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CIVIL RIGHTS: A CALL FOR QUALIFIED LEGISLATIVE IMMUNITY FOR CITY COUNCIL MEMBERS UNDER 42 U.S.C. § 1983

Abstract: If a city council member engages in legislative conduct that violates a person's clearly established, federally protected rights, should the council member ever be personally liable for civil damages under 42 U.S.C. § 1983? By the end of the 1980s, eight circuit courts of appeals found that absolute legislative immunity prevented local legislators from being held personally liable for their legislative acts. This majority position is misguided. Legal analysis and public policy support qualified, rather than absolute, legislative immunity for city council members in section 1983 cases. Under a rule of qualified legislative immunity, the council member would be liable for legislative conduct that a reasonable person would recognize as violative of the victim's clearly established, federally protected right.

Assume that a city council member helps pass an ordinance that violates a person's clearly established constitutional right. Consider, for example, a zoning ordinance that is unconstitutional because it amounts to a taking of a person's property for reasons not in the public interest.[1] Assume further that a reasonable person in the council member's position would have known that the ordinance would be unconstitutional. Does federal law authorize the victim in such a scenario to recover civil damages against the individual council member? The answer depends on the correct interpretation of 42 U.S.C. § 1983.[2]

Section 1983 provides that *any person* can be held civilly liable for violating another's federally protected civil rights when the offending party acts "under the color of state law."[3] The United States Supreme Court has stated that Congress intended the statute to provide a remedy to parties deprived of constitutional rights by an official's abuse of position.[4]

1. This is a common scenario in federal court. *See, e.g.,* Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980); *see also infra* notes 61–76 and accompanying text (discussing *Bruce* and *Gorman Towers*).

2. 42 U.S.C. § 1983 (1988) states:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State . . . 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 in an action at law, suit in equity, or other proper proceeding for redress . . . .

3. *Id.* (emphasis added).

4. Monroe v. Pape, 365 U.S. 167, 172 (1961) (referring to the previous codification of section 1983, Revised Statutes § 1979), *overruled on other grounds,* Monell v. Department of Social Serv., 436 U.S. 658 (1978).

Despite the statute's broad language, suing state and local officials is difficult under section 1983 because the Supreme Court has found that the statute does not abrogate well established common-law principles of official immunity.[5] Under the common-law "official immunity" doctrine, certain types of official conduct are either "absolutely" or "qualifiedly" immune to civil liability.[6] "Absolute immunity" completely bars damage suits against protected officials in their personal capacities.[7] "Qualified immunity" protects officials from personal liability only if they act reasonably.[8]

In section 1983 cases, the Supreme Court has adopted the common law absolute immunity of judges,[9] prosecutors,[10] and state[11] and regional[12] legislators. Qualified immunity to section 1983, on the other hand, protects executive officials,[13] and the administrative duties of public officials in general.[14]

Given that state and regional legislators have absolute legislative immunity, two remaining issues are whether city council members have any section 1983 immunity when engaged in legislative functions, and if so, what kind? Over the course of the 1980s, the majority of circuit courts of appeals held that, based on Supreme Court precedent and policy considerations, local legislators are absolutely immune to suits brought under section 1983.[15] This Comment, however, disagrees with the circuit courts' analyses.

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5. Owen v. City of Independence, 445 U.S. 622, 637 (1980); *see, e.g.*, Tenney v. Brandhove, 341 U.S. 367, 376–79 (1951). Section 1983 does, however, amend traditional common law. *See* sources cited *infra* note 22.

6. *See* W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 132, at 1056–60 (5th ed. 1984).

7. Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976); *see also* S. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 7.05 (2d ed. 1986).

8. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

9. Pierson v. Ray, 386 U.S. 547, 553–55 (1967).

10. *Imbler*, 424 U.S. at 427.

11. Tenney v. Brandhove, 341 U.S. 367 (1951).

12. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).

13. Scheuer v. Rhodes, 416 U.S. 232 (1974).

14. Forrester v. White, 484 U.S. 219 (1988).

15. *See* Haskell v. Washington Township, 864 F.2d 1266, 1277 (6th Cir. 1988); Aitchison v. Raffiani, 708 F.2d 96, 98–100 (3d Cir. 1983); Reed v. Village of Shorewood, 704 F.2d 943, 952–53 (7th Cir. 1983); Espanola Way Corp. v. Meyerson, 690 F.2d 827, 829 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983); Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1349–50 (9th Cir. 1982); Hernandez v. City of Lafayette, 643 F.2d 1188, 1193–94 (5th Cir. Unit A May 1981), *cert. denied*, 455 U.S. 907 (1982); Bruce v. Riddle, 631 F.2d 272, 274–80 (4th Cir. 1980); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 611–14 (8th Cir. 1980). Before *Lake Country*, however, some circuit court judges found city council members to have only qualified legislative immunity under section 1983. *See, e.g.*, Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958),

This Comment concludes that the legislative function of city council members should be qualifiedly, rather than absolutely, immune to section 1983 damages. In reconciling section 1983 with the official immunities doctrine, the Supreme Court has indicated that common law tradition and public policy collectively determine what effect the statute has on any given class of public officials. Both of these factors, contrary to circuit court reasoning, support qualified legislative immunity for council members.

I. RECONCILING 42 U.S.C. § 1983 WITH COMMON LAW OFFICIAL IMMUNITIES: WHERE DO CITY COUNCIL MEMBERS STAND?

A. The Role of the City Council Member

City council members wield extensive governmental power over the approximately 150 million Americans[16] who live in metropolitan areas.[17] Council members may, for example, enact zoning ordinances, levy taxes, and control public education and city agencies.[18] If, pursuant to governing, council members infringe upon persons' federal rights, section 1983 may be the victims' only remedy.

B. 42 U.S.C. § 1983: The Supreme Court's Interpretation

Congress passed section 1983 as section 1 of the Civil Rights Act of 1871,[19] pursuant to the enforcement clause of the fourteenth amend-

abrogation recognized by Haskell, 864 F.2d at 1277; Cobb v. City of Malden, 202 F.2d 701, 706–07 (1st Cir. 1953) (Magruder, C.J., concurring).

16. BUREAU OF THE CENSUS, UNITED STATES DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 34 (1990).

17. City council members serve on a city council, the body that governs a metropolitan area. *See* C. RHYNE, THE LAW OF LOCAL GOVERNMENT OPERATIONS 72 (1980). State statutes create councils and give them power to govern. *Id.* There are five basic types of city councils: the strong and weak mayor-council plans, the commission plan, the council-manager plan, and the mayor-administrator plan. *See* Morlan, *Local Governments—The Cities,* in THE 50 STATES AND THEIR LOCAL GOVERNMENTS 469–89 (J. Fesler ed. 1967). Under the strong mayor-council plan, the mayor has substantive administrative authority and the council focuses on legislative matters. *Id.* at 473–74. The weak mayor-council plan has a mayor with formal duties as chief executive, but the substantive legislative and administrative functions lie with the council and various boards of elected and appointed officials. *Id.* at 469–73. With the commission form of city government, a handful of commissioners holds all legislative and administrative authority; the commissioners are usually, though not always, elected. *Id.* at 475–78. Under the council-manager plan, all policy-making and administrative powers reside in an elected council which usually appoints one of its members as mayor. *Id.* at 478–86. Under the mayor-administrator plan, the mayor retains substantive administrative control of the city, but appoints a city manager to help with responsibilities. *Id.* at 486–89.

18. 2 E. MCQUILLAN, MUNICIPAL CORPORATIONS § 10.01 (3d ed. 1988).

19. S. NAHMOD, *supra* note 7, § 1.03.

ment. This Act, named the "Ku Klux Klan Act," attempted to stop members of the Klan and corrupt southern governments from lawlessly disenfranchising freed slaves and their allies. Schematically, section 1983 inserted the federal government between a state and its population in order to protect the citizens' fourteenth amendment rights from unconstitutional government action.[20] On a practical level, the statute provided victims with civil causes of actions against all persons who under color of state law violated the victims' federally protected rights.[21]

Notwithstanding the broad application of section 1983, the Supreme Court has held that the statute does not abrogate "firmly established" common-law immunities that reflect policies consistent with the statute's original purpose.[22] In section 1983 cases, consequently, the Court has adopted the common-law official immunities for numerous classes of public officials at the state and local levels.[23]

C. *Reconciling 42 U.S.C. § 1983 with the Official Immunities Doctrine*

There are two basic types of official immunity: qualified immunity, and the more protective absolute immunity.[24] In the section 1983 context, as well as at common law, these immunities differ in scope and

20. *Id.* (quoting Mitchum v. Foster, 407 US 225, 238–39, 242 (1972)); *see also* Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study,* 67 CORNELL L. REV. 482, 484 (1982).

21. *See* Eisenberg, *supra* note 20, at 484–85.

22. Owen v. City of Independence, 445 U.S. 622, 637 (1980); *see, e.g.,* Tenney v. Brandhove, 341 U.S. 367, 376–79 (1951). Although section 1983 does not abrogate common law principles of immunity, the Supreme Court has amended these principles. At traditional common law, for example, qualified immunity required the protected officials to act reasonably or without malice. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982). In modern section 1983 cases, however, officials with qualified immunity need only show that reasonable persons in the officials' positions would not have known that they violated a clearly established constitutional right. Anderson v. Creighton, 483 U.S. 635, 638–42 (1987) (explaining qualified immunity as stated in *Harlow*); *see generally* S. NAHMOD, *supra* note 7, §§ 8.01–.18 (background and analysis of qualified immunity). Moreover, although governors had absolute immunity at common law, they are only qualifiedly immune to section 1983 claims. *Compare* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 132, at 987–88 (4th ed. 1971) (stating that absolute immunity extends to a state's highest executive officers) *with* Scheuer v. Rhodes, 416 U.S. 232, 238–49 (1974) (holding that governors are only qualifiedly immune to section 1983). For an analysis of *Scheuer,* see S. NAHMOD, *supra* note 7, § 8.13. Finally, bi-state regional planners, a class of officials with no common law heritage, have the same absolute immunity to section 1983 as state legislators. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).

23. *See* 1 C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS §§ 99–115 (2d ed. 1980 & Supp. 1988).

24. *See Harlow,* 457 U.S. at 807-08.

applicability. They also attach to official functions rather than to titular positions.[25]

1. Qualified Immunity

Modern qualified immunity is an affirmative defense. It shields defendant officials from civil damages if they can satisfy a two-part test. First, the officials must show that they performed the allegedly violative activity pursuant to their official duties. Second, the officials must prove that reasonable persons in the officials' positions would not have known that such conduct would violate the plaintiffs' clearly established constitutional rights.[26] The burden of proof is on the officials because they plead the immunity as a defense.

In section 1983 cases, the Supreme Court has amended the coverage of qualified immunity. Traditionally, governors and high level state executives were absolutely immune for their discretionary functions.[27] In the modern section 1983 realm, governors and other public officials have only qualified immunity for their executive, as well as administrative, decisions.[28] Such immunity reconciles two competing public interests: citizens can vindicate important federal rights, and public officials can perform their discretionary duties independently and without fear of frivolous suits.[29]

2. Absolute Immunity

Absolute immunity, as interpreted by the Supreme Court, provides a complete bar to civil liability for damages under section 1983. By precluding damages liability altogether, absolute immunity eliminates the need for public officials to prove that they acted reasonably.[30]

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25. Forrester v. White, 484 U.S. 219, 224 (1988); *see* S. NAHMOD, *supra* note 7, §§ 7.01, 8.01. *But see* Nixon v. Fitzgerald, 457 U.S. 731, 744–57 (1982) (the President's special status under the Constitution gives the President absolute immunity for all Presidential duties).

26. Anderson v. Creighton, 483 U.S. 635, 638–42 (1987); *see also* S. NAHMOD, *supra* note 7, §§ 8.01–.18.

27. *See* W. PROSSER, *supra* note 22, § 132, at 988 (stating that absolute immunity extends to a state's highest executive officers).

28. *Forrester,* 484 U.S. at 229–30 (administrative decisions of state court judges are qualifiedly immune to section 1983); Scheuer v. Rhodes, 416 U.S. 232, 238–49 (1974) (an executive decision of a state governor is qualifiedly immune to section 1983). For analysis of *Scheuer,* see S. NAHMOD, *supra* note 7, § 8.13.

29. Ryan v. Burlington County, N.J., 889 F.2d 1286, 1292 (3d Cir. 1989) (citing Anderson v. Creighton, 483 U.S. 635 (1987)).

30. Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976); *see also* S. NAHMOD, *supra* note 7.

In section 1983 cases, the Supreme Court has extended absolute damages immunity to state[31] and regional[32] legislative conduct,[33] and to the adjudicative conduct of judges[34] and prosecutors.[35] The Court bases such immunity on what the Court views as "well established" common law principles of official immunity and public policy.[36]

In 1951, the Supreme Court first recognized absolute immunity to section 1983 damages in *Tenney v. Brandhove.*[37] In *Tenney,* the Court adopted absolute immunity for state legislators who violate section 1983 when performing a legislative function.[38]

The *Tenney* decision relied on a two-step canon of construction. First, the Court found that when Congress passed section 1983 in 1871, state legislators enjoyed absolute legislative immunity based on a "tradition of legislative freedom achieved in England . . . and carefully preserved in [the United States]."[39] Second, the Court found that the

31. Tenney v. Brandhove, 341 U.S. 367 (1951).

32. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).

33. Absolute *legislative* immunity differs from absolute judicial and prosecutorial immunity in that absolute legislative immunity protects individual legislators against injunctive relief as well as damages. Supreme Court of Virginia v. Consumers Union of United States, Inc., 446 U.S. 719, 731–34 (1980). *But see* Spallone v. United States, 110 S. Ct. 625, 634–35 (1990) (not ruling out the possibility of contempt sanctions against individual city council members who do not comply with an injunction against the council body). *See also* Schapiro, *The Legislative Injunction: A Remedy for Unconstitutional Legislative Inaction,* 99 YALE L.J. 231, 234, 238–42 (1989) (arguing that a court order that enjoins a legislative body to pass specific legislation does not controvert principles of legislative immunity).

34. Pierson v. Ray, 386 U.S. 547, 553–55 (1967).

35. Imbler v. Pachtman, 424 U.S. 409, 421–27 (1975).

36. Owen v. City of Independence, 445 U.S. 622, 638 (1979).

37. 341 U.S. 367 (1951).

38. *See id.* at 376, 379. A state legislator's function involves making state policy that complies with the state and federal constitutions. *See* Mansfield, *Functions of State and Local Governments,* in THE 50 STATES AND THEIR LOCAL GOVERNMENTS 105–06 (J. Fesler ed. 1967); *see also* Bosworth, *Policy Making,* in THE 50 STATES AND THEIR LOCAL GOVERNMENTS, *id.,* at 297–300. State policy can involve important national, state, and local issues, and such policy is often enacted through state legislative procedures and codified in state constitutions and/or statutes. *Id.*

39. *Tenney,* 341 U.S. at 376. Legislative immunity was first codified in the English Bill of Rights in 1689. The immunity was then known as the "parliamentary privilege," and it was based on separation of powers principles. *See* Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers,* 86 HARV. L. REV. 1113, 1122–35 (1973). Specifically, the privilege allowed members of parliament to engage in free discourse on the House floor without fear of reprisal from the King. *Id.* at 1122.

In America, the privilege was codified in the speech or debate clause of the Constitution, with language borrowed from the English Bill of Rights. *Id.* at 1135–44. The privilege has evolved to protect not only federal legislative speech, but the independence of the entire legislative function. *Id.* at 1144. Although the clause immunizes only federal legislators, many state legislatures incorporated the immunity into their state constitutions. *See, e.g., Tenney,* 341 U.S. at 375.

statute's language and legislative history failed to indicate that Congress intended to abrogate this immunity.[40]

In dicta, the *Tenney* court found that legislative immunity serves the public good because such immunity allows courageous decisionmaking by state legislators without precluding checks on, and remedies for, official misconduct.[41] Absolute legislative immunity enables and encourages public representatives to firmly and effectively discharge their public duty without fearing the resentment of aggrieved members of the public.[42] Such decisionmaking would be difficult if the privilege were not absolute, the Court found, because legislators' motives could be challenged and speculated upon in "cost[ly] and inconvenien[t] and distract[ing]" jury trials.[43] Moreover, elections and legislative self-discipline, rather than litigation, provide more appropriate checks against legislative misconduct.[44] The Court concluded, therefore, that public policy supports absolute immunity of state legislative functions in section 1983 cases.

In 1967 and 1976, the Supreme Court extended absolute immunity to judicial[45] and prosecutorial[46] functions under section 1983. In both cases, the Court formally complied with *Tenney*'s canon of construction. The Court purported to find that these absolute immunities were well established in common law[47] and that there was no indication that Congress intended to abrogate such immunity.[48] These cases reveal a common policy: anything less than absolute immunity for judges and prosecutors undermines the adjudicative process by interfering with the independent, principled and fearless decisions of these participants.[49] Furthermore, the appellate process is an adequate means of remedying judicial misconduct.[50]

40. *Tenney,* 341 U.S. at 376. For criticism of the Court's analysis, see Eisenberg, *supra* note 20, at 491–99. *But see* S. NAHMOD, *supra* note 7, § 7.02.

41. *Tenney,* 341 U.S. at 377–78 (legislative self-discipline and voters, rather than the courts, should discourage and correct official abuse of discretion).

42. *Id.* at 373.

43. *Id.* at 377.

44. *Id.* at 378.

45. Pierson v. Ray, 386 U.S. 547 (1967).

46. Imbler v. Pachtman, 424 U.S. 409 (1976).

47. *Imbler,* 424 U.S. at 421–24; *Pierson,* 386 U.S. at 553–55. The *Pierson* and *Imbler* courts arguably did not sufficiently show that there were established common law rules of absolute judicial and prosecutorial immunity, respectively, when section 1983 was passed. *See, e.g.,* 1 C. ANTIEAU, *supra* note 23, §§ 99, 105; Note, *Liability of Judicial Officers Under Section 1983,* 79 YALE L.J. 322, 328 (1969).

48. *Pierson,* 386 U.S. at 553–55.

49. Briscoe v. LaHue, 460 U.S. 325, 342–43 (1983).

50. *See Imbler,* 424 U.S. at 427; *Pierson,* 386 U.S. at 554.

In 1979, the Supreme Court extended absolute legislative immunity to regional planners. In *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,*[51] the Court held that non-elected members of a bi-state regional planning board were entitled to absolute immunity from section 1983 when acting "in a capacity comparable to that of members of a state legislature."[52] The Court reasoned that *Tenney*'s absolute state legislative immunity rested on policy considerations[53] that applied equally to federal, state, and regional legislators,[54] even if the regional legislators were unelected.[55] The Court did not discuss means of checking or remedying the official misconduct of the regional legislators.

3. *The Circuit Courts' Rationale for Adopting Absolute Legislative Immunity for City Council Members*

After *Lake Country,* the question remained whether city council members had absolute legislative immunity under section 1983. The *Lake Country* court expressly declined to decide whether local, as compared to state and regional, legislative functions were also entitled to absolute immunity from section 1983 damages claims.[56] In the aftermath of *Lake Country,* however, eight circuit courts of appeals have adopted absolute immunity for local legislative functions.[57] The Eighth Circuit[58] and the Fourth Circuit[59] set forth specific, independent legal rationales for such immunity.[60]

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51. 440 U.S. 391, 402–06 (1979).

52. *Id.* at 406.

53. *See* Tenney v. Brandhove, 341 U.S. 367, 377–78 (1951).

54. *Lake Country,* 440 U.S. at 405.

55. *Id.* at 404–05. For criticism of the court's reasoning, see Eisenberg, *supra* note 20, at 502–03.

56. *Lake Country,* 440 U.S. at 404 n.26. This Comment will refer to such immunity as "absolute local legislative immunity."

57. *See* cases cited *supra* note 15. The circuits, however, disagree on how to properly identify "legislative" conduct, which is considered absolutely immune, from executive or administrative conduct, which are qualifiedly immune. The courts split three ways on this issue. Some circuits find that official conduct is "legislative" if it involves discretion and policymaking that is traditionally seen as part of the legislative function. *See, e.g.,* Minton v. St. Bernard Parish School Bd., 803 F.2d 129, 135 (5th Cir. 1986). Other circuits, however, look to see whether the conduct establishes general policy, or singles out individuals for special treatment. *See, e.g.,* Cutting v. Muzzey, 724 F.2d 259, 261 (1st Cir. 1984). The Third Circuit requires legislative conduct to be "procedurally" as well as "substantively" legislative. *See* Ryan v. Burlington County, N.J., 889 F.2d 1286, 1290–91 (3d Cir. 1989). *See generally* Schapiro, *supra* note 33, at 240–41; M. Schwartz, *Legislative Immunity Developments,* N.Y.L.J., Oct 18, 1988, at 3, col. 1.

58. Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980).

59. Bruce v. Riddle, 631 F.2d 272, 274–80 (4th Cir. 1980).

60. The Seventh Circuit has set forth further policy justifications for adopting absolute legislative immunity. In Reed v. Village of Shorewood, 704 F.2d 943, 952–53 (7th Cir. 1983), the

a. The Eighth Circuit: Balancing Public Interests

In *Gorman Towers, Inc. v. Bogoslavsky,*[61] the Eighth Circuit held that city directors were absolutely legislatively immune to section 1983 claims when they conspired to enact an allegedly unconstitutional amendment to the city's zoning ordinance. The *Gorman* court reasoned that the Supreme Court's official immunity decisions balance policy interests.[62] On one side of the scale is the interest of having official decisionmaking free from the fear of burdensome litigation.[63] On the other side of the scale are the interests in deterring improper official conduct and providing adequate remedies.[64] According to the *Gorman* court, this balancing test weighed in favor of absolute legislative immunity for the city directors.[65]

The Eighth Circuit gave three reasons for adopting absolute legislative immunity for city council members. First, the public good is served if local legislative decisionmaking is free of litigation.[66] Local legislators are particularly close to their constituents and are therefore more vulnerable to lawsuits spurred by their legislative acts.[67] Second, personal liability for damages under section 1983 was not needed as a check on the council members' unconstitutional conduct.[68] The court reasoned that criminal law, the electoral process, and judicial review of unconstitutional zoning sufficiently restrain unconstitutional official activity.[69] Third, plaintiffs could obtain adequate remedies by suing the city directly rather than the local legislators.[70]

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court noted that such immunity was warranted even though fewer safeguards to official misconduct exist at the local, as opposed to state and federal, level of government. In particular, separation of powers, bureaucracy, political competition, and the press are more effective checks on official misconduct at the state, as opposed to local, level. The court reasoned that weaker safeguards should not diminish local legislative immunity, because no such safeguards operate against judges, who have absolute immunity, and local government is less powerful than state government. *Reed,* 704 F.2d at 953.

61. 626 F.2d 607 (8th Cir. 1980). The city board was unicameral, having seven members who exercised the city's executive and legislative authority without self-disciplinary provisions. *Id.* at 613.

62. *Gorman,* 626 F.2d at 612; *see* Scheuer v. Rhodes, 416 U.S. 232 (1974).

63. *Gorman,* 626 F.2d. at 612.

64. *Id.*

65. *Id.* at 613–14.

66. *Id.* at 612.

67. *Id.* at 612–14.

68. *Id.* at 613.

69. *Id.*

70. *Id.* Plaintiffs may sue municipalities under Section 1983. Monell v. Department of Social Servs., 436 U.S. 658, 690-91 (1978). Moreover, cities have neither qualified nor absolute immunity. Owen v. City of Indepedence, 445 U.S. 622 (1980). *But see* Baker v. Mayor & City Council, 894 F.2d 679 (4th Cir. 1990), *cert. denied,* 111 S. Ct. 57 (1990). The Fourth Circuit ruled that legislative immunity barred the plaintiff's age discrimination suit against the city. The

b. The Fourth Circuit: The Functional Approach

In *Bruce v. Riddle,*[71] the Fourth Circuit followed *Gorman*'s lead and held that individual county council members had absolute legislative immunity to section 1983.[72] Looking towards Supreme Court precedent, the *Bruce* court found that *Tenney* grounded absolute state legislative immunity to section 1983 on English and American common law, neither of which offered any guidance on the immunity of local legislators.[73] Nonetheless, the Fourth Circuit concluded that local legislators were absolutely immune to section 1983 based on Supreme Court precedent.[74] The court reasoned that the Supreme Court had extended absolute legislative immunity to regional legislators because they function within a legislative sphere, and not because these officials function at a particular level of government.[75] The Fourth Circuit concluded, therefore, that local legislators should be absolutely immune when performing a legislative function.[76]

court reasoned that although legislative immunity protects legislators only in their individual capacities, a suit against a local legislative body is precluded if it forces the legislators to reveal aspects of their decision-making process. *Id.* at 681–82.

71. 631 F.2d 272 (4th Cir. 1980) (the council passed a rezoning ordinance prohibiting multi-family dwellings, thereby greatly reducing the value of plaintiff's land; the plaintiff claimed that the council members' decision was made in bad faith).

72. *Id.* at 274.

73. *Id.* at 276. The Fourth Circuit stated that the early American cases were "concerned for the most part with types of qualified immunity." *Id.* Indeed, when section 1983 was passed, the general common-law rule appeared to be that city council members had qualified immunity for their discretionary acts. *See, e.g.,* Cobb v. City of Malden, 202 F.2d 701, 706–07 (1st Cir. 1953) (Magruder, C.J., concurring); Walker v. Hallock, 32 Ind. 239, 243–44 (1869) (city council members are not individually liable in a civil suit for discretionary acts, unless such acts are corrupt); Baker v. State, 27 Ind. 485, 488–89 (1867); 1 J. DILLON, THE LAW OF MUNICIPAL CORPORATIONS 298–99 n.2 (2d ed. 1873) (citing *Walker* and *Baker*); Annotation, *Civil Responsibility of Member of Legislative Body for His Vote Therein,* 22 A.L.R. 125 (1923). *But see* T. COOLEY, A TREATISE ON THE LAW OF TORTS 376 (1879) (stating that city council members have absolute legislative immunity). Cooley, however, supports local absolute legislative immunity with a cite to *Baker,* a case supporting qualified immunity for city council members. *See Baker,* 27 Ind. at 488–89.

74. *Bruce,* 631 F.2d at 279.

75. *Id.* at 277. In support of its conclusion, the appellate court noted that four Supreme Court Justices acknowledged local absolute legislative immunity in a footnote in a dissenting opinion. *Id.* at 279 (citing Owen v. City of Independence, 445 U.S. 622, 664 n.6 (1980) (Powell, J., dissenting)).

76. *Bruce,* 631 F.2d at 279.

II. NO BASIS IN LAW OR POLICY FOR GIVING CITY COUNCIL MEMBERS ABSOLUTE LEGISLATIVE IMMUNITY UNDER 42 U.S.C. § 1983

Qualified legislative immunity should replace absolute legislative immunity for city council members in section 1983 cases. The circuit courts' adoption of absolute legislative immunity is incorrect because it relies on reasoning that does not comport with standards set forth in Supreme Court cases on section 1983 official immunity. The critical issue in these cases is whether a specific type of official conduct warrants the extra protection of absolute immunity, rather than just qualified immunity. In making this determination, the Supreme Court follows the *Tenney* canon of construction by looking at legislative history and common law tradition.[77] The Court also considers, as the Eighth Circuit recognizes, public policy interests such as remedying deprivations of important federal rights,[78] checking official misconduct,[79] and the countervailing policy of encouraging fearless, effective decisionmaking that serves the public good.[80] Contrary to circuit court findings, these considerations do not support absolute legislative immunity for city council members.

A. Legal Analysis Supports Adopting Qualified Legislative Immunity to City Council Members in Section 1983 Cases

The circuit courts base absolute legislative immunity of city council members partly on incorrect legal analysis. The courts attach too much precedential value to *Tenney* and *Lake Country,* two cases that do not logically entail absolute legislative immunity at the local level. Moreover, the courts do not adhere to *Tenney*'s canon of construction.[81]

77. *See, e.g.,* Imbler v. Pachtman, 424 U.S. 409, 421–25 (1976); Pierson v. Ray, 386 U.S. 547, 553–55 (1967); Tenney v. Brandhove, 341 U.S. 367, 372–77 (1951).

78. *See, e.g., Tenney,* 341 U.S. at 378; *cf.* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

79. *See, e.g., Imbler,* 424 U.S. at 421-25; *Pierson,* 386 U.S. at 554.

80. *See, e.g., Tenney,* 341 U.S. at 377; *cf. Harlow,* 457 U.S. at 814.

81. *See, e.g.,* Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980) (no discussion of common law official immunity of city council members); *see also* Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980) (declining to follow common law).

1. Tenney *and* Lake Country: *No Precedential Support for Giving City Council Members Absolute Legislative Immunity to Section 1983*

Tenney and *Lake Country,* contrary to circuit court findings,[82] do not support absolute immunity for local legislative activity.[83] As noted above,[84] the Supreme Court adopts official immunity to section 1983 on a functional basis. In *Tenney* and *Lake Country,* the Court immunized state legislative functions and comparable regional legislative functions respectively.[85] The state legislative function, however, is inherently different from the city legislative function.

The state legislative function is to make state policy in accordance with the state and federal constitutions.[86] State policy can involve important national, state, and local issues. Such policy is often enacted through state legislative procedures and codified in state constitutions or statutes.[87] Cities, on the other hand, are subordinate "creatures of the state."[88] City council members make policy regarding only local matters, and the state controls the scope of this policy-making power.[89]Moreover, there are different types of city governments: the strong and weak mayor-council plans, and the commission, council-manager, and mayor-administrator plans.[90] Most of these plans do not resemble the separation-of-powers structure of state government. Furthermore, the scope of council members' legislative function differs with each type of city government.[91]

The circuit courts, therefore, incorrectly interpret *Tenney* and *Lake Country* as precedent for absolute legislative immunity of city council members in section 1983 cases. The state legislative function is simply not analogous to the legislative function that city council members perform in the various types of city governments. Rather than analogizing city legislative functions to state legislative functions, the circuit

82. *See, e.g., Bruce,* 631 F.2d at 275–79; *Gorman,* 626 F.2d at 611–13.

83. *See* Eisenberg, *supra* note 20, at 503.

84. Forrester v. White, 484 U.S. 219, 224 (1988); *see supra* text accompanying note 25.

85. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 406 (1979); Tenney v. Brandhove, 341 U.S. 367, 379 (1951).

86. *See* Mansfield, *supra* note 38, at 105; *see also* Bosworth, *supra* note 38, at 297–300.

87. *See* Bosworth, *supra* note 38, at 298.

88. *See* Morlan, *supra* note 17, at 465–66.

89. *See* 2 E. MCQUILLAN, *supra* note 18, § 10.09.

90. *See* Morlan, *supra* note 17, at 469.

91. *See* Morlan, *supra* note 17, at 469–89.

courts should more carefully apply *Tenney*'s canon of construction to city council members.[92]

2. Tenney's *Canon of Construction: The Common Law Supports Qualified Legislative Immunity for City Council Members in Section 1983 Cases*

Tenney's canon of construction,[93] which the *Gorman* and *Bruce* courts did not follow,[94] supports giving city council members qualified immunity for their local legislative conduct that violates section 1983 because council members were not absolutely immune at common law in 1871.[95] The *Tenney* canon presumes that the "every person" language of section 1983 was too broad to abrogate firmly established common-law immunities.[96] Public officials, therefore, are generally entitled to traditional common law immunities they had in 1871.

Under the *Tenney* Court's analysis, two aspects of traditional common law bear on section 1983's applicability to city council members: the common law tradition of absolute legislative immunity in general, and the traditional common law status of city council members in particular. Neither aspect supports absolute legislative immunity for city council members.

a. General Principles of Absolute Legislative Immunity

General principles of absolute legislative immunity do not apply to city council members because city governments are not generally based on the separation-of-powers ideal. Absolute legislative immunity is historically based on separation-of-powers principles.[97] The immunity was originally intended to protect legislators' decisionmaking from incursions by the executive branch. There are several different types of city governments, however, and most are not based on the

92. *See* Tenney v. Brandhove, 341 U.S. 367, 376 (1951). The *Lake Country* court could not follow the *Tenney* court's canon of construction, because there is apparently no common law tradition surrounding bi-state regional planners.

93. *See id.*

94. *See Bruce v. Riddle,* 631 F.2d 272, 275–79 (4th Cir. 1980); *Gorman Towers, Inc., v. Bogoslavsky,* 626 F.2d 607, 611–13 (8th Cir. 1980).

95. *See* sources cited *supra* note 73; *see also infra* text accompanying notes 101–02.

96. *See Tenney,* 341 U.S. at 376. For a summary of the legislative debates on the Civil Rights Act of 1871, see 1 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 597–653 (1970) (containing no discussion of section 1983's applicability to city council members).

97. *See* Reinstein & Silverglate, *supra* note 39, at 1122–35.

separation-of-powers principle.[98] Therefore, the historical justification for absolute legislative immunity does not apply to many city council members.

b. The Common Law Status of City Council Members in 1871

According to the *Tenney* canon of construction, city council members should be only qualifiedly immune to section 1983, because council members had only a qualified immunity to individual civil liability in 1871.[99] The *Tenney* Court found that in 1871 Congress did not intend section 1983 to abrogate firmly established common law official immunities.[100] It is clear that in 1871, local absolute legislative immunity was not well established at common law. The rule appears to have been that city council members were individually immune to civil liability for their official, discretionary acts only if such acts were not corrupt.[101] This is substantively the same as the traditional qualified immunity.[102] Because legislative decisions are discretionary acts, such decisions were presumably also qualifiedly immune to civil liability. According to the *Tenney* Court's canon of construction, this common-law rule of qualified immunity should be preserved under section 1983.

c. The Common Law After 1871

The common law status of city council members *after* 1871 also supports giving these officials qualified, rather than absolute, legislative immunity to section 1983. Although, according to *Tenney*'s cannon of construction, the 1871 common law rule of qualified immunity of city council members would seem sufficient by itself to preclude absolute immunity for local legislators in section 1983 cases, the Supreme Court's adoption of judicial immunity[103] indicates otherwise. For example, the Court made judges absolutely immune to section 1983 even though such immunity was arguably a minority rule at common law when Congress passed the statute.[104] In maintaining that absolute judicial immunity was the rule as of 1871, the Court

98. *See, e.g.*, Morlan, *supra* note 17, at 469–89. Furthermore, section 1983 provides a civil cause of action to private citizens; it does not provide the executive branch with a criminal cause of action against legislators.

99. *See* Cobb v. City of Malden, 202 F.2d 701, 704–05 (1st Cir. 1953) (Magruder, C.J., concurring).

100. *See* Tenney, 341 U.S. at 376; *see supra* text accompanying note 40.

101. *See* sources cited *supra* note 73.

102. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982); *supra* note 22.

103. Pierson v. Ray, 386 U.S. 547 (1967).

104. *See supra* note 47.

relied on post-1871 case law and policy considerations.[105] Supreme Court precedent, therefore, requires an examination of the common law status of city council members from 1871 to the present.

Since the passage of section 1983, the common law has continued to support the adoption of qualified legislative immunity for city council members in section 1983 actions. Over the last century, the majority rule appears to have been that city council members have enjoyed only qualified immunity for defamation during council debates.[106] The derogation of someone's federally protected right is as serious as the derogation of that person's reputation. If council members are liable for their bad faith or unreasonable legislative conduct when it defames someone, then council members should also be liable when such conduct violates a person's clearly established constitutional right. Post-1871 common law, therefore, supports adopting qualified legislative immunity for city council members in section 1983 cases.

B. Policy Considerations: Additional Support for Qualified Legislative Immunity for City Council Members

In addition to common law tradition, public policy supports adopting qualified legislative immunity for city council members in section 1983 cases. Public policy is an important element in the Supreme Court's interpretation of official immunity and section 1983.[107] When distinguishing between absolute and qualified immunity, the Court tries to balance the interest of having independent, courageous decisionmaking on the one hand, against the interests of remedying constitutional deprivations and checking official misconduct on the other.[108] In this regard, there are five relevant issues. First, will the fear of civil liability hamper official decisionmaking that should be unfettered?[109] Second, are there alternative paths to remedies?[110] Third, will section

105. *Pierson,* 386 U.S. at 553–54.

106. *See* Cobb v. City of Malden, 202 F.2d 701, 706–07 (1st. Cir. 1953) (Magruder, C.J., concurring); W. PAGE KEETON, *supra* note 6, § 114, at 820–21; Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings,* 10 COLUM. L. REV. 131, 137 (1910) (policy considerations supporting absolute immunity to defamation at the state level are inapplicable at the local level); *cf.* Annotation, *supra* note 73 (discussing city council member's liability for his or her vote).

107. *See, e.g.,* Scheuer v. Rhodes, 416 U.S. 232 (1974); Tenney v. Brandhove, 341 U.S. 367, 377–78 (1951). In *Scheuer,* policy concerns were arguably the sole basis of the Court's decision to adopt only a qualified immunity for high-level state officials in section 1983 cases, because such officials were absolutely immune at common law. *See* W. PROSSER, *supra* note 22.

108. *See* Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 612–13 (8th Cir. 1980).

109. *See, e.g.,* Imbler v. Pachtman, 424 U.S. 409, 424–25 (1976); *Pierson,* 386 U.S. 547, 554 (1967).

110. *See, e.g., Tenney,* 341 U.S. at 378.

1983 litigation interfere with the officials' exercise of public duties?[111] Fourth, is section 1983 needed as a safeguard against officials' abuse of discretion?[112] Finally, will potential section 1983 liability deter qualified persons from seeking public office?[113] Circuit courts of appeals have generally found that these policy issues favor absolute, rather than qualified, immunity for local legislative activity.[114] When scrutinized in light of the true nature of city government and current section 1983 opinions, however, these factors actually weigh against absolute immunity and support qualified immunity.

1. Protecting a Council Member's Independent Decisionmaking

The independence of city council members' discretionary functions does not warrant absolute immunity. Courts fear that the possibility of defending against section 1983 lawsuits will deter local legislators from making courageous, independent decisions because these officials are close to their constituents and therefore more vulnerable to lawsuits.[115] Supreme Court precedent and state law, however, imply that city council members' discretionary decisions do not warrant absolute immunity. As noted above, the decisionmaking of high level executives, including governors, is only qualifiedly immune to suits under section 1983.[116] It is inconsistent to argue that the need for courageous legislative decisionmaking of city council members warrants absolute immunity when the decisionmaking of state governors is only qualifiedly immune.

Additionally, a city council member's discretion is less independent than state legislators' discretion because the former are subject to the latters' control. The state legislature controls the boundaries of official discretion in city government, and council members have discretionary power only to the degree that the state allows.[117] State control of city council members' discretion, as well as the qualified immunity of governors, controvert the argument that the independence of city council members' discretion warrants absolute legislative immunity.

111. *Id.* at 377.

112. *See, e.g., id.* at 378.

113. *See, e.g.,* Ryan v. Burlington County, N.J., 889 F.2d 1286, 1292 (3d. Cir. 1989).

114. *See, e.g.,* Reed v. Village of Shorewood, 704 F.2d 943, 952–53 (7th Cir. 1983); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 612–14 (8th Cir. 1980).

115. *See, e.g., Gorman,* 626 F.2d at 612.

116. Scheuer v. Rhodes, 416 U.S. 232, 248 (1974). Moreover, governors are the chief legislators in many states. Bosworth, *supra* note 38, at 312.

117. *See* 2 E. MCQUILLAN, *supra* note 18, § 10.09.

2. *Remedying Deprivations of Constitutional Rights*

City council members should not have absolute legislative immunity because such immunity may preclude alternative remedies for violations of constitutional rights. The Supreme Court states that damages suits against individual officials are important remedies for constitutional deprivations.[118] Absolute legislative immunity to section 1983, however, bars injunctive and monetary relief against protected officials.[119]

Nonetheless, the Eighth Circuit[120] justifies absolute legislative immunity of city council members by finding that plaintiffs have an alternative means of vindicating their rights: they may sue the city.[121] A recent Fourth Circuit decision, however, casts doubt on the Eighth Circuit's position.[122]

In 1990, the Fourth Circuit prohibited an age discrimination suit against a city council because the suit would have forced the council members, who were protected by absolute legislative immunity, to reveal aspects of their decision-making process; absolute legislative immunity, the court found, precludes this type of revelation.[123] The Fourth Circuit's reasoning would also preclude section 1983 actions against city councils when such actions are dependent on council members testifying about their legislative decisionmaking. Absolute legislative immunity for city council members, therefore, could prevent section 1983 plaintiffs from vindicating their federally protected rights.

3. *Distracting Litigation*

Courts have expressed concern that section 1983 liability could lead to litigation that would distract officials from their duties.[124] Modern qualified immunity, rather than absolute immunity, offers a better guard against distracting trials. First, the Court has reformulated qualified immunity to focus primarily on an objective "reasonable person" test. This test permits courts to resolve suits against public offi-

118. Harlow v. Fitzgerald, 457 U.S. 800, 807, 809 (1982).

119. Supreme Court of Va. v. Consumers Union of United States, Inc. 446 U.S. 719, 731–34 (8th Cir. 1980). *But see* sources cited *supra* note 33.

120. Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 613 (1980).

121. *Id.; see also* Owen v. City of Independence, 445 U.S. 622 (1980); Monell v. Dep't of Social Serv., 436 U.S. 658, 690–91 (1978).

122. Baker v. Mayor & City Council, 894 F.2d 679 (4th Cir. 1990), *cert. denied,* 111 S. Ct. 56 (1990).

123. *Id.*

124. *See, e.g.,* Tenney v. Brandhove, 341 U.S. 367 (1951); *Gorman,* 626 F.2d at 612.

cials at the summary judgment level.[125] Second, qualified local legislative immunity would help standardize the administration of justice. Courts that have adopted absolute local legislative immunity have the difficult task of distinguishing between council members' legislative activity, which the courts consider absolutely immune, and nonlegislative activity, which is generally qualifiedly immune.[126] This problem would be alleviated if local legislative activity was made qualifiedly immune. Under such a rule, city council members would be qualifiedly immune for all of their official conduct, be it legislative or nonlegislative.

4. Safeguarding Against Abuses of Discretion

City council members should have only qualified legislative immunity to section 1983 because some liability is needed as a safeguard against council members' abuse of discretion. In *Tenney,* the Supreme Court's adoption of absolute legislative immunity precluded section 1983's effectiveness as a safeguard against state legislators' abuse of discretion. According to the Court, the ballot box and the legislature's internal self-disciplinary procedures offered sufficient protection.[127]

Internal self-disciplinary procedures and ballot boxes are insufficient safeguards against city council members' abuse of discretion. Most importantly, city governments have been historically prone to corruption, especially during elections.[128] Furthermore, as noted above,[129] the Seventh Circuit recognized that bureaucracy, political competition, the press, and separation of powers, though capable of preventing official misconduct at the state level of government, do less to curtail misconduct at the local level.[130] Despite acknowledging weaker safeguards against local legislative misconduct, however, the Seventh Circuit gave local council members absolute legislative immunity.[131] Reasoning by analogy, the court compared the diminished safeguards against local legislative conduct to the weakened safeguards against

125. *See Harlow v. Fitzgerald,* 457 U.S. at 800, 815, 818 (1982).

126. *See supra* note 57.

127. *Tenney,* 341 U.S. at 377–78.

128. *See* 1 J. BRYCE, THE AMERICAN COMMONWEALTH 608–11 (1889).

129. See *supra* note 60.

130. Reed v. Village of Shorewood, 704 F.2d 943, 953 (7th Cir. 1983). Political competition is less on the local level, for example, because many city council elections are nonpartisan. *See* Morlan, *supra* note 17, at 504. Moreover, the checks and balances function of the separation of powers principle is not prevalent in city government, and council members have extensive administrative functions which presumably help them overcome bureaucratic resistance to their legislative activity. *See* Morlan, *supra* note 17, at 469–89.

131. *Reed,* 704 F.2d at 953.

judicial misconduct, noting that judicial conduct is absolutely immune to section 1983.[132] Absolute judicial immunity, however, does not support absolute legislative immunity for city council members. Unlike most city councils, the judicial process has built-in safeguards against official misconduct. When a judge violates a person's federally protected rights, civil and criminal rules of procedure grant or provide the victim with standing to seek recourse through an appeal. Moreover, judicial misconduct is presumably curbed because the victim's lawyer is normally present and obligated to zealously defend the rights of his or her client. Local legislative activity, on the other hand, does not offer the protections of the judicial process. Local legislatures generally provide no procedure for appealing the bad faith conduct of their members. Furthermore, legislative misconduct does not ordinarily occur in a crowded courtroom in front of the victim's lawyer. Consequently, the risk of misconduct by city council members is greater than the risk of misconduct by judges. This greater risk, however, can be checked by qualified legislative immunity, which, unlike absolute legislative immunity, would make council members personally liable for their legislative misconduct. Qualified immunity, therefore, is an appropriate safeguard against local legislative misconduct.

5. *Encouraging Qualified Persons to Run for City Council*

Courts have expressed concern that qualified persons will not run for local council positions if they risk being sued for their legislative decisions.[133] There are two reasons, however, that this concern does not justify absolute legislative immunity for city council members. First, under the reasonable person standard of modern qualified immunity, officials are likely to win meritless suits at summary judgment.[134] Second, the majority of city council members in American cities today are responsible for their cities' administrative functions,[135] for which the council members have only a qualified immunity to sec-

132. *Id.* The court also found that stronger safeguards were unnecessary because local government is weaker than state government. *Id.* This reasoning, however, is unrealistic considering the array of powers that city council members wield over city residents. *See* supra notes 17–18 and accompanying text.

133. *See, e.g.*, Ryan v. Burlington County, N.J., 889 F.2d 1286, 1293 (3d Cir. 1989).

134. Harlow v. Fitzgerald, 457 U.S. 800, 815, 818 (1982). Summary judgment motions still cost time and money to defend, but the victor in section 1983 suits can recover attorney's fees. Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 (1988); *see* S. NAHMOD, *supra* note 7, § 1.19.

135. *See supra* note 17 and accompanying text.

tion 1983.[136] Absolute legislative immunity, therefore, cannot offer liability-free work to potential candidates for city councils.

III. CONCLUSION

Courts should adopt qualified legislative immunity for city council members in section 1983 cases because Supreme Court precedent supports such immunity. When reconciling section 1983 with the official immunities doctrine, the Supreme Court has adopted well established common law immunities that are supported by public policy. The circuit courts, on the other hand, have neglected traditional common law and misconstrued public policy.

Traditional common law supports qualified legislative immunity for city council members. Before Congress passed section 1983, the common law gave city council members qualified immunity for their discretionary acts. Moreover, throughout the twentieth century council members have been only qualifiedly immune for defamation. Qualified immunity, therefore, has been the traditional common law standard with respect to city council members.

Public policy likewise supports adopting qualified legislative immunity for several reasons. Qualified legislative immunity is needed to help vindicate federally protected rights and check official misconduct. Moreover, council members' discretion is not independent enough to warrant the complete protection of absolute immunity. Also, as currently applied on the local level, absolute legislative immunity does not avoid time-consuming litigation. Finally, absolute legislative immunity would not help encourage qualified persons to run for city council, because council members have non-legislative responsibilities that are only qualifiedly immune. Qualified legislative immunity for city council members, therefore, is the correct rule in section 1983 cases.

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136. *See* Forrester v. White, 484 U.S. 219, 229–30 (1988).