B

The Court searches at length -- and in vain -- for legal authority to buttress its policy judgment. Despite its general statements to the contrary, the Court can find no support for its position in the debates on the civil rights legislation that included § 1983. Indeed, the legislative record suggests that **[*671]** the Members of the 42d Congress would have been dismayed by this ruling. Nor, despite its frequent citation of authorities that are only marginally relevant, can the Court rely on the traditional or current law of municipal tort liability. Both in the 19th century and now, courts **[**1426]** and legislatures have recognized the importance of limiting the liability of local governments for official torts. Each of these conventional sources of law points to the need for qualified immunity for local governments.

The modern dispute over municipal liability under § 1983 has focused on the defeat of the Sherman amendment during the deliberations on the Civil Rights Act of 1871. *E. g.*, *Monroe v. Pape*, 365 U.S., at 187-191; *Monnell v. New York City Dept. of Social Services*, 436 U.S., at 664-683. Senator Sherman proposed that local governments be held vicariously liable for constitutional deprivations caused by riots within their boundaries. As originally drafted, the measure imposed liability even if municipal officials had no actual knowledge of the impending disturbance. n13 The amendment, which did not affect the part of the Civil Rights Act that we know as § 1983, was approved by the Senate but rejected by the House of Representatives. 436 U.S., at 666. After two revisions by Conference Committees, [***707] both Houses passed what is now codified as 42 U. S. C. § 1986. The final version applied not just to local governments but to all "persons," and it imposed no [*672] liability unless the defendant knew that a wrong was "about to be committed." n14

n13 Cong. Globe, 42d Cong., 1st Sess., 663 (1871). The proposal applied to any property damage or personal injury caused "by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude. . . ." As revised by the first Conference Committee on the Civil Rights Act, the provision still required no showing of notice. *Id.*, at 749.

n14 The final Conference amendment stated:

"That any person or persons having knowledge that any of the wrongs . . . mentioned in the second section of this act, are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse to do so, and such wrongful act shall be committed, such person or persons shall be liable to the person injured or his legal representatives for all damages caused by any such wrongful act. . . ." *Id.*, at 819.

Because Senator Sherman initially proposed strict municipal liability for constitutional torts, the discussion of his amendment offers an invaluable insight into the attitudes of his colleagues on the question now before the

Court. Much of the resistance to the measure flowed from doubts as to Congress' power to impose vicarious liability on local governments. *Monell v. New York City Dept. of Social Services*, 436 U.S., at 673-683; *id.*, at 706 (POWELL, J., concurring). But opponents of the amendment made additional arguments that strongly support recognition of qualified municipal immunity under § 1983.

First, several legislators expressed trepidation that the proposal's strict liability approach could bankrupt local governments. They warned that liability under the proposal could bring municipalities "to a dead stop." Cong. Globe, 42d Cong., 1st Sess., 763 (1871) (Sen. Casserly). See *id.*, at 762 (Sen. Stevenson); *id.*, at 772 (Sen. Thurman). Representative Bingham argued that municipal liability might be so great under the measure as to deprive a community "of the means of administering justice." *Id.*, at 798. Some Congressmen argued that strict liability would inhibit the effective operation of municipal corporations. The possibility of liability, Representative Kerr insisted, could prevent local officials from exercising "necessary and customary functions." *Id.*, at 789. See *id.*, at 763 (Sen. Casserly); *id.*, at 808 (Rep. Garfield).

[*673] Most significant, the opponents objected to liability imposed without any showing that a municipality knew of an impending constitutional deprivation. Senator Sherman defended this feature of the amendment as a characteristic of riot Acts long in force in England and this country. *Id.*, at 760. But Senator Stevenson argued against [**1427] creating "a corporate liability for personal injury which no prudence or foresight could have prevented." *Id.*, at 762. In the most thorough critique of the amendment, Senator Thurman carefully reviewed the riot Acts of Maryland and New York. He emphasized that those laws imposed liability only when a plaintiff proved that the local government had both notice of the impending injury and the power to prevent it. *Id.*, at 771.

"Is not that right? Why make the county, or town, or parish liable when it had no reason whatsoever to anticipate that any such crime was about to be committed, and when it had no knowledge of the commission of the crime until after it was committed? What justice is there in that?" *Ibid.*

[***708] These concerns were echoed in the House of Representatives. Representative Kerr complained that "it is not required, before liability shall attach, that it shall be known that there was any intention to commit these crimes, so as to fasten liability justly upon the municipality." *Id.*, at 788. He denounced the "total and absolute absence of notice, constructive or implied, within any decent limits of law or reason," adding that the pro-

posal "takes the property of one and gives it to another by mere force, without right, in the absence of guilt or knowledge, or the possibility of either." *Ibid.* Similarly, Representative Willard argued that liability "is only warranted when the community . . . has proved faithless to its duties. . . ." *Id.*, at 791. He criticized the absence of a requirement that it be "[proved] in court that there has been any default, any denial, any neglect on the part of [*674] the county, city, town, or parish to give citizens the full protection of the laws." *Ibid.*

Partly in response to these objections, the amendment as finally enacted conditioned liability on a demonstration that the defendant knew that constitutional rights were about to be denied. Representative Poland introduced the new measure, noting that "any person *who has knowledge* of any of the offenses named . . . shall [have a] duty to use all reasonable diligence within his power to prevent it." *Id.*, at 804 (emphasis supplied). The same point was made by Representative Shellabarger, the sponsor of the entire Act and, with Representative Poland, a member of the Conference Committee that produced the final draft. *Id.*, at 804-805; see *id.*, at 807 (Rep. Garfield).

On the Senate side, one conferee stated that under the final version

"in order to make the [municipal] corporation liable as a body it must appear in some way to the satisfaction of the jury that the officers of the corporation, those persons whose duty it was to repress tumult, if they could, had reasonable notice of the fact that there was a tumult, or was likely to be one, and neglected to take the necessary means to prevent it." *Id.*, at 821 (Sen. Edmunds).

Senator Sherman disliked the revised provision. He complained that "before you can make [a person] responsible you have got to show that they had knowledge that the specific wrongs upon the particular person were about to be wrought." *Ibid.* n15

n15 Under 42 U. S. C. § 1986, the current version of the language approved in place of the Sherman amendment, liability "is dependent on proof of actual knowledge by a defendant of the wrongful conduct. . . ." *Hampton v. Chicago*, 484 F.2d 602, 610 (CA7 1973), cert. denied, 415 U.S. 917 (1974).

These objections to the Sherman amendment apply with equal force to strict municipal liability under § 1983. Just [*675] as the 42d Congress refused to hold municipalities vicariously liable for deprivations that

could not be known beforehand, this Court should not hold those entities strictly liable for deprivations caused by actions that reasonably and in good faith were thought to be legal. The Court's approach today, like the Sherman amendment, could spawn onerous judgments against local governments and distort the [***709] decisions of officers who fear municipal liability for their actions. Congress' [**1428] refusal to impose those burdens in 1871 surely undercuts any historical argument that federal judges should do so now.

The Court declares that its rejection of qualified immunity is "compelled" by the "legislative purpose" in enacting § 1983. *Ante*, at 650. One would expect powerful documentation to back up such a strong statement. Yet the Court notes only three features of the legislative history of the Civil Rights Act. Far from "compelling" the Court's strict liability approach, those features of the congressional record provide scant support for its position.

First, the Court reproduces statements by Congressmen attesting to the broad remedial scope of the law. *Ante*, at 636, and n. 17. In view of our many decisions recognizing the immunity of officers under § 1983, *supra*, at 666-667, those statements plainly shed no light on congressional intent with respect to immunity under the statute. Second, the Court cites Senator Stevenson's remark that frequently "a statutory liability has been created against municipal corporations for injuries resulting from a neglect of corporate duty." *Ante*, at 642-643, citing Cong. Globe, 42d Cong., 1st Sess., 762 (1871). The Senator merely stated the unobjectionable proposition that municipal immunity could be qualified or abolished by statute. This fragmentary observation provides no basis for the Court's version of the legislative history.

Finally, the Court emphasizes the lack of comment on municipal immunity when opponents of the bill did discuss the immunities of government officers. "Had there been a [*676] similar common-law immunity for municipalities, the bill's opponents doubtless would have raised the spectre of its destruction, destruction, as well." *Ante*, at 643-644. This is but another example of the Court's continuing willingness to find meaning in silence. This example is particularly noteworthy because the very next sentence in the Court's opinion concedes: "To be sure, there were two doctrines that afforded municipal corporations some measure of protection from tort liability." *Ante*, at 644. Since the opponents of the Sherman amendment repeatedly expressed their conviction that strict municipal liability was unprecedented and unwise, the failure to recite the theories of municipal immunity is of no relevance here. In any event, that silence cannot contradict the many contemporary judicial decisions applying that immunity. See *infra*, at 677-678, and nn. 16, 17.

2

The Court's decision also runs counter to the common law in the 19th century, which recognized substantial tort immunity for municipal actions. *E. g.*, 2 J. Dillon, *Law of Municipal Corporations* § § 753, 764, pp. 862-863, 875-876 (2d ed. 1873); W. Williams, *Liability of Municipal Corporations for Tort* 9, 16 (1901). Nineteenth-century courts generally held that municipal corporations were not liable for acts undertaken in their "governmental," as opposed [***710] to their "proprietary," capacity. n16 Most States now use other criteria [*677] for determining when a local government should be liable for damages. See *infra*, at 681-683. Still, the governmental/proprietary distinction retains significance because it was so widely accepted when § 1983 was enacted. It is inconceivable that a Congress thoroughly versed in current legal doctrines, see *Monell v. New York City Dept. of Social Services*, 436 U.S., at 669, would have intended through silence to create the [**1429] strict liability regime now imagined by this Court.

n16 In the leading case of *Bailey v. Mayor &c. of the City of New York*, 3 Hill 531, 539 (N. Y. 1842), the court distinguished between municipal powers "conferred for the benefit of the public" and those "made as well for the private emolument and advantage of the city. . . ." Because the injury in *Bailey* was caused by a water utility maintained for the exclusive benefit of the residents of New York City, the court found the municipality liable "as a private company." *Ibid.* This distinction was construed to provide local governments with immunity in actions alleging inadequate police protection, *Western College of Homeopathic Medicine v. Cleveland*, 12 Ohio St. 375 (1861), improper sewer construction, *Child v. Boston*, 86 Mass. 41 (1862), negligent highway maintenance, *Hewison v. New Haven*, 37 Conn. 475 (1871), and unsafe school buildings, *Hill v. Boston*, 122 Mass. 344 (1877).

More directly relevant to this case is the common-law distinction between the "discretionary" and "ministerial" duties of local governments. This Court wrote in *Harris v. District of Columbia*, 256 U.S. 650, 652 (1921): "[When] acting in good faith municipal corporations are not liable for the manner in which they exercise discretionary powers of a public or legislative character." See *Weightman v. The Corporation of Washington*, 1 Black 39, 49-50 (1862). The rationale for this immunity derives from the theory of separation of powers. In *Carr v. The Northern Liberties*, 35 Pa. 324, 329 (1860), the Pennsylvania Supreme Court explained why a local gov-

ernment was immune from recovery for damage caused by an inadequate town drainage plan.

"[How] careful we must be that courts and juries do not encroach upon the functions committed to other public officers. It belongs to the province of town councils to direct the drainage of our towns, according to the best of their means and discretion, and we cannot directly or indirectly control them in either. No law allows us to substitute the judgment of a jury . . . for that of the representatives of the town itself, to whom the business is especially committed by law."

[*678] That reasoning, frequently applied in the 19th century, n17 parallels the theory behind qualified immunity under § 1983. This Court has recognized the importance of preserving the autonomy of executive bodies entrusted with discretionary powers. *Scheuer v. Rhodes* held that executive officials who have broad responsibilities must enjoy a "range of discretion [that is] comparably broad." 416 U.S., at 247. [***711] Consequently, the immunity available under § 1983 varies directly with "the scope of discretion and responsibilities of the office. . . ." 416 U.S., at 247. Strict municipal liability can only undermine that discretion. n18

n17 *E. g.*, *Goodrich v. Chicago*, 20 Ill. 445 (1858); *Logansport v. Wright*, 25 Ind. 512 (1865); *Mills v. Brooklyn*, 32 N. Y. 489, 498-499 (1865); *Wilson v. Mayor &c. of City of New York*, 1 Denio 595, 600-601 (N. Y. 1845); *Wheeler v. Cincinnati*, 19 Ohio St. 19 (1869) (*per curiam*); *Richmond v. Long's Adm'rs*, 17 Gratt. 375 (Va. 1867); *Kelley v. Milwaukee*, 18 Wis. 83 (1864).

n18 The Court cannot wish away these extensive municipal immunities. It quotes two 19th-century treatises as referring to municipal liability for some torts. *Ante*, at 640. Both passages, however, refer to exceptions to the existing immunity rules. The first treatise cited by the Court concedes, though deplores, the fact that many jurisdictions embraced the governmental/proprietary distinction. T. Shearman & A. Redfield, *A Treatise on the Law of Negligence* § 120, pp. 140-141 (1869). The same volume notes that local governments could not be sued for injury caused by discretionary acts, *id.*, § 127, at 154, or for officers' acts beyond the powers of the municipal corporation, *id.*, § 140, at 169. The

Court's quotation from Dillon on Municipal Corporations stops just before that writer acknowledges that local governments are liable only for injury caused by nondiscretionary acts involving "corporate duties." 2 J. Dillon, *Law of Municipal Corporations* § 764, p. 875 (2d ed. 1873). That writer's full statement of municipal tort liability recognizes immunity for both governmental and discretionary acts. Dillon observes that municipal corporations may be held liable only "where a duty is a corporate one, that is, one which rests upon the municipality in respect of its special or local interests, and not as a public agency, and is absolute and perfect, and not discretionary or judicial in its nature. . . ." *Id.*, § 778, at 891 (emphasis in original).

The Court takes some solace in the absence in the 19th century of a qualified immunity for local governments. *Ante*, at 644-650. That absence, of course, was due to the availability of absolute immunity for governmental and discretionary acts. There is no justification for discovering strict municipal liability in § 1983 when that statute was enacted against a background of extensive municipal immunity.

The Court also points out that municipalities were subject to suit for some statutory violations and neglect of contractual obligations imposed by State or Federal Constitutions. *Ante*, at 639-640. That amenability to suit is simply irrelevant to the immunity available in tort actions, which controls the immunity available under § 1983.

[*679] The lack of support for the Court's view of the common law is evident in its reliance on *Thayer v. Boston*, 36 Mass. 511 (1837), as [**1430] its principal authority. *Ante*, at 641-642. *Thayer* did hold broadly that a city could be liable for the authorized acts of its officers. 36 Mass., at 516. But *Thayer* was limited severely by later Massachusetts decisions. *Bigelow v. Inhabitants of Randolph*, 80 Mass. 541, 544-545 (1860), ruled that *Thayer* applied only to situations involving official malfeasance -- or wrongful, bad-faith actions -- not to actions based on neglect or nonfeasance. See *Child v. Boston*, 86 Mass. 41 (1862); *Buttrick v. Lowell*, 83 Mass. 172 (1861). Finally, *Hill v. Boston*, 122 Mass. 344, 359 (1877), squarely repudiated the broad holding of *Thayer* and limited municipal liability to acts performed in the proprietary interest of the municipality.

n19 The Court cites eight cases decided before 1871 as "[reiterating]" the principle an-

nounced in *Thayer* while awarding damages against municipalities for good-faith torts. Three of those cases involved the "special and peculiar" statutory liability of New England towns for highway maintenance, and are wholly irrelevant to the Court's argument. *Billings v. Worcester*, 102 Mass. 329, 332-333 (1869); *Horton v. Inhabitants of Ipswich*, 66 Mass. 488, 491 (1853) (trial court "read to the jury the provisions of the statutes prescribing the duties of towns to keep roads safe . . . and giving a remedy for injuries received from defects in highways"); *Elliot v. Concord*, 27 N. H. 204 (1853) (citing similar statute); see 2 J. Dillon, *Law of Municipal Corporations* § 1000, pp. 1013-1015, and n. 2 (3d ed. 1881). A fourth case, *Town Council of Akron v. McComb*, 18 Ohio 229 (1849), concerned damages caused by street-grading, and was later expressly restricted to those facts. *Western College of Homeopathic Medicine v. Cleveland*, 12 Ohio St., at 378-379. Two of the other cases cited by the Court involved the performance of ministerial acts that were widely recognized as giving rise to municipal liability. *Lee v. Village of Sandy Hill*, 40 N. Y. 442, 451 (1869) (liability for damage caused by street-opening when city was under a "duty" to open that street); *Hurley v. Town of Texas*, 20 Wis. 634 (1866) (improper tax collection). The seventh case presented malfeasance, or bad-faith acts, by the municipality's agents. *Hawks v. Inhabitants of Charlemont*, 107 Mass. 414 (1871) (city took material from plaintiff's land to repair bridge). Thus, despite any discussion of *Thayer* in the court opinions, seven of the eight decisions noted by the Court involved thoroughly unremarkable exceptions to municipal immunity as provided by statute or common law. They do not buttress the Court's theory of strict liability.

The Court also notes that Senator Stevenson mentioned *Thayer* during the debates on the Sherman amendment. *Ante*, at 642, and nn. 23, 24. That reference, however, came during a speech denouncing the Sherman amendment for imposing tort liability on municipal corporations. To reinforce his contention, Senator Stevenson read from the decision in *Prather v. Lexington*, 52 Ky. 559, 560-652 (1852), which cited *Thayer* for the general proposition that a municipal corporation is not liable on a *respondeat superior* basis for the unauthorized acts of its officers. Cong. Globe, 42d Cong., 1st Sess., 762 (1871). But the point of the passage in *Prather* read by Senator Stevenson -- and the holding of that case -- was that "no principle of law . . . subjects a

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municipal corporation to a responsibility for the safety of the property within its territorial limits." Cong. Globe, *supra*, quoting *Prather, supra*, at 561. So Stevenson cited *Prather* to demonstrate that municipalities should not be held vicariously liable for injuries caused within their boundaries. *Prather*, in turn, cited *Thayer* for a subsidiary point. Nowhere in this sequence is there any support for the Court's idea that local governments should be subjected to strict liability under § 1983.

[*680] [***712] Today's decision also conflicts with the current law in 44 States and the District of Columbia. All of those jurisdictions provide municipal immunity at least analogous to a "good faith" defense against liability for constitutional torts. Thus, for municipalities in almost 90% of our jurisdictions, the Court creates broader liability for constitutional deprivations than for state-law torts.

[*681] Twelve States have laws creating municipal tort liability but barring damages for injuries caused by discretionary decisions or by the good-faith execution of a validly enacted, though unconstitutional, regulation. n20 Municipalities in those States have [**1431] precisely the form of qualified immunity that this Court has granted to executive officials under § 1983. Another 11 States provide even broader immunity for local governments. Five of those have retained the governmental/proprietary distinction, n21 while Arkansas and [***713] South Dakota grant even broader protection for municipal corporations. n22 Statutes in four more States protect local governments from tort liability except for particular injuries not relevant to this case, such as those due to motor vehicle accidents or negligent maintenance of public facilities. n23 In [*682] Iowa, local governments are not liable for injuries caused by the execution with due care of any "officially enacted" statute or regulation. n24

n20 *Idaho Code* § 6-904(1) (1979); *Ill. Rev. Stat.*, ch. 85, § § 2-103, 2-109, 2-201, 2-203 (1977); *Ind. Code* § § 34-4-16.5-3 (6), (8) (1976); 1979 *Kan. Sess. Laws*, ch. 186, § 4 (including specific exceptions to immunity); *Mass. Gen. Laws Ann.*, ch. 258, § § 10 (a), (b) (West Supp. 1979); *Minn. Stat.* § § 466.03 (5), (6) (1978); *Mont. Code Ann.* § § 2-9-103, 2-9-111, 2-9-112 (1979); *Neb. Rev. Stat.* § § 23-2409 (1), (2) (1977); *Nev. Rev. Stat.* § 41.032 (1977); *N. D. Cent. Code* § 32-12.1-03 (3) (Supp. 1979); *Okla. Stat.*, Tit. 51, § § 155 (1)-(5) (Supp. 1979); *Ore. Rev. Stat.* § § 30.265 (3)(c), (f) (1979).

The Federal Tort Claims Act provides a similar exemption for damages suits against the Federal Government. 28 U. S. C. § 2680 (a). The goal of that provision, according to this Court, is to protect this "discretion of the executive or the administrator to act according to one's judgment of the best course. . . ." *Dalehite v. United States*, 346 U.S. 15, 34 (1953).

n21 *Mayor and City Council of Baltimore v. Seidel*, 44 *Md. App.* 465, 409 *A. 2d* 747 (1980); *Mich. Comp. Laws* § 691.1407 (1970); *Parks v. Long Beach*, 372 *So. 2d* 253, 253-254 (*Miss.* 1979); *Haas v. Hayslip*, 51 *Ohio St. 2d* 135, 139, 364 *N. E. 2d* 1376, 1379 (1977); *Virginia Electric & Power Co. v. Hampton Redevelopment & Housing Authority*, 217 *Va. 30*, 34, 225 *S. E. 2d* 364, 368 (1976).

n22 *Ark. Stat. Ann.* § 12-2901 (1979); *Shaw v. Mission*, 88 *S. D. 564*, 225 *N. W. 2d* 593 (1975).

n23 1977 *N. M. Laws*, ch. 386, § § 4-9; *Pa. Stat. Ann.*, Tit. 53, § 5311.202 (b) (Purdon Supp. 1979-1980); *Wright v. North Charleston*, 271 *S. C. 515*, 516-518, 248 *S. E. 2d* 480, 481-482 (1978), see *S. C. Code* § § 5-7-70, 15-77-230 (1976 and Supp. 1979); 1979 *Wyo. Sess. Laws*, ch. 157, § 1 (to be codified as *Wyo. Stat.* § § 1-39-105 to 112).

n24 *Iowa Code* § 613A.4 (3) (1979).

Sixteen States and the District of Columbia follow the traditional rule against recovery for damages imposed by discretionary decisions that are confided to particular officers or organs of government. n25 Indeed, the leading commentators on governmental tort liability have noted both the appropriateness and general acceptance of municipal immunity for discretionary acts. See *Restatement (Second) of Torts* § 895C (2) and Comment g (1979); K. Davis, *Administrative Law of the Seventies* § 25.13 (1976); W. Prosser, *Law of Torts* 986-987 (4th ed. 1971). In four States, local governments enjoy complete immunity from tort actions unless they have taken out liability insurance. n26 Only five States [*683] impose the kind of blanket liability constructed by the Court today. n27

n25 *Cal. Gov't Code Ann.* § § 815.2, 820.2 (West 1966); *Tango v. New Haven*, 173 *Conn. 203*, 204-205, 377 *A. 2d* 284, 285 (1977);

445 U.S. 622, *; 100 S. Ct. 1398, **;
63 L. Ed. 2d 673, ***; 1980 U.S. LEXIS 14

Biloon's Electrical Serv., Inc. v. Wilmington, 401 A. 2d 636, 639-640, 643 (Del. Super. 1979); *Spencer v. General Hospital of the District of Columbia*, 138 U. S. App. D. C. 48, 53, 425 F.2d 479, 484 (1969) (en banc); *Commercial Carrier Corp. v. Indian River County*, 371 So. 2d 1010, 1020 (Fla. 1979); Ga. Code § 69-302 (1978); *Frankfort Variety, Inc. v. Frankfort*, 552 S. W. 2d 653 (Ky. 1977); Me. Rev. Stat. Ann., Tit. 14, § 8103 (2)(C) (Supp. 1965-1979); *Merrill v. City of Manchester*, 114 N. H. 722, 729, 332 A. 2d 378, 383 (1974); N. J. Stat. Ann. § 59:2-2 (b) and 59:2-3 (West Supp. 1979-1980); *Weiss v. Fote*, 7 N. Y. 2d 579, 585-586, 167 N. E. 2d 63, 65-66 (1960); *Calhoun v. Providence, R. I.*, 390 A. 2d 350, 355-356 (1978); Tenn. Code Ann. § 23-3311 (1) (Supp. 1979); *Tex. Rev. Civ. Stat. Ann., Art. 6252-19*, § 14 (7) (Vernon 1970); Utah Code Ann. § 63-30-10 (1) (1953); *King v. Seattle*, 84 Wash. 2d 239, 246, 525 P. 2d 228, 233 (1974) (en banc); *Wis. Stat. § 895.43* (3) (1977).

n26 *Colo. Rev. Stat. § 24-10-104* (1973); *Mo. Rev. Stat. § 71.185* (1978); *N. C. Gen. Stat. § 160A-485* (1976); *Vt. Stat. Ann., Tit. 29, § 1403* (1970).

n27 *Ala. Code § 11-47-190* (1975); *State v. Jennings*, 555 P. 2d 248, 251 (Alaska 1976); *Ariz. Rev. Stat. Ann. § 11-981 (A)(2)* (Supp. 1979-1980); La. Const., Art. 12, § 10 (A); *Long v. Weirton, W. Va.*, 214 S. E. 2d 832, 859 (1975). It is difficult to determine precisely the tort liability rules for local governments in Hawaii.

C

The Court turns a blind eye to this overwhelming evidence that municipalities have enjoyed a qualified immunity and to the policy considerations that for the life of this Republic have justified its retention. This [**1432] disregard of precedent and policy is especially unfortunate because suits under § 1983 typically implicate evolving constitutional standards. A good-faith defense is much more important for those actions than in those involving ordinary tort liability. [***714] The duty not to run over a pedestrian with a municipal bus is

far less likely to change than is the rule as to what process, if any, is due the busdriver if he claims the right to a hearing after discharge.

The right of a discharged government employee to a "name clearing" hearing was not recognized until our decision in *Board of Regents v. Roth*, 408 U.S. 564 (1972). That ruling was handed down 10 weeks after Owen was discharged and 8 weeks after the city denied his request for a hearing. By stripping the city of any immunity, the Court punishes it for failing to predict our decision in *Roth*. As a result, local governments and their officials will face the unnerving prospect of crushing damages judgments whenever a policy valid under current law is later found to be unconstitutional. I can see no justice or wisdom in that outcome.

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Joe REIMER, Plaintiff-Appellant, v. Herman SHORT, Chief of Police, et al., Defendants-Appellees

No. 75-1428

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

578 F.2d 621; 1978 U.S. App. LEXIS 9442

August 21, 1978

SUBSEQUENT HISTORY: [**1]

As Amended.

PRIOR HISTORY: Appeal from the United States District Court for the Southern District of Texas.

COUNSEL:

Joe Reimer, (Pro Se), Channelview, Texas, for Appellant.

Joseph G. Rollins, Senior Asst. City Atty., Houston, Texas

Roy F. Martin, III, Asst. City Atty. for Appellee.

JUDGES:

Jones, Wisdom and Godbold, Circuit Judges. Jones, Circuit Judge, dissenting.

OPINIONBY:

WISDOM

OPINION:

[*623] WISDOM, Circuit Judge:

Joe Reimer, the proprietor of an auto salvage business in Channelview, Texas, appearing pro se, brought this suit under 42 U.S.C. §§ 1981, 1982, 1983, and 1985 against the City of Houston, Houston's Chief of Police (Short), and two members of the Houston Police Department, Officers Adams and DeFoor. He alleges that during the summer of 1973 he was the victim of police harassment, unlawful searches of his business premises, and unlawful searches and seizure of his pickup truck. After the City of Houston and Police Chief Short were dismissed as defendants, the first trial of Reimer's civil rights action against Officers Adams and DeFoor ended in a mistrial before a deadlocked jury. At the second

trial, the jury found for the defendant officers, [**2] and the district court entered judgment accordingly. On this appeal, Reimer raises eleven claims of error but essentially seeks three things: (1) the reversal of the jury's verdict for the defendant policemen in the civil rights action, (2) the reinstatement of the City of Houston and Police Chief Short as defendants, and (3) the reversal of a state conviction for theft of the pickup truck. Reimer's vigorous pro se advocacy has borne some fruit. We reverse the jury verdict as to some of the actions of the defendant police officers, but affirm the district court on all other points. n1

n1 This case was argued on November 4, 1976. Reimer initially submitted only a partial transcript of the second trial. Because consideration of his contention that the evidence was insufficient to support a jury verdict required consideration of all the evidence, *F.R.App.P. 10*, we requested him to supplement the record. We granted Reimer several extensions because the court stenographer proved unable or was unwilling to provide a complete transcript. After Reimer filed a motion to show cause why the court reporter should not be held in contempt of this Court, the reporter completed the supplemental transcript, which was filed more than a year after the case was argued.

[**3]

I

Reimer alleges that during the period from June 19, 1973 to September 10, 1973, Adams and DeFoor came to his salvage lot at least ten times to inventory the vehicles in his possession and check for stolen merchandise. All visits were made without warrants. Although the police officers contend that the searches were made with Reimer's consent, Reimer asserts that he never consented

to them. He contends that the officers interfered with his business by telling customers they had "closed" the lot and circulating rumors that Reimer was selling stolen vehicles.

At about 3:00 A.M. on September 10, 1973, Adams noticed a truck bearing the license plate FK 9100 parked on the street. He remembered seeing that license number a few weeks earlier on a wrecked truck. Upon checking with state authorities, he learned that the license plate should have been on a truck with a vehicle identification number (VIN) different from that on the parked truck. He set up a surveillance and impounded the truck when one Elton Brown, who had borrowed the truck from Reimer, attempted to drive it away. Later, Adams and DeFoor and others conducted a thorough inspection of the truck, disassembling it in a search [**4] for identification numbers. The officers did not obtain a warrant for either the seizure of the truck or the search while it was in police custody.

Reimer argued that the truck in question was his, having been reconstructed from three vehicles: a blue 1968 Ford, a green 1972 Ford (VIN F10GKP62670, with license FK 9100), and a red and white 1970 Ford [*624] (VIN F10GKH11749). He had documentation of title for the latter two vehicles and maintained that under Texas law the FK 9100 license plate was the authorized one for the hybrid truck. His only proof of title with regard to the body portion of the vehicle was his own testimony that he once had the certificate of title but no longer had it because the police officers had taken it and were withholding it. The police maintained that except for the frame and a few other parts of the hybrid truck, the vehicle was a truck that was stolen from one John Hubbard. Hubbard identified the truck by informing the police of several minor details about it that only its owner would have known. Reimer asserts that this identification was the product of a conspiracy between the police and Hubbard and that another man has since been convicted [**5] for the theft of Hubbard's truck.

After the police filed charges against Reimer, but before his arrest and indictment, Reimer brought this civil rights action. On October 26, 1973, he filed a "Motion for the Return of the Seized Property and the Suppression of Evidence", which was granted in a default judgment entered January 7, 1974 "insofar as it refers to one 1970 Ford pick-up truck with serial numbers F10GKH11749 and F10GKP62670". Reimer made much of this default judgment, even convincing a state judge at one point that it constituted an order binding the state court to suppress evidence of the truck in state criminal proceedings against him. A later amendment of the minute entry covering the judgment and a qualification in the minute entry itself make clear that the order, properly construed, was *only* an order directing the police to re-

turn the truck to Reimer. The proceeding was not an adjudication of Reimer's title to the truck nor a determination that the seizure and suppression claims were valid.

Despite the January 7, 1974 order to return the truck, the police did not return it until January 18, 1974 and returned it then only after Reimer filed a motion to show cause [**6] why they should not be held in contempt. The police returned the truck but retained its identification plate, making Reimer's possession of the truck technically illegal. The defendants finally returned this plate on August 23, 1974, in response to a second contempt motion Reimer filed. After returning the plate, however, the defendants placed a "stop" on the title of the truck, preventing the vehicle from being transferred. Reimer challenged this action with a third contempt motion, but that motion was denied.

After the conclusion of Reimer's civil rights action against the police, the state tried its auto theft charges against him. On March 25, 1975, a jury convicted Reimer of the theft of the Ford pickup truck. The Texas Court of Criminal Appeals, however, granted him a new trial on September 23, 1975, because of newly discovered evidence. Weary, so Reimer says, of his battle against "City Hall" and the Houston Police Department, on March 1, 1976, he entered a plea of *nolo contendere* to a charge of misdemeanor auto theft. He received a thirty-day sentence. In addition to seeking a reversal of the judgment in his civil rights action, Reimer also challenges the disposition of the [**7] state criminal case against him on this appeal.

II

We dispose of the challenge to the *nolo contendere* plea first. Reimer is attempting to challenge his plea of *nolo contendere* to a state criminal charge through an appeal of a federal civil rights action. This he cannot do. First, and most obviously, Reimer has never challenged the disposition of the state criminal charges in a federal district court, so there is no lower court order regarding the matter on which an appeal could be based. Consequently, this matter is not properly before us on appeal. Second, although Reimer's plea was one of *nolo contendere* rather than guilty, he is still challenging the fact or length of his confinement. The relief sought is thus habeas corpus in nature, and under *Preiser v. Rodriguez*, 1973, 411 U.S. 475, 93 S. Ct. 1827, 36 L. Ed. 2d 439, Reimer must exhaust adequate state remedies before bringing suit [*625] for relief from his *nolo contendere* plea in federal district court.

We next reach Reimer's contention that the district court erred in dismissing Police Chief Short and the City of Houston as defendant parties in the civil rights suit. The district court did not err [**8] in granting Police Chief Short's motion to dismiss him as a defendant after

the conclusion of the plaintiff's case at the first trial. "There is no evidence that he participated in, had knowledge of, or was negligent with regard to the actions of the [policemen which were the subject of Reimer's complaint]". n2 *Anderson v. Nosser*, 5 Cir. 1971, 438 F.2d 183, 199, modified on other grounds, 456 F.2d 835 (en banc), cert. denied, 409 U.S. 848, 93 S. Ct. 53, 34 L. Ed. 2d 89 (1973). As this Court noted in *Anderson*, quoting *Jordan v. Kelly*, 223 F. Supp. 731, 739 (W.D.Mo., 1963) "The chief of police would not be responsible for the wrongful acts of the officer unless he was present or unless it is shown he directed such acts or personally cooperated in them. . . ." 438 F.2d at 199.

n2 The only evidence of Short's involvement in the acts that gave rise to Reimer's civil rights suit was the following testimony given by Reimer at the first trial.

Q During this period when you were trying to locate your automobile at the Houston Police Department, did you ever have any conversation with a man who was then Chief of Police, Mr. Herman Short?

A No.

Q Did you make any efforts to see Mr. Short?

A Yes.

Q What did you do?

A I went up there.

Q Went up where?

A To the police department, which was located on Riesner Street. There was a gentleman down below that little desk, kind of like an information center. I asked him what I to do do to see Chief Short.

Q When was this, if you recall?

A This was before they had seized the truck, but I couldn't put an exact date on it.

Q This was before they seized the truck?

A Yes, sir.

Q Well, why were you going to see Chief Short at that time?

A I wanted him to stop all this harassment, these officers just coming out there and shaking my yard down all the time.

Q All right. And did you get to see him?

A I waited out in the hall. He wouldn't see no one. I waited out in the hall till -- it was a little after noon. He came out in the hall with four or five other people that was along with him and I just broke into the line and told him everything.

Q What did you tell him?

A I told him I wanted all this stuff stopped, I was sick and tired of all this harassment. I wanted these things stopped. These officers were outside the city limits of Houston. He told me, "I'm sure if my men are out there, they've got a good reason and I'm not going to do anything about it."

Q And that was the extent of your conversation with Chief Short?

A That was it because he kept walking.

Q Did you ever have any other conversations with him, write him any letters, or anything?

A I did not.

. . . .

Q And can you tell us a little about this conversation with Chief Short? You say that this was around noon?

A It was at noontime, yes, sir.

Q And he was surrounded by several people or walking with a group of men?

A Yes, sir.

Q And you said said that you kind of broke into the crowd?

A Yes.

. . . .

Q And that was the only conversation you had with Chief Short?

A That is it, yes.

Q All right, sir. And what did you tell him, now?

A I asked him why I was being harassed and requested that this harassment and illegal seizures and searches of my property be stopped.

Q Did you explain what it was about?

A No, because he just kept walking. I didn't have time.

Q You just used the word, harassed, and didn't say Adams or DeFoor were coming on your property?

A I believe their names were mentioned to him, but I couldn't truthfully tell you that, Counsel.

Q All right. And you didn't explain about the automobiles or anything like that?

A No, sir.

Second Supplemental Record on Appeal, Testimony of Joe Reimer at 46-48, 90-92.

[**9]

As to the City of Houston, the district court applied *Monroe v. Pape*, 1961, 365 U.S. 167, 187-92, 81 S. Ct. 473, 5 L. Ed. 2d 492, and found that the City of Houston was not "a person" for the purposes of [*626] § 1983. Although the court was correct at the time, the Supreme Court has since overruled that holding of *Monroe*. *Monnell v. Department of Social Services of the City of New York* (1978), 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611. The Supreme Court did not find cities liable to the same extent as any other employer.

"On the other hand, the language of § 1983, read against the background of the same legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor -- or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory."

U.S. at , 98 S. Ct. at 2036. As with Chief Short, there is no evidence that the City [**10] of Houston "acted" through its policies, formally or informally adopted, to deprive Reimer of his constitutional rights. Thus, because the only theory under which the City of Houston could be held liable is *respondeat superior*, the action was properly dismissed as to the City.

III

We turn finally to Reimer's request that the jury's verdict for defendant officers Adams and DeFoor be reversed. Although he raises numerous claims of error as to the proceedings below, Reimer primarily asserts two grounds for overturning the jury's verdict: an improper charge to the jury and insufficiency of the evidence.

The district court instructed the jury that even if you find by a preponderance of the evidence that the plaintiff's civil rights have been violated in this case, should you find, by a preponderance of the evidence, that the defendants were at all times acting in good faith with a reasonable belief in the validity of their conduct, then you must find for the defendants.

Under this instruction, the defendant policemen could avail themselves of an affirmative defense of good faith only if two criteria -- one subjective and one objective -- were met. First, the defendant [**11] police officers had to show that they subjectively harbored a good faith belief that their actions were lawful; second, the objective circumstances surrounding their actions must have been such that their subjective good faith was reasonable. The court's instruction is a correct statement of the law. This can best be shown by discussing the applicability of the "good faith-reasonable belief" defense to the searches of the auto salvage yard and the impoundment of the truck separately.

The availability of a good faith defense to police officers defending § 1983 actions premised on allegedly illegal searches and seizures was first announced by the Supreme Court in *Pierson v. Ray*, 1967, 386 U.S. 547, 87 S. Ct. 1213, 18 L. Ed. 2d 288. The Court there held that where the police activity complained of involved an arrest, "the defense of *good faith and probable cause* . . . available to the officers in the common-law action for false arrest and imprisonment, is also available to them in [an] action under § 1983". (Emphasis added.) Cf. *Procunier v. Navarette*, 1978, 434 U.S. 555, 98 S. Ct. 855, 55 L. Ed. 2d 24 (extending a good faith defense to prison [**12] officials).ⁿ³ Subsequently, several courts of appeals, led by the Second Circuit in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 2 Cir. 1972, 456 F.2d 1339, on remand, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619, decided that the probable cause requirement of a police officer's good faith defense to a § 1983 action is not the same as the probable cause that is constitutionally required to validate searches and [*627] seizures in a criminal proceeding.ⁿ⁴ *Hill v. Rowland*, 4 Cir. 1973, 474 F.2d 1374; *Jones v. Perrigan*, 6 Cir. 1972, 459 F.2d 81. These Courts held that in a § 1983 action against a police officer based upon searches and seizures he committed in the circumstances of an arrest, "it is a defense to allege and prove *good faith and reasonable belief* in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted". *Bivens v. Six Unknown Agents*, 456 F.2d at

1348 (emphasis added); *Hill v. Rowland*, 474 F.2d at 1377; *Jones v. Perrigan*, 459 F.2d at 83. [**13]

n3 In *Procurier* the Supreme Court categorized the two branches of good faith immunity as requiring the plaintiff to prove either that the defendant knew or should have known that he was violating the plaintiff's rights, or that the defendant acted with some malicious intention. Although that statement is phrased differently from our Court's objective/subjective standard, the substantive differences, if any, are not relevant to this case.

n4 The district court charged the jury to this effect:

In considering whether or not the defendants are liable to the plaintiff in this case, you are asked to determine whether or not the defendants acted in good faith with a reasonable belief in the validity of their acts. A policeman or other official may commit a variety of acts which in the course of a criminal trial might be found to be in violation of the civil rights of the accused person. In a civil case in which a policeman is sued for damages, however, he will not be held to the same standard to which he is held in a criminal case. He is not expected to predict whether or not a judge will hold as a matter of law that he did not have "probable cause" to act as he did under the circumstances. Rather, he will have a complete defense to his actions if he can show that, under the circumstances and acting as an ordinary and prudent policeman, he acted in good faith and it was reasonable for him to have believed that his actions were lawful.

[**14]

Because the searches by Adams and DeFoor of Reimer's auto yard were not incident to any arrest, *Bivens* and the cases approving it are not directly applicable. In *Laverne v. Corning*, 2 Cir. 1975, 522 F.2d

1144, however, the court held that the "good faith-reasonable belief" defense is available to public officials sued under § 1983 for performing searches not directly incident to an arrest. In *Laverne*, the Mayor, Deputy Mayor, Building Inspector, and other officials of Laurel Hollow, Long Island were sued under the Civil Rights statutes for performing a series of searches of the plaintiff's property that led to a criminal prosecution for violating both the Village zoning ordinance and a previously obtained injunction. The plaintiffs advanced two reasons for distinguishing prior cases including *Wood v. Strickland*, 1975, 420 U.S. 308, 95 S. Ct. 992, 43 L. Ed. 2d 214 and *Scheuer v. Rhodes*, 1974, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90, upholding the "good faith-reasonable belief" defense to suits based on official acts. First, they urged that *Pierson* and *Monroe v. Pape*, 1961, 365 U.S. 167, 187, 81 S. Ct. 473, 484, 5 L. Ed. 2d 492, 505, [**15] require that § 1983 "be read against the background of tort liability", and good faith is not a defense to the closest common law tort analogue -- trespass. Second, they argued that *Wood*, *Scheuer*, *Pierson*, and *Bivens* all involved officials required under the circumstances to think and act quickly. The *Laverne* Court rejected both arguments. Although the defendants in *Laverne* were executive officials of a locality rather than policemen, they were sued for performing investigatory activities routinely performed by police officer. We agree with the Second Circuit that a police officer's reasonable good faith belief that his actions are lawful and within the scope of his authority is an affirmative defense to a § 1983 action based on searches performed by the policeman not directly incident to an arrest. Indeed, a contrary holding might encourage policemen to arrest first and search later in a misguided attempt to avoid civil liability. Furthermore, the approval of the "good faith-reasonable belief" defense to non-arrest § 1983 actions against policemen that we make explicit today was implicit in our decision in *Rodriguez v. Jones*, 5 Cir. 1973, 473 F.2d 599. [**16] See also *Fisher v. Volz*, 3 Cir. 1974, 496 F.2d 333, 348 n.27.

With respect to § 1983 actions premised on the seizure and retention of personal property by the police -- such as the prolonged impoundment of Reimer's truck by Adams and DeFoor here -- our *en banc* decision in *Bryan v. Jones*, 5 Cir. 1976, 530 F.2d 1210, requires that police officers be permitted a reasonable good faith defense. In *Bryan*, we held that when a plaintiff sues his jailer under § 1983 for keeping him illegally imprisoned, "a defense of official [**628] immunity is available to a jailer who has acted in reasonable good faith". 530 F.2d at 1214. Although it is questionable whether the common law affords a police officer who has committed a trespass to a chattel or a conversion the defense of reasonable good faith, we permitted the reasonable good faith defense in *Bryan*. n5 It would be anomalous to allow a reasonable

good faith defense to an official responsible for depriving a plaintiff of his personal liberty and not avail that defense to one responsible for depriving an individual of his personal property. The district court properly instructed [**17] the jury on the police officer's good faith defense to both the search and the impoundment.

n5 *Section 265 of the Restatement (Second) of Torts* (1965), for example, provides:

One is privileged to commit an act which would otherwise be a trespass to a chattel or a conversion if he is acting in discharge of a duty or authority created by law to preserve the public safety, health, peace, or other public interest, and his act is reasonably necessary to the performance of his duty or the exercise of his authority.

Comment (a) to § 265, however, explains:

It is beyond the scope of this Restatement to state when an officer . . . is under a duty to act, or is authorized to act. Particular statutes may authorize him to act when he reasonably believes it to be necessary. Other statutes may be construed to give the authority only when there is actual necessity. If he is found to be authorized, the rule stated in this Section applies.

Reimer argues that the evidence was insufficient to support [**18] the jury's conclusion that the officers acted in good faith. We can reverse the jury's verdict only if the district court erred in not granting Reimer's motions for a directed verdict and for judgment notwithstanding the verdict. 5 *Moore's Federal Practice* para. 38.08[5], at 89. The standard for granting these motions was set out by this Court in *Boeing Company v. Shipman*, 5 Cir. 1969, 411 F.2d 365 (en banc).

On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence -

- not just that evidence which supports the non-mover's case -- but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, [**19] and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for a jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they be granted only when there is a complete absence of probative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question.

411 F.2d at 374-75.

After reviewing the record, we conclude that, for most of Reimer's claims, this is not a case in which "the facts and inferences point so strongly and overwhelmingly in favor of one party that . . . reasonable men could not arrive at a contrary verdict. . . ." The parties introduced directly conflicting evidence concerning the frequency, intrusiveness, and consensual nature of the officers' searches of Reimer's yard. A reasonable jury could have held for the officers, not only on the issue of good faith but on the question whether any violation at all had occurred. Similarly, the evidence presented shows that the officers could well have believed the truck to have been stolen, and was contraband, when they seized it in September [**20] 1973.

On one point, however, the jury did exceed the bounds of reason. The defendants' actions after January 7, 1974, cannot be said to have been in good faith. On October 26, 1973, Reimer filed a motion in federal court for return of his truck. The district court granted this motion on January [**29] 7. Reimer took the order granting his motion to the police department the next morning. There he was told that "they couldn't read the Judge's signature" and therefore were not going to honor it. After asking for time to consult the City Attorney, the defendants made Reimer wait in the hall for five hours.

A Mr. Storemski finally told Reimer that afternoon that they were not going to release his truck. Ten days later, and only after Reimer served the defendants with a motion to show cause why they should not be held in contempt, the truck was released. Third Supp. Record, 222-28. Even then, the police would not release to Reimer the vehicle's identification plate. This made possession of the truck by Reimer technically illegal. The plate was not returned until August 23, 1974, the scheduled date of argument on Reimer's second contempt motion concerning that plate. His possession [**21] of the truck was still uncertain, for the defendants put a "stop" on the title to the truck, preventing it from being transferred.

From the record, it seems clear that Officers Adams and DeFoor decided Reimer had stolen the truck, then set out to prove it. Until confronted with a court order, the jury could reasonably find that they had acted in good faith, subjectively and objectively. After that order was served, while their actions may still have been from good motives, that good faith could not have been reasonable. All the evidence leads to the conclusion that this contin-

ued barrier to Reimer's possession of the truck was an unreasonable deprivation of his property.

IV

Except for the deprivation of property after January 8, 1973, the judgment below is AFFIRMED. With respect to the actions after that date, the judgment is REVERSED and the case is REMANDED for determination of damages.

DISSENTBY:

JONES

DISSENT:

JONES, Circuit Judge, dissenting:

The question of the good faith of the officers should be, I think, submitted to a jury.

I dissent.

**SUPREME COURT OF VIRGINIA ET AL. v. CONSUMERS UNION OF THE
UNITED STATES, INC., ET AL.**

No. 79-198

SUPREME COURT OF THE UNITED STATES

446 U.S. 719; 100 S. Ct. 1967; 64 L. Ed. 2d 641; 1980 U.S. LEXIS 108

**February 19, 1980, Argued
June 2, 1980, Decided**

PRIOR HISTORY:

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

DISPOSITION:

470 F.Supp. 1055, vacated and remanded.

DECISION:

Virginia Supreme Court held subject to suit under *42 USCS 1983* and to award of attorneys' fees under *42 USCS 1988* in its enforcement capacity as to prohibition against attorney advertising, but immune from suit and not subject to award of fees in its legislative capacity.

SUMMARY:

In connection with preparation of a legal services directory, a consumer organization sought to obtain information, including information as to fee and billing practices, from all attorneys practicing law in one Virginia county. The organization encountered difficulty because lawyers declined to supply the requested information for fear of violating the strict prohibition against advertising in the Virginia Code of Professional Responsibility, promulgated pursuant to statutory authority by the Supreme Court of Virginia. The organization then brought an action in the United States District Court for the Eastern District of Virginia pursuant to *42 USCS 1983* against, among others, the Supreme Court of Virginia, its chief justice, and the state bar, seeking a declaration that the defendants had violated the organization's First and Fourteenth Amendment rights to gather, publish and receive factual information concerning the attorneys involved, and a permanent injunction against the enforcement and operation of the applicable code provision.

Ultimately, after the Virginia Supreme Court declined to amend the code despite the state bar's recommendation to do so and despite the intervening decision in *Bates v State Bar of Arizona (1977) 433 US 350, 53 L Ed 2d 810, 97 S Ct 2691*, holding that enforcement of a ban on attorney advertising would violate the First and Fourteenth Amendment rights of attorneys seeking to advertise fees charged for certain routine legal services, the three-judge District Court declared the code provision unconstitutional on its face and permanently enjoined the defendants from enforcing it (*470 F Supp 1055*). The District Court also held that the Civil Rights Attorney's Fees Awards Act (*42 USCS 1988*) authorized, in proper circumstances, the award of attorneys' fees against the defendants, and, in such regard, concluded that it would be unjust to award attorneys' fees against the state bar because it had no power to change the code and because it had unsuccessfully sought to persuade the Virginia Supreme Court to amend the code to what it deemed to be constitutional standards, but that no similar circumstances made it unjust to award attorneys' fees against the Virginia Supreme Court and its chief justice in his official capacity because of the court's failure or refusal to amend the code. Subsequently, the District Court denied the defendants' petition for rehearing, in which it was argued for the first time, on judicial immunity grounds, that the Virginia Supreme Court and its chief justice were exempt from having declaratory and injunctive relief entered against them and that, in any event, it was an abuse of discretion to enter the fee award against the Virginia Supreme Court and its chief justice.

On direct appeal, the United States Supreme Court vacated the award of attorneys' fees and remanded. In an opinion by White, J., expressing the unanimous view of the eight participating members of the Court, it was held that (1) in promulgating the Code of Professional Responsibility, the Virginia Supreme Court and its members were acting in their legislative capacity and were

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immune from suit under *42 USCS 1983*, (2) the Virginia Supreme Court and its members were nevertheless proper defendants in the action under *42 USCS 1983* challenging the constitutionality of the state code, since, pursuant to the court's inherent authority and state statutory law, the court had authority to enforce the state code beyond that of adjudicating complaints filed by others and beyond the normal authority of the court to punish attorneys for contempt, and (3) the District Court abused its discretion in premising the award of attorneys' fees against the Virginia Supreme Court and its chief justice upon the court's failure or refusal to amend the code, an action for which the defendants enjoyed absolute legislative immunity.

Powell, J., did not participate.

LAWYERS' EDITION HEADNOTES:

[**LEdHN1]

RIGHTS § 12.5

state's highest court -- immunity in legislature --

Headnote:[1A][1B][1C]

A state's highest court and its members are acting in their legislative capacity and are immune from suit under *42 USCS 1983* with respect to the issuance of a state code of professional responsibility governing the conduct of attorneys, where the court, claiming inherent power to regulate the bar, exercises the state's entire legislative capacity with respect to regulating the bar, and the court's members are the state's legislators for the purpose of issuing the code.

[**LEdHN2]

RIGHTS § 12.5

state's highest court -- immunity --

Headnote:[2A][2B]

A state's highest court and its members are proper defendants in an action under *42 USCS 1983* seeking a declaration that a disciplinary rule of the state code of professional responsibility governing the conduct of attorneys violates a consumer organization's First and Fourteenth Amendment rights to gather, publish and receive factual information concerning attorneys and also seeking a permanent injunction against the enforcement and operation of the rule, where, pursuant to its inherent authority and state statutory law, the state court has authority to enforce the state code beyond that of adjudicating complaints filed by others and beyond the normal authority of the courts to punish attorneys for contempt.

[**LEdHN3]

RIGHTS § 12.5

Attorney's Fees Awards Act -- discretion --

Headnote:[3A][3B]

Upon granting declaratory and injunctive relief in an action under *42 USCS 1983* challenging the constitutionality of a disciplinary rule of a state code of professional responsibility for attorneys issued by a state's highest court and as to which the state court has independent enforcement authority, a Federal District Court abuses its discretion in awarding attorneys' fees under the Civil Rights Attorney's Fees Awards Act (*42 USCS 1988*) against the state court and its chief justice where the District Court premises its award upon the state court's failure or refusal to amend the state code to conform to constitutional requirements--as to which actions the state court enjoys absolute legislative immunity--rather than upon the state court's direct role in enforcing the code.

[**LEdHN4]

RIGHTS § 12.5

FEES § 33

Attorney's Fees Awards Act -- applicability --

Headnote:[4A][4B]

The Civil Rights Attorney's Fees Awards Act (*42 USCS 1988*) is applicable to a case in which the trial was held and the initial decision rendered five months and two months, respectively, prior to enactment of the Act, Congress having intended for the Act to apply to actions pending when the Act was passed.

[**LEdHN5]

ERROR § 1340

review -- question for decision --

Headnote:[5]

On direct appeal for the United States Supreme Court to review the decision of a Federal District Court in which the court declared unconstitutional a disciplinary rule of a state code of professional responsibility for attorneys issued by a state's highest court and also enjoined enforcement and operation of the rule, the fact that the District Court referred to issuance of the state code as a judicial function is not conclusive on the Supreme Court for the purpose of deciding whether issuance of the code is a judicial act as to which the state court and its chief justice are entitled to immunity from suit under *42 USCS 1983*; since issuance of the state code is not an act of adjudication but one of rulemaking, the Supreme Court must inquire whether the state's highest court and its chief justice are immune from suit in their legislative capacity.

[**LEdHN6]

RIGHTS § 12.5

state legislators -- immunity --

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Headnote:[6]

State legislators' common-law immunity from liability for their legislative acts extends to civil rights actions seeking declaratory or injunctive relief under *42 USCS 1983* as well as to actions seeking damages.

[***LEdHN7]

RIGHTS § 12.5

LEGISLATURE § 1

state legislators -- immunity --

Headnote:[7]

Although the separation of powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions, the legislative immunity to which state legislators are entitled under *42 USCS 1983* is equivalent to that accorded Congressmen under the Constitution.

[***LEdHN8]

COURTS § 236.5

state bar disciplinary rules -- case or controversy --

Headnote:[8A][8B]

Although mere enforcement authority does not create a case or controversy with the enforcement official, in the circumstances of an action under *42 USCS 1983* seeking a declaration that a disciplinary rule of a state code of professional responsibility for attorneys violates a consumer organization's First and Fourteenth Amendment rights to gather, publish and receive factual information concerning attorneys, and also seeking a permanent injunction against enforcement and operation of the rule, a sufficiently concrete dispute is as well made out against a state's highest court, which has inherent and statutory authority to enforce the state code, as it is against the state bar itself.

[***LEdHN9]

RIGHTS § 12.5

prosecutor -- immunity --

Headnote:[9]

Prosecutors enjoy absolute immunity from damages liability under *42 USCS 1983*, but they are natural targets for injunctive suits under *42 USCS 1983* since they are the state officers who are threatening to enforce and who are enforcing the law.

[***LEdHN10]

ERROR § 338

Supreme Court review -- three-judge court -- attorneys' fees -- jurisdiction --

Headnote:[10A][10B]

On direct appeal to review the decision of a three-judge Federal District Court in which the District Court declared unconstitutional a disciplinary rule of a state code of professional responsibility for attorneys issued by a state's highest court and also permanently enjoined enforcement and operation of the rule, while awarding attorneys' fees against the state's highest court and its chief justice, the United States Supreme Court has jurisdiction under *28 USCS 1253* to decide whether attorneys' fees were properly awarded under the Civil Rights Attorney's Fees Awards Act (*42 USCS 1988*), where the case is properly before the Court on the question whether the state's highest court and its chief justice were immune from suit for declaratory and injunctive relief under *42 USCS 1983*, although the Supreme Court would not have jurisdiction to decide the attorneys' fees question if that question alone had been appealed.

[***LEdHN11]

RIGHTS § 12.5

FEES § 33

STATES § 93

attorneys' fees -- recovery from state officials --

Headnote:[11]

An award of attorneys' fees authorized by the Civil Rights Attorney's Fees Awards Act (*42 USCS 1988*) may be recovered from state officials who are sued in their official capacities.

[***LEdHN12]

RIGHTS § 12.5

Civil Rights Attorney's Fees Awards Act -- state bar -- fairness --

Headnote:[12]

Upon granting declaratory and injunctive relief in an action under *42 USCS 1983* challenging the constitutionality of a disciplinary rule of a state code of professional responsibility for attorneys, it would not necessarily be unfair for a Federal District Court to award attorneys' fees under the Civil Rights Attorney's Fees Awards Act (*42 USCS 1988*) against the state bar, which by statute is designated as an administrative agency to enforce the state code; merely because the state bar had recommended to the state's highest court that the code be amended to conform to what it deemed to be constitutional standards and because the state court, which had the sole power to change the code, declined or failed to adopt this proposal.

SYLLABUS:

Appellant Virginia Supreme Court, which claims inherent authority to regulate and discipline attorneys,

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also has statutory authority to do so. Pursuant to these powers, the court promulgated the Virginia Code of Professional Responsibility (Code) and organized the Virginia State Bar to act as an administrative agency of the court to report and investigate violations of the Code. The statute reserves to the state courts the sole power to adjudicate alleged violations of the Code, and the Supreme Court and other state courts of record have independent authority on their own to initiate proceedings against attorneys. When one of the appellees sought to prepare a legal services directory, the attorneys who were canvassed refused to supply the requested information for fear of violating the Code's prohibition against attorney advertising (DR 2-102 (A)(6)). Appellees then brought an action in Federal District Court under 42 U. S. C. § 1983 against, *inter alios*, the Virginia Supreme Court and its chief justice (also an appellant) in both his individual and official capacities, seeking a declaration that the defendants had violated appellees' First and Fourteenth Amendment rights to gather, publish, and receive factual information concerning the attorneys involved, and a permanent injunction against the enforcement and operation of DR 2-102 (A)(6). Ultimately, after the Virginia Supreme Court declined to amend DR 2-102 (A)(6) despite the State Bar's recommendation to do so and despite the intervening decision in *Bates v. State Bar of Arizona*, 433 U.S. 350, holding that enforcement of a ban on attorney advertising would violate the First and Fourteenth Amendment rights of attorneys seeking to advertise fees charged for certain routine legal services, the District Court declared DR 2-102 (A)(6) unconstitutional on its face and permanently enjoined defendants from enforcing it. The court further held that the Civil Rights Attorney's Fees Awards Act of 1976, which provides that in any action to enforce 42 U. S. C. § 1983, *inter alia*, a district court, in its discretion, may award the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, authorized in proper circumstances the award of fees against the Virginia Supreme Court and the chief justice in his official capacity, and that here such an award was not unjust because the Supreme Court had denied the State Bar's petition to amend the Code and had also failed to amend it to conform to the holding in *Bates*, *supra*.

Held:

1. In promulgating the Code, the Virginia Supreme Court acts in a legislative capacity, and in that capacity the court and its members are immune from suit. Pp. 731-734.

2. But the court and its chief justice were properly held liable in their enforcement capacities. Since the state statute gives the court independent authority on its own to initiate proceedings against attorneys, the court and its members were proper defendants in a suit for

declaratory and injunctive relief, just as other enforcement officers and agencies are. Pp. 734-737.

3. The District Court abused its discretion in awarding attorney's fees against the Virginia Supreme Court premised on acts or omissions for which appellants enjoy absolute legislative immunity. There is nothing in the legislative history of the Civil Rights Attorney's Fees Awards Act to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute immunity. Pp. 737-739.

COUNSEL:

Marshall Coleman, Attorney General of Virginia, argued the cause for appellants. With him on the briefs were Walter H. Ryland, Chief Deputy Attorney General, and Philip B. Kurland.

Ellen Broadman argued the cause for appellees. With her on the brief were Alan Mark Silbergeld, James W. Benton, Jr., and Michael Pollet. *

* Burt Neuborne, Bruce J. Ennis, Jr., and Stephen Bricker filed a brief for the American Civil Liberties Union et al. as amici curiae urging affirmance.

JUDGES:

WHITE, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the case.

OPINIONBY:

WHITE

OPINION:

[*721] [***646] [**1969]

[***LEdHR1A] [1A] [***LEdHR2A] [2A]
[***LEdHR3A] [3A]MR. JUSTICE WHITE delivered the opinion of the Court.

This case raises questions of whether the Supreme Court of Virginia (Virginia Court) and its chief justice are officially immune from suit in an action brought under 42 U. S. C. § 1983 challenging the Virginia Court's disciplinary rules governing the conduct of attorneys and whether attorney's fees were properly awarded under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988, against the [***647] Virginia Court and its chief justice in his official capacity.

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I

It will prove helpful at the outset to describe the role of the Virginia Court in regulating and disciplining attorneys. The Virginia Court has firmly held to the view that it has inherent authority to regulate and discipline attorneys. *Button v. Day*, 204 Va. 547, 552-555, 132 S. E. 2d 292, 295-298 (1963). It also has statutory authority to do so. Section 54-48 of the Code of Virginia (1978) authorizes the Virginia Court to "promulgate and amend rules and regulations . . . [prescribing] a code of ethics governing the professional conduct of attorneys-at-law. . . ." n1

n1 "§ 54-48. Rules and regulations defining practice of law and prescribing procedure for practice by law students, codes of ethics and disciplinary procedure. -- The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:

"(a) Defining the practice of law.

"(a1) Prescribing procedure for limited practice of law by third-year law students.

"(b) Prescribing a code of ethics governing the professional conduct of attorneys-at-law including the practice of law or patent law through professional law corporations, professional associations and partnerships, and a code of judicial ethics.

"(c) Prescribing procedure for disciplining, suspending, and disbaring attorneys-at-law."

Pursuant to these powers, the Virginia Court promulgated the Virginia Code of Professional Responsibility (State Bar Code, Bar Code, or Code), the provisions of which were substantially [*722] identical to the American Bar Association's Code of Professional Responsibility. Section 54-48 provides no standards for the Virginia Court to follow in regulating attorneys; it is apparent that insofar as the substantive content of such a code is concerned, the State has vested in the court virtually its entire legislative or regulatory power over the legal profession.

Section 54-48 also authorizes the Virginia Court to prescribe "procedure for disciplining, suspending and disbaring attorneys-at-law"; and § 54-49 authorizes the court to promulgate rules and regulations "organizing and governing the association known as the Virginia State Bar, composed of the attorneys-at-law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting . . . [violations]. . ." n2 Acting under this authority, the Virginia State Bar (State Bar or Bar) has been organized and its enforce-

ment role vested in an ethics committee and [**1970] in various district committees. Section 54-51 reserves to the courts the sole power to adjudicate alleged violations of the Bar Code, n3 and [***648] hence the role of the State Bar is limited to the [*723] investigation of violations and the filing of appropriate complaints in the proper courts. Under § 54-74, the enforcement procedure involves the filing of a complaint in a court of record, the issuance of a rule to show cause against the charged attorney, the prosecution of the case by the commonwealth attorney, and the hearing of the case by the judge issuing the rule together with two other judges designated by the chief justice of the Virginia Supreme Court. n4 Appeal lies to the Virginia Supreme Court.

n2 "§ 54-49. Organization and government of Virginia State Bar. -- The Supreme Court may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys-at-law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under this article for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing."

n3 "§ 54-51. Restrictions as to rules and regulations. -- Notwithstanding the foregoing provisions of this article, the Supreme Court shall not adopt or promulgate rules or regulations prescribing a code of ethics governing the professional conduct of attorneys-at-law, which shall be inconsistent with any statute; nor shall it adopt or promulgate any rule or regulation or method of procedure which shall eliminate the jurisdiction of the Courts to deal with the discipline of attorneys-at-law as provided by law; and in no case shall an attorney, who demands to be tried by a court of competent jurisdiction for the violation of any rule or regulation adopted under this article be tried in any other manner."

n4 "§ 54-74. Procedure for suspension or revocation of license. -- (1) *Issuance of rule.* -- If the Supreme Court of Virginia, or any court of record of this State, observes, or if complaint, verified by affidavit, be made by any person to such court of any malpractice or of any unlawful or dishonest or unworthy or corrupt or unprofessional conduct on the part of any attorney, or that

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any person practicing law is not duly licensed to practice in this State, such court shall, if it deems the case a proper one for such action, issue a rule against such attorney or other person to show cause why his license to practice law shall not be revoked or suspended. If the complaint, verified by affidavit, be made by a District Committee of the Virginia State Bar, such court shall issue a rule against such attorney to show cause why his license to practice law shall not be revoked or suspended.

"(2) *Judges hearing case.* -- At the time such rule is issued the court issuing the same shall certify the fact of such issuance and the time and place of the hearing thereon, to the chief justice of the Supreme Court of Virginia, who shall designate two judges, other than the judge of the court issuing the rule, of circuit courts or courts of record of cities of the first class to hear and decide the case in conjunction with the judge issuing the rule, which such two judges shall receive as compensation ten dollars per day and necessary expenses while actually engaged in the performance of their duties, to be paid out of the State treasury, from the appropriation for criminal charges.

"(3) *Duty of Commonwealth's attorney.* -- It shall be the duty of the attorney for the Commonwealth for the county or city in which such case is pending to appear at the hearing and prosecute the case.

"(4) *Action of court.* -- Upon the hearing, if the defendant be found guilty by the court, his license to practice law in this State shall be revoked, or suspended for such time as the court may prescribe; provided, that the court, in lieu of revocation or suspension, may, in its discretion, reprimand such attorney.

"(5) *Appeal.* -- The person or persons making the complaint or the defendant, may, as of right, appeal from the judgment of the court to the Supreme Court of Virginia, by petition based upon a true transcript of the record, which shall be made up and certified as in actions at law. In all such cases where a defendant's license to practice law has been revoked by the judgment of the court, his privilege to practice law shall be suspended pending appeal."

Effective July 1, 1981, the judge issuing the rule to show cause will not participate in disciplinary cases, which are to be heard by three judges designated by the chief justice from any circuit other than the one in which the case is pending.

The courts of Virginia, including the Supreme Court, thus [*724] play an adjudicative role in enforcing the Bar Code similar to their function in enforcing any statute adopted by the Virginia Legislature and similar or identical to the role they would play had the Bar Code been adopted by the state legislature.

The Virginia Court, however, has additional enforcement power. As we have said, it asserts inherent power to discipline attorneys. Also, § 54-74 expressly provides that if the Virginia Court or any other court of record observes any act of unprofessional conduct, it may itself, without any complaint being filed by the State Bar or by any third party, issue a rule to show cause against the offending attorney. Although [**1971] once the rule issues, such cases [***649] would be prosecuted by the commonwealth attorney, it is apparent that the Virginia Court and other courts in Virginia have enforcement authority beyond that of adjudicating complaints filed by others and beyond the normal authority of the courts to punish attorneys for contempt.

II

This case arose when, in 1974, one of the appellees, Consumers Union of the United States, Inc. (Consumers Union), sought to prepare a legal services directory designed to assist consumers in making informed decisions concerning utilization of legal services. Consumers Union sought to canvass all [*725] attorneys practicing law in Arlington County, Va., asking for information concerning each attorney's education, legal activities, areas of specialization, office location, fee and billing practices, business and professional affiliations, and client relations. However, it encountered difficulty because lawyers declined to supply the requested information for fear of violating the Bar Code's strict prohibition against attorney advertising. Rule 2-102 (A)(6) of the Code prohibited lawyers from being included in legal directories listing the kind of legal information that Consumers Union sought to publish. n5

n5 At the time Consumers Union sought to canvass Virginia attorneys, Disciplinary Rule 2-102 (A) of the State Bar Code provided in pertinent part: "A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in dignified form:

....

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(6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. . . . The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular field of law or law practice . . . ; date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; military service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented."

On February 27, 1975, Consumers Union and the Virginia Citizens Consumer Council brought an action pursuant to 42 U. S. C. § 1983 against the Virginia Court, the Virginia State Bar, the American Bar Association, and, in both their individual and official capacities, the chief justice of the Virginia Court, the president of the State Bar, and the chairman [*726] of the State Bar's Legal Ethics Committee. With respect to the Virginia Court, the complaint identified its chief justice and alleged only that the court had promulgated the Bar Code. The other defendants were alleged to have authority to enforce the Code. Plaintiffs sought a declaration that defendants had violated their First and Fourteenth Amendment rights to gather, publish, and receive factual information concerning attorneys practicing in Arlington County, and a permanent injunction against the enforcement and operation of DR 2-102 (A)(6).

***650] A three-judge District Court was convened pursuant to 28 U. S. C. § 2281 (1970 ed.). Defendants moved for indefinite continuance of the trial on the grounds that the ABA and the State Bar were preparing amendments to relax the advertising prohibitions contained in DR 2-102 (A)(6). Over plaintiff-appellees' opposition, the District Court granted defendants a continuance until March 25, 1976.

On February 17, 1976, the ABA adopted amendments to its Code of Professional Responsibility which would permit attorneys to advertise office hours, initial consultation fees, and credit arrangements. Defendants

then sought and obtained a further continuance [**1972] to permit the Virginia Court and the State Bar to consider amending the State Bar Code to conform to the ABA amendments. Although the governing body of the State Bar recommended that the Virginia Court adopt the ABA amendments to DR 2-102, on April 20, 1976, the court declined to adopt the amendments on the ground that they would "not serve the best interests of the public or the legal profession."

The action then proceeded to trial on May 17, 1976, and was decided on December 17, 1976. *Consumers Union of United States, Inc. v. American Bar Assn.*, 427 F.Supp. 506 (ED Va. 1976). The three-judge District Court concluded that abstention would be inappropriate in light of defendants' failure to amend the State Bar Code despite continuances based on the speculation that DR 2-102 (A)(6) would be [*727] relaxed. *Id.*, at 513-516. The court declared that DR 2-102 (A)(6) unconstitutionally restricted the right of plaintiff-appellees to receive and gather nonfee information and information concerning initial consultation fees. Defendants were permanently enjoined from enforcing DR 2-102 (A)(6) save for its prohibition against advertising fees for services other than the initial consultation fee. *Id.*, at 523.

***LEdHR4A] [4A]Plaintiff-appellees appealed to this Court, challenging the District Court's refusal to enjoin enforcement of the prohibition of fee advertising. Defendants brought a cross-appeal, arguing that DR 2-102 (A)(6) should have been upheld in its entirety. While these appeals were pending, we decided *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), in which we held that enforcement of a ban on attorney advertising would violate the First and Fourteenth Amendment rights of attorneys seeking to advertise the fees they charged for certain routine legal services. In light of *Bates*, the judgment below was vacated and the case was remanded for further consideration. 433 U.S. 917 (1977).

On remand, defendants agreed that in light of *Bates* DR 2-102 (A)(6) could not constitutionally be enforced to prohibit attorneys from providing plaintiff-appellees with any of the information they sought to publish in their legal services directory. Defendants proposed that a permanent injunction be entered barring them from enforcing DR 2-102 (A)(6) against attorneys providing plaintiff-appellees with information. On May 8, 1979, the District Court declared DR 2-102 (A)(6) unconstitutional on its face and permanently enjoined defendants from enforcing [***651] it. n6

n6 The District Court's final order provided in pertinent part:

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"1. The publication described in plaintiff's complaint, as amended, is declared valid and constitutionally protected;

"2. The Virginia Code of Professional Responsibility Disciplinary Rule 2-102 (A)(6) is declared unconstitutional on its face;

"3. The defendants, their successors in office, their agents and attorneys and all acting in concert therewith are permanently enjoined from enforcement of Virginia Code of Professional Responsibility Disciplinary Rule 2-102 (A)(6)."

[*728] Plaintiff-appellees also moved for costs, including an award of attorney's fees pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U. S. C. § 1988. n7 The defendants objected to any fee award on various grounds, including judicial immunity. They did not object to their paying other costs. Although holding the individual defendants immune from attorney's fees liability in their individual capacities, the District Court held that the Act authorized in proper circumstances the award of fees against the State Bar, the Virginia Court and the individual defendants in their official capacities. *Consumers Union of United States, Inc. v. American Bar Assn.*, 470 F.Supp. 1055, 1059-1061 (ED Va. 1979).

n7

***LEdHR4B] [4B]The Civil Rights Attorney's Fees Awards Act was enacted into law on October 19, 1976, five months after the trial in this action and two months before the District Court's initial decision. The Act is applicable in this case because Congress intended for the Act to apply to actions that were pending when the Act was passed. *Hutto v. Finney*, 437 U.S. 678, 694-695, n. 23 (1978).

**1973] The District Court went on to conclude that special circumstances made it unjust to award attorney's fees against the State Bar or against the State Bar officers in their official capacities because it was not these defendants but the Virginia Court that had the power to change the State Bar disciplinary rules and because the State Bar and its officers had unsuccessfully sought to persuade the court to amend the Code to conform to what they deemed to be constitutional standards. There were no similar circumstances making it unjust to award attorney's fees against the Virginia Court and its chief justice in his official capacity. This was because the court had denied the State Bar's petition to amend the Code to conform to what were deemed to be the re-

quirements of *Bigelow v. Virginia*, 421 U.S. 809 (1975), and had also failed to amend the Code to conform to the holding in *Bates v. State Bar of Arizona*, *supra*. Hence, "[it] would hardly be unjust to order the [*729] Supreme Court of Virginia defendants to pay plaintiffs reasonable attorneys fees in light of their continued failure and apparent refusal to amend [the Code] to conform with constitutional requirements." 470 F.Supp., at 1063. The parties were directed to attempt to reach an agreement on a reasonable sum, failing which the court would determine the fee. n8

n8 Judge Warriner dissented on the grounds that legislative immunity barred an award of attorney's fees and that it would be unjust to award attorney's fees against a state supreme court in the absence of a showing of bad faith. 470 F.Supp., at 1063.

On May 23, 1979, defendants filed a petition for rehearing, arguing for [***652] the first time, on judicial immunity grounds, that the Virginia Court and its chief justice were exempt from having declaratory and injunctive relief entered against them. It was also argued that in any event it was an abuse of discretion to enter the fee award against the Virginia Court and its chief justice.

Following denial of rehearing, the Virginia Court and its chief justice appealed, presenting the following questions:

1. Is the Supreme Court of Virginia immune from judgment under the doctrine of judicial immunity?
2. May the Civil Rights Attorney's Fees Awards Act of 1976 be construed to permit an award of attorneys' fees against the Supreme Court of Virginia for its judicial acts?
3. Does the doctrine of judicial immunity preclude the award of attorneys' fees for failure to correct a challenged judicial act which is the subject of litigation?
4. On the facts before it, did the District Court abuse its discretion in awarding fees against the Virginia Court?

Appellees moved to dismiss or affirm, the motion to dismiss urging that the claim of judicial immunity from declaratory or injunctive relief was not properly before the Court because [*730] it had not been timely raised in the District Court and had therefore been waived. We noted probable jurisdiction, 444 U.S. 914 (1979).

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III

Title 42 U. S. C. § 1988, as amended by the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, provides in pertinent part:

"In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

The District Court held that in light of the § 1983 judgment that had been entered in favor of appellees, the Act authorized an award of attorney's fees against appellants. Appellants urge that this was error. Their primary contention is that on the grounds of absolute legislative or judicial immunity they should have been excluded from the judgment below and also from liability for [**1974] attorney's fees. Appellees on the other hand assert that neither judicial nor legislative immunity immunized these defendants from declaratory or injunctive relief as distinguished from a damages award; and in any event they insist that the judgment stand against these defendants because the Virginia Court itself shares direct enforcement authority with the State Bar and hence is subject to prospective judgments just as other enforcement officials are. n9

n9 As indicated in the text, the motion to dismiss the appeal rested on the failure of appellants to have raised the immunity issue at an earlier time. We noted probable jurisdiction, and appellees' brief on the merits has not again urged that the claim of immunity was not timely raised either with respect to the fee question alone or with respect to the entry of prospective relief against the Virginia Court and its chief justice. Their arguments, like those of appellants, are centered on the issues of judicial and legislative immunity.

[*731] A

[***653]

[***LEdHR1B] [1B] [***LEdHR5] [5]Appellees sought declaratory and injunctive relief with respect to particular provisions of the State Bar Code propounded by the Virginia Court. Although it is clear that under Virginia law the issuance of the Bar Code was a proper function of the Virginia Court, propounding the Code was not an act of adjudication but one of rulemaking. The District Court below referred to the issuance of the

Code as a judicial function, but this is not conclusive upon us for the purpose of deciding whether issuance of the Code is a judicial act entitled to immunity under § 1983. Judge Warriner, dissenting in the District Court, agreed with a prior District Court holding in *Hirschkop v. Virginia State Bar*, 421 F.Supp. 1137, 1156 (ED Va. 1976), rev'd in part on other grounds *sub nom. Hirschkop v. Snead*, 594 F.2d 356 (CA4 1979), that in promulgating disciplinary rules the Virginia Supreme Court acted in a legislative capacity. Judge Warriner said:

"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." 470 F.Supp., at 1064.

We agree with this analysis and hence must inquire whether the Virginia Court and its chief justice are immune from suit for acts performed in their legislative capacity.

We have already decided that the Speech or Debate Clause immunizes Congressmen from suits for either prospective relief or damages. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502-503 (1975). The purpose of this immunity is to insure that the legislative function may be performed independently without fear of outside interference. *Ibid.* To preserve legislative independence, we have concluded that [*732] "legislators engaged 'in the sphere of legitimate legislative activity,' *Tenney v. Brandhove*, [341 U.S. 367, 376 (1951)], should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

[***LEdHR6] [6] [***LEdHR7] [7]We have also recognized that state legislators enjoy common-law immunity from liability for their legislative acts, an immunity that is similar in origin and rationale to that accorded Congressmen under the Speech or Debate Clause. *Tenney v. Brandhove*, 341 U.S. 367 (1951). In *Tenney* we concluded that Congress did not intend § 1983 to abrogate the common-law immunity of state legislators. Although *Tenney* involved an action for damages under § 1983, its holding is equally applicable to § 1983 actions seeking declaratory or [***654] injunctive relief. n10 In holding [**1975] that § 1983 "does not create [*733] civil liability" for acts unknown "in a field where legislators traditionally have power to act," *id.*, at 379, we did

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not distinguish between actions for damages and those for prospective relief. Indeed, we have recognized elsewhere that "a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Eastland v. United States Servicemen's Fund*, *supra*, at 503. Although the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions, *United States v. Gillock*, 445 U.S. 360 (1980), we generally have equated the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution. *Eastland v. United States Servicemen's Fund*, *supra*, at 502-503, 505, 506; *Dombrowski v. Eastland*, *supra*, at 84-85; *United States v. Johnson*, 383 U.S. 169, 180 (1966); *Tenney v. Brandhove*, *supra*, at 377-379. n11 Thus, there is little doubt that if the Virginia Legislature had enacted the State Bar Code and if suit had been brought against the legislature, its committees, or members [***655] for refusing to amend the Code in the wake of our cases indicating that the Code in some respects would be held invalid, the defendants in that suit could [*734] successfully have sought dismissal on the grounds of absolute legislative immunity. n12

n10 This seems to be the view of the Court of Appeals for the Second Circuit in its recent holding in *Star Distributors, Ltd. v. Marino*, 613 F.2d 4 (1980). That court held that the legislative immunity enjoyed by the members of a state legislative committee bars an action for declaratory and injunctive relief just as it bars an action for damages. Understanding that *Tenney* was based on the similarity between common-law immunity and the Speech or Debate Clause, the Second Circuit reasoned that legislative immunity should protect state legislators in a manner similar to the protection afforded Congressmen. The Courts of Appeals for the Fifth and Eighth Circuits have dismissed on immunity grounds suits seeking both damages and injunctive relief but without separately addressing the issue of immunity from prospective relief. *Safety Harbor v. Birchfield*, 529 F.2d 1251 (CA5 1976); *Smith v. Klecker*, 554 F.2d 848 (CA8 1977); *Green v. DeCamp*, 612 F.2d 368 (CA8 1980). The Court of Appeals for the Fourth Circuit, however, takes the contrary view and rejects the notion that the legislative immunity enjoyed by state officials bars suits for prospective relief. *Jordan v. Hutcheson*, 323 F.2d 597 (1963); *Eslinger v. Thomas*, 476 F.2d 225, 230 (1973). Both opinions of the Court of Appeals for the Fourth Circuit, however, were rendered prior to this Court's decision in *Eastland v.*

United States Servicemen's Fund, 421 U.S. 491 (1975). The Court of Appeals for the Ninth Circuit may have a similar view with respect to the immunity enjoyed by officials of a regional body exercising both legislative and executive powers. *Jacobson v. Tahoe Regional Planning Agency*, 566 F.2d 1353 (1977).

n11 Contrary to appellees' suggestion, we do not view *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979), as indicating our approval of injunctive relief against a regional legislative body or its officers. No injunctive relief had been awarded when *Lake Country Estates* reached this Court. Although it is not entirely clear, the Court of Appeals in that case seemed to believe that immunity would not bar a suit for equitable relief against officials of the Tahoe Regional Planning Agency (TRPA). The court did not specify whether equitable relief could be founded on acts for which the officials would otherwise enjoy legislative immunity, and this Court did not have occasion to express any view on this question because the TRPA never challenged this aspect of the Court of Appeals' decision. We simply affirmed the Court of Appeals' holding that TRPA officials could not be held liable in damages for their legislative acts.

n12 Of course, legislators sued for enacting a state bar code might also succeed in obtaining dismissals at the outset on grounds other than legislative immunity, such as the lack of a case or controversy.

[***LEdHRIC] [IC]Appellees submit that whatever may be true of state legislators, the Virginia Court and its members should not be accorded the same immunity where they are merely exercising a delegated power to make rules in the same manner that many executive and agency officials wield authority to make rules in a wide variety of circumstances. All of such officials, it is urged, are not [***1976] absolutely immune from civil suit. As much could be conceded, but it would not follow that, as appellees would have it, in *no* circumstances do those who exercise delegated legislative power enjoy legislative immunity. In any event, in this case the Virginia Court claims inherent power to regulate the Bar, and as the dissenting judge below indicated, the Virginia Court is exercising the State's entire legislative power with respect to regulating the Bar, and its members are

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the State's legislators for the purpose of issuing the Bar Code. Thus the Virginia Court and its members are immune from suit when acting in their legislative capacity.

B

If the sole basis for appellees' § 1983 action against the Virginia Court and its chief justice were the issuance of, or failure to amend, the challenged rules, legislative immunity would foreclose suit against appellants. As has been pointed out, however, the Virginia Court performs more than a legislative role with respect to the State Bar Code. It also hears appeals from lower court decisions in disciplinary cases, a traditional adjudicative task; and in addition, it has independent enforcement authority of its own.

Adhering to the doctrine of *Bradley v. Fisher*, 13 Wall. 335 (1872), we have held that judges defending against § 1983 [*735] actions enjoy absolute immunity from damages liability for acts performed in their judicial capacities. *Pierson v. Ray*, 386 U.S. 547 (1967); *Stump v. Sparkman*, 435 U.S. 349 (1978). However, we have never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts. The Courts of Appeals appear to be divided on the question whether judicial immunity bars declaratory or injunctive relief; n13 we have not addressed the [***656] question. n14

n13 The Courts of Appeals for the Second, Fourth, and Seventh Circuits are of the view that judicial immunity does not extend to declaratory and injunctive relief. *Heimbach v. Village of Lyons*, 597 F.2d 344, 347 (CA2 1979); *Timmerman v. Brown*, 528 F.2d 811, 814 (CA4 1975); *Fowler v. Alexander*, 478 F.2d 694, 696 (CA4 1973); *Harris v. Harvey*, 605 F.2d 330, 335, n. 7 (CA7 1979); *Hansen v. Ahlgrimm*, 520 F.2d 768, 769 (CA7 1975); *Jacobson v. Schaefer*, 441 F.2d 127, 130 (CA7 1971). Three other Courts of Appeals, the Eighth, Ninth, and District of Columbia Circuits seem to agree. *Kelsey v. Fitzgerald*, 574 F.2d 443, 444 (CA8 1978); *Williams v. Williams*, 532 F.2d 120, 121-122 (CA8 1976); *Shipp v. Todd*, 568 F.2d 133, 134 (CA9 1978); *Briggs v. Goodwin*, 186 U. S. App. D. C. 179, 184, n. 4, 569 F.2d 10, 15, n. 4 (1977). It is rare, however, that any kind of relief has been entered against judges in actions brought under § 1983 and seeking to restrain or otherwise control or affect the future performance of their adjudicative role. Such suits have been recurrently dismissed for a variety of reasons other than immunity. Hence, the question of awarding attorney's fees against judges will not often arise.

n14 Although we did not address the issue, a state judge was among the defendants in *Mitchum v. Foster*, 407 U.S. 225 (1972), where the Court held that § 1983 served to pierce the shield of 28 U. S. C. § 2283 against a federal court enjoining state-court proceedings. The Court did say, quoting from *Ex parte Virginia*, 100 U.S. 339, 346 (1880), to this effect, that § 1983 was designed to enforce the provisions of the Fourteenth Amendment against all state action, whether that action be executive, legislative, or *judicial*. The Court also noted that the proponents of § 1983 at the time it was enacted insisted that state courts were being used to harass and injure citizens, perhaps because they were powerless to stop deprivations or were in league with those who were bent upon abrogating federally protected rights. 407 U.S., at 242.

In *Boyle v. Landry*, 401 U.S. 77 (1971), and *O'Shea v. Littleton*, 414 U.S. 488 (1974), lower courts had entered injunctions against state officials including state-court judges. In each case, we reversed on the grounds that no case or controversy had been made out against any of the appellants in this Court; and in *O'Shea*, we concluded that even assuming that there was a case or controversy, insufficient grounds for equitable relief had been presented. We did not suggest, however, that judges were immune from suit in their judicial capacity.

Gerstein v. Pugh, 420 U.S. 103 (1975), involved a judgment against state-court judges and a prosecuting official declaring unconstitutional and enjoining the enforcement of certain state statutes. The prosecutor brought the case to this Court. We affirmed the declaration that the Florida procedures at issue were unconstitutional and held that *Younger v. Harris*, 401 U.S. 37 (1971), did not bar injunctive relief in the circumstances of the case. No issue of absolute immunity was raised or addressed.

[*736] [**1977]

[***LEdHR2B] [2B] [***LEdHR8A] [8A]We need not decide whether judicial immunity would bar prospective relief, for we believe that the Virginia Court and its chief justice properly were held liable in their enforcement capacities. As already indicated, § 54-74 gives the Virginia Court independent authority of its own to initiate proceedings against attorneys. For this reason the

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Virginia Court and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were. n15

n15

[**LEdHR8B] [8B]Of course, as *Boyle v. Landry, supra*, and *O'Shea v. Littleton, supra*, indicate, mere enforcement authority does not create a case or controversy with the enforcement official; but in the circumstances of this case, a sufficiently concrete dispute is as well made out against the Virginia Court as an enforcer as against the State Bar itself. See *Person v. Association of the Bar of New York*, 554 F.2d 534, 536-537 (CA2 1977).

[**LEdHR9] [9] [**LEdHR10A] [10A]Prosecutors enjoy absolute immunity from damages liability, *Imbler v. Pachtman*, 424 U.S. 409 (1976), but they are natural targets for § 1983 injunctive suits since they are the state officers who are threatening to enforce and who are enforcing the law. *Gerstein v. Pugh*, 420 U.S. 103 (1975), [*737] is only one of a myriad of such cases since *Ex parte Young*, 209 U.S. 123 (1908), decided that suits against state officials in federal courts are not barred by the Eleventh Amendment. If prosecutors and law enforcement personnel cannot be proceeded against for declaratory relief, putative plaintiffs would have to await the institution of state-court proceedings [**657] against them in order to assert their federal constitutional claims. This is not the way the law has developed, and, because of its own inherent and statutory enforcement powers, immunity does not shield the Virginia Court and its chief justice from suit in this case. n16

n16

[**LEdHR10B] [10B]Although appellants argued below that the Virginia Court as an entity is not a "person" suable under § 1983, they have not raised this issue before this Court. In any event, prospective relief was properly awarded against the chief justice in his official capacity; and absent a valid claim of immunity, the question remains whether the District Court's award of attorney's fees was proper. Although we would not have appellate jurisdiction under 28 U. S. C. § 1253 to decide the attorney's fees question had it alone been appealed, because the case is properly here on the § 1983 issue we have jurisdiction to

decide the attorney's fees issue. Cf. *Rosado v. Wyman*, 397 U.S. 397, 404-405 (1970).

IV

[**LEdHR11] [11]Because appellees properly prevailed in their § 1983 action, the Civil Rights Attorney's Fees Awards Act, 42 U. S. C. § 1988, authorized the District Court, "in its discretion," to award them "a reasonable attorney's fee," which may be recovered from state officials sued in their official capacities. *Hutto v. Finney*, 437 U.S. 678, 694 (1978). Applying the standard of *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968), the District Court indicated that attorney's fees should ordinarily be awarded "unless special circumstances would render such an award unjust." 470 F.Supp., at 1061. n17 [*738] Accordingly, enforcement authorities against whom § 1983 judgments have been entered would ordinarily be charged with attorney's fees. The District Court nevertheless considered it unjust to require the State Bar defendants to pay attorney's fees because they had recommended that the State Bar Code be amended to conform to what the Bar thought our cases required and because the Virginia Court declined or failed to [**1978] adopt this proposal. No similar circumstances excused the Virginia Court, the court held, for it was the very authority that had propounded and failed to amend the challenged provisions of the Bar Code.

n17 The District Court derived this standard from the Senate Committee Report on the Civil Rights Attorney's Fees Awards Act, which stated:

"It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by [the Act], if successful, 'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.' *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968)." S. Rep. No. 94-1011, p. 4 (1976).

[**LEdHR3B] [3B]We are unable to agree that attorney's fees should have been awarded for the reasons relied on by the District Court. Although the Virginia Court and its chief justice were subject to suit in their direct enforcement role, they were immune in their legislative roles. Yet the District Court's award of attorney's fees in this case was premised on acts or omissions for

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which appellants enjoyed absolute legislative immunity. This was error.

We held in *Hutto v. Finney, supra*, that Congress intended to waive whatever Eleventh Amendment immunity would otherwise bar an award of attorney's fees against [***658] state officers, but our holding was based on express legislative history indicating that Congress intended the Act to abrogate Eleventh Amendment immunity. There is no similar indication in the legislative history of the Act to suggest that Congress intended to permit an award of attorney's fees to be premised on acts for which defendants would enjoy absolute legislative immunity. The House Committee Report on the Act indicates that Congress intended to permit attorney's fees awards in cases in which prospective relief was properly [*739] awarded against defendants who would be immune from damages awards, H. R. Rep. No. 94-1558, p. 9 (1976), but there is no indication that Congress intended to permit an award of attorney's fees to be premised on acts that themselves would be insulated from even prospective relief. Because the Virginia Court is immune from suit with respect to its legislative functions, it runs counter to that immunity for a district court's discretion in allowing fees to be guided by considerations centering on the exercise or nonexercise of the state court's legislative powers.

[***LEdHR12] [12] This is not to say that absent some special circumstances in addition to what is disclosed in this record, a fee award should not have been made in this case. We are not convinced that it would be unfair to award fees against the State Bar, which by statute is designated as an administrative agency to help enforce the State Bar Code. Fee awards against enforcement officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a lawsuit or for an injunction. Nor would we disagree had the District Court awarded fees not only against the Bar but also against the Virginia Court because of its own direct enforcement role. However, we hold that it was an abuse of discretion to award fees because the Virginia Court failed to exercise its rulemaking authority in a manner that satisfied the District Court. We therefore vacate the award of attorney's fees and remand for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

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Supreme Court's views as to civil liability of judges. *55 L Ed 2d 850.*

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