Characterization of Land Use Decisions: A Zone of Uncertainty

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CHARACTERIZATION OF LAND USE DECISIONS:
A ZONE OF UNCERTAINTY

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(663)
I. Introduction

Under section 1983 of the Civil Rights Act, government officials acting under color of state law may be held personally liable for those acts that deprive persons of their constitutional rights. Section 1983 liability is a matter of concern in particular for state and local govern-


Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, 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.


2. For a discussion of the requirement that government officials be sued in an individual capacity, see infra notes 39-40 and accompanying text.

3. 42 U.S.C. § 1983 (1988). In a § 1983 action, a plaintiff must allege both that his constitutional rights were violated and that the person who violated his rights was acting under "color of law." Craig A. Peterson & Claire McCarthy, Handling Zoning and Land Use Litigation: A Practical Guide § 12-6(A), at 531 (1982). Aggrieved landowners have usually brought § 1983 actions against zoning officials on the basis of the Takings, Due Process (substantive and procedural) and Equal Protection Clauses of the United States Constitution. See Kenneth B. Bley, Use of the Civil Rights Acts to Recover Damages for Undue Interference with the Use of Land, in 2 Land Use Institute: Planning, Regulation, Litigation, Eminent Domain and Compensation, supra note 1, at 807-19 (analyzing constitutional theories espoused in § 1983 actions).

With respect to a due process allegation, it must be noted that land use cases are more frequently brought on substantive due process or "takings" grounds and less frequently on procedural due process grounds. Peterson & McCarthy, supra, § 12-7, at 550. Substantive due process under the Constitution places limits on state police power, requiring that land use regulation serve public health, safety, morals and general welfare. Daniel R. Mandelker, Land Use Law § 2.31, at 36-37 (1982). Courts sometimes overlap substantive due process analysis with takings and equal protection analyses. Id. § 2.31, at 37. Procedural due process requires that government agencies provide procedures through which the agencies make their decisions. Id. § 2.34, at 39. This requirement is imposed only on administrative as opposed to legislative zoning decisions. Id. Therefore, to determine whether a plaintiff's procedural due process claim is valid, a court must characterize the challenged zoning decision as being either administrative or legislative. Developments in the Law—Zoning, 91 Harv. L. Rev. 1427, 1508 (1978) [hereinafter Zoning]. This characterization process is similar to the characterization process undertaken by courts to determine § 1983 immunity for local government officials. In fact, federal courts deciding immunity issues have relied upon the characterization methods used by courts that address procedural due process issues. See, e.g., Cutting v. Muzzey, 724 F.2d 259, 261 (1st Cir. 1984) (applying characterization tests that examine what type of facts decision is based upon and impact of decision on individuals, as suggested in Zoning, supra, at 1510-11); Three Rivers Cablevision v. City of Pittsburgh, 502 F. Supp. 1118, 1136 (W.D. Pa. 1980) (applying characterization stan-
ment officials involved in land use planning. Because state government articulated in Rogin v. Bensalem Township, 616 F.2d 680, 693 (3d Cir. 1980), cert. denied, 450 U.S. 1029 (1981)).

4. Section 1983 actions brought against local government officials in their individual capacities are used increasingly in land use disputes to remedy constitutional violations by local governments. FRANK SCHNEIDER ET AL., HANDLING THE LAND USE CASE 404 (1984). See generally Michael M. Berger, The Civil Rights Act: An Alternative Remedy for Property Owners Which Avoids Some of the Procedural Traps and Pitfalls in Traditional “Takings” Litigation, in 1990 ZONING AND PLANNING LAW HANDBOOK 291-304 (Mark S. Denison ed., 1990). Berger argues that § 1983 litigation for land use disputes is on the rise for three primary reasons: (1) all federal precedent applies to § 1983 litigation, whether land use cases are not present in § 1983 cases; and (2) many procedural “hurdles” present in conventional takings cases are not present in § 1983 cases; and (3) successful property owners may recover attorneys’ fees, which is favorable because “[r]egulatory taking litigation is expensive.” Id. One of the hurdles in takings claims is the requirement that a takings case be “ripe” before federal court litigation may commence. Id. at 295 (citing Williamson County Regional Planning Comm’n v. Hamilton Bank, 473 U.S. 172 (1985)). A case is ripe when an aggrieved landowner seeks and is refused compensation in state courts. Id. Berger argues that the ripeness hurdle is not present in § 1983 land use cases where the basis for the claim is a violation of substantive due process. Id. at 296. This is because “[u]nlike an unconstitutional taking, which is not complete . . . until the state has refused compensation, a substantive due process violation is complete at the time of the original government action.” Id. Furthermore, if the plaintiff makes a proper § 1983 claim based on a substantive due process violation in a federal court, the plaintiff may be able to “append an ‘unripe’ takings claim” to his federal claim through pendent jurisdiction so that the entire case will be heard in one court. Id. at 296-97.

An article by Brian Blaesser, however, presents an argument essentially opposite to Berger’s. Within the article, Blaesser asserts that if a property owner fails to jump the procedural hurdles in a takings claim, the property owner’s related claims of substantive due process, procedural due process and equal protection will also be dismissed. Brian W. Blaesser, Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases, in 1990 ZONING AND PLANNING LAW HANDBOOK, supra, § 12.01, at 310-11.

For a full discussion of the entire litigation process for § 1983 claims in land use disputes, see PETERSON & MCCARTHY, supra note 3, § 12. Peterson and McCarthy include three sample “anatomies” from § 1983 land use cases. Id. at 591-663. The first anatomy is an example of an attack on an administrative decision and includes excerpts from a complaint filed by a developer, a memorandum in support of a defendant’s motion to dismiss and a memorandum in support of the defendant’s motion to abstain. Id. at 591-611. The second anatomy describes a 1980 Third Circuit case involving down-zoning and includes excerpts from the developer’s cross-claim against the defendants for a declaratory judgment and the court’s opinion. Id. at 613-33. The third anatomy describes a suit brought against a local government for including a landowner’s property in a local redevelopment plan allegedly in violation of the Fourteenth Amendment. Id. at 633-63. This third anatomy includes excerpts from a complaint (seeking an injunction, declaratory judgment and damages), the plaintiff’s first request to produce documents to the city and a memorandum in opposition to defendants’ motion to strike, dismiss and abstain. Id.

The procedural hurdle of ripeness, as well as the doctrine of abstention mentioned below, arises out of issues relating to the appropriate circumstances for judicial review. See Blaesser, supra, in 1990 ZONING AND PLANNING LAW HANDBOOK, supra, § 12.01, at 307. Both doctrines in particular bar causes of action in land use cases brought under § 1983. See generally id. § 12.01, at 307-08 (arguing
ments authorize local governments through enabling legislation to adopt the majority of land use laws, local government officials are especially likely to face section 1983 liability in the land use planning context.\(^5\) Notwithstanding the threat of section 1983 liability against government officials, whether local or state, government officials can invoke a number of defenses that may shield them from liability.\(^6\) One

\[^5\text{See, e.g., Mandelker, supra note 3, § 1.1, at 1 (stating that "[s]tate enabling legislation authorizes local land use planning and control, and in some states local governments adopt land use controls under their constitutional home rule powers"). Mandelker also notes that "[a]ll states . . . have enabling legislation authorizing localities to engage in a comprehensive planning process and adopt comprehensive plans." Id. For a definition of "comprehensive plan," see infra note 18.}\n
\[^6\text{Peterson & McCarthy, supra note 3, §§ 12-11 to 12-13. The authors outline the following seven "defenses" that officials may assert to relieve them from liability. First, if a plaintiff raises a procedural due process claim against a government official, the official may show that an adequate state remedy exists, thus fulfilling the plaintiff's Fourteenth Amendment procedural due process\}
such defense is official immunity.

The United States Supreme Court has held that the function of the government official rather than his or her status determines the availability of an immunity defense in a section 1983 action. Characterizing official acts according to their function is necessary not only for determining whether defendant officials can invoke an immu-

rights. Id. § 12-7. Second, if the municipality is being sued, it may assert a "respondeat superior exception" which prevents the municipality from being held liable for the unconstitutional acts of its employees/officials where the only relationship between the municipality and the officials is that of employer-employee. Id. § 12-8. Third, if the state is being sued, the state may assert that it is protected by absolute immunity under the Eleventh Amendment of the Constitution. Id. § 12-9. The Eleventh Amendment may also protect local government entities which can clearly show that their land use acts are tied into statewide standards with statewide supervision. Id. Fourth, if government officials are being sued for actions taken while performing a judicial function, they can raise the defense of absolute judicial immunity against liability for damages. Id. § 12-11. Fifth, if city attorneys are named as defendants, they can assert the defense of absolute immunity for their prosecutorial activities. Id. § 12-12. Sixth, if government officials are being sued for actions performed in a legislative capacity, they may assert an absolute immunity defense. Id. § 12-13. Finally, if governmental officials are being sued and are not afforded absolute immunity, they may still be protected by qualified "good faith" immunity. Id. § 12-15.

Governmental officials are not the only individuals who can be sued under § 1983. Private persons who enter into a conspiracy with others acting under color of state law may also be sued. Lugar v. Edmondson Oil Co., 457 U.S. 922, 931 (1982); see also Dennis v. Sparks, 449 U.S. 24, 27-28 (1980) ("Private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions."). Interestingly, while governmental officials may be protected by absolute immunity, private individuals will not be entitled to the same protection. Dennis, 449 U.S. at 31-32.

7. Forrester v. White, 484 U.S. 219, 224 (1988) (acknowledging that functional approach to immunity questions must be used so that "the nature of the functions with which a particular official or class of officials has been lawfully entrusted" is examined); Briscoe v. LaHue, 460 U.S. 325, 342 (1983) ("[O]ur cases clearly indicate that immunity analysis rests on functional categories, not on the status of the defendant."); Harlow v. Fitzgerald, 457 U.S. 800, 810 (1982) (applying "functional" approach to immunity law); Butz v. Economou, 438 U.S. 478, 512-13 (1978) (holding that persons performing adjudicatory functions are absolutely immune from liability due to characteristics of judicial process and not their government position).

8. See, e.g., Hyson v. Montgomery County Council, 217 A.2d 578, 582 (Md. 1966) ("It is elementary that governmental bodies, tribunals, agencies, boards . . . and officials, in the performance of their public duties, exercise functions that are divided into three general categories: executive, judicial, and legislative."); see also Michael S. Holman, Comment, Zoning Amendments—The Product of Judicial or Quasi-Judicial Action, 33 Ohio St. L.J. 130, 134 (1972) [hereinafter Zoning Amendment] (stating that city councils, county commissioners, and township trustees "perform not only legislative but also executive and judicial functions").

Government action can also be characterized as quasi-legislative or quasi-judicial. See Shelton v. City of College Station, 780 F.2d 475, 482 (5th Cir.) (quasi-legislative), cert. denied, 477 U.S. 905, and cert. denied, 479 U.S. 822 (1986); Zoning Amendment, supra, at 142 (quasi-judicial).
nity defense, but also for determining which kind of immunity applies: absolute or qualified. Thus, if a court characterizes an act as legislative or judicial in nature, it will grant absolute immunity and dismiss the plaintiff’s suit at the outset, without inquiring into the reasonableness of the act. On the other hand, if a court characterizes an act as administrative or executive in nature, it will grant qualified immunity and dismiss the suit, so long as the act passes the qualified immunity test.

Characterization of an official act is crucial to the determination of the applicable immunity. Ordinarily, zoning and land use control is characterized as a legislative function. For instance, circuit and district courts have determined that an official who enacts an ordinance is clearly acting in a legislative capacity and will thus be entitled to absolute immunity. At times, however, it is difficult to characterize the acts of officials because officials often assume a mixture of functions. In

9. Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976) (stating that “absolute immunity defeats a suit at the outset”); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 611 (8th Cir. 1980) (“Absolute immunity defeats a damage suit at the pleading stage.”); SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 7.01, at 3 (3d ed. 1991) (stating that objective reasonableness is not scrutinized to determine whether absolute immunity applies). For the purposes of clarity in this Note, legislative and judicial immunity will be referred to as “absolute legislative immunity” and “absolute judicial immunity” respectively. For a more detailed discussion of absolute immunity, see infra notes 41-54 and accompanying text.

10. Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982) (holding that judge may determine whether defendant official is entitled to qualified immunity during summary judgment motion); Gorman Towers, 626 F.2d at 611 (“[Q]ualified immunity is available only if the evidence shows that [the officials’] actions were taken in good faith, i.e., with a reasonable belief that they were lawful.”). For a discussion of qualified immunity, see infra notes 55-67 and accompanying text.


13. NAHMOD, supra note 9, § 7.05, at 17-18. In addressing the characterization issue with respect to determining whether absolute immunity applies, Nahmod stated that “[w]here clear legislative acts are involved, such as passing of an ordinance, reducing the number of liquor licenses, or budget making, absolute immunity has been conferred.” Id. (footnotes omitted).

14. See Ryan v. Burlington County, 889 F.2d 1286, 1290 (3d Cir. 1989) (“It is generally understood that local governmental bodies . . . are given a combination of proprietary, managerial and legislative powers.”); Moore v. Tripe, 743 F. Supp. 201, 207 (S.D.N.Y. 1990) (recognizing that “with a local board it is often difficult to differentiate executive action”); Stone’s Auto Mart, Inc. v. City of St. Paul, 721 F. Supp. 206, 209 (D. Minn. 1989) (“Unfortunately, it is often difficult to determine whether government action concerning zoning is legisla-
those cases where the function cannot be clearly identified, federal courts have formulated their own characterization standards in the absence of guidance from the United States Supreme Court.\footnote{15}

In \textit{Zamsky v. Hansell},\footnote{16} the Ninth Circuit addressed the characteriza-

\textit{Ward v. Village of Skokie}, 186 N.E.2d 529, 533 (Ill. 1962) (Klingbiel, J., concurring specially); \textit{Nahmod}, supra note 9, § 7.05, at 19 (distinguishing between legislative and nonlegislative acts of local legislators is "sometimes especially difficult in land use cases"); \textit{Zoning Amendment}, supra note 8, at 136 (stating that there is no distinct line distinguishing between legislative, administrative or judicial acts). As concurring Justice Klingbiel stated in \textit{Ward v. Village of Skokie}:

Concededly it is difficult in zoning matters to formulate a precise test separating legislative from administrative or quasi-judicial func-

\textit{Ward}, 186 N.E.2d at 533.

In his Comment, author Michael Holman determined that legislative decisions are regulated by constitutional provisions, whereas judicial and executive decisions are additionally limited by statutes and common law. \textit{Zoning Amendment}, supra note 8, at 136. Holman focused on distinguishing between legislative and judicial governmental zoning acts. \textit{Id}. Holman formulated the following test to distinguish between legislative and judicial acts:

- Does the action formulate a general rule or policy which is applicable to an open class of persons, interests, or situations, or does the action apply a general rule or policy to specific persons, interests, or situations? If the answer is yes to the latter half of the question, then legislative action is present. If the answer is yes to the first half of the question, then there is judicial action.

\textit{Id}. at 136 n.59. Holman further argued that most zoning amendments "should be considered the product of either judicial or quasi-judicial action." \textit{Id}. at 136-37.

\footnote{15} \textit{Nahmod}, supra note 9, § 7.05, at 18-19; see e.g., \textit{Cinevision Corp. v. City of Burbank}, 745 F.2d 560, 579 (9th Cir. 1984), \textit{cert. denied}, 471 U.S. 1054 (1985) (rejecting approaches enunciated by other federal courts and instead adopting "rule enactment" approach). In \textit{Cinevision}, the Ninth Circuit Court of Appeals rejected two possible methods of distinguishing between legislative and admin-

\textit{Cinevision}, see infra notes 257-58 and accompanying text and notes 277-78 and accompanying text.

\textit{The Zoning} article evaluated three characterization tests used by state courts to resolve procedural due process issues. \textit{Zoning}, supra note 3, at 1509. Some state courts consider the "nature of the decisionmaking body [to] determine[] the character of the act." \textit{Id}. Other courts "simply classify" certain types of zoning decisions as legislative and others as administrative. \textit{Id}. Still other courts use an approach that "distinguishes general policy formulations, which are considered legislative, from specific applications of previously formulated policy, which are considered administrative." \textit{Id}. In reviewing section 1983 immunity cases, this Note demonstrates that the federal courts utilize different tests than the state tests analyzed in the \textit{Zoning} article. For a discussion of what methods federal courts have utilized, see infra notes 99-239 and accompanying text.

\footnote{16} 933 F.2d 677 (9th Cir. 1991) (per curiam). For a more detailed discussion of this case, see infra notes 240-308 and accompanying text.
tion issue in the land use context. The plaintiff in Zamsky brought a section 1983 action against the director of the state zoning body, the Land Conservation and Development Commission (LCDC), and commissioners of the LCDC.\textsuperscript{17} The commissioners had issued a continuance order requiring the plaintiff’s county to rezone the plaintiff’s land so that the county’s comprehensive land use plan would be in conformity with the state’s land use goals.\textsuperscript{18} The plaintiff claimed that the order violated his constitutional rights under the Due Process, Equal Protection and Takings Clauses of the United States Constitution.\textsuperscript{19}

In analyzing the immunity defenses raised by the defendants, the Zamsky court characterized the defendants’ act of issuing a continuance order as executive in nature, primarily because the act involved monitoring the county’s compliance with the state’s land use goals.\textsuperscript{20} The court determined that such an act necessarily involved the “ad hoc decision-making” of an executive.\textsuperscript{21} Thus, the court held that the officials could not be afforded absolute immunity.\textsuperscript{22} The court remanded the case for further proceedings to determine whether the officials were entitled to qualified immunity.\textsuperscript{23}

The majority in Zamsky utilized a characterization standard designed to determine whether the defendant officials were formulating policy or engaging in ad hoc decision-making.\textsuperscript{24} The dissent, however, claimed that the majority had in fact applied a characterization standard previously rejected by the Ninth Circuit that focused on the scope of the official act.\textsuperscript{25}

\textsuperscript{17} Zamsky, 933 F.2d at 678.

\textsuperscript{18} Id. A “comprehensive plan” is a policy statement on land use planning which directs the “use and development of property in the zoning territory.” 82 AM. JUR. 2d Zoning § 69, at 502 (1976). The comprehensive plan is to be implemented by zoning regulations that have the force of law. Id. The enabling legislation in most states requires that zoning regulations comply with a comprehensive plan. Id. at 501. The comprehensive plan requirement is “intended to avoid an arbitrary, unreasonable, or discriminatory use of power, and to avoid lot-by-lot zoning.” Id. at 502. When a comprehensive plan has been prepared by the planning board, it is considered advisory and may be changed at any time. Id. at 503.

\textsuperscript{19} Zamsky, 933 F.2d at 678.

\textsuperscript{20} Id. at 679. The Zamsky court also noted that Zamsky’s property was “singled out” by the zoning ordinance; thus, enforcement of that ordinance constituted “an executive action subject only to qualified immunity.” Id.

\textsuperscript{21} Id.

\textsuperscript{22} Id. at 679-80.

\textsuperscript{23} Id. at 680. For a discussion of qualified immunity, see infra notes 55-67 and accompanying text.

\textsuperscript{24} Zamsky, 933 F.2d at 679. The court found that “[m]onitoring compliance with established laws... is an executive function involving ‘ad-hoc decision-making’ rather than ‘formulation of policy’ which is a legislative function. Id. This method of characterization was previously adopted by the Ninth Circuit in Cinevision Corp. v. City of Burbank, 745 F.2d 560, 578, 580 (9th Cir. 1984), cert. denied, 471 U.S. 1054 (1985).

\textsuperscript{25} Zamsky, 933 F.2d at 687 (Alarcon, J., dissenting). The dissent further
The majority and dissenting opinions in Zamsky exemplify two interpretations of one of six different characterization standards federal courts have employed to evaluate the acts of government officials. While these characterization standards overlap, they differ slightly in their focus. For example, while one characterization standard is based on whether the challenged official act reflected an enactment or enforcement of a law, a different standard is concerned with whether the officials relied on legislative facts and whether their act impacted on specific individuals. Another standard combines both of these inquiries. Other standards investigate such issues as the effect that a general law has on the community, whether the defendant officials acted on the basis of legislative facts, and whether the challenged official act was part of the legislative process.

This Note first discusses the different types of immunity available to government officials and explores the history of absolute legislative immunity. This Note then outlines the present position of the federal courts regarding immunity in section 1983 actions and specifically describes the standards used by the federal courts to characterize the land use decisions of government officials. Against this backdrop, this Note presents the facts of Zamsky v. Hansell, followed by an analysis of the court’s decision. In the final section, this Note concludes that the

argued that a characterization test employed by the majority was contrary to the functional test established by the court in Cinevision. Id. at 686-87 (Alarcon, J., dissenting).

26. For a discussion of these standards, see infra notes 99-239 and accompanying text.

27. For a discussion of the standard that distinguishes between enactment and enforcement, see infra notes 113-34 and accompanying text.

28. For a discussion of the standard that investigates the facts on which an official act was based and the impact of the official act, see infra notes 161-91 and accompanying text.

29. For a discussion of this combined standard, see infra notes 192-207 and accompanying text.

30. For a discussion of the standard that considers the scope of official action, see infra notes 135-60 and accompanying text.

31. For a discussion of the standard that solely examines the type of facts that were considered by the officials, see infra notes 208-24 and accompanying text.

32. For a discussion of the standard that focuses on whether the challenged official action was part of the legislative process, see infra notes 225-39 and accompanying text.

33. For a discussion of the types of official immunity, see infra notes 41-67 and accompanying text.

34. For a discussion of the history of legislative immunity, see infra notes 68-98 and accompanying text.

35. For a discussion of how the federal courts characterize the land use decisions of local government officials, see infra notes 99-239 and accompanying text.

36. For a discussion of Zamsky, see infra notes 240-308 and accompanying text.
most appropriate standard for characterizing land use decisions is one which distinguishes legislative acts from administrative acts on the basis of whether the challenged official act constitutes an enactment or an enforcement of a land use law.37

II. BACKGROUND

Two types of official immunity are recognized: absolute and qualified.38 Both types of immunity are defenses available to government officials only when a "personal-capacity suit" is brought against them.39 Government officials may not raise these defenses when an "official-capacity" suit is brought against them.40 This section of the Note describes both types of immunity available to government officials and gives an historical overview of the development of legislative immunity with respect to section 1983 actions. This section also discusses the characterization standards that federal courts have employed to determine whether section 1983 immunity attaches to a challenged official act.

A. Types of Official Immunity

1. Absolute Immunity

An official may invoke the absolute immunity defense to a section 1983 action41 if the official’s function passes the Supreme Court’s two-

37. For the author’s recommendation as to the most appropriate standard for characterizing land use decisions, see infra notes 309-14 and accompanying text.

38. See, e.g., Harlow v. Fitzgerald, 457 U.S. 800, 807-08 (1982) (asserting that "[o]ur decisions have recognized immunity defenses of two kinds": absolute and qualified); Haskell v. Washington Township, 864 F.2d 1266, 1277 (6th Cir. 1988) (stating that "[t]here are two types of immunities available to persons performing certain governmental functions: absolute and qualified"). See generally Bley, supra note 3, at 836-39 (detailing Supreme Court’s acknowledgement of officials protected by absolute immunity and those protected by qualified immunity).

39. Kentucky v. Graham, 473 U.S. 159, 167 (1985). Personal-capacity actions or individual-capacity actions are actions seeking personal liability against government officials acting under color of state law, whereas official-capacity actions are actions against government officials as agents for the government entity. Id. at 165 (quoting Monell v. Department of Social Servs., 436 U.S. 658, 690 n.55 (1978)). In personal-capacity actions, the official can raise personal immunity defenses, such as absolute or qualified immunity. Id. at 167.

40. Id. at 167 (holding that "personal immunity defenses" are unavailable in official capacity actions). In official-capacity actions, the real party in interest is the governmental entity. Id. at 166. As a result, in such actions, government officials can claim only sovereign immunity. Id. at 167. The Graham Court noted, however, that under Monell, official-capacity suits are no longer necessary because local government entities can be sued directly. Id. at 167 n.14.

41. For an excerpt of 42 U.S.C. § 1983 (1988), see supra note 1. For a discussion concerning the policy reasons supporting the absolute immunity con-
prong test set forth in Owen v. City of Independence. The first prong of the Owen test requires that the official's function must have been protected by immunity since the time section 1983 was enacted. The second prong of the Owen test requires that the grant of absolute immunity to the official's function must complement the goal of the Civil Rights Act, which is to provide a "broad remedy for violations of federally protected rights." If the official's function does not satisfy both prongs of the Owen test, it will not be "incorporated" into section 1983, and the official will not be able to successfully claim an absolute immunity defense. The Owen Court recognized that there are at least three kinds of functions that satisfy the Owen test for absolute immunity: legislative, judicial and prosecutorial.

Officials accorded absolute immunity cannot be held individually liable for damages in a section 1983 action unless their challenged act reached beyond the scope of their official function. Thus, the motives of the officials are irrelevant in determining whether they are entitled to

except within the context of legislative immunity, see infra notes 74-80 and accompanying text.

42. 445 U.S. 622, 638 (1980).
43. Id. The Court did not explicitly break down the test into two prongs. Instead, it stated that "[w]here 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." Id.
44. Id. at 636, 638. Thus, the concept of immunity is inconsistent with the primary goal of the Civil Rights Act to provide a broad remedy for the violations of rights. However, the Court stated "that the tradition of immunity was 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 the doctrine.'" Id. at 637 (quoting Pierson v. Ray, 386 U.S. 547, 555 (1967)).
45. Id. at 638; see also Forrester v. White, 484 U.S. 219, 229-30 (1988) (where absolute immunity is not warranted, qualified immunity may be available). For a discussion of the point raised in Forrester, see infra note 57 and accompanying text. For a discussion of qualified immunity, see infra notes 55-67 and accompanying text.
46. Owen, 445 U.S. at 637 (traditional legislative immunity); see also Tenney v. Brandhove, 341 U.S. 367, 379 (1951) (holding that defendant state legislators were protected by legislative immunity). For a discussion of Tenney, see infra notes 74-80 and accompanying text.
47. Owen, 445 U.S. at 637 (stating that judges' absolute immunity privilege is preserved under § 1983 (citing Pierson v. Ray, 386 U.S. 547, 553-54 (1967))); see also Butz v. Economou, 438 U.S. 478, 512-14 (1978) (finding that functions of executive officers were sufficiently judicial so as to afford them absolute immunity).
49. See Tenney v. Brandhove, 341 U.S. 367, 379 (1951); see also Zamsky v. Hansell, 933 F.2d 677, 678 n.1 (9th Cir. 1991); Dunmore v. City of Natchez, 703 F. Supp. 31, 33 (S.D. Miss. 1988) (holding that conspiracy is not privileged by legislative immunity because it goes beyond scope of legislative duty); Nahmod, supra note 9, § 7.01, at 3-4 (stating that court determining absolute immunity
absolute immunity.\textsuperscript{50} Additionally, although officials acting in a legislative capacity are protected against injunctive relief,\textsuperscript{51} officials acting in a

issue does not consider reasonableness of defendant's conduct. In describing the scope of absolute immunity, the Ninth Circuit in \textit{Zamisky} stated:

If state officials are absolutely immune, they can't be held liable, no matter how lawful or lawless their conduct; they could single out an individual based on his race, religion or dislike of sushi, and no damages would lie. The question here is whether the culpable will be held accountable.


The Sixth Circuit has stated that "absolute immunity does not extend to even traditionally legislative actions of officials taken either in bad faith, because of corruption, or primarily in furtherance of personal instead of public interests." \textit{Haskell v. Washington Township}, 864 F.2d 1266, 1278 (6th Cir. 1988). Nahmod has criticized this limitation of absolute immunity as unjustified and, moreover, as undermining the purpose of granting officials absolute immunity. \textit{Nahmod, supra} note 9, § 7.05, at 19 n.34. For the Supreme Court's articulation of the purpose of affording officials absolute immunity, see infra notes 78-80 and accompanying text.

It is important to note that while an "administrative decisionmaker" may be found to be absolutely immune against civil damage actions, he or she may still be compelled to testify or produce documents. Raveson, supra, at 927. The Supreme Court recently held that city council members might be individually subject to contempt sanctions for failing to comply with a judicial order requiring the council to immediately adopt an ordinance to stop segregation in the housing market. \textit{Spallone v. United States}, 493 U.S. 265, 280 (1990) (5-4 decision). In \textit{Spallone}, however, the Court noted that sanctions against the individual council members should not be considered until contempt sanctions against the city have failed to obtain the council's compliance. \textit{Id.} Nonetheless, the four dissenting Justices in \textit{Spallone} argued in favor of the availability of contempt sanctions "in extreme circumstances" against local officials acting in a legislative capacity. \textit{Id.} at 281 (Brennan, J., dissenting); see also \textit{Kevin R. Cole, Comment, Civil Rights: A Call for Qualified Legislative Immunity for City Council Members Under 42 U.S.C. § 1983, 66 WASH. L. REV. 169, 174 (1991)} (stating that "absolute legislative immunity protects individual legislators from injunctive relief as well as damages"). Cole argues that "the legislative function of city council members should be qualifiedly, rather than absolutely, immune to section 1983 damages." \textit{Id.} at 171.


\textit{50. Tenney}, 341 U.S. at 377 (stating that "[t]he claim of unworthy purpose does not destroy the privilege").

\textit{51. Eastland v. United States Servicemen's Fund}, 421 U.S. 491, 503 (1975) (stating that Speech or Debate Clause of Constitution requires absolute immunity for legislators). The issue before the Court in \textit{Eastland} was whether a federal court could enjoin Congress from issuing a subpoena duces tecum directing a bank to produce the records of an organization claiming First Amendment protection for those records. \textit{Id.} at 492-93. The organization brought an action
judicial or prosecutorial capacity are not similarly protected.\textsuperscript{52}

Procedurally, the issue of absolute immunity is resolved during the pleading stages of a lawsuit.\textsuperscript{53} Officials who are afforded absolute immunity, therefore, are not subjected to the expense of further judicial proceedings.\textsuperscript{54}

2. Qualified Immunity

Qualified immunity protects government officials from liability for civil damages when they perform discretionary functions.\textsuperscript{55} Government officials are not absolutely immune to private civil actions for injunctive relief. Supreme Court of Virginia v. Consumers Union of the U.S., Inc., \textsuperscript{446 U.S. 719, 733} (1980) (stating that Court has generally equated state legislator's § 1983 immunity with that of congressmen). The Court noted, however, that it had not yet addressed this issue with respect to regional officials acting in a legislative capacity. \textit{Id.} at 733 n.11.

\textsuperscript{52} Consumers Union, \textsuperscript{446 U.S. at 735-36} (noting that "we have never held that judicial immunity absolutely insulates judges from declaratory or injunctive relief with respect to their judicial acts" and that similarly, prosecutors are absolutely immune from § 1983 damage actions but not from injunctive relief). While prosecutors may be protected by legislative immunity in a suit for damages, "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." \textit{Id.} at 736. As for judges, they are subject to liability for both injunctive relief and attorneys' fees. Pulliam v. Allen, \textsuperscript{466 U.S. 522, 541-44} (1984).

\textsuperscript{53} Imbler v. Pachtman, \textsuperscript{424 U.S. 409, 419 n.13} (1976) (stating that procedurally, "absolute immunity defeats a suit at the outset, so long as the official's actions were within the scope of the immunity"); see also Gorman Towers, Inc. v. Bogoslavsky, \textsuperscript{626 F.2d 607, 611} (8th Cir. 1980) ("Absolute immunity defeats a damage suit at the pleading stage . . . .").

\textsuperscript{54} See Gorman Towers, \textsuperscript{626 F.2d at 616} (affirming complete dismissal of lawsuit because defendant officials had absolute immunity).

\textsuperscript{55} Cole, Comment, \textit{supra} note 49, at 173. At common law, qualified immunity protected officials from suit if they acted with "respect for 'basic, un questioned constitutional rights'" and without malice. Harlow v. Fitzgerald, \textsuperscript{457 U.S. 800, 815} (1982) (quoting Wood v. Strickland, \textsuperscript{420 U.S. 308, 322} (1975)). Cole presents the modern qualified immunity test as having two prongs. Under Cole's test, to be afforded qualified immunity, the officials must prove: (1) that they acted within their official duties and (2) that a reasonable person in their position would not have known that the act would violate the plaintiff's constitutional rights. Cole, Comment, \textit{supra} note 49, at 173; see also Haskell v. Washing-
ment officials perform discretionary functions when acting in an administrative or executive capacity. In section 1983 actions, courts may afford qualified immunity to officials where absolute immunity is unavailable as a defense.

In *Harlow v. Fitzgerald*, the Supreme Court set forth a test to determine whether an official should be entitled to the qualified immunity defense. Under the *Harlow* test, in order for qualified immunity to attach, an official must show that a reasonable person in the official’s position would not have known that his or her act constituted a violation of the plaintiff’s constitutional rights. Yet, even if an official meets this standard, he or she may lose qualified immunity if he or she acted in bad faith. The Court has afforded qualified immunity to various government officials. See, e.g., *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (presidential advisors); *Butz v. Economou*, 438 U.S. 478 (1978) (cabinet officials); *Wood v. Strickland*, 420 U.S. 308, 322 (1975); *Cinevision*, 745 F.2d at 577 (asserting that officials are protected by qualified immunity only if they act in good faith).


Additionally, the scope of qualified immunity has widened to reach more types of officials than it traditionally reached. See *Cole*, Comment, *supra* note 49, at 173. For example, while governors and high level officials were traditionally afforded absolute immunity for their discretionary functions under “modern section 1983,” such officials are only afforded qualified immunity for their executive and administrative decisions. *Id.*

*Peterson & McCarthy*, *supra* note 3, § 12-15, at 574; *see also* *Forrester*, 484 U.S. at 229-30 (holding that judge was not entitled to absolute immunity but not deciding whether judge was entitled to qualified immunity). In *Forrester*, the Court stated that it “ha[d] recognized a category of ‘qualified’ immunity that avoids unnecessarily extending the scope of the traditional concept of absolute immunity.” *Id.* at 224.

*Id.* at 224.

*Id.* at 224.

*Anderson v. Creighton*, 483 U.S. 635, 638-40 (1987) (discussing *Harlow* test). To explain its standard, the Court in *Harlow* stated that immunity would not be provided in instances where the law forbidding the official’s conduct was clearly established, because a reasonable person in the official’s position should know the law governing his conduct. *Harlow*, 457 U.S. at 818-19.

Prior to the establishment of the present test used to determine the availability of qualified immunity, the Court in *Wood v. Strickland* had established and utilized a two-prong test. *See Wood v. Strickland*, 420 U.S. 308, 322 (1975). The *Wood* test consists of both objective and subjective prongs. *Id.* Under the objective prong, the official is not entitled to immunity unless he or she “knew or
standard and qualified immunity could attach, immunity will be denied if he or she acted with malice or contrary to established law.61

Qualified immunity, like absolute immunity, is an affirmative defense; the defendant officials bear the burden of proof.62 Prior to the Harlow decision, an issue relating to qualified immunity could only be considered after all of the evidence had been presented before the trial court.63 Under Harlow, however, a court may apply the Harlow test during a motion for summary judgment.64 This procedural development in Harlow has "limited individual liability by [potentially] converting qualified immunity into the functional equivalent of absolute immunity."65 Practically, unless officials commit an egregious act, the qualified immu-

reasonably should have known" that his or her official act would violate the constitutional rights of the person affected. Id. The subjective prong examines whether the official acted "with the malicious intention to cause a deprivation of constitutional rights or other injury to the [person affected]." Id.

The Court refined the objective prong of the Wood test in Procunier v. Navarette, 434 U.S. 555, 561-65 (1978). In Procunier, the Court held that the defendant official would automatically pass the objective prong of the test if the constitutional right was not clearly established at the time the defendant allegedly violated that constitutional right. Id. at 565. The subjective prong of the qualified immunity defense established in Wood was recognized by the Court in Harlow, but the Harlow Court found that "substantial costs attend the litigation of the subjective good faith of governmental officials...[and][i]nquiries of this kind can be peculiarly disruptive of effective government." Harlow, 457 U.S. at 816-17. Thus, the presently applied Harlow test severely circumscribes the subjective prong of the two-prong test established in Wood. PETERSON & McCARTHY, supra note 3, § 12-15(B), at Supp. 63 (1985). The authors found that "[m]any courts have interpreted...[Harlow] as defining qualified immunity only in relation to objective factors." Id. at 64. However, some courts have not. Id.; see, e.g., McElveen v. County of Prince William, 725 F.2d 954 (4th Cir.), cert. denied, 469 U.S. 819 (1984); Stuebig v. Hammel, 714 F.2d 292 (3d Cir. 1983), cert. denied, 465 U.S. 1023 (1984).

For an in-depth discussion of how the Supreme Court has shaped the two-prong test articulated in Wood, see PETERSON & McCARTHY, supra note 3, at 574-88.

61. Procunier v. Navarette, 434 U.S. 555, 562 (1978); see also Harlow, 457 U.S. at 819 ("By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct.").

62. Gomez v. Toledo, 446 U.S. 635, 640 (1980) ("[T]his Court has never indicated that qualified immunity is relevant to the existence of the plaintiff's cause of action: instead we have described it as a defense available to the official in question."). The Gomez Court further asserted that there is "no basis for imposing on the plaintiff an obligation to anticipate such a defense by stating in his complaint that the defendant acted in bad faith." Id.

63. Imbler v. Pachtman, 424 U.S. 409, 419 n.13 (1976) ("The fate of an official with qualified immunity depends upon the circumstances and motivations of his actions, as established by the evidence at trial."); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 611 (8th Cir. 1980) (stating that "qualified immunity is available only if the evidence shows that [the official] actions were taken in good faith") (emphasis added).

64. Harlow, 457 U.S. at 818.

65. NAHMOD, supra note 9, § 8.04, at 115.
nity defense will protect them against civil liability.\(^{66}\) Nevertheless, being afforded absolute immunity is more favorable than qualified immunity, because under absolute immunity, defendant officials "can't be held liable, no matter how lawful or lawless their conduct."\(^{67}\)

B. Historical Overview of Legislative Immunity and Section 1983

1. Speech and Debate Clause

Absolute legislative immunity arose during the sixteenth and seventeenth centuries in England as Parliament grew more and more independent from the king.\(^{68}\) As the United States Supreme Court has noted, legislative immunity is thought to be based on the English principle of freedom of parliamentary debate.\(^{69}\) This concept was imported to the American colonies and was later incorporated in the Articles of Confederation.\(^{70}\) Presently, the right to free legislative debate is embodied in the United States Constitution: "[F]or any Speech or Debate

\(^{66}\) See Zamsky v. Hansell, 933 F.2d 677, 678 n.1 (9th Cir. 1991) (noting that "[a]fter all, officials who don't violate clearly recognized rights will be entitled to qualified immunity—and will not be liable—no matter how this [absolute immunity issue] is decided").

\(^{67}\) Id.

\(^{68}\) Id.; see also ABA Standing Committee on American Citizenship, American Bar Association, *Bill of Rights (British)*, in 7 SOURCES OF OUR LIBERTIES 36 (Richard L. Perry ed., 1959) (discussing historical evolution of Parliament's right to freely debate); Raveson, supra note 49, at 893-97 (adopting premise "that the privilege arose and evolved to preserve legislative independence in a system of separation of powers").

During the Middle Ages, the freedom of parliamentary debate was generally acknowledged and respected. *Bill of Rights (British)*, supra, in SOURCES OF OUR LIBERTIES 36. The Strode's Act of 1512 gave statutory recognition of this right by condemning the punishment of members of Parliament for their debates of governmental matters within Parliament. *Id.* In 1610, the House of Commons, in an address to James I, declared: "We hold it an ancient, general, and undoubted right of parliament to debate freely all matters which do properly concern the subject and his right or state; which freedom of debate being once foreclosed, the essence of the liberty of parliament is withal dissolved." *Id.* Finally, in the Bill of Rights, Parliament codified its right to free debate in 1689, thereby securing the freedom to debate governmental issues without fear of reprimal that Parliament members struggled for years to obtain from the king. *Id.* The Bill of Rights of 1689 expressed the right to free debate as follows: "That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament." Tenney, 341 U.S. at 372 (quoting An Act for Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown, 1 W. & M., Sess. 2, C. II (Eng. 1688)).

\(^{70}\) Tenney, 341 U.S. at 372. The Tenney Court stated: Freedom of speech and action in the legislature was taken as a matter of course by those who served the Colonies from the Crown and founded our Nation. It was deemed so essential for representatives of the people that it was written into the Articles of Confederation and later into the Constitution. Article V of the Articles of Confederation is quite close to the English Bill of Rights: "Freedom of speech and debate in
in either House, [the Senators and Representatives] shall not be questioned in any other Place."71 Recognizing the historical importance of legislative freedom, courts developed a common law immunity defense for legislators.72 The doctrine has expanded to include all legislative acts whether performed by federal, state, regional or local officials.73

2. Section 1983 Immunity

a. Immunity of State Legislators

In the early 1950s, the Supreme Court in Tenney v. Brandhove74 addressed the viability of absolute legislative immunity within the context:

Congress shall not be impeached or questioned in any court, or place out of Congress . . . .”

Id. (quoting ARTS. OF CONFEDERATION, art. V).

71. U.S. Const. art. I, § 6. The majority in Tenney found that legislative immunity came out of this English tradition. Tenney, 341 U.S. at 372. See generally Raveson, supra note 49, at 889-93 (discussing Speech or Debate Clause); Richard D. Batchelder, Jr., Note, Chastain v. Sundquist: A Narrow Reading of the Doctrine of Legislative Immunity, 75 CORNELL L. REV. 384, 385-91 (1990) (discussing development of Speech or Debate Clause legislative immunity). Raveson argues that “[t]he speech or debate clause provides legislators with substantive immunity, which has been invoked as a shield against criminal prosecution and grand jury investigation initiated by the executive branch and damage and injunctive actions brought by private citizens.” Raveson, supra note 49, at 891. Moreover, Raveson notes that the Supreme Court has consistently held “that if the speech or debate clause privilege is applicable, its protection is absolute.” Id.

In James Madison’s notes of the debates at the Federal Convention of 1787, Mr. Pinkney submitted a proposition to the House reflecting the attitude of the Framers toward protection of their freedom to debate while wording legislation:

Each House shall be the judge of its own privileges, and shall have authority to punish by imprisonment every person violating the same; or who, in the place where the Legislature may be sitting and during the time of its Session, shall threaten any of its members for any thing said or done on the House—or who shall assault any of them therefor—or who shall assault or arrest any witness or other person ordered to attend either of the Houses in his way going or returning; or who shall rescue any person arrested by their order.


72. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 404 (1979) (indicating that source of absolute immunity for state or regional officials is not Speech or Debate Clause of Constitution). This clause of the Constitution “reflect[s] the central importance related to legislative freedom in our Nation.” Id. The Court in Lake Country Estates then stated that the extension of legislative immunity to state legislators reflected its interpretation of federal law and did not depend on the Speech or Debate Clause in a state constitution or state law. Id. Instead, this rule “recognizes the need for immunity to protect the 'public good.'” Id.

73. See, e.g., id. at 391 (regional agency members performing legislative acts are entitled to absolute immunity); Tenney, 341 U.S. at 367 (state legislators protected by absolute immunity); Shoultes v. Laidlow, 886 F.2d 114 (6th Cir. 1989) (legislative immunity extends to local officials acting in legislative capacity).

74. 341 U.S. 367 (1951).
of section 1983 actions. Initially, the Court determined that Congress did not intend to abrogate absolute legislative immunity by enacting the Civil Rights Act of 1871. The Court then held that absolute legislative immunity attached in actions brought under the Civil Rights statutes where state legislators acted within the scope of their legislative power. It was not for the courts to decide issues involving the dishonest or vindictive motives that may influence legislators while they are acting in their legislative roles. Instead, “[s]elf-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.” The Court concluded that legislators were entitled to the privilege of absolute immunity to further the public good; otherwise,

75. Id. at 369. The case was brought, in part, under 8 U.S.C. § 43. Id. This section was derived from the Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871), and has since been transferred to 42 U.S.C. § 1983.

In Tenney, plaintiff Brandhove brought a civil rights action against members of a committee of the California legislature. Tenney, 341 U.S. at 369 (committee's purpose was to make factual findings on “un-American activities”). Brandhove circulated a petition throughout the state legislature. Id. at 370. The following day, Brandhove was summoned for a hearing before the committee. Id. Brandhove alleged in his complaint that the hearing was designed to intimidate, silence and deter him from “exercising his constitutional rights of free speech and to petition the Legislature for redress of grievances, and also to deprive him of the equal protection of the laws, due process of law, and of the enjoyment of equal privileges and immunities as a citizen of the United States . . . .” Id. at 371. The Supreme Court held that the committee members were “acting in a field where legislators traditionally have power to act, and that the statute of 1871 does not create civil liability for such conduct.” Id. at 379.

76. Tenney, 341 U.S. at 376. The Court stated: “We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.” Id. See generally Cole, Comment, supra note 49, at 174-75. Cole found that “[t]he Tenney decision relied on a two-step canon of construction.” Id. at 174. The first step was the Court's finding that when Congress enacted the Civil Rights Act in 1871, state legislators enjoyed the privilege of absolute immunity based on legislative tradition. Id. The second step was the Court's finding that the “statute's language and legislative history failed to indicate Congress intended to abrogate this [legislative] immunity.” Id. at 174-75. Cole argued that in § 1893 cases, city council members should be afforded only qualified legislative immunity rather than the absolute legislative immunity that circuit courts have afforded them. Id. at 179. Cole asserts that the “critical issue” in determining whether to extend absolute or qualified immunity is: “[W]hether a specific type of official conduct warrants the extra protection of absolute immunity . . . .” Id.; see also Raveson, supra note 49, at 929 (“The Court has refused to extend absolute immunity to officials engaged in less sensitive functions.”). After considering the Supreme Court's method of inquiry, including the Tenney “two-step canon of construction” requiring investigation of the legislative history, common law and public policy interests, Cole concludes that absolute immunity for city council members finds no support. Cole, Comment, supra note 49, at 179.

77. Tenney, 341 U.S. at 379. This legislative immunity is absolute. Id. at 377-78. The Court stressed, however, that it was only considering the “scope of the privilege as applied to the facts of the present case.” Id. at 378.

78. Id.

79. Id. This statement reflects the Court’s age-old position of judicial con-

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they would be distracted from their duties by the threat of legal action and the inconveniences of trial.  

b. Immunity of Municipalities

Twenty-nine years after Tenney, the Supreme Court in Owen v. City of Independence addressed the issue of whether the official immunity granted in Tenney could be invoked by local governments, such as municipalities, in section 1983 actions. Local governments had been subject to liability under section 1983 since the Court's decision in Monell v. Department of Social Services, in which the Court expanded the meaning of "person" to include local governments. As in Tenney, the Court in

servantism starting with Madison's transcriptions of the debates in the federal convention. For a discussion of this position, see supra note 71.

81. 445 U.S. 622 (1980). Owen did not involve a land use dispute. In Owen, a police chief brought suit under the Civil Rights Act against the city, city manager and members of the city council, alleging that he was discharged in violation of his due process rights. Id. at 630.
82. Id. at 634-35.
83. 436 U.S. 658 (1978). While Monell also did not involve a land use dispute, its propositions have an impact on land use litigation. Peterson & McCarthy, supra note 3, § 12-1, at 497. For a discussion of this point, see infra note 84. Monell involved a class action suit by female employees of the Department of Social Services and the Board of Education in New York City alleging that an official policy compelling pregnant employees to take unpaid leaves of absence before medically necessary deprived these female employees of their constitutional rights. Monell, 436 U.S. at 660-61.
84. Monell, 436 U.S. at 690. The Court in Monell stated that "[o]ur analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies." Id. The Court further stated that Congress intended municipalities to be liable only if the action was based upon an official-municipal policy, thereby causing a constitutional tort. Id. at 691. Thus, a municipality cannot be held vicariously liable for the torts committed by its employees not based on official policy. Id. This is known as the "respondeat superior exception." Peterson & McCarthy, supra note 3, § 12-1, at 498. Thus, a local government can be sued "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." Monell, 436 U.S. at 694. The Monell Court's holding is significant in the land use context because the vast majority of land use decisions are made by local governments. Peterson & McCarthy, supra note 3, §§ 12-1 to 12-2, at 496, 499 ("Since most attacks on local land use decision-making include alleged violation of the United States Constitution, particularly the due process, equal protection and 'taking' clauses, plaintiff attorneys should consider the possibility of a Monell count against the local government body responsible for land use decisions."). Thus, Monell opened the door for aggrieved landowners to sue local governments under § 1983 in the federal courts. Id. § 12-1, at 497. Before Monell, aggrieved landowners could only institute actions based on constitutional violations of the Due Process, Equal Protection and Takings Clauses against local governments in state courts. Id. However, after Monell, local governments could be sued (under certain circumstances) for violations of a federal statute, like § 1983. Id.
Owen acknowledged that the tradition of affording governmental immunity is deeply rooted in the common law. Thus, if Congress had intended to preclude the defense of absolute legislative immunity in section 1983 actions, it would have done so explicitly. The Court therefore held that Congress' passage of section 1983 of the Civil Rights Act did not abrogate the federal common law immunities protecting government officials. The Owen Court then applied an historical analysis of immunity with respect to municipalities to determine whether such governmental entities should be afforded immunity. Based on its findings, the Court concluded that municipalities could not enjoy the privilege of either absolute or qualified immunity in section 1983 actions.

c. Immunity of Regional and Local Officials Sued in their Personal Capacities

One year before the Court's decision in Owen precluding municipal entities from receiving official immunity, the Court in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency was presented with a narrower

Prior to the Court's decision in Monell, the Court held that municipalities were not "persons" for purposes of § 1983 and thus could not be sued under that statute. Monroe v. Pape, 365 U.S. 167, 190-91 (1961), overruled by Monell v. Department of Social Servs., 436 U.S. 658 (1978). However, it is interesting to note that the Court in Monell analyzed the same legislative history as did the Court in Monroe, and yet the Monell Court came to the opposite conclusion. Laura Oren, Immunity and Accountability in Civil Rights Litigation: Who Should Pay?, 50 U. PTT. L. REV. 995, 963 (1989).

The Court has refined its holding in Monell in subsequent decisions. For instance, the Court has held that "there must be an affirmative link between the municipality's policy and the particular constitutional violation alleged." City of Oklahoma City v. Tuttle, 471 U.S. 808, 823 (1985). According to the Tuttle Court, "[p]roof of a single incident of unconstitutional activity is not sufficient to impose liability," unless the incident was done pursuant to an existing, unconstitutional municipal policy attributable to a municipal policy maker. Id. at 825. See generally Freilich, supra note 1, at 788-93 (discussing impact of Tuttle on Monell).

85. Owen, 445 U.S. at 637. The Owen Court further noted that governmental immunity is supported by "strong" policy concerns. Id.

86. Id. ("Congress would have specifically so provided had it wished to abolish the doctrine [of immunity].") (quoting Pierson v. Ray, 386 U.S. 547, 555 (1967)).

87. Id.

88. Id. at 638.

89. Id. The Court stated: "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." Id. Because there was neither tradition supporting municipal immunity, nor history and policy supporting a construction of § 1983 justifying such immunity, the Owen Court held that municipalities were not entitled to assert either absolute or qualified immunity as a defense to § 1983 actions. Id.

question: whether regional officials can be protected by legislative immunity. The Supreme Court answered this question in the affirmative. The Court extended absolute legislative immunity to regional officials based on its reasoning in Tenney. According to the Court, absolute immunity must not depend on what rules or procedures are available to discipline those acting in a legislative capacity, but must instead depend on furthering the goal of protecting the public good.

The Court in Lake Country Estates explicitly reserved addressing the issue of whether the defense of absolute legislative immunity also extends to officials acting in a legislative capacity at the local level. The lower federal courts that have addressed this issue have held that local officials acting in a legislative capacity are protected by the privilege of absolute immunity. Generally, these federal courts have reasoned that

91. Id. at 402-03. In Lake Country Estates, owners of property in the Lake Tahoe Basin brought suit against the individual members of the Tahoe Regional Planning Agency (TRPA), in part under 42 U.S.C. § 1983, alleging that the members of TRPA destroyed the economic value of their property by enacting a land use ordinance and general plan. Id. at 394. In the alternative, the petitioners alleged violations of the Fifth and Fourteenth Amendments, giving rise to an implied cause of action. Id. at 395. The petitioners alleged that the respondents had taken their property "without just compensation in violation of the Fifth and Fourteenth Amendments." Id. at 394.

The TRPA was organized in 1969 after Congress gave its consent to the states of California and Nevada to create a single agency through which the two states could coordinate and regulate development in the Lake Tahoe Basin and conserve the Basin's natural resources. Id. The TRPA, therefore, is an interstate governmental entity and not an intrastate governmental entity.

92. Id. at 405. The precise issue the Court decided was whether, in § 1983 actions, absolute immunity should be extended to those individuals acting on the regional level. Id. at 395. The Court struck down petitioners' arguments that: (1) the source of immunity for state legislators is the Debate Clause of the Constitution, which does not apply to the TRPA and (2) the TRPA does not have a mechanism to discipline its members because, unlike in state legislatures, "the threat of possible personal liability is necessary to deter lawless conduct." Id. at 403-04. In response, the Court stated that immunity does not depend on the Speech or Debate Clause of the Constitution but instead on the Court's interpretation of the federal law. Id.

93. Id. at 404-05. For an enumeration of the Court's reasons for affording legislative immunity, see supra notes 78-80 and accompanying text.

94. Lake Country Estates, 440 U.S. at 404-05.

95. Id. at 404 n.26. The Court did not decide this issue because it was not raised by the parties. Id. The Court impliedly admitted the importance of this question because it stated that "regulation of land use is traditionally a function performed by local governments." Id. at 402.

no difference exists between the necessity to protect legislative officials on the federal, state and regional levels, and the necessity to protect legislative officials on the local level. In fact, courts have found that the need for immunity is even greater for officials at the local level due to the close proximity between local legislators and their constituents, which leaves them more “vulnerable to and least able to defend law suits.”

C. Characterization of Land Use Decisions to Determine the Applicability of Immunity Defenses

Federal courts have observed that a zoning or land use planning decision “that is legislative on its face may be construed to be administrative in character.” In addressing the characterization issue, federal


Note that “[i]t 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, 889 F.2d at 1290 (3d Cir. 1989). For a discussion of the source of the legislative powers of local officials, see supra note 5 and accompanying text.

97. See, e.g., Shoultes, 886 F.2d at 117 (stating that because rewards of “pay and prestige” are less at local level than at federal and state levels, threat of liability might deter persons from serving at local level even more); Gorman Towers, 626 F.2d at 612 (no difference between need for immunity on state, regional and municipal level).

98. Gorman Towers, 626 F.2d at 612 (quoting Ligon v. Maryland, 448 F. Supp. 935, 947 (D. Md. 1977)). The Gorman Towers court stated: “[W]e perceive no material distinction between the need for insulated legislative decision-making at the state or regional level and a corresponding need at the municipal level. Indeed, the nature of municipal government may make the need to quell a legislator’s fear of personal retribution particularly compelling.” Id.

In Ligon, the court found that “[p]articularly in the area of land use, where decisions may have an immediate quantifiable impact on both the value and development of property, local legislators should be free to act solely for the public good without the specter of personal liability with the passage of each zoning ordinance.” Ligon v. Maryland, 448 F. Supp. 935, 947 (D. Md. 1977).

99. Gorman Towers, 626 F.2d at 611 n.5; see also Haskell v. Washington Township, 864 F.2d 1266, 1278 (6th Cir. 1988) (“Although zoning is ordinarily a legislative activity, it is not always legislative for purposes of immunity.”); Altaire Builders, Inc. v. Village of Horseheads, 551 F. Supp. 1066, 1073 (W.D.N.Y. 1982) (zoning treated as legislative when act involves enactment or amendment of zoning laws, but treated as executive or administrative when act involves enforcement of zoning law).
courts have recognized that immunity depends upon the function in which the defendant official was acting at the time of his or her allegedly unconstitutional conduct. 100 The federal courts, however, have applied different standards to classify challenged official action as either legislative, administrative or judicial. 101 Federal courts differ in the characterization standards they utilize, perhaps because officials often act in a combination of legislative, administrative and judicial capacities, 102 making it difficult for courts to draw bright lines distinguishing one function from another. 103 Yet, federal courts have strived to draw these lines in ways that will "preserve[] the balance between inhibiting public officials from exercising their essential duties and protecting victims of wrongs committed by public officials." 104

100. See, e.g., Haskell, 864 F.2d at 1277-78 (because activities of most local or municipal officials are not solely administrative, legislative or judicial, "the scope of immunity depends on the nature of the activity involved"); Stewart v. Lattanzi, 832 F.2d 12, 13 (2d Cir. 1987) ("This court looks at the function of the individual in determining the appropriate level of immunity given a government official."); Chapoose v. Hodel, 831 F.2d 931, 935 (10th Cir. 1987) (nature of function of official determines whether immunity applies (quoting Greater Los Angeles Council on Deafness v. Zolin, 812 F.2d 1103, 1108 (9th Cir. 1987)).

These federal courts followed the Supreme Court's holding that courts must utilize a functional approach to determine whether the official is granted absolute or qualified immunity. See, e.g., Forrester v. White, 484 U.S. 219, 224 (1988) (applying "functional" approach to characterization of official acts); Butz v. Economou, 438 U.S. 478, 512-13 (1978) (employing careful examination of act to determine whether it is judicial, administrative or legislative).

101. This conclusion is apparent because federal courts have not used the same standards to determine what type of acts are legislative and what type are executive. For a discussion of the different standards courts have employed, see infra notes 105-239 and accompanying text.

102. Haskell, 864 F.2d at 1278. For other authority that has concluded that officials act in a mixture of functions, see supra note 14. The Haskell court broke down the characterizations of official action into three groups: (1) officials acting in a judicial or quasi-judicial capacity are absolutely immune; (2) federal, state and local legislators acting in a legislative capacity are absolutely immune; and (3) officials acting in executive or administrative discretionaries functions are qualifiedly immune. Haskell, 864 F.2d at 1277.

At least two federal court decisions have analyzed cases to determine whether a local official has acted in a judicial capacity. See, e.g., Zamsky v. Haskell, 933 F.2d 677, 679 (9th Cir. 1991); Reed v. Village of Shorewood, 704 F.2d 943, 952 (7th Cir. 1983) (en banc) (holding that liquor control commissioner acting in judicial capacity and, thus, was absolutely immune from suit). The Zamsky court found that the government officials did not act in a judicial capacity. Zamsky, 933 F.2d at 679. The court stated that the proceedings conducted by the government officials were not adversarial, and their combined function of lawmaker and monitor was inconsistent with the judicial role. Id.

103. Rateree v. Rockett, 852 F.2d 946, 951 (7th Cir. 1988) (line drawing between functions is difficult); Altaire Builders, Inc. v. Village of Horseheads, 551 F. Supp. 1066, 1071 (W.D.N.Y. 1982) ("The difficulty in determining the nature of the immunity to be accorded in this case arises from the fact that the [defendant zoning officials], comprising the legislative body of the Village, also perform functions which are normally performed by the executive branch.").

104. Rateree, 852 F.2d at 951 (stating that immunity doctrine "embodies the
Federal courts have utilized six different standards to characterize challenged official actions. For purposes of this Note, the six standards have been labelled below to facilitate their identification and discussion. The first standard is the "rule enactment standard," which focuses on whether officials were enacting or enforcing laws when performing the challenged act. The second standard is the "general scope standard," which focuses on whether the official act affected the community at large or only specific individuals. The third standard is the "fact/impact standard," which scrutinizes the types of facts that the officials considered when performing the challenged act and the impact of the act on the community. The fourth standard is the "enact/fact standard," which combines the general scope and fact/impact standards. The fifth standard is the "legislative fact standard," which only focuses upon whether the officials considered legislative facts when reaching the challenged decision. The final standard is the "legislative process standard," which focuses upon whether the challenged official acts in connection with the challenged conduct so that it was legislative in nature, or whether the challenged conduct was a proper exercise of legislative powers.

For a further discussion of the differing standards, see infra notes 113-239. Nahmod has also stated that the federal circuit courts have established various standards to distinguish between legislative acts entitled to absolute immunity and "nonlegislative" acts entitled to qualified immunity. Nahmod, supra note 9, § 7.05, at 18-19. Nahmod delineated four factors that are "often" significant when characterizing official acts:

1. Was the challenged conduct a general policy or overall plan, or was it administrative in nature because it was not based on legislative facts and its impact was particularized?
2. Was the challenged conduct the adoption of prospective, legislative-type rules or was it the enforcement of such rules?
3. Was the challenged conduct the formulation of a policy or did it involve monitoring and administering, thereby being executive in nature?
4. Under state law, was the proper legislative procedure used in connection with the challenged conduct so that it was legislative in nature, or was the challenged conduct not a proper exercise of legislative powers?

Id.

Note that the characterization standards utilized by federal courts frequently overlap; nevertheless, the standards are clearly distinguishable from one another.

For a discussion of how federal courts have applied a rule enactment standard, see infra notes 113-34 and accompanying text.

For a discussion of how federal courts have applied a general scope standard, see infra notes 135-60 and accompanying text.

For a discussion of how federal courts have applied a fact/impact standard, see infra notes 161-91 and accompanying text.

For a discussion of how federal courts have applied an enact/fact standard, see infra notes 192-207 and accompanying text.

For a discussion of how federal courts have applied a legislative fact standard, see infra notes 208-24 and accompanying text.
sional act was part of the legislative process. Through case illustrations, this section of the Note describes all six characterization standards.

1. The "Rule Enactment Standard": Altaire Builders, Inc. v. Village of Horseheads

Federal court decisions that utilize a rule enactment standard for determining section 1983 immunity attempt to draw a bright line to distinguish between legislative and administrative/executive acts.

112. For a discussion of how federal courts have applied a legislative process standard, see infra notes 225-39 and accompanying text.

113. A rule enactment standard has also been used by courts when characterizing the acts of officials in procedural due process claims. See Zoning, supra note 3, at 1509-10; see, e.g., Rogin v. Bensalem Township, 616 F.2d 680 (3d Cir. 1980), cert. denied, 450 U.S. 1029 (1981). In Rogin, the Third Circuit determined that an act would be legislative if it involved the formulation of general policy statements affecting all present and future landowners in a municipality. Id. at 693. Conversely, an act would be administrative if it applied a previously formulated federal policy to specified landowners. Id.

Rogin involved a class action suit brought by homeowners against a developer, township, township zoning officer and board of supervisors requesting injunctive relief and money damages caused by a delay in the construction of their homes. Id. at 683. The developer crossclaimed against the township and zoning officials, bringing the claim under the Civil Rights Act. Id. The developer alleged that the officials' delay in issuing building permits, which caused subsequent cost escalation, was done to discourage construction of the development, thereby violating the developer's due process and equal protection rights. Id. The developer's request for building permits was denied by the township because the developer's plan "no longer complied with the township's zoning ordinance, which had been amended" about a month after the original plan had been approved. Id. at 682-83. The Rogin court held that the passing of the amendment was a legislative act. Id. at 693. The court reasoned that the amendments were general statements of policy and, therefore, legislative. Id. However, had the amendments been mere applications of policy to a specific landowner, they would not be legislative. Id. The Rogin court then found that the Zoning Hearing Board's refusal to grant the developer building permits was an administrative act because it merely involved application of zoning policies to a specific parcel of land. Id. at 694.

Additionally, the Rogin court rejected the notion that the differential impact of general legislation on certain groups of landowners should be part of the court's characterization standard. Id. at 693 n.60. The court illustrated this point by the following example:

[A]n ordinance limiting the height of buildings will affect a landowner who is planning to build or is constructing a fifty story building differently than it will his neighbor who owns a renovated, three-story colonial townhouse. . . . That differential impact does not however, change the character of the legislative act . . . .

Id. As illustrative of administrative action, the court suggested that the denial of a variance would constitute administrative action because it involves general policy considerations as well as application of that policy to a specific landowner. Id.

The commentator in Zoning has described this standard as one that "distinguishes general policy formulations, which are considered legislative, from specific applications of previously formulated policy, which are considered administrative." Zoning, supra note 3, at 1509. The commentator dislikes this
Under the rule enactment standard, legislative acts are distinguished from administrative/executive acts on the basis of whether the officials were enacting laws or enforcing them.\footnote{See, e.g., Zamsky v. Hansell, 933 F.2d 677, 679 (9th Cir. 1991); Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 865 F.2d 77, 79 (4th Cir. 1989); Scott v. Greenville, 716 F.2d 1409, 1423 (4th Cir. 1983); Altaire Builders, Inc. v. Village of Horseheads, 551 F. Supp. 1066, 1073 (W.D.N.Y. 1982); Adler v. Lynch, 415 F. Supp. 705, 712 (D. Neb. 1976).}\footnote{Id. at 1510. The commentator then provides the following illustration as to the problems that may result from application of this standard:}

[If] the decisionmakers [such as local government officials] decide to change a previous policy favoring single-family dwellings, they could constitutionally deny a building permit for a single-family house without granting a hearing to the applicant. On the other hand, if the board had chosen to follow the previously established policy in favor of single-family housing, they could not have denied a hearing right to the affected interests.

A similar problem . . . [arises when] zoning amendments, even though directed at a very small area and proposed by a single landowner, are [determined to be] legislative in nature.

\footnote{Id. at 1510 n.41.\footnote{See, e.g., Zamsky v. Hansell, 933 F.2d 677, 679 (9th Cir. 1991); Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 865 F.2d 77, 79 (4th Cir. 1989); Scott v. Greenville, 716 F.2d 1409, 1423 (4th Cir. 1983); Altaire Builders, Inc. v. Village of Horseheads, 551 F. Supp. 1066, 1073 (W.D.N.Y. 1982); Adler v. Lynch, 415 F. Supp. 705, 712 (D. Neb. 1976).}}

\footnote{See, e.g., Front Royal, 865 F.2d at 79 (finding that "defendant's denials of requests for sewer service were not legislative actions" because they dealt "with zoning enforcement rather than rulemaking" (quoting Scott, 716 F.2d at 1423)).}
persons. Third, the policy must be made binding as a rule of conduct. Thus, for example, while a decision to deny a building permit is a binding rule of conduct as to the permit applicant, the decision is not an enactment because it is not a formulation of general policy, though it may have been motivated by policy considerations. If the mere fact that a decision is based on policy indicates that the decision should be categorized as an enactment, the denial of a building permit could be considered a legislative act. Such an act, however, would more properly be characterized as administrative because it reaches beyond the scope of enactment as defined above and into the area of enforcement.

For an official's act to be classified as an "enforcement," it too must meet three requirements. First, the official must make a decision that addresses or directly applies to specific individuals. Second, the decision must have been made pursuant to an established law. Third, the decision must be binding on the individual. The literal meaning of

ville, 716 F.2d 1409, 1423 (4th Cir. 1983) (determining that legislative acts involve adoption of "prospective, legislative-type rules").

The term policy "as applied to a law, ordinance, or rule of law, denotes its general purpose or tendency considered as directed at the welfare or prosperity of the state or community." BLACK'S LAW DICTIONARY 1157 (6th ed. 1990).

119. See Kuzminich, 689 F.2d at 1449 (holding that enactment of general zoning ordinance is legislative act).

120. Cinevision Corp. v. City of Burbank, 745 F.2d 560, 580 (9th Cir. 1984) (holding that legislative acts "involve the formulation of policy 'as a defined and binding rule of conduct' ") (quoting Yakus v. United States, 321 U.S. 414, 424 (1944))); cert. denied, 471 U.S. 1054 (1985); see also Scott, 716 F.2d at 1423 (asserting that officials act in legislative capacity when adopting "legislative-type rules"); Altaire Builders, Inc. v. Village of Horseheads, 551 F. Supp. 1066, 1073 (W.D.N.Y. 1982) (holding that legislative function "involves the enactment or amendment of the zoning laws").

121. See Scott, 716 F.2d at 1423 (holding that when officials go beyond adopting rules and into area of enforcement, they act in executive capacity). Denying a building permit is an enforcement-type decision because it is applying enacted policy to a specific situation and, therefore, is "outside the ... [officials'] range of legitimate legislative duties." Id. at 1423 (footnote omitted).

122. See Front Royal & Warren County Indus. Park v. Town of Front Royal, 865 F.2d 77, 79 (4th Cir. 1989) (holding that failure to authorize sewer service to plaintiffs was not legislative decision); Cinevision, 745 F.2d at 580 (concluding that "monitoring and administering the contract by voting on the various proposed concerts" is executive function); Scott, 716 F.2d at 1423 (noting state court's determination that action at issue was "functionally in the nature of executive review of a specific building permit application" and therefore executive act).

123. See Zaminsky v. Hansell, 933 F.2d 677, 679 (9th Cir. 1991) (holding that monitoring compliance of county land use plan with established law or regulations is executive act); Minton v. St. Bernard Parish Sch. Bd., 803 F.2d 129, 135 (5th Cir. 1986) (asserting that applying existing public policies is administrative function); Jodeco, Inc. v. Hann, 674 F. Supp. 488, 495 (D.N.J. 1987) (determining that zoning officials who enforce already existing zoning laws are acting in administrative, executive or ministerial capacity).

124. See Front Royal, 865 F.2d at 78-79 (due to defendant officials' refusal to
the term "enforcement" is: "the act of putting . . . a law into effect; the execution of a law; the carrying out of a mandate or command."\(^{125}\) In the land use context, enforcement seems to include both requiring a landowner to comply with the law and applying a law to specific individuals who seek a decision from government officials.\(^{126}\)

The district court's decision in *Altair Builders, Inc. v. Village of Horseheads*\(^{127}\) further illustrates the application of the rule enactment standard. In *Altair*, the plaintiff submitted an application for a planned unit development (P.U.D.) to the Village of Horseheads.\(^{128}\) The Board of Trustees denied the application, even though the application complied with the Village's ordinances.\(^{129}\) The plaintiff brought an action before the state trial court seeking an annulment of the Board's decision.\(^ {150}\)

After three such proceedings in the state trial court, the plaintiff's requested building permit was issued.\(^ {131}\) During the interim, however, interest rates had greatly increased, making it financially impossible to complete the plaintiff's building plans.\(^ {132}\) The plaintiff thereupon provide sewer service to plaintiffs, plaintiffs were "deprived . . . of all economically viable and reasonable uses of their land"); Cinevision, 745 F.2d at 581 (holding that councilman's vote against corporation's proposed concerts was executive act).


\(^{126}\) See, e.g., Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1349 (9th Cir. 1982) (holding that order to institute suit to abate business of operator of adult movie theatre is executive in nature); Altair Builders, Inc. v. Village of Horseheads, 551 F. Supp. 1066, 1075 (W.D.N.Y. 1982) (holding that officials' refusal to approve planned unit development (P.U.D.) "turned on the project's compliance with P.U.D. regulations" and, therefore, was executive act).

In a case decided by the Fifth Circuit, the court did not utilize the term enforcement at all and instead defined an administrative act as the application of prior existing general policy. See Minton v. St. Bernard Parish Sch. Bd., 803 F.2d 129, 135-36 (5th Cir. 1986) (directing lower court on remand to determine whether decision of defendant school board members involved "the degree of discretion and public-policy-making traditionally associated with legislative functions" or whether decision involved "administrative application of existing policies"). \(^ {133}\) Minton was not a land use case. Rather, the plaintiff in *Minton* sued the parish school board under § 1983 seeking recovery on a tort claim for which the board refused to appropriate funds. \(^ {134}\) Id. at 130. The court could not decide whether the board members were entitled to official immunity because the issue was not fully developed by the parties; the court remanded the claim against the board members to decide this issue. \(^ {135}\) Id. at 135-36.

The Fifth Circuit has seemingly applied a different standard to cases concerning variances or "spot zoning." See Calhoun v. St. Bernard Parish, 937 F.2d 172, 174 (5th Cir. 1991) (stating that if decision involves evaluation of legislative facts, then it is legislative in character). cert. denied, 112 S. Ct. 939 (1992). For a discussion of Calhoun, see infra notes 212-24 and accompanying text. For a definition of "spot zoning," see infra note 220.

\(^{127}\) 551 F. Supp. 1066 (W.D.N.Y. 1982).

\(^{128}\) Id. at 1068.

\(^{129}\) Id.

\(^{130}\) Id.

\(^{131}\) Id.

\(^{132}\) Id.
brought a section 1983 action before the district court against the Board for violating his constitutional rights under the Takings, Due Process and Equal Protection Clauses.\textsuperscript{133} The district court held that the Board could only be afforded qualified immunity because its decision to deny the plaintiff a building permit "turned on the project's compliance with P.U.D. regulations," and therefore constituted an enforcement of a zoning law—an executive act.\textsuperscript{134}

2. The "General Scope Standard": Ryan v. Burlington County and Haskell v. Washington Township

The category of federal court decisions that apply a general scope standard distinguish legislative acts from administrative acts on the basis of how generally or specifically the challenged official act affected individuals in the community.\textsuperscript{135} The Third and Sixth Circuits favor this standard.

The Third Circuit's decision in Ryan v. Burlington County,\textsuperscript{136} although not a land use case, established a characterization standard that contains a substantive requirement and a procedural requirement, both of which must be met for an official act to be characterized as legislative.\textsuperscript{137} Under the substantive requirement, the act must be "legislative in character," involving policy-making decisions of general scope.\textsuperscript{138} If an official act affected only a small group of individuals, that act would be characterized as administrative, not legislative.\textsuperscript{139} Under the procedural requirement, the act must have been passed under constitutionally acceptable legislative procedures "in order to assure that the act is a legitimate, reasoned decision representing the will of the people which the governing body has been chosen to serve."\textsuperscript{140}

\textsuperscript{133} Id. at 1068-69.
\textsuperscript{134} Id. at 1073, 1074-75.
\textsuperscript{135} See, e.g., Ryan v. Burlington County, 889 F.2d 1286, 1290-91 (3d Cir. 1989) (finding that legislative acts involve policy-making decisions that are general in scope); Haskell v. Washington Township, 864 F.2d 1266, 1278 (6th Cir. 1988) (establishing general policy is legislative whereas directing acts at specific individuals is administrative (citing Cutting v. Muzzey, 724 F.2d 259, 261 (1st Cir. 1984))).
\textsuperscript{136} 889 F.2d 1286 (3d Cir. 1989).
\textsuperscript{137} Id. at 1290.
\textsuperscript{138} Id. at 1290-91 ("Legislative acts are those which involve policy-making decisions of a general scope or . . . [in other words], legislation involves line-drawing.").
\textsuperscript{139} Id. at 1291.
\textsuperscript{140} Id. The procedural requirement seems to be equivalent to the enactment requirement under the rule enactment standard. For a discussion of the enactment prong of the rule enactment standard, see supra notes 115, 118-121 and accompanying text.
In *Ryan*, a pretrial detainee brought a civil rights action against certain jail personnel and a county board of freeholders after being rendered quadriplegic from an attack by an inmate. The court applied its substantive and procedural requirements to the facts of the case in order to determine whether the defendants acted legislatively and would thus be entitled to absolute immunity. The court concluded that the substantive requirement was not met because the decisions of the defendants regarding the inmates or the staff, though made by a legislative body, did not affect the entire jail community. The court also concluded that the procedural requirement was not met because the defendants passed no ordinance or resolution with regard to the operation of the jail. The court therefore held that the defendants were not entitled to absolute legislative immunity.

The Sixth Circuit established its characterization standard in *Haskell v. Washington Township*. In that case, a physician, Haskell, brought a section 1983 action seeking declaratory, injunctive and monetary relief against the Washington Township Board of Trustees for blocking his proposed outpatient abortion clinic. Haskell made an offer to purchase an office building where the outpatient clinic was to operate. After the offer had been conditionally accepted, the Trustees decided to block the opening of the proposed clinic because of inadequate parking. Haskell then announced that he was abandoning his plan to open the clinic in that office building. Subsequently, the Township enacted a zoning ordinance that zoned abortion clinics as "B-3." The court pointed out that "[a]t that time, there were 3.317 acres of Washington Township zoned B-3, and all of it was fully occupied by a cement company."

The *Haskell* court established the following analysis for its characterization standard. First, a court must determine the underlying purpose of the official act. Second, a court must determine what persons were

141. *Id.* at 1288-89.
142. *Id.* at 1291.
143. *Id.*
144. *Id.*
145. *Id.* at 1292. As is evident from the case discussion, the court in *Ryan* seemed to apply its test literally, looking at the effects of an official decision and also whether the decision is a product of a legislative process. See *id.* at 1291. While the *Ryan* court has formulated a facile test, it is unclear whether this test, though established in a § 1983 suit and therefore applicable to all § 1983 actions, will be applied in the same manner for land use cases.
146. 864 F.2d 1266 (6th Cir. 1988).
147. *Id.* at 1271.
148. *Id.* at 1270.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* To support the first prong of its characterization standard, the
affected by the act. If the purpose of the act was to establish general policy, the act is legislative. If the act singled out specific individuals in the community and affected them differently than others, the act is administrative. The Haskell court did not apply its newly established standard to the case; instead, it remanded the case to the district court.

Taken literally, the general scope standard broadens the meaning of "legislative act" beyond that contemplated by the rule enactment standard. Under the Third and Sixth Circuits' general scope standard, absolute legislative immunity attaches not only where official acts involve the formulation of general policy, as under the rule enactment standard, but also where official acts involve the formulation of general policy that is aimed at only certain persons in the community. Presumably then, if officials were to enact an ordinance precluding farming in a county that contained only one farm, the enactment of the ordinance would be deemed an administrative act under the general scope standard, and the officials enacting the ordinance would be afforded only qualified immunity. Such a result would be contrary to the accepted view that an enactment by an official is clearly a legislative act. Moreover, application of the general scope standard may sometimes lead to an illogical result. For example, if an ordinance is passed precluding dentists' offices in a residential area, would a court espousing a general scope standard characterize the act of voting on the ordinance as legislative if there are no dentists' offices in the area and administrative if there are already some dentist offices in the area? Whether the general scope standard will have the same far-reaching effects as the above hypothe-

3. The "Fact/Impact Standard": Stone's Auto Mart, Inc. v. City of St. Paul

The third category of federal decisions utilizes a fact/impact charac-

Haskell court cited the enforcement prong of the Ninth Circuit's standard set in Kuzinich v. County of Santa Clara. Id. (citing Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1349 (9th Cir. 1982)). For a discussion of the Ninth Circuit's decisions regarding the enforcement prong of its characterization standard, see infra notes 287-90 and accompanying text.

154. Haskell, 864 F.2d at 1278.
155. Id.
156. Id. (quoting Cutting v. Muzzey, 724 F.2d 259, 261 (1st Cir. 1984)).
157. Id.
158. See id. (combining the rule enactment standard in Kuzinich v. County of Santa Clara, 689 F.2d 1345 (9th Cir. 1982) and the second prong of the fact/impact standard in Cutting v. Muzzey, 724 F.2d 259 (1st Cir. 1984)).
159. See Ryan v. Burlington County, 889 F.2d 1286, 1291 (3d Cir. 1989) ("Where the decision affects a small number or a single individual, the legislative power is not implicated, and the act takes on the nature of administration.").
160. NAHMOD, supra note 9, § 7.05, at 17-18.
terization standard that was first outlined in a *Harvard Law Review* article. The commentator of that article established this characterization standard for the purpose of determining whether a person affected by a land use decision is entitled to procedural due process protection; it was not established for the purpose of determining section 1983 immunity. In their decisions, however, federal courts have adopted this test without considering whether it is proper to transfer such an inquiry into the realm of section 1983 immunities.

The fact/impact standard has two prongs. The first prong characterizes the facts utilized by officials to support the challenged land use decision as legislative or administrative. "Legislative facts" are generalizations about a particular policy that serve to aid legislators in "decid[ing] questions of law, policy and discretion." "Administrative facts," on the other hand, are facts that "relate with greater specificity to individuals or particular situations." For the basis of the article's fact prong, federal courts and the commentator of the law review article rely


162. *Zoning*, *supra* note 3, at 1508. In determining entitlement to procedural due process protection, "[i]t is an established constitutional principle that procedural due process attaches only to administrative or adjudicatory action by the state, and not to legislative action." *Id.*

163. For a list of the federal courts that have adopted the fact/impact standard, see *supra* note 161.


165. *Id.* (citing Kenneth C. Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193, 199 (1956) [hereinafter Davis, *Trial-Type Hearing*]; see also Kenneth C. Davis, *Administrative Law Treatise* §§ 7.02, 7.06 (1958) [hereinafter Davis, *Administrative Law*]. Davis defines legislative facts as "not usually concern[ing] the immediate parties but are general facts which help the tribunal decide questions of law and fact." *Id.* § 7.02, at 413.

166. *Zoning*, *supra* note 3, at 1511 (citing Davis, *Trial-Type Hearing*, *supra* note 165, at 199). Note that the authors of *Zoning* have renamed Davis' "adjudicative facts" as "administrative facts." *See* Davis, *Administrative Law*, *supra* note 165, § 7.02, at 413. According to Davis, "adjudicative" facts are "facts about the parties and their activities, businesses, and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case." *Id.* § 7.02, at 413. Davis also admits that borderline cases exist where there is not a clear distinction between the legislative and administrative facts. Davis, *Trial-Type Hearing*, *supra* note 165, at 200. In these cases, the facts have characteristics of both legislative and administrative components. *Id.* Therefore, this distinction is "susceptible to semantic manipulation." *Zoning*, *supra* note 3, at 1511 n.45 (quoting Glen O. Robinson, *The Making of Administra-
on Kenneth Davis' treatise on administrative law. Davis makes a distinction between legislative facts and adjudicative facts, the latter being comparable to "administrative facts" defined above. To describe adjudicative facts, Davis explained:

When a court or an agency finds facts concerning the immediate parties—who did what, where, when, how, and with what motive or intent—the court or agency is performing an adjudicative function.

Stated in other terms, adjudicative facts are those [facts] to which the law is applied in the process of adjudication. They relate to the parties, their activities, their properties, their businesses. . . .

[F]indings of adjudicative facts must be supported by evidence.

To define legislative facts, Davis stated:

When a court or an agency develops law or policy, it is acting legislatively; the courts have created the common law through judicial legislation, and the facts which inform the tribunal's legislative judgment are called legislative facts.

Legislative facts are the facts which help the tribunal determine the content of law and of policy and help the tribunal to exercise its judgment or discretion in determining what course of action to take. . . . [They are] ordinarily general and do not concern the immediate parties.

[F]indings or assumptions of legislative facts need not be, frequently are not, and sometimes cannot be supported by evidence.

Thus, as Davis explains, both types of "facts" are those considerations made by an agency or court when deciding cases.

The second prong of the fact/impact standard is used to determine the impact of the land use decision on members of the community. If the decision has an impact on specific individuals, affecting them differ-
ently than others, it is an administrative act. If the decision has an impact on the public in general, it is a legislative act.

Under this standard, denying a variance to a specific builder who has applied for the variance would be an administrative act. Not only would the builder have a due process right to sue the local officials, but neighboring landowners potentially affected by the variance decision would also have a right to sue. On the other hand, if zoning officials enacted a zoning ordinance which sets the maximum height of buildings permitted in a certain area, the enactment would be legislative in character. The latter act is legislative because the act was not taken against certain, specified persons even though specific groups may be affected by the ordinance if they owned or had plans to construct buildings higher than what was permitted by the ordinance.

The federal District Court for the District of Minnesota adopted the fact/impact standard in Stone's Auto Mart, Inc. v. City of St. Paul. In that case, a corporation selling used cars as its business and that corporation's owners brought a section 1983 action against the City of St. Paul, city council and city council members for voting to deny the plaintiffs' rezoning petition that would have permitted the plaintiffs to establish a used car lot. The committee staff report supporting the city council's decision stated that the land use surrounding the relevant plot was residential and concluded that were the land owned by the plaintiffs rezoned to allow for the used car lot, the resulting increase in automobile use on the land "would be inconsistent with the policies of the city's zoning plan." In their complaint, the plaintiffs alleged that the reasons stated in the committee staff report were simply a pretext for preventing businesses owned by African-Americans from operating in their community. The defendants moved for summary judgment on

172. Id. The extent to which a government act singles out particular individuals dictates the level to which the government must extend individual procedural due process rights. Id. at 1512.

173. Id. at 1511-12.

174. Zoning, supra note 3, at 1511; Stone's Auto Mart, 721 F. Supp. at 209 (quoting Zoning, supra note 3, at 1511). The denial of the variance would be considered an administrative act because it specifically affects only the applicant builder, regardless of whether the act was grounded primarily on general policy considerations. Id.

175. Zoning, supra note 3, at 1511. Under this theory, the neighboring landowners also have a due process right because the denial of the variance indirectly affects them. Id.

176. Id.

177. Id. For an act to be characterized as administrative, the act must single out particular individuals. Id.


179. Id. at 207-08.

180. Id. at 207.

181. Id. at 208.
the grounds of legislative immunity.\textsuperscript{182} 

In applying the fact prong of its characterization test, the court determined that "the city council's decision was based on particularized facts concerning the character of the area in which plaintiffs' property was located, the nature of the use proposed by the plaintiffs and the appropriateness of that use under the previously-adopted zoning policy."\textsuperscript{183} The court concluded that the city council considered administrative and not legislative facts when reaching its decision.\textsuperscript{184} In applying the impact prong of the test, the court determined that "[t]he decision not to rezone was one affecting specifiable individuals, not a broad class of persons" and thus was an administrative act.\textsuperscript{185} Based upon the application of both prongs of its characterization standard, the court held that the city council members acted in an administrative capacity when they refused to rezone the plaintiffs' property and were therefore not entitled to absolute legislative immunity.\textsuperscript{186}

As is evident from Stone's Auto Mart, the fact/impact standard is similar to the general scope standard because, in part, it determines whether a decision, though of general application, impacts upon "specifiable in-

\begin{itemize}
\item \textsuperscript{182} Id.
\item \textsuperscript{183} Id. at 210.
\item \textsuperscript{184} Id.
\item \textsuperscript{185} Id.
\item \textsuperscript{186} Id. Prior to the Stone's Auto Mart decision wherein the Minnesota district court adopted the fact/impact standard, the Eighth Circuit had addressed the extent of immunity granted to local officials. See O'Brien v. City of Greers Ferry, 875 F.2d 1115, 1119 (8th Cir. 1989). The fact/impact standard, however, was not used in O'Brien.

In O'Brien, an alderwoman brought a § 1983 action against the mayor of the city and another alderman. Id. at 1116. The alderwoman alleged that the defendants deprived her of her constitutional rights by refusing to appropriate $2,000 from a fund of the Arkansas Municipal League Defense Program in order to support her defense in a slander suit. Id. at 1116-17. Because the vote on the appropriation of the $2,000 was the only vote taken at the meeting, the court concluded that the refusal of defendants to appropriate the $2,000 was an executive act. Id. at 1120. Therefore, the defendants enjoyed only a qualified immunity because they were acting in an executive capacity. Id. at 1119-20.

Apparently, the district court in Stone's Auto Mart did not interpret O'Brien as establishing a standard for distinguishing between legislative and executive acts, because the district court adopted the fact/impact standard. See Stone's Auto Mart, 721 F. Supp. at 209. The court in Stone's Auto Mart went so far as to apply a fact/impact standard to the facts in O'Brien, perhaps to prove that its approach is consistent with O'Brien. Id. at 209-10. In applying a fact/impact standard to the facts in O'Brien, the court in Stone's Auto Mart stated that the city council's decision not to appropriate funds was "apparently" based on administrative facts. Id. at 210. The court noted that the decision could have been based on legislative facts if the council had decided "whether or not the city should, as a matter of policy, indemnify its public officials for acts taken in their official capacity." Id. Because the decision affected one particular person (the alderwoman) and not a class of persons, the court concluded that the decision constituted an administrative act. Id.
dividuals" in the community and affects them differently than others.187 Both standards, therefore, reach beyond the rule enactment standard.188 Yet, the fact/impact standard also differs from both the rule enactment and general scope standards in that only the fact/impact standard investigates the types of facts—legislative or administrative—that the zoning officials considered to make their land use decision.189 According to the commentator of the law review article that introduced this standard, this inquiry "provides a reasonably clear and feasible means for distinguishing policy decisions from specific applications of the policy."190

Thus, when the fact/impact standard is broken down into its component prongs, it is apparent that the purpose of the fact prong is to evaluate the decisions of administrative agencies in a particular case, such as a hearing on a variance. The purpose of the impact prong is to evaluate the decisions of a legislative body when enacting laws not connected with a particular case. Because the fact/impact standard originated in a procedural due process discussion, it is difficult to conclude that such an inquiry is proper in a section 1983 action for the purpose of resolving the immunity issue.191

187. See Cutting v. Muzzey, 724 F.2d 259, 261 (1st Cir. 1984) (stating that one prong of characterization standard to be applied determines whether official action points to specific individuals or establishes general policy); Stone's Auto Mart, 721 F. Supp. at 206, 209 (same); Visser v. Magnarelli, 542 F. Supp. 1331, 1333 (N.D.N.Y. 1982) (same); Zoning, supra note 3, at 1510 (same).

188. See Stone's Auto Mart, 721 F. Supp. at 209; Zoning, supra note 3, at 1510 (stating that impact prong makes allowance for possibility that "new policies may be articulated through specific decisions of limited applicability").

189. See Stone's Auto Mart, 721 F. Supp. at 206, 210. The court in Stone's Auto Mart commented that the Sixth Circuit, which utilizes the general scope standard, only embraces the impact prong of the fact/impact standard or "test," implying that the fact prong of the test is in fact a distinct, if not novel test. Id. at 210 (illustrating that Sixth Circuit in Haskell v. Washington Township, 864 F.2d 1266 (6th Cir. 1988), "adopts the second of the two tests . . . as a means for distinguishing between legislative and administrative zoning action").

190. Zoning, supra note 3, at 1510.

191. In Zoning, two flaws become apparent from the commentator's explication of the fact/impact standard: (1) uncertainty in the meaning of the impact prong and (2) the possible inappropriateness of using legislative and administrative facts to distinguish between legislative and administrative acts.

Regarding the impact prong of the standard, the commentator gives inconsistent illustrations of this prong. Zoning, supra note 3, at 1509-13. Though the article states that the differentiated impact of an official act among members of a community constitutes an administrative act, the article asserts that the establishment of building height limits, for example, would be a legislative act even though it probably would have a differentiated impact on members in the community. Id. at 1511. The article then explains, without more, that such an act is legislative because it was not taken against specific members of the community. Id. The article's explanation of the impact prong of the standard in this instance makes the test more akin to the rule enactment test, in which the impact of an official decision on the community is ignored and the focus is on whether the decision reflects an enforcement of policy. Due to this apparently contradictory
4. The "Enact/Fact Standard": Moore v. Trippe

The fourth category of federal decisions utilizes both the rule enactment and fact/impact standards for determining whether an official act is legislative or administrative.192 One decision viewed the components of these standards as simply factors that should be taken into consideration when deciding whether to grant immunity to local officials.193 An explanation of the impact prong of the standard, the meaning and proper application of this prong is uncertain.

It may also be problematic to transfer the concept of legislative and administrative facts to the context of characterizing official acts for the purpose of determining § 1983 immunity because these facts are utilized in a very limited context. As Davis explains, such facts are considered to decide cases by courts and agencies. Davis, Administrative Law, supra note 165, § 15.03, at 353. Davis notes that legislative facts are "ordinarily general and do not concern the immediate parties . . . [and] the legislative element is either absent or unimportant or interstitial because . . . the applicable law or policy has already been established." It is only when a court or agency creates law or policy that it resorts to legislative facts, whether or not they were developed in the record of the case. Id.

Just because legislative and administrative facts are considered when a case is brought before a court or administrative agency, it does not necessarily mean that such facts "on the record" can be transferred to the law-making forum. In the law-making forum, there is a legislative history and other sources for a court hearing a § 1983 immunity case to determine what policies supported the enactment of a law. This prong of the fact/impact standard investigates not the legislative process, but rather the adjudicative process, when a specific landowner has petitioned for a decision to determine whether the decisions made during that process were in fact legislative based.

192. See Crymes v. Dekalb County, 923 F.2d 1482, 1485 (11th Cir. 1991) (per curiam); Moore v. Trippe, 743 F. Supp. 201, 207 (S.D.N.Y. 1990). When considering the fact prong of the fact/impact standard, both of these courts refrained from using the terms "legislative" and "administrative" facts. In Crymes, the court described the fact/impact test in the following manner: "If the facts utilized in making a decision are specific, rather than general, in nature, then the decision is more likely administrative. . . . [I]f the decision impacts specific individuals, rather than the general population, it is more apt to be administrative in nature." Crymes, 923 F.2d at 1485. The district court in Moore stated it would not provide legislative immunity "if the factors considered in adopting the legislation relate to specific individuals, instead of general policy implications." Moore, 743 F. Supp. at 207.

193. See Crymes, 923 F.2d at 1485. In Crymes, a property owner brought a § 1983 action against the county and its commissioners after they denied his application for a development permit. Crymes, 923 F.2d at 1483-84. Crymes sought to operate a solid waste landfill on his property. Id. at 1483. While the Board of Commissioners approved Crymes' application, the associate director of Public-Works-Development withheld approval. Id. at 1484. The director withheld approval because the roads surrounding the proposed landfill would need to be improved. Id. The director conditioned approval on the requirement that Crymes donate some of his property for public use without compensation. Id. The court held that the defendants' decision to deny Crymes' permit application could not be protected by absolute immunity because it was directed specifically at Crymes. Id. at 1486. The Crymes court applied the enact/fact standard in the following manner:

[T]he vote of the Board of Commissioners to remove Pleasant Hill Road from the list of truck routes was probably legislative in nature.
other decision considered each component of the two standards but did not determine which component was controlling.

The District Court for the Southern District of New York discussed the enact/fact standard in *Moore v. Trippe*. *Moore* involved a suit by a religious organization, Wellspring Zendor, Inc. (Wellspring), against the Town of Pound Ridge and its officials. Wellspring constructed a temple on nineteen acres of property it owned after obtaining a building permit. Neighbors of Wellspring complained to town officials about Wellspring’s activities on the land. Specifically, Wellspring was cutting down trees, creating beams and blasting. Wellspring also placed over two hundred “No Trespassing” signs on the property and secured it with guards. Subsequently, the Town Board enacted an amendment to the Town Code which provided that site plan approval by the Planning Board was required before a property owner could construct or modify a building on the premises. In addition, the amendment stated that a property owner could not: “remove, relocate, alter, or enlarge any existing stonewall, pond, wetland, natural soil grade or other existing topographical feature, including stands of trees or vegetation in excess of three (3) feet in height and within seventy-five feet of any property line without prior site plan approval.” In seeking damages, injunctive and declaratory relief, Wellspring alleged that the amendment violated its First and Fourteenth Amendment rights under the Constitution and its analogous rights under the New York Constitution.

That action, however, did not apply to Crymes. Rather, Crymes’ complaint focuses on the Board’s decision to uphold the denial of the development permit for Crymes’ property on the ground that surrounding roads were in need of improvement. The decision to deny Crymes’ application is the application of policy to a specific party. Therefore, the complaint stated sufficient facts to withstand a motion to dismiss on absolute immunity grounds. *Id.* As is evident from the above quotation, the *Crymes* court did not articulate how it applied the prongs of the enact/fact standard.

194. See *Moore*, 743 F. Supp. at 207. The court in *Moore* found that “local legislative immunity may be lost if the actions taken impact on particular individuals, rather than on a community generally.” *Id.* Legislative immunity will also be “lost” if the action is directed at specific individuals rather than based upon considerations of general policy. *Id.* The *Moore* court also held that if legislators go beyond adopting legislation and into enforcement, legislative immunity will also be lost. *Id.*

196. *Id.* at 203.
197. *Id.*
198. *Id.* at 204.
199. *Id.*
200. *Id.*
201. *Id.* at 204 n.5.
202. *Id.*
203. *Id.* at 206. The plaintiffs moved for class certification. *Id.* at 205. The defendants moved to dismiss the action on a number of grounds, including the
The Moore court concluded that it could not determine on the pleadings alone whether the defendant officials' enactment of the amendment was a legislative act or an executive act because "with a local board it is often difficult to differentiate between legislative and executive action." The court explained that to characterize the officials' act, the court needed to know whether the act would only affect Wellspring, and what the Board considered in making its decision. The court indicated that the board members would not be entitled to absolute immunity under the fact/impact standard if the act of the Town Board members affected only Wellspring, and if the members considered only "whether they could stop plaintiffs from continuing their practices." The court also noted that the Town Board members would not be afforded absolute immunity under the rule enactment standard if they, along with the town attorney and Building Inspector, engaged in enforcement activities.

Under Moore, it is unclear how a court espousing the enact/fact standard will reach a determination as to whether an act is legislative or administrative in those cases in which the act is legislative under one prong of the test and yet is administrative under the other prong of the test.

5. The "Legislative Fact Standard": Calhoun v. St. Bernard Parish

Only the Fifth Circuit has applied a legislative fact standard to characterize official acts. Under such a standard, the court considers the argument that the members of the Town Board should be entitled to absolute immunity with respect to their adoption of the amendment to the Town Code.

204. Id. at 207.
205. Id.
206. Id.
207. Id. (hypothesizing that if "the Town Board members engaged in enforcement efforts in conjunction with the Town Attorney and the Building Inspector, absolute immunity may . . . be forfeited").

The Fifth Circuit's holdings in Calhoun and Shelton overturned a line of cases dating back to 1977. Calhoun, 937 F.2d at 174 (stating that Fifth Circuit "put Bayou Landing and its progeny to rest" with its holding in Shelton); cf. Bayou Landing, Ltd. v. Watts, 563 F.2d 1172, 1175 (5th Cir. 1977) (determining that resolution directed at single business rather than generally applicable to entire
type of official who acted and the character of the act performed. In addition, the court examines whether the defendant officials based their act on legislative facts. Therefore, if the act were performed by elected officials pursuant to a legislative judgment that in turn was based on legislative facts, the official act would be characterized as legislative.

In Calhoun v. St. Bernard Parish, the plaintiff, Calhoun, proposed to build low to moderate income housing on his property. His plans, however, were temporarily halted by an interim moratorium passed by the Police Jurors of the Parish affecting an area of land within which Calhoun’s parcel was located. Calhoun alleged that immediately prior to the moratorium enactment, he approached one of the Police Jurors to discuss his project, during which time the juror proceeded to “denunciate[] minorities and low to moderate income housing.” Nevertheless, Calhoun submitted a building permit application. After a prolonged delay, the Parish finally issued Calhoun his building permit, limiting its use to housing for the elderly. Calhoun subsequently filed suit against the Police Jurors under section 1983 and the Takings


Calhoun, Shelton and Dunmore seemingly run afoul of Minton v. St. Bernard Parish Sch. Bd., 803 F.2d 129 (5th Cir. 1986). In Minton, the Fifth Circuit remanded the case, requiring the district court to consider whether the defendant officials were engaged in establishing public policy (a legislative act) or applying existing policy (an administrative act). Id. at 133-36. Although courts bound by Fifth Circuit precedent have not explicitly overruled Minton, they seem to have subsequently ignored the standard set in Minton requiring that a court label the application of existing policy as an administrative act. For example, in Dunmore, the district court held that legislative immunity attaches to officials when they deny a request for a zoning variance. Dunmore, 703 F. Supp. at 32. Such an act invariably is an application of policy to a specific individual. Minton may be distinguishable, however, because it is not a land use case. For a further discussion of Minton, see supra note 126.

209. Dunmore, 703 F. Supp. at 32 (holding that granting of variances is legislative act entitled to absolute immunity); see also Hernandez, 643 F.2d at 1194 (holding that mayoral veto is legislative act because “it constitutes the policy-making decision of an individual elected official”).

210. Calhoun, 987 F.2d at 172, 174 (determining that spot zoning is legislative judgment because of its review of legislative facts).

211. Id. at 174 (holding that police jurors are entitled to legislative immunity); see also Dunmore, 703 F. Supp. at 33 (determining that elected or appointed officials acting within scope of their duties are entitled to legislative immunity).


213. Id. at 173.

214. Id. The Calhoun court noted that the moratorium enacted at that time was the first moratorium ever enacted by the Police Jurors. Id. The public record did not discuss the Police Jurors’ reasons for passing the moratorium.

215. Id.

216. Id. While Calhoun’s permit application was under consideration, two more moratoria were enacted by the Police Jurors. Id.

217. Id. The plaintiff subsequently attempted to have his permit revised, but his efforts failed. Id.
Clause of the Fifth Amendment. The Police Jurors moved to dismiss the action on the grounds that they were entitled to absolute or qualified immunity. The issue before the court was whether the Police Jurors’ “spot zoning” of Calhoun’s property was a legislative or administrative act.

Initially, the Calhoun court reaffirmed its rejection of the line-drawing characterization standard used by other courts that seeks to classify an ordinance as general or particularized. Using its own characterization test, the court purported to examine whether the challenged official act involved a consideration of legislative facts. The court then held that spot zoning is a legislative act entitled to absolute immunity, despite the fact that it is an action taken against specific individuals and is “not the initial enactment of a zoning code.” Interestingly, courts in other jurisdictions that have addressed this issue have determined that “particularized” official decisions, such as denying a variance, are administrative and not legislative acts, and are therefore entitled only to qualified immunity.

218. Id.
219. Id. The Calhoun court stated that the district court in which the suit was brought dismissed the defendants’ motion. Id.
220. Id. at 174. “Spot zoning” is an unofficial phrase that refers to “a zoning map amendment that is perceived to be arbitrary because it confers a zoning ‘favor’ on a single landowner without justification.” Mandelker, supra note 3, at 158. Spot zoning is a single-tract zoning map amendment. Id. at 157. The general function of a map amendment is to change zoning regulations so as to reclassify particular property. Id.

The denying of a variance under the legislative fact standard would also be considered legislative. See Shelton v. City of College Station, 780 F.2d 475, 480 (5th Cir.) (finding that “[n]othing internal to the legislative model impedes its application to a specific zoning decision”), cert. denied, 477 U.S. 905, and cert. denied, 479 U.S. 822 (1986). Under the rule enactment standard, however, the granting or denying of a variance to zoning regulations would be an administrative and not a legislative act. See, e.g., Rogin v. Bensalem Township, 616 F.2d 680, 693 n.60 (3d Cir. 1980) (“An example of an administrative act would be the denial of a variance, because such an act involves not only general policy considerations but also application of that policy to an individual landowner.”), cert. denied, 450 U.S. 1029 (1981).

A variance is an “authorization for the construction or maintenance of a building or structure, or for the establishment or maintenance of a use of land, which is prohibited by a zoning enactment.” 82 Am. Jur. 2d Zoning and Planning § 255 (1976). The purpose of a variance is “to correct maladjustments and inequities, and to render justice in individual cases, and each application for a variance must be considered on its own facts and merits.” Id. § 266. From this definition, it is evident why the rule enactment standard would characterize the granting or denying of a zoning variance as an administrative act: it involves applying established land use policy to a specific landowner.

221. Calhoun, 937 F.2d at 174 (citing Shelton, 780 F.2d at 480).
222. Id.
223. Id. (holding that spot zoning is legislative in nature even though it did not involve enactment of zoning law).
224. See, e.g., Rogin, 616 F.2d at 693 n.60 (asserting that denial of zoning variance would be administrative act because it “involves not only general policy
The view of the Fifth Circuit is problematic because it ends its characterization analysis at whether or not legislative facts (i.e., policy) constituted the basis for the official act. If that point were the end of the inquiry, officials could bring themselves within legislative immunity simply by indicating that their decision was policy-based, regardless of whether the policy was being enforced or enacted and whether the policy was being formulated or had already been established. At this time, it is unclear whether the broad reasoning supporting the Fifth Circuit's decision in Calhoun is limited to "spot zoning" cases.

6. The "Legislative Process Standard": Hansen v. Bennett

The decisions of federal courts in this category do not articulate a clearly defined characterization standard. Rather, to characterize a challenged official act, these courts examine the nature of the act to determine if the act had been traditionally characterized as part of the legislative process. The holdings in these cases tend to be very narrow, considerations but also application of the policy to an individual landowner"; Jodeco, Inc. v. Hann, 674 F. Supp. 488, 496 (D.N.J. 1987) (holding that ruling on variance application is administrative act because it "impacted no one other than the plaintiff").

225. See Hansen v. Bennett, 948 F.2d 397, 402-03 (7th Cir. 1991) (holding that mayor removing municipal citizen from city council meeting is not legislative act because legislative business was not being conducted at meeting); Gross v. Winter, 876 F.2d 165, 170-74 (D.C. Cir. 1989) (holding that personnel decision by councilmember was made while acting in administrative capacity); Rateree v. Rockett, 852 F.2d 946, 950 (7th Cir. 1988) (holding that budget decision eliminating positions of city employees was legislative).

226. Rateree, 852 F.2d at 950 (asserting that certain decisions of local officials are not administrative if made through traditional legislative functions; see also Gross, 876 F.2d at 172 (basing holding on Supreme Court decision in Forrester v. White, 484 U.S. 219 (1988), which applied functional approach to action of state court judge).

Examining the district court opinions for Rateree and Gross may be helpful in understanding the standard impliedly endorsed by the circuit court opinions. In the district court opinion of Rateree, city employees sued the city and its commissioners for wrongful termination. Rateree v. Rockett, 650 F. Supp. 763, 768 (N.D. Ill. 1986), aff'd, 852 F.2d 946 (7th Cir. 1988). The city commission had passed a budget ordinance that eliminated funding for the plaintiffs' positions. Id. at 767. The plaintiffs argued that characterization of the official act should be determined by the rule enactment standard, resulting in the classification of the defendants acts as administrative. Id. at 770. The district court rejected the plaintiffs' argument, relying on a case that stated that the type of act at issue was traditionally a legislative act "reflecting policy objectives." Id. at 770-71 (quoting Goldberg v. Village of Spring Valley, 538 F. Supp. 646, 650 (S.D.N.Y. 1982)).

In Gross v. Winter, after reviewing relevant federal common law, the district
limiting the grant of immunity to the particular function at issue because "immunity is justified and defined by the functions it protects and serves, not by the person to whom it attaches." 227 For example, one court stated: "political decision making . . . strikes at the heart of the legislative process and [therefore] is protected legislative conduct." 228

_Hansen v. Bennett_, 229 though not a land use case, is illustrative of the legislative process standard. In _Hansen_, the mayor ordered the police chief to remove a citizen from a city council meeting for creating a disturbance during the meeting. 230 Subsequently, the plaintiff sued the mayor and the police chief for violating his First Amendment rights under the United States Constitution. 231 The mayor and police chief moved for partial summary judgment on the grounds that they were entitled to absolute or qualified immunity. 232 The _Hansen_ court purported to use the functional approach developed by the Supreme Court in _Forr_

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**Note**

227. Gross, 876 F.2d at 170 (quoting Forrest v. White, 484 U.S. 219, 227 (1978)); see also Hansen, 948 F.2d at 403 (narrow holding of decision emphasized by court); Rateree, 852 F.2d at 950 (holding that budget decisions are legislative in nature, and, therefore, officials making such decisions are entitled to absolute immunity).

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

229. 948 F.2d 397 (7th Cir. 1991).

230. _Id._ at 398. The plaintiff "ha[d] long been a political gadfly of" the mayor. _Id._

231. _Id._ The court noted that the plaintiff brought claims in addition to his First Amendment claim discussed in the case, but the court did not list what the plaintiff's other claims were. _Id._ at 398 n.1.

232. _Id._ The court dismissed the qualified immunity claim because deciding whether the defendants can be afforded qualified immunity necessitates a determination of a question of fact. _Id._ at 399. However, because deciding whether the defendants are entitled to absolute immunity is a question of law, the court was able to address this issue. _Id._
to characterize the acts of the mayor and the police chief. Instead of making an independent determination as to the function of the mayor and the police chief at the meeting, the *Hansen* court turned to the facts of specific Supreme Court cases and observed that the Court has extended legislative immunity to legislators "only when they were voting on a resolution, speaking on legislation or in a legislative hearing, or subpoenaing records for use in a legislative hearing." After determining which of these legislative acts occurred at the meeting, the *Hansen* court held that the mayor was not entitled to absolute immunity because the portion of the meeting in which the mayor removed the plaintiff was not legislative. The court stated that at the time the plaintiff was ejected from the meeting, the meeting was open to the general public and "citizens were not limited to discussing legislative issues, and the aldermen were not considering any legislation or investigating any legislation."

The flaw in the decisions that embrace a legislative process standard is that they fail to provide a mechanism for determining the nature of the official act in question. Evident from the *Hansen* decision is that a court must investigate how courts have historically characterized the act at issue in order to apply this standard. If no prior case has characterized an act similar to the challenged act, a plaintiff can only hypothesize how the court will characterize the act in his or her own suit. For

233. 484 U.S. 219 (1988). For a list of other Supreme Court cases articulating the functional approach, see *supra* note 7.

234. *Hansen*, 948 F.2d at 401.


236. *Id.* at 403. The court pointed out that it "would be a different case if the city council meeting had been a purely legislative session." *Id.* The court illustrated that if Hansen "disrupted the city council . . . while its members were voting on legislation, debating legislation among themselves, or holding a legislative hearing or investigation, . . . [the mayor] might well be entitled to absolute immunity for ejecting him." *Id.*

237. *Id.* at 402. Hansen came to the meeting to discuss an environmental matter. *Id.* at 398. The court noted that this environmental matter was not legislative because Hansen only wished for the mayor to disclose information concerning a particular site and to read a letter publicly from the Federal Superfund Program. *Id.* at 402 n.13. The court determined that "[c]ommunication by a legislator to his or her constituents is not legislative activity for purposes of legislative immunity." *Id.* at 402 (citing Hutchinson v. Proxmire, 443 U.S. 111, 130-33 (1979)).

238. For a discussion of characterization of the official act in question, see *Zoning, supra* note 3, at 1509. The article states that these courts "simply classify some types of zoning decisions, such as the adoption of a comprehensive plan, as legislative acts, while characterizing other decisions, such as the granting of zoning variances, as administrative." *Id.*
example, under both the legislative process and rule enactment standards, enacting a zoning ordinance, acknowledging land use plans, adopting an amendment to a zoning ordinance as well as a mayoral veto would be characterized as legislative acts. Only the rule enactment standard, however, defines a “legislative act” so that courts have grounds for making the above conclusions and have guidance for making future decisions.239

Given the various characterization standards that courts employ, the remaining sections of this Note will evaluate the rule enactment standard as it has been applied by the Court of Appeals for the Ninth Circuit. This Note will focus specifically on Zamsky v. Hansell,240 in which the Ninth Circuit expanded the elements of this standard. After a presentation of the facts of Zamsky, this Note will describe how the Ninth Circuit has modified the rule enactment standard. In conclusion, this Note will discuss why the Ninth Circuit’s modification is unjustified.

III. DISCUSSION OF ZAMSKY V. HANSELL

In Zamsky v. Hansell, the plaintiff, Zamsky, owned 1,950 acres of undeveloped land in Klamath County, Oregon.241 The County rezoned Zamsky’s land pursuant to a continuance order from the Oregon Land Conservation and Development Commission (LCDC) which required the county to bring its comprehensive plan into compliance with the LCDC’s statewide goals.242 This rezoning dropped the value of Zamsky’s undeveloped land from $3,500,000 before the rezoning to $200,000 after the rezoning.243 Subsequently, Zamsky filed a section 1983 action against the Director of the LCDC and the LCDC Commissioners in their individual capacities, alleging that these officials had violated his constitutional rights under the Due Process, Equal Protection and Takings Clauses of the Fourteenth Amendment of the United States

239. For a critique of the Ninth Circuit’s conclusions on characterizing these land use decisions, see Zamsky v. Hansell, 933 F.2d 677, 685-87 (9th Cir. 1991) (Alarcon, J., dissenting). For the conclusions of courts utilizing a rule enactment standard on characterizing these land use decisions, see Haskell v. Washington Township, 864 F.2d 1266, 1278 (6th Cir. 1988) (enacting zoning ordinance); Hernandez v. City of Lafayette, 643 F.2d 1188, 1193-94 (5th Cir. 1981) (mayoral veto), cert. denied, 455 U.S. 907 (1982); Rogin v. Bensalem Township, 616 F.2d 680, 693 (3d Cir. 1980) (passing amendments to zoning ordinance), cert. denied, 450 U.S. 1029 (1981).

240. 933 F.2d 677 (9th Cir. 1991) (per curiam).

241. Id. at 678.

242. Id. For a discussion of Oregon’s statutory scheme, see infra notes 249-53 and accompanying text.

243. Zamsky, 933 F.2d at 678. Zamsky’s property had previously been zoned for building not more than one dwelling per five acres. Id. at 682 (Alarcon, J., dissenting). In response to the LCDC’s continuance order, the county rezoned an area that included Zamskys property to a minimum of one dwelling per 20 acres. Id. at 685 (Alarcon, J., dissenting).
Zamsky argued that the LCDC could not require a rezoning of his property because it had already acknowledged his proposed development a few years previously. At trial, the magistrate granted the LCDC officials’ motion for summary judgment, finding that the officials had been acting in a legislative capacity when they ruled on whether the county’s comprehensive plan complied with the LCDC’s land use goals. The trial court held, therefore, that the LCDC officials were absolutely immune from liability in Zamsky’s suit against them.

On appeal, the Ninth Circuit posited the issue before the court in the following manner: “Are state officials who unconstitutionally cause land to be rezoned absolutely immune from liability for the damage caused by their unlawful conduct?” Before addressing this issue, the majority first noted that Oregon utilizes a comprehensive plan system for enacting its land use laws. In Oregon, the LCDC adopts land use plans, amendment, and county would have to adopt a plan that was consistent with the state-wide goals. The Healthy Klamath Act created a Klamath Healthy Klamath Act, which local governments are required to create and adopt for conformity with the state-wide goals. A local land use plan becomes effective if

244. Id. (Alarcon, J., dissenting). Zamsky filed the § 1983 action on December 31, 1986. Id. (Alarcon, J., dissenting). The rezoning of his land took place in 1984. Id. (Alarcon, J., dissenting). He asserted that the LCDC had singled out his property and demanded that the local legislators rezone his property in order to render it virtually worthless. Id. at 679.

245. Id. The LCDC acknowledged the plaintiff’s proposed development in 1982, which was two years prior to Klamath County’s rezoning of his land. Id. Zamsky claimed that because the LCDC had already acknowledged this proposed development, it was precluded from a second review of his property under Oregon’s administrative rules. Id.

246. Id.
247. Id.
248. Id. at 678. The Zamsky opinion does not reveal whether Zamsky sued Klamath County and its officials as well as the LCDC Commissioners for constitutional violations. Zamsky could not have sued the LCDC itself because it is a state entity protected by Eleventh Amendment immunity. See Will v. Michigan Dep’t of State Police, 491 U.S. 58, 66 (1989) (holding that Eleventh Amendment bars § 1983 claim against state unless state has waived its immunity or Congress has exercised its power under § 5 of Fourteenth Amendment to override state’s immunity). Zamsky also might not have been able to bring an action against Klamath County because the county also may be protected by the Eleventh Amendment if it is determined that it is acting as an arm of the state. See Mount Healthy City Sch. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977) (determining that if local governmental entity is treated under state law as “arm of the State,” it is protected by Eleventh Amendment immunity). However, there probably would be no bar against Zamsky bringing a § 1983 action against Klamath County officials. For a discussion of sovereign immunity under the Eleventh Amendment, see supra note 6.

249. Zamsky, 933 F.2d at 680. For a general discussion of comprehensive plans, see supra note 18. The following excerpt from the majority opinion describes Oregon’s statutory scheme for giving land use plans the force of law: The Oregon Land Conservation and Development Commission has two primary functions. First, it adopts “goals” which become the mandatory state-wide planning standards with which all local land use plans must comply. It also reviews the comprehensive land use plans which local governments are required to create and adopt for conformity with the state-wide goals. A local land use plan becomes effective if
goals which serve as the planning standards for the entire state. Each county submits its comprehensive plan to the LCDC to be reviewed for compliance with the statewide goals. If the LCDC acknowledges that the plan meets its goals, the plan becomes effective as law. Other-

and only if the LCDC "acknowledges" that it meets the state-wide goals. If the plan does not conform with the state-wide goals, the LCDC may issue a continuance order and explain how to bring the plan into compliance.

Zamsky, 933 F.2d at 678 (citing Or. Rev. Stat. §§ 197.015(1), (8), 197.040(1)(c), (2)(d), 197.175(2)(a), (2)(c), (2)(d), 197.251(12) (1989)). Compare this interpretation of the statute with the dissent's view. For a statement of the dissent's view, see infra notes 267-79 and accompanying text.

Under the Oregon statute, "the commission shall adopt goals and guidelines for use by state agencies, local governments and special districts in preparing, adopting, amending and implementing existing and future comprehensive plans." Or. Rev. Stat. § 197.225 (1991). With respect to whether a local government’s comprehensive plan complies with adopted statewide goals, the statute states:

1. Upon the request of a local government, the commission shall by order grant, deny or continue acknowledgment of compliance with the goals.

2. In accordance with rules of the commission, the director shall prepare a report for the commission stating whether the comprehensive plan and land use regulations for which acknowledgment is sought are in compliance with the goals. The rules of the commission shall:

   (a) Provide a reasonable opportunity for persons to prepare and to submit to the director written comments and objections to the acknowledgment requests; and

   (b) Authorize the director to investigate and in the report to resolve issues raised in the comments and objections or by the director’s own review of the comprehensive plan and land use regulations.

5. A commission order granting, denying or continuing acknowledgment shall include a clear statement of findings which sets forth the basis for the approval, denial or continuance of acknowledgment. The findings shall:

   (a) Identify the goals with which the comprehensive plan and land use regulations comply and those with which they do not comply; and

   (b) Include a clear statement of findings in support of the determinations of compliance and noncompliance.

6. A commission order granting acknowledgment shall be limited to an identifiable geographic area described in the order if:

   (a) Only the identified geographic area is the subject of the acknowledgment request; or

   (b) Specific geographic areas do not comply with the goals, and the goal requirements are not technical or minor in nature.

7. The commission may issue a limited acknowledgment order only in the circumstances identified in subsection (6) of this section.

Id. § 197.251.

250. Zamsky, 933 F.2d at 678.
251. Id. (citing Or. Rev. Stat. §§ 197.175(2)(a), 197.040(2)(d) (1989)).
252. Id. (citing Or. Rev. Stat. §§ 197.015(1), 197.175(2)(c), (2)(d) (1989)).
wise, the LCDC may issue a continuance order permitting the county to bring the plan into compliance. If the LCDC does issue the order, it must point out which parts of the county’s plan did comply, which parts did not comply and which areas of land are affected.253

After reviewing this system, the Ninth Circuit reversed the trial court’s decision and held that the Director and Commissioners of the LCDC had acted in an executive capacity and not in either a legislative or judicial capacity when they ruled on the county’s comprehensive plan.254 To support its conclusion, the Ninth Circuit found that the officials were monitoring compliance with the laws and regulations previously established in the LCDC land use goals and were offering suggestions on how compliance could be achieved.255 Such action was executive according to the court, because it involved ad hoc discretionary decisionmaking.256

In reaching its decision, the majority in Zamsky purported to follow the precedent established by the Ninth Circuit in Cinevision Corp. v. City of Burbank.257 In Cinevision, the Ninth Circuit held that monitoring and administering a contract between the city council and a concert promoter was an administrative act.258 Analogizing to Cinevision, the Zamsky court concluded that the LCDC officials were simply monitoring Klamath County’s comprehensive plan for compliance with established statewide goals.259 In further support of its conclusion, the court found that the officials had acted against a specific individual in enforcing the LCDC’s

253. Id. (citing OR. REV. STAT. § 197.251(12) (1989)).
254. Id. at 679. The court suggested that the acts of enacting a master plan or confirming local plans to give them the force of law would be legislative. Id. However, because Zamsky did not sue the LCDC officials on either of these grounds, the court did not pursue those issues further. Id. Zamsky alleged that the actions of the officials singled out his property. Id.
255. Id. at 680. The court noted that this case closely resembled Cinevision Corp. v. City of Burbank, 745 F.2d 560 (9th Cir. 1984), cert. denied, 471 U.S. 1054 (1985). Zamsky, 933 F.2d at 679. In Cinevision, the court held that the administration and monitoring compliance with a contract was an executive function. Cinevision, 745 F.2d at 580. In Zamsky, the court found that both monitoring compliance with a contract and monitoring compliance with statewide planning goals involved “ad hoc decision-making,” an executive function, rather than “formulation of policy,” a legislative function. Zamsky, 933 F.2d at 679.
256. Id. (holding that offering recommendations on how to comply with law is executive function).
257. 745 F.2d 560 (9th Cir. 1984), cert. denied, 471 U.S. 1054 (1985).
258. Id. at 579-80. The Cinevision court held: [T]he City Council was simply monitoring and administering the contract by voting on the various proposed concerts. Administration of a municipal contract—a contract between a private party and a municipality—would generally seem to be an executive function. . . . Administration of a contract does not involve the formulation of policy “as a defined and binding rule of conduct.” Rather, it is more the type of ad hoc decisionmaking engaged in by an executive. Id. at 580 (citation omitted) (footnote omitted).
259. Zamsky, 933 F.2d at 679.
land use goals. The court noted that the officials' act would have been entitled to legislative immunity if the act had only involved the formulation of policy. Because the officials had acted in an executive capacity, the Ninth Circuit remanded the case to the district court for a determination as to whether the officials' act could pass the qualified immunity test.

Had Zamsky brought suit on other grounds, the court might have entitled the LCDC officials to absolute immunity protection. For example, the court noted that had Zamsky sued the LCDC officials for adopting statewide planning goals, the act of adopting such a plan would have been characterized as legislative, affording the officials absolute immunity. Similarly, if the officials had been sued for confirming local land use plans, the court stated that it "might" have characterized such an act as legislative.

The Zamsky majority also rejected a judicial characterization of the LCDC officials' act. The majority stated that the act was not made in a judicial capacity because: (1) the proceedings during which the act took place were not adversarial; (2) the officials made recommendations on how to bring the plan into compliance (an executive function); and (3) the officials had the combined role of acting as legislators and administrators, which are functions inconsistent with acting in a judicial capacity.

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260. Id. ("Zamsky sued the LCDC for singling out his property and demanding that the local legislature amend its plan so as to make Zamsky's property virtually worthless.").

261. Id. The court in Zamsky determined that:
Monitoring compliance with established laws or regulations and offering recommendations on how compliance may be achieved is an executive function involving "ad hoc decisionmaking" rather than "formulation of policy." . . . Because the LCDC Commissioners and staff member Ross acted in an executive function in suggesting or demanding changes to local plans, they are not entitled to absolute immunity.
Id. (citing Cinevision, 745 F.2d at 580).

262. Id. at 680 (finding that in ruling on whether proposed plan complied with statewide planning standards, LCDC officials were not exercising legislative judgment). For a discussion of the "qualified immunity test," see supra notes 55-67 and accompanying text.

263. Zamsky, 933 F.2d at 679. The LCDC argued that the enactment of a general zoning ordinance is a legislative act and is therefore entitled to legislative immunity. Id. However, Zamsky was not suing the LCDC for enacting legislation, but for singling out his property when recommending changes to the proposed local land use plan. Id.

264. Id.
265. Id.

266. Id. The court stated that the officials "are the same individuals who promulgate the 'goals' in the first place . . . combin[ing] the functions of lawmaker and monitor of compliance . . . which are not uncommon at the local level, but they are inconsistent with the judicial role and judicial immunity." Id. See Cleavinger v. Saxner, 474 U.S. 193, 203-04 (1985) (holding that prison
The Zamsky dissent argued that LCDC officials were acting in a legislative capacity and should be afforded absolute immunity. The dissent claimed that the majority failed to consider the nature of the LCDC officials’ act within the context of the state of Oregon’s comprehensive plan system of enacting land use laws. The dissent argued that the LCDC officials’ function of monitoring compliance was part of the legislative process required by the Oregon statutory code. Because the officials only acted within their statutory authority to promulgate zoning regulations, the dissent argued that the officials’ acts could not be labelled as administrative. To support this argument, the dissent pointed out that under the Oregon statute, the LCDC officials were given the power to “acknowledge” a local comprehensive plan and give it the force of law. Therefore, because the officials had the power to acknowledge a local plan, they likewise could have refused to give the plan the force of law. Relying upon the Supreme Court’s decision in

guards serving as disciplinary board members are not entitled to absolute immunity: Butz v. Economou, 438 U.S. 478, 512-14 (1978) (stating that extensive safeguards are built into process of administrative agency adjudication to ensure that administrative law judges exercise independent judgment); Wood v. Strickland, 420 U.S. 308, 319-20 (1975) (holding that school board members function as both legislators and adjudicators in disciplinary process and are not entitled to absolute immunity).

267. Zamsky, 933 F.2d at 687 (Alarcon, J., dissenting).
268. Id. at 685 (Alarcon, J., dissenting) (stating that court must consider function of LCDC in acknowledging comprehensive land use plan).
269. Id. at 684 (Alarcon, J., dissenting). Under the Oregon Comprehensive Land Use Planning Act, the LCDC officials must review, adopt and amend comprehensive land use plans promulgated by local governments if they are in compliance with the law. Id. at 685 (citing OR. REV. STAT. §§ 197.040(2)(a), 197.251(1) (1989)). These land use plans do not have the force of law until they are acknowledged by the LCDC. Id. (citing OR. REV. STAT. § 197.175(2)(c) (1989)). The LCDC’s role in this process is similar to that of the President or a governor when signing or vetoeing proposed legislation. Id. This function has long been recognized as a legislative function entitled to absolute immunity. Id. (citing Edwards v. United States, 286 U.S. 482, 490 (1932) (holding that “President’s function in approving or disapproving bills” is legislative function)).
270. Id. at 680-81 (Alarcon, J., dissenting). The dissent outlined the “legislative process” required by the Oregon statutory code:
[First,] the Director of Land Conservation and Development must prepare a report for consideration by the LCDC analyzing the comprehensive plan’s compliance with the goals. . . . Interested persons must be provided a reasonable opportunity to present comments and objections for the Director’s consideration. . . . Before the Director submits the report to the LCDC, he must allow local governments and persons who submitted written comments or objections an opportunity to file written exceptions to the report.

Id. (Alarcon, J., dissenting) (citations omitted).
271. Id. at 685 (Alarcon, J., dissenting).
272. Id. at 687 (Alarcon, J., dissenting). Judge Alarcon stated: The LCDC’s acknowledgement of a local government’s land-use plans, giving them the force of law, is a legislative function. An acknowledge ment constitutes “the formulation and promulgation of legislative pol-
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Edwards v. United States,273 in which the Court held that an executive veto is a legislative function,274 the dissent argued that the LCDC's act of issuing a continuance order was equivalent to vetoing parts of the local plan.275 The dissent concluded, therefore, that this act should be characterized as legislative, entitling the LCDC officials to absolute immunity.276

The dissent further argued that the majority's opinion did not follow the precedent set forth in Cinevision in which the Ninth Circuit adopted a functional approach for deciding immunity issues.277 The Cinevision court had explicitly rejected a rule employed by other federal courts that examined whether specific individuals were affected by the challenged official act.278 The dissent accused the majority of giving life

icy as a defined and binding rule of conduct."... A corollary power to the acknowledgement power is the power to veto local legislation and thereby prevent it from having any legal effect.

Id. (Alarcon, J., dissenting) (citation omitted) (quoting Yakus v. United States, 321 U.S. 414, 424 (1944)).
273. 286 U.S. 482 (1932).
274. Id. at 490.
275. Zamsky, 933 F.2d at 685 (Alarcon, J., dissenting).
276. Id. at 687 (Alarcon, J., dissenting). Judge Alarcon determined: The LCDC exercises its "veto" power either in the form of a denial or continuance order. Zamsky has challenged the LCDC's exercise of this function. The Supreme Court instructed in Lake Country Estates, ... that to the extent that the agency members act in a legislative capacity, they are entitled to absolute immunity.

Id. (Alarcon, J., dissenting) (citing Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979)).
277. Id. at 687-88; see also Cinevision Corp. v. City of Burbank, 745 F.2d 560, 577-81 (9th Cir. 1984) ("[i]n deciding whether an act is legislative we must look at the nature of the act rather than simply at ... their particular location within the government."); cert. denied, 471 U.S. 1054 (1985). By stating that the correct characterization standard to be used is the "functional approach," the dissent did not resolve the issue of what kind of standard a court should apply to determine which function the officials were performing when they acted. It is otherwise well settled that a functional approach must be taken to determine whether the official is to be afforded § 1983 immunity. See, e.g., Forrester v. White, 484 U.S. 219, 224 (1988) (asserting that Court uses functional approach to decide whether immunity is to be afforded to an official); Hansen v. Bennett, 948 F.2d 397, 400-04 (7th Cir. 1991) (stating that when determining whether local official's action is entitled to absolute immunity, court is to look only at function local official was performing at time of such action); Crymes v. Dekalb County, 923 F.2d 1482, 1485 (11th Cir. 1991) (same; quoting Espanola Way Corp. v. Meyerson, 690 F.2d 827, 829 (11th Cir. 1982), cert. denied, 460 U.S. 1039 (1983)); Gross v. Winter, 876 F.2d 165, 170 (D.C. Cir. 1989) ("[I]mmunity is justified and defined by the functions it protects ... not by the person to whom it attaches.").
278. Zamsky, 933 F.2d at 686-87 (Alarcon, J., dissenting); see also Cinevision, 745 F.2d at 579. In Cinevision, the court found that "[s]ome courts attempting to distinguish executive and legislative acts by local legislators have done so by scrutinizing the scope of the act: an act that applies generally to the community is a legislative one, while an act directed at one or a few individuals is an executive one." Id. The court rejected this view by stating that "[a]lthough this dis-
IV. ANALYSIS OF ZAMSKY v. HANSELL

The dispute between the majority and dissent in Zamsky reflects a fundamental difference in the interpretation and application of the Ninth Circuit’s rule enactment characterization standard. This section of the Note discusses the rule enactment standard by comparing the majority’s expansive interpretation with the dissent’s criticism of such an interpretation. This Note concludes that the Zamsky majority unjustifiably expanded the meaning of “executive act” beyond the scope of the rule enactment standard as defined by prior precedent. This Note also concludes that the Zamsky majority was incorrect in holding that the defendant officials acted in an executive capacity when issuing their continuance order to Klamath County and making recommendations as to how Klamath County could comply with its statewide land use goals. This Note concurs with the dissent’s conclusion that the LCDC Commissioners acted in a legislative capacity. Unlike the dissent, however, this Note finds that the defendant officials’ action of issuing the continuance order was a legislative act because it was analogous to a formulation of policy, which is a legislative act under a more conservative interpretation of the rule enactment standard.

A. Expansion of the Ninth Circuit’s Characterization Standard by the Majority

Despite the majority’s expansion of the rule enactment standard, in some respects, the holding and reasoning of the majority in Zamsky is illustrative of the rule enactment test. Zamsky sued the LCDC officials for “singling out his property and demanding that the local legislature amend its plan so as to make . . . [his] property virtually worthless.” The majority accepted Zamsky’s argument. In essence, the court concluded that by issuing a continuance order, the LCDC officials were enforcing the county’s comprehensive plan by monitoring the local plan’s compliance with established statewide goals and making recommendations as to how compliance might be achieved. The majority’s distinction may at times be useful, it does not always provide an answer to the question.”

279. Zamsky, 933 F.2d at 687 (Alarcon, J., dissenting). Judge Alarcon asserted that “[w]e declined [in Cinevision], however, to adopt the rule suggested by Zamsky . . . that would define an executive act as ‘an act directed at one or a few individuals.’” Id. (quoting Cinevision, 745 F.2d at 579).

280. For a discussion of the traditional rule enactment standard, see supra notes 113-34 and accompanying text.

281. Zamsky, 933 F.2d at 679.

282. See id. The majority in Zamsky did not label the actions of the LCDC officials as enforcing its land use goals rather than enacting them. Nevertheless, this terminology can be applied to the majority’s reasoning, given that this terminology has been used in prior precedent of the Ninth Circuit. See Cinevision, 745 F.2d at 577-78 (noting that enactment of general zoning ordinance is legis-
ity felt that these acts did not comprise policy-making or plan enactment, but instead reflected the ad hoc decision-making of the executive.\textsuperscript{283}

The Ninth Circuit's decisions, including Zamsky, uniquely articulate the components of the rule enactment standard. To define the enactment prong, the Ninth Circuit had utilized the Supreme Court's statement in \textit{Yakus v. United States}.\textsuperscript{284} There, the Court stated: "The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct."\textsuperscript{285} Considering the Supreme Court's statement alone, it is unclear whether an act is considered legislative if it is based solely on a policy determination, or whether it must include both a policy determination and a formulation of that policy into rules of conduct. In interpreting this statement, the Ninth Circuit had concluded that legislative acts involve "the formulation of policy 'as a defined and binding rule of conduct.'"\textsuperscript{286}

\begin{footnotesize}
\begin{enumerate}
\item Zamsky, 933 F.2d at 679 (quoting \textit{Cinevision}, 745 F.2d at 580).
\item 321 U.S. 414 (1944). For the Ninth Circuit decision that utilized the \textit{Yakus} statement, see \textit{Cinevision}, 745 F.2d at 580 (quoting \textit{Yakus}, 321 U.S. at 424).
\item \textit{Yakus} was a criminal case involving neither land use issues nor § 1983. \textit{See} \textit{Yakus}, 321 U.S. at 418. The petitioners in \textit{Yakus} were convicted of violating the Emergency Price Control Act, as amended by the Inflation Control Act of October 2, 1942, by willfully selling cuts of beef wholesale at prices exceeding the maximum prices set by a regulation of the Act. \textit{Id.} The Act was promulgated as a temporary wartime measure. \textit{Id.} at 419. The issues before the Court were: (1) whether Congress, through the Act, unconstitutionally delegated its legislative power to the Price Administrator; (2) whether challenging the validity of the maximum price regulation was a valid defense in a criminal prosecution under the Act; (3) whether the procedure of judicial review of regulations provided adequate due process; and (4) whether a provision of the Act violated the Sixth Amendment if challenging the validity of the maximum price regulation was not deemed a valid defense. \textit{Id.} at 418. In response to the first issue, the Court held that Congress acted within its legislative power in promulgating the Act. \textit{Id.} at 423. In support of its holding, the Court described the "essentials of the legislative function." \textit{Id.} at 424. For the Court's statement as to what comprised the legislative function, see \textit{infra} text accompanying note 285.
\item \textit{Yakus}, 321 U.S. at 424.
\item \textit{See} \textit{Cinevision}, 745 F.2d at 580 (finding that "\textit{a}dministration of a contract does not involve the formulation of policy 'as a defined and binding rule of conduct'" and is therefore an executive function). This distinction between determining legislative policy and formulating policy into a rule of conduct may be an important one. If the only inquiry necessary to determine whether an official
\end{footnotesize}
Previously, the Ninth Circuit in *Cinevision* had used the phrase "ad hoc decision-making" instead of the term "enforcement" in stating its standard for determining what constitutes an executive act.\(^{287}\) The term "ad hoc" means "for this special purpose."\(^{288}\) From this definition, it follows that "ad hoc decision-making" occurs when the decision-maker resolves the particular issue that is presented before him or her at that particular time. In cases prior to *Zamsky*, it was uncertain whether ad hoc decision-making was the standard used to characterize executive action, or whether it was just one characteristic of executive action.\(^{289}\) The Ninth Circuit held until the *Zamsky* decision that an executive function encompassed monitoring compliance with established laws and instituting an action against specific individuals to enforce laws.\(^{290}\)

Under the *Zamsky* decision, it is clear that the Ninth Circuit has expanded the rule enactment test by adopting "ad hoc decision-making" as the standard for determining what constitutes an executive act.\(^{291}\) The *Zamsky* majority expanded the *Cinevision* definition of "ad hoc decision-making" to include monitoring compliance of potential law with established law and making recommendations as to how compliance may be achieved.\(^{292}\) Thus, in contrast to the three elements that constitute

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287. *Cinevision*, 745 F.2d at 580. In *Cinevision*, the Ninth Circuit began with the proposition that the enforcement of general zoning laws is an executive act and concluded that executive functions are those involving ad hoc decision-making. *Id.* at 578, 580. Therefore, under this view, it is unclear as to whether ad hoc decision-making or enforcing laws is the standard by which an act should be characterized.


289. See *Cinevision*, 745 F.2d at 579 (holding that monitoring and administering contract "would generally seem to be an executive function"); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345, 1349 (9th Cir. 1982) (holding that executive function involves ordering County Counsel to bring action against specific individual to enforce general zoning ordinance).

290. For an explanation as to why it was unclear in *Cinevision* whether the ad hoc decision-making concept was the basis for its holding, see *supra* note 287.

291. See *Zamsky*, 933 F.2d at 679 (supporting its conclusion that monitoring compliance with established zoning laws is executive function, reasoning that such monitoring "involv[es] 'ad hoc decisionmaking' rather than 'formulation of policy' ").

292. *Id.* at 679. In *Cinevision*, only monitoring compliance of a municipal contract was considered an "ad hoc" executive act. *Cinevision*, 745 F.2d at 579. The act of making recommendations as to how to comply with a zoning law was not characterized prior to *Zamsky* by the Ninth Circuit.
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an executive act under the "traditional" rule enactment standard,293 the Ninth Circuit's broadened application of "ad hoc decision-making" in Zamsky suggests that for an act to be characterized as executive, it must meet only two requirements: first, the officials must have made a decision pursuant to established law and second, their decision must have been applied to specific individuals.294

B. Interpretation of the Ninth Circuit's Characterization Standard by the Dissent

Despite the Zamsky majority's use of the basic tenets of the rule enactment standard, the dissent disagreed with the majority's expanded application of the standard. In fact, the dissent stated that the majority's opinion had effectively reversed prior precedent.295 The dissent argued that the majority had erred in accepting Zamsky's argument that the LCDC officials' act was executive because the act was directed specifically at him.296 This contention by the dissent, however, is misplaced. The concept of enforcement, upheld and further refined by the Ninth Circuit in Cinevision,297 necessarily involves the application of policy to specific persons. The majority's acceptance of Zamsky's argument, 298

293. For a description of the "traditional" rule enactment standard, see supra notes 113-34 and accompanying text.
294. See Zamsky, 933 F.2d at 679.
295. Id. at 687 (Alarcon, J., dissenting) ("This error [in mischaracterizing the LCDC's continuance order as being an executive act] has led the majority to conclude that our decision in Cinevision compels reversal.").
296. Id. at 686 (Alarcon, J., dissenting). The dissent accused the majority of applying the previously rejected general scope standard. See id. at 686-87 (Alarcon, J., dissenting) ("We declined ... [in Cinevision] to adopt the rule suggested by Zamsky ... that would define an executive act as 'an act directed at one or a few individuals.' "). The dissent interpreted Cinevision to define legislative acts as acts that formulate legislative policy or "promulgat[e] a rule of conduct with general application." Id. at 686 (Alarcon, J., dissenting). The dissent, however, was inconsistent in defining the rule. On the one hand, the dissent stated that promulgating a rule of conduct with general application is a legislative act. Id. (Alarcon, J., dissenting). On the other hand, the dissent stated that a rule defining an executive act as an act that is directed at one or a few individuals is not the applicable rule. Id. at 686-87 (Alarcon, J., dissenting).

What Zamsky did allege in his complaint was that the officials' act was "an action against a specific individual enforcing the general zoning ordinance." "Id. at 679. An action "taken against" an individual is not the same as an action "directed at" an individual. The former situation suggests that persons were enforcing a law. The latter situation suggests both that persons were enforcing a law and that the law itself includes a reference to a specific individual. The latter situation was rejected in Cinevision because it focuses on the scope of an act, thereby improperly widening the reach of what constitutes an executive act. See Cinevision, 745 F.2d at 579 n.26.
297. Cinevision, 745 F.2d at 577-78 (noting that Ninth Circuit has held that in "ordering the County Counsel to institute an action against a specific individual enforcing the general ordinance, the local legislature ... [was act[ing]] in an executive, rather than a legislative, capacity" (citing Kuzinich v. County of Santa Clara, 689 F.2d 1345, 1349 (9th Cir. 1982))).
therefore, is not tantamount to a reversal of *Cinevision* or an espousal of a previously rejected standard. Instead, what the majority accomplished in *Zamsky* was to expand the characteristics of executive acts, thereby concurrently limiting the characteristics of legislative acts.

The dissent’s argument is based on the premise that because the LCDC officials were acting within their power as mandated by Oregon’s statutory code, they were acting in a legislative capacity. The dissent argued that the issuance of a continuance order is “akin” to an exercise of executive veto power. Because exercise of the veto power prevents a policy determination from becoming law, it has been held to be a legislative act. Under Oregon’s statutory code, however, denial of a comprehensive plan is not labelled as equivalent to exercise of the veto power. While the majority did not extensively address the issue of how the LCDC’s denial power should be characterized, the majority did comment that had the LCDC denied Klamath County’s comprehensive plan, that act possibly would have been legislative. Whether the LCDC’s denial power is a legislative act under the dissent’s view or possibly a legislative act under the majority’s view depends upon how the mechanics of this power are discerned.

Under Oregon’s comprehensive plan system, the denial of a local plan is effectively a denial of local policy in favor of a policy determination previously set by the LCDC in its statewide goals. In one sense, if the LCDC were to deny a local plan, it would be a legislative act because it is a policy determination to dismiss the policy-based local plan; it would not simply be an ad hoc determination as to which components of the plan complied with the state plan and which did not. In another sense, the act of denying a local plan could be considered an executive

298. *Zamsky*, 933 F.2d at 685 (Alarcon, J., dissenting) (“[T]he LCDC function in granting acknowledgement or in preventing a zoning ordinance from having any legal effect is a mandatory part of its legislative function under Oregon law.”).

299. *Id.* (Alarcon, J., dissenting).

300. See Edwards v. United States, 286 U.S. 482, 490 (1932). See generally *Black’s Law Dictionary* 1164-65 (6th ed. 1990) (veto is refusal of assent by executive officer of law passed by legislative body). Arguably, in *Zamsky*, the LCDC’s refusal to acknowledge Klamath County’s local plan could be administrative even under the legislative process standard. For an explanation of the legislative process standard, see *supra* notes 225-39 and accompanying text. The dissent reasoned that because the statutorily promulgated act of “acknowledging” a local plan is equivalent to an enactment, the opposite act, refusal, must also be part of the legislative process. *Zamsky*, 933 F.2d at 685 (Alarcon, J., dissenting). It does not necessarily follow, however, that the refusal to acknowledge a local plan is equivalent to a veto.

301. *See* *Or. Rev. Stat.* § 197.251(1) (1989) (referring to act of refusing to give local land use plan force of law as denial order).

302. *Zamsky*, 933 F.2d at 679 (“[T]he LCDC . . . has a role which might be considered legislative—confirming local plans and thereby giving them the force of law . . . .”)

act because it involves a determination of whether the local plan conforms to the previously established statewide goals. The latter situation, however, does not follow from the meaning of "ad hoc decision-making." Indeed, the decision to deny a local comprehensive plan is itself a policy decision to deny the policies embodied by the local plan; it is not a decision to penetrate through the policy of the plan to make determinations on its specifics. It therefore follows that the denial power of the LCDC should be characterized as a legislative act, as the dissent concluded.\textsuperscript{304} If the majority's holding were strictly applied, however, an official's exercise of the denial power would constitute the monitoring of compliance of local plans with statewide goals and would thus be an executive act.\textsuperscript{305}

Furthermore, in issuing the continuance order, the LCDC acknowledged some parts of the plan and denied other parts of the plan.\textsuperscript{306} Under the dissent's argument, this should be a legislative act.\textsuperscript{307} Making recommendations under the dissent's view should also be a legislative act because it was part of the legislative process, just like a denial or an acknowledgment of the plan.\textsuperscript{308} On this point, the dissent's reasoning is inaccurate. Making recommendations under the traditional definition of enforcement would not be an executive act because it was not binding on the county. That is, the recommendations would be a legislative act not because the act was part of the legislative process, as the dissent argued, but because the recommendations made by the LCDC were simply a guide for the county.

C. Zamsky v. Hansell Analyzed Under the Traditional Rule Enactment Standard

After Zamsky, application of the enactment prong of the Ninth Circuit's rule enactment standard is uncertain. To the majority, the LCDC officials' act of "formulating policy" seemingly was completed after they promulgated the statewide land use goals, and it would not be until they actually acknowledged a local plan that they would again be engaged in the formulation of policy. In effect, the majority focused on the basis of the act and not on its substance. The majority seemed to reason that all of the land use policy that was to be formulated had already been formulated in the statewide goals. The majority did not consider, however,

\textsuperscript{304} See Zamsky, 933 F.2d at 687 (Alarcon, J., dissenting).

\textsuperscript{305} On the other hand, perhaps the crux of the holding in Zamsky is not based on the fact that the LCDC officials were "monitoring compliance" of local land use plans with the statewide goals, but instead is based on the fact that the LCDC officials singled out Zamsky's land when making recommendations to Klamath County on how compliance may be achieved. If this is so, then it is difficult to say how far the holding extends past the facts of the case.

\textsuperscript{306} Zamsky, 933 F.2d at 678.

\textsuperscript{307} Id. at 687 (Alarcon, J., dissenting).

\textsuperscript{308} See id. at 685, 687 (Alarcon, J., dissenting).
that while the statewide goals operate as the law in the absence of local law, 309 once enacted, local law becomes the source of law for the county. 310 Thus, the LCDC is empowered to enact laws on two "levels:" on the local level and on the state level. While the laws on both levels should be the same, two separate acts are necessary before the laws are enacted. Therefore, the majority should have considered the LCDC's act regarding the local plan as distinct from the act regarding the statewide goals, even though the law promulgated on the state level was the basis for the law promulgated on the local level. If the majority had viewed the Oregon comprehensive plan system in this light, it would also have characterized the LCDC's act of issuing the continuance order as a legislative act.

Moreover, had the "enactment" and "enforcement" prongs of the traditional rule enactment standard been applied in Zamsky, 311 the LCDC officials' acts would also have been characterized as legislative. Under a traditional enactment analysis 312 of the LCDC officials' issuance of a continuance order for Klamath County's comprehensive plan: the LCDC officials were formulating policy by acknowledging some parts of the plan and denying other parts of the plan; the policy embodied in the local plan was of general applicability within the county; and the acknowledgement and denial of the plan was binding on the county, and, therefore, on all persons within the county. Thus, the LCDC Commissioners' issuance of the continuance order met all of the requirements of enactment. Under the enactment analysis for the recommendations given by the LCDC officials, the recommendations, while based on the policy-made statewide goals, were not a formulation of policy; the recommendations were of specific applicability to particular landowners; and the recommendations were not binding on either the county or the individual landowners. As is evident from this analysis, the LCDC's act of making recommendations for compliance did not meet the requirements of a legislative act under the enactment prong of the rule enactment standard.

Under a traditional enforcement analysis 313 of the rule enactment standard for the LCDC officials' denial of portions of Klamath County's plan: (1) the LCDC officials did not address the decision to deny the plan to specific individuals; (2) the decision was made pursuant to an established law—the statewide goals; but (3) the decision did not force an individual to comply and instead forced the entire county to comply.

310. Id. §§ 197.175(1), (2)(c) (1989).
311. For a discussion of the rule enactment standard as traditionally applied, see supra notes 113-34 and accompanying text.
312. For a discussion of the enactment analysis, see supra notes 118-21 and accompanying text.
313. For a discussion of the enforcement analysis, see supra notes 122-26 and accompanying text.
Thus, the officials’ action of issuing the continuance order did not meet the requirements of an enforcement and cannot be regarded as an executive act. Under the enforcement analysis as to the LCDC officials’ recommendations on how compliance might be achieved: (1) the LCDC officials made recommendations that were directed at specific individuals; (2) the recommendations were made pursuant to established law (the goals); but (3) the recommendations were not binding on Zamsky or the county. Thus, under the enactment prong of the test, the LCDC officials’ recommendations did not reflect an executive act. As is evident after the two prongs of the rule enactment standard are applied, the LCDC officials’ continuance order was made in a legislative capacity and not in an executive capacity. The act of making the recommendations was neither legislative nor executive—it should not have been a part of the dispute at all.

Thus, the Zamsky majority seems to have extended its definition of ad hoc decision-making to such an extent that it has limited what constitutes a legislative act. In this case, the LCDC’s act should have been labelled as legislative because the LCDC officials, though monitoring a new plan against established statewide goals, were monitoring policy against policy, thereby making their entire decision a policy decision. The majority’s extension of the general meaning of enforcement\(^\text{314}\) to include monitoring policy against policy and making recommendations not binding on any specific individual was therefore unwarranted.

V. CONCLUSION

Zamsky, in both its majority and dissenting opinions, reflects the difficulty courts encounter in attempting to characterize land use decisions. Of the six characterization standards used in federal court decisions, the rule enactment standard seems to best characterize official acts. This conclusion is apparent because only the rule enactment standard identifies legislative and administrative functions with common labels—“enactment” and “enforcement”—that dovetail the purposes of affording government officials section 1983 immunity.\(^\text{315}\)

The rule enactment standard nevertheless requires further clarification. A federal court faced with a section 1983 immunity issue should make two inquiries to decide whether an official act is an “enactment” or an “enforcement” of law. First, a court should investigate whether: (1) the officials were formulating or rejecting proposed policy; (2) the decision generally applied to all persons within the community; and (3) the decision was a binding rule of conduct. If all three elements are present, the officials have acted in a legislative capacity and should thus receive

\(^{314}\) For the general meaning of enforcement, see supra notes 116 & 122-26 and accompanying text.

\(^{315}\) For a discussion of the purposes of affording officials § 1983 immunity, see supra notes 74-80 and accompanying text.
absolute immunity. It is not enough for the officials to have based a decision on policy; policy itself must have been formulated or rejected by the decision. Second, a court should determine whether: (1) the officials have made a decision that was directed at or applied to specific individuals in the community; (2) the decision was based on established rules of conduct; and (3) the decision was binding on specific individuals and not on the general populace. All three of these elements must be present for officials to have acted in an administrative capacity and thus be entitled to receive qualified immunity. If such lines are drawn, then characterizing land use decisions will be simplified and landowners will be better able to predict whether officials will have absolute or qualified immunity from suit, thereby reducing unnecessary and expensive section 1983 litigation.

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