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The Yonkers Case: Separation of Powers as a Yardstick for Determining Official Immunity

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THE *YONKERS* CASE: SEPARATION OF POWERS AS A YARDSTICK FOR DETERMINING OFFICIAL IMMUNITY

I. Introduction

By a handwritten contempt order issued August 2, 1988,[1] a federal judge fined three Yonkers City Council members[2] $500 per day[3] until each member voted in favor of a specific item of legislation.[4] The contempt order also provided that if the council failed to pass the proposed legislative package by a certain date,[5] every individual member who voted against the proposal would be incarcerated until the council as a whole enacted the legislation.[6]

Judge Leonard B. Sand of the federal district court in the Southern

1. United States v. Yonkers Bd. of Educ., No. 80 Civ. 6761 (S.D.N.Y. Aug. 2, 1988), *aff'd sub nom.* United States v. City of Yonkers, 856 F.2d 444 (2d Cir. 1988), *cert. granted sub nom.* Spallone v. United States, 57 U.S.L.W. 3588 (U.S. March 6, 1989) (Nos. 88-854, 88-856, 88-870) (cases consolidated).

2. The three council members were Nicholas Longo, Edward Fagan, and Peter Chema. A fourth council member, Vice Mayor Henry Spallone, was held in contempt on August 3rd to ensure that his counsel was present during the contempt hearing. *Yonkers*, No. 80 Civ. 6761 (S.D.N.Y. Aug 5, 1988).

3. The fine imposed on the City of Yonkers, however, was to double each day. *Yonkers*, No. 80 Civ. 6761, at 3 (S.D.N.Y. filed July 26, 1988).

4. This legislation, if passed, would designate specific sites located in predominately white neighborhoods to be condemned and dedicated for the construction of low income housing. *See infra* notes 27-52 and accompanying text. The court proposed this legislation in order to remedy the city's history of intentional racial discrimination in the allocation of its subsidized housing. United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1294-1368, 1500-21 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987) (upholding determination of liability). *See infra* notes 24-35 and accompanying text.

5. Because the court's primary objective was that the city enact the ordinance, *see infra* note 64, each individual council member could purge himself of the contempt order by voting to enact the legislation or voting to pass a resolution of intent to adopt the legislation. *Yonkers*, No. 80 Civ. 6761, at 3, ¶ 4 (S.D.N.Y. July 26, 1988); *Yonkers*, No. 80 Civ. 6761, at 5, ¶ 1 (S.D.N.Y. Aug. 2, 1988). Furthermore, if the city passed the legislation, the dissenting council members would not be held in contempt. Therefore, the individual council members would be held in contempt only if the legislation were not passed *and* the council members were a part of the majority who refused to vote for its passage. *Yonkers*, No. 80 Civ. 6761, at 5, ¶ 1 (S.D.N.Y. Aug. 2, 1988). The order stated that each council member could purge himself of contempt by "voting to enact the Affordable Housing Ordinance, or a resolution of intent to adopt the same, or such time that the [c]ity has so acted." *Id.*

6. The contempt order provided that "[a]ny such [c]ouncil [m]ember who has not purged himself of civil contempt on or before August 10, 1988 shall be committed on August 11, 1988 to the custody of the United States Marshall until such time as the [c]ity enacts the legislation or until such individual council member purges himself of contempt." *Yonkers*, No. 80 Civ. 6761, at 6 (S.D.N.Y. Aug. 2, 1988). For a discussion on how the council members could purge themselves of contempt, see *supra* note 5.

District of New York entered this contempt order only after the council breached its promise to enact the proposed legislation.[7] This promise, embodied in a consent decree,[8] was approved by the council and entered by the court.[9] The purpose and effect of the contempt order, therefore, was to coerce the council members to vote in favor of the legislation they promised to enact.[10]

The Court of Appeals for the Second Circuit affirmed the contempt order based on the district court's inherent power to enforce its consent decrees.[11] Because the Second Circuit decided the appeal solely on the consent decree issue, the court did not need to decide "whether as a general matter a district court may order city council members to vote in favor of a particular ordinance, even to implement remedies for constitutional violations."[12]

When the city and the council members appealed the contempt order to the United States Supreme Court,[13] the Court, without issuing an opinion, decided to stay the district court's order.[14] In his dissent

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7. Although not every council member voted in favor of making such a promise through the consent decree, the council approved of the consent decree by a majority vote. Brief for Appellant Spallone at 8, Spallone v. United States, 837 F.2d 1181 (2d Cir. 1987) (No. 82-1679). *See infra* notes 45-61 and accompanying text.

8. For a discussion of consent decrees, see *infra* notes 47-50. The council entered into the remedial consent decree pursuant to a finding of liability in favor of plaintiff, United States, and plaintiff intervenor, the National Association for the Advancement of Colored People (NAACP). *See infra* notes 24-61 and accompanying text.

9. *See Yonkers*, No. 80 Civ. 6761, at 4 (S.D.N.Y. Aug. 2, 1988) (citing the order in *Yonkers*, No. 80 Civ. 6761 (S.D.N.Y. July 26, 1988)).

10. *See Yonkers*, No. 80 Civ. 6761 (S.D.N.Y. Aug. 2, 1988). *See infra* notes 59-61 and accompanying text.

11. *See* United States v. City of Yonkers, 856 F.2d 444, 457 (2d Cir. 1988), *cert. granted sub nom.* Spallone v. United States, 57 U.S.L.W. 3588 (U.S. March 6, 1989) (Nos. 88-854, -856, -870) (cases consolidated).

12. *Id.* at 457.

13. Spallone v. United States, 57 U.S.L.W. 3183 (U.S. Sept. 1, 1988) (pending orders no. A-172 – A-175).

14. *Id.* at 3183. The Court stayed the fines against the council members pending the determination of certiorari, but denied the stay sought by the city. *Id.* Justices Marshall and Brennan dissented from the issuance of the Court's stay on the narrow ground that a district court has the inherent power to enforce its consent decrees. *Id.* (Marshall J., concurring in part, dissenting in part). In an opinion joined by Justice Brennan, Justice Marshall argued that because the council members had promised, by consent decree, to pass specific legislation, the Court should have addressed only the narrow issue of "whether a federal court may order local officials to abide by an explicit obligation—here, a promise to enact legislation—contained in a consent decree that the officials voted to adopt and that the [d]istrict [c]ourt agreed to accept." *Id.* at 3184. Subsequently, the Court granted certiorari to the individual council members. 57 U.S.L.W. 3581, 3588 (U.S. March 7, 1989) (Nos. 88-854, -856, -870) (granting certiorari to council members Spallone, Chema, and Longo). The Court, however, denied certiorari to the City of Yonkers. *Id.* (No. 88-855). The Court also granted certiorari to another case in order to answer the question whether a federal court has the power, consistent with the 10th

from issuance of the stay, Justice Marshall noted that the *Yonkers* case raises a broad question "of substantial interest"[15] as to whether a federal court has "the authority to order an individual local legislator . . . to enact specific legislation."[16] Furthermore, the Court subsequently granted certiorari to the council members on the issue of whether a district court may direct a local legislator to cast his vote for or against a specific item of legislation.[17]

In an effort to address this issue,[18] this Note explains the *Yonkers* case through an official immunity analysis which, although not used by the Southern District or the Second Circuit, was implicitly asserted in both courts' opinions.[19] In applying the official immunity analysis, the Note concludes that the Yonkers council members would not have received absolute legislative immunity because they did not act in a legitimate[20] legislative capacity.[21] Moreover, this Note asserts that the failure of the council members to act in such a capacity was caused by the very structure of the Yonkers government, i.e., the absence of a clear separation of powers.[22] Beyond *Yonkers*, the Note proposes that for purposes of official immunity, courts should examine the separation of powers within a local government as a yardstick for determining the function in which a local official acted. This Note concludes that in the context of a government which has sufficiently separated and balanced its political powers, a federal court does not have the authority to order an individual local legislator to vote in a particular way because of the threshold obstacle of official immunity.[23]

Part II of the Note sets forth the history of the *Yonkers* case. Part

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amendment and principles of comity, to impose a tax increase on the citizens of the local school district in order to remedy racial segregation in Kansas City public schools. Missouri v. Jenkins, 57 U.S.L.W. 3704 (U.S. April 24, 1989) (No. 88-1150).

15. *Spallone*, 57 U.S.L.W. at 3184.

16. *Id.* The issue that Justice Marshall articulated is precisely the issue which official immunity addresses—i.e., the court's authority over individual officials as opposed to the collective body of which they are a part. See *infra* notes 73-220 and accompanying text for a discussion of the doctrine of official immunity.

17. *Spallone*, 57 U.S.L.W. at 3435-36, 3588.

18. *See supra* notes 15-16 and accompanying text.

19. *See infra* notes 249-89 and accompanying text. Moreover, this Note analyzes the *Yonkers* case through official immunity also because that doctrine has traditionally limited a court's power over public officials. *See infra* notes 106-59 and accompanying text.

20. For the meaning of "legitimate," see *infra* notes 88-105, 111-36, 162-86 and accompanying text.

21. *See infra* notes 249-289 and accompanying text.

22. *Id.*

23. Official immunity is a threshold obstacle because it prevents a court from having jurisdiction over a particular official. Colon Berrios v. Hernandez Agosto, 716 F.2d 85, 88 (1st Cir. 1983); *see also infra* notes 106-59 and accompanying text.

III explores the doctrine of official immunity. Part IV explains how the principle of separation of powers has been used as a guide for the official immunity test. Part V applies the doctrine of official immunity to *Yonkers* and concludes that, beyond that case's unique circumstances, the doctrine of official immunity will bar a court from ordering a legislator, acting in a legitimate legislative capacity, to vote in a particular way.

II. Background: the *Yonkers* Case

A. Liability

In 1985, the District Court for the Southern District of New York held that the City of Yonkers had intentionally limited all its subsidized low income housing[24] to one section of Yonkers[25] in order to maintain racial segregation.[26] The court found that the Yonkers Board of Education, the City of Yonkers, and the Yonkers Community Development Agency (YCDA)[27] committed intentional racial segregation in violation of both the Fair Housing Act (FHA)[28] and the equal protection clause[29] of the fourteenth amendment to the United States Constitution.[30]

Although the court found the city liable, Judge Sand conceded that such intentional racial segregation was "particularly difficult to iden-

24. United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1294-1358 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987) (upholding determination of liability). In 1980, the Department of Housing and Urban Development (HUD) decided to impose conditions on the city's receipt of its annual public housing funds (Community Development Block Grant, or CDBG). The condition was that the city would take all actions within its control to provide for the construction of subsidized housing outside the areas of minority concentration. *Id.* at 1356.

25. The southwestern portion of Yonkers contained 97.7% of the subsidized units inhabited by 80.7% of the city's minority population (which was only 37.5% of the city's total population). *Id.* at 1290-91.

26. *Id.* at 1289.

27. United States v. Yonkers Bd. of Educ., 518 F. Supp. 191 (S.D.N.Y. 1981). The action alleged that the city, through the board of education and the Yonkers Community Development Agency (YCDA), promoted unlawful racial segregation in the public schools by the appointment of individuals opposed to desegregation to the school board and by the selection of sites for public and subsidized housing which "intentionally and effectively" perpetuated the racial segregation in the city. *Id.* at 193.

28. 42 U.S.C. § 3604 (1982). The FHA prohibits practices which "make available or deny . . . a dwelling to any person because of race, color, religion, sex, or national origin." *Id.* § 3604(a).

29. ". . . nor [shall any state] deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

30. *Id.*; *see* United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1291-94, 1369-73 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987) (upholding determination of liability).

tify when the intent at issue is the 'collective' intent of a *legislative or administrative body*."[31] Based on its factual findings,[32] however, the court concluded that subsidized housing in Yonkers had been characterized by a common theme: "racially influenced opposition to subsidized housing in certain areas of the city, and acquiescence in that opposition by city officials."[33]

B. The Injunctive Orders

In an effort to remedy the intentional racial segregation in Yonkers, the district court issued several injunctive orders.[34] First, the court issued a Housing Remedy Order (order) which included an Injunction (injunction) and a Fair Housing Resolution (housing resolution).[35]

The injunction prohibited the city[36] from blocking or limiting the availability of subsidized housing in certain areas of Yonkers on the basis of race or national origin.[37] The resolution further ordered the city to take affirmative measures.[38] Specifically, the court ordered the city to "adopt a [r]esolution of the [c]ity [c]ouncil setting forth the fair

31. *Id.* at 1369 (emphasis added). Judge Sand acknowledged that "[w]hat is at issue is not a single action, or series of actions, undertaken by a single group of individuals, but more than [30] years of subsidized housing activity, for which a sizable and changing group of [c]ity officials shared responsibility." *Id.*

32. The court based its conclusion on three "constants": first, that the community strongly opposed the allocation of sites to subsidized housing which were located in predominantly white areas of Yonkers; second, that Yonkers' political structure (a ward system) made community opposition unusually effective; and third, that the city officials systematically rejected sites after the community manifested its opposition to them. *Id.* at 1369-70. *See infra* notes 252-70 and accompanying text.

33. *Id.* at 1370.

34. United States v. Yonkers Bd. of Educ., No. 80 Civ. 6761 (S.D.N.Y. 1985) (finding that HUD rejected sites proposed by the city, and ordering the city to submit a subsidized housing plan); 635 F. Supp. 1577 (S.D.N.Y. 1986), *aff'd*, 837 F.2d 1181, *cert. denied*, 108 S. Ct. 2821 (1988) (housing remedy order); 662 F. Supp. 1575 (S.D.N.Y. 1987) (ordering city to submit a long term housing remedy plan, and warning that failure to do so will be met with contempt sanctions as well as court implementation of its housing remedy order in spite of the city's non-compliance); 675 F. Supp. 1407 (S.D.N.Y. 1987) (ordering the board of education to return vacant property adjacent to school); 675 F. Supp. 1413 (S.D.N.Y. 1987) (issuing a freeze on any city action in furtherance or implementation of private housing projects); No. 80 Civ. 6761 (S.D.N.Y. Jan. 28, 1988) (issuing first remedial consent decree in equity); No. 80 Civ. 6761 (S.D.N.Y. June 13, 1988) (issuing "Long Term Plan Order"); No. 80 Civ. 6761 (S.D.N.Y. July 26, 1988) (ordering that unless the legislation was passed, every council member who voted against its passage would be held in contempt).

35. *Yonkers*, 635 F. Supp. 1577 (S.D.N.Y. 1986), *aff'd*, 837 F.2d 1181 (2d Cir. 1987).

36. The injunction was directed to the City, "its officers, agents, employees, successors and all persons in active concert or participation with any of them . . . ." *Id.*

37. *Id.*

38. *Id.*

housing policy of the [c]ity of Yonkers."[39] The court also ordered the city to submit a housing plan,[40] execute a grant agreement,[41] and submit at least two sites for low-income housing to the department of Housing and Urban Development (HUD).[42] Upon the city's failure to take any of these actions,[43] the court would deem such actions to have been taken.[44]

C. The Consent Decree

After the city unsuccessfully appealed the constitutionality of the orders entered against it,[45] the city council approved[46] a remedial consent decree[47] which the court entered as an order.[48] Pursuant to this

39. *Id.*

40. *Id.* at 1580.

41. *Id.*

42. *Id.*

43. After the city failed to comply with the order in 1986 to submit a long term housing plan, the court issued a long term housing plan (plan). 662 F. Supp. 1575 (S.D.N.Y. 1987). When the city failed to comply with this later order, the city approved of a remedial consent decree on January 28, 1988, and the court issued a long term plan order (June 13 order) on June 13, 1988. No. 80 Civ. 6761 (S.D.N.Y. June 13, 1988). Following further non-compliance, however, on July 26, 1988, the court ordered the city to abide by the terms of the consent decree or be held in contempt. No. 80 Civ. 6761 (S.D.N.Y. July 26, 1988). *See infra* notes 62-69 and accompanying text.

44. United States v. Yonkers Bd. of Educ., 635 F. Supp. 1577, 1580-81 (S.D.N.Y. 1986), *aff'd*, 837 F.2d 1181 (2d Cir. 1987) (upholding determination of liability). In addition, the city was ordered to establish a fair housing office to administer the city's fair housing policy, and an affordable housing trust fund for those qualified applicants who had been denied the subsidized housing. *Id.* at 1577-79, 1581-82.

45. *Yonkers*, 837 F.2d 1181 (2d Cir. 1987).

46. No. 80 Civ. 6761 (S.D.N.Y. Jan. 28, 1988) (remedial consent decree). Although the consent decree was passed by majority, one council member, Spallone, voted against the agreement. Brief for Appellant Spallone at 8, City of Yonkers v. United States, 837 F.2d 1181 (2d Cir. 1987) (No. 82-1679).

47. A consent decree is "an agreement between the parties to end a lawsuit on mutually acceptable terms which the judge agrees to enforce as a judgment." Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 325 (1988) [hereinafter Kramer]. The precise definition, however, is still the subject of debate. *Id.* at 324. *See infra* notes 48, 50.

48. No. 80 Civ. 6761 (S.D.N.Y. Jan. 28, 1988); *see also* No. 80 Civ. 6761 (S.D.N.Y. July 26, 1988) (order). Some commentators maintain that a consent decree is a private contract, while others argue that it is a judgment. Kramer, *supra* note 47, at 324. One of the most recent commentators, however, maintains that it is a hybrid of the two: it is "neither a contract nor a judgment—and it is both." *Id. See also* Laycock, *Consent Decrees Without Consent: The Rights of Nonconsenting Third Parties*, 1987 U. CHI. LEGAL F. 103 (1987) [hereinafter Laycock] (consent decree is "simply a settlement that includes an injunction"). In cases such as *Yonkers*, where the consent decree is agreed upon only pursuant to a liability determination, the court must treat the consent decree more as a judicial order than as a private contract, and must therefore "interpret the decree in light of what the substantive law requires to remedy a proven violation." Kramer, *supra* note 47, at 329. For a general discussion on consent decrees, see 1987 U.

consent decree, the city agreed to implement the subsidized housing[49] through a number of remedial measures:[50] to provide specifically listed sites for a certain number of low-income housing units,[51] to make (or cause to be made) fair market value offers to purchase the private sites from their owners,[52] and to prepare a request for proposals from developers for the construction of the housing units.[53]

In addition to these specific remedial measures, the city also agreed to undertake a more general course of action. For example, the city agreed to "fully and in good faith cooperate with all persons, parties, and organizations the involvement of which is necessary or desirable for the completion of racial desegregation of the subsidized housing in Yonkers."[54] The city also agreed not to seek further appellate review of the court's decision "to the extent it relates to the [c]ity's obligation to provide sites for the . . . public housing."[55] Furthermore, the city acknowledged that if any subsequent appellate ruling nullified or weakened the constitutional or statutory basis of the city's obligation, the consent decree would remain binding upon the city to perform as promised.[56]

CHI. LEGAL FORUM in its entirety; Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887 (1984) [hereinafter Schwarzschild].

49. The consent decree first set forth the city's liability by stating that "the [c]ity acknowledges its continuing commitment to the construction of the 200 units of public housing . . . ." No. 80 Civ. 6761, § 1, at 1-2 (S.D.N.Y. Jan. 28, 1988).

50. The Supreme Court has given wide discretion to the consenting parties with respect to the scope of consent decrees. In one of the first cases to address the issue of consent decrees, the Court held that the parties "have the right to agree to any thing they please in reference to the subject-matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings." Pacific R.R. v. Ketchum, 101 U.S. 289, 297 (1879).

In a recent Supreme Court case, the Court held that a court may enter a consent decree which requires more by way of relief than the court could have awarded after a trial. Local 93, Int'l Assoc. of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). The Court based this holding on its view that a consent decree is essentially voluntary: "it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." *Id.* at 522. Furthermore, the Court rejected the argument that a consent decree should be treated as an order merely because it can be enforced by a citation for contempt. *Id.* at 523.

51. No. 80 Civ. 6761, § 2, at 2 (S.D.N.Y. Jan. 28, 1988).

52. *Id.* § 4, at 3. The consent decree also states that if the owners will not voluntarily sell their property, "the [c]ity will commence (or will cause to be commenced) legal proceedings to secure control over the relevant site . . . including the use of the power of eminent domain." *Id.* § 4, at 3-4.

53. *Id.* § 6, at 4-5.

54. *Id.* § 9, at 6.

55. *Id.* § 10, at 6.

56. *Id.*

The most crucial portion of the consent decree for the purposes of this Note is section seventeen.[57] In this section, the city agreed to adopt legislation designed to implement the subsidized housing.[58] However, when the city and the council failed to comply with the consent decree, the court issued a Long Term Plan Order (June 13 order)[59] outlining the particular legislation[60] which the city, through the consent decree, had promised to enact.[61]

D. The Contempt Order

In response to the council's refusal to comply with either the June 13 order or the original consent decree,[62] the court demanded that the City of Yonkers "enact, on or before August 1, 1988, the legislative package relating to the long-term plan as described in [s]ection seventeen of the [f]irst [r]emedial [c]onsent [d]ecree . . . ."[63] The court warned that if the council did not pass the legislation by this deadline, both the city and "each of the [c]ouncil members who fail[ed] to vote in favor of enactment of such legislation" would be held in contempt

57. No. 80 Civ. 6761, § 17, at 9-10 (S.D.N.Y. Jan. 28, 1988).

58. For example, the proposed legislation provided for tax abatements to housing developments, density bonuses to the developers, and zoning changes to allow for the placement of such developments. *Id.* In addition to these pieces of legislation, the city agreed "to implement a package of [m]andated [i]ncentives," which consisted of "other provisions upon which the parties may subsequently agree." *Id.* § 17, at 10. The city agreed to implement this package "as promptly as practicable but, in no event, later than 90 days . . . ." *Id.*

59. No. 80 Civ. 6761 (S.D.N.Y. June 13, 1988). This order tracked the language of the long term housing plan appended to United States v. Yonkers Bd. of Educ., 662 F. Supp. 1575, 1581 (S.D.N.Y. 1987), *aff'd*, 837 F.2d 1181 (2d Cir. 1987). *See supra* notes 45-58. The court promulgated the June 13 order only after the city failed to comply with two previous orders (the housing remedy order and the long term housing Plan). *See supra* notes 34-44 and accompanying text.

60. No. 80 Civ. 6761, §§ 4-10 (S.D.N.Y. Jan. 28, 1988). *See supra* notes 49-58 and accompanying text.

61. No. 80 Civ. 6761 (S.D.N.Y. June 13, 1988); *see also* Spallone v. United States, 57 U.S.L.W. 3138 (U.S. Sept. 1, 1988) (pending orders nos. A-172 – A-175).

62. On June 28, the council defeated a resolution stating that the city would enact the court-ordered legislation. No. 80 Civ. 6761, at 1 (S.D.N.Y. July 26, 1988). Furthermore, the city stated that "it will not voluntarily adopt the legislation contemplated by [the Long Term Plan] Order." Brief for City of Yonkers at 1-2, City of Yonkers v. United States, 837 F.2d 1181 (2d Cir. 1987) (No. 82-1679).

63. No. 80 Civ. 6761, at 2 (July 26, 1988). According to the Federal Rules of Civil Procedure, a federal judge has the power to enforce consent decrees: "[i]f a judgment directs a party . . . to perform any . . . specific act and the party fails to comply . . . the court may direct the act to be done . . . . [t]he court may also in proper cases adjudge the party in contempt." FED. R. CIV. P. 70. In addition, the court's power of contempt is inherent under the common law. Hirschorn, *Where the Money Is: Remedies to Finance Compliance with Strict Structural Injunctions*, 82 MICH. L. REV. 1815, 1828 (1984) [hereinafter Hirschorn].

of court.[64]

On August 1, 1988, the city council refused to adopt the proposed resolution by a vote of four to three.[65] Subsequent to a formal hearing, the court placed the city and each of the four individual council members who opposed the resolution[66] in civil contempt.[67] The court ordered all the contemnors to pay daily fines[68] and threatened to incarcerate each of the four members if the council as a whole failed to pass the legislation by August 10, 1988.[69]

III. Official Immunity

The Court of Appeals upheld Judge Sand's contempt order based on the theory that a district court has the inherent power to enforce

64. No. 80 Civ. 6761, at 2-3 (S.D.N.Y. July 26, 1988). The order stated that the city and the council members would be given an opportunity to show cause why each should not be held in contempt; the order also set forth the specific sanctions that would be imposed. *Id.* at 2-3. The general power of contempt is a court's method of recourse against a recalcitrant party. *See generally* D. DOBBS, REMEDIES § 2.9, at 94-105 (1973). The purpose of civil contempt is to obtain future compliance with the underlying order which the defendant has so far disobeyed. *Id.* § 2.9, at 104. Thus, the essence of civil contempt is "the indefinite cumulative sanction which continues until the defendant has purged himself of contempt by obeying the underlying order." Hirschhorn, *supra* note 63, at 1826. The court implements its civil contempt power either by personal coercion or property transfer, or both. *Id.* Specifically, the sanctions may consist of sequestration of property within the court's power, compensation to plaintiffs for the cost of noncompliance, *per diem* fines, or even a jail sentence. *Id.* at 1826-27. Because contemnors can purge themselves of civil contempt by merely obeying the underlying order, they "carry the keys of their prison in their own pockets." *In re* Nevitt, 117 F. 448, 461 (8th Cir. 1902) (quoted in Hirschorn, *supra* note 63, at 1826 n.61). DOBBS, *supra*, § 2.9, at 98 n.20.

65. No. 80 Civ. 6761, at 3 (S.D.N.Y. Aug. 2, 1988). In order to accommodate the city's concern that adoption of the legislation would violate state notice and hearing requirements, the court modified its order. The modified order allowed the council to pass only a resolution (rather than the legislative package itself) committing itself to enact the legislation within the minimal time required for notice according to state law. *Id.* at 2.

66. The four majority members who prevented the legislation's enaction were Vice-Mayor Henry Spallone, Majority Leader Nicholas Longo, Edward Fagan, and Peter Chema. Spallone's contempt hearing, however, did not take place until August 4, 1988, so that his attorney could be present. *Id.* at 3. Spallone was held in contempt following the hearing on August 5. No. 80 Civ. 6761, at 3 (S.D.N.Y. Aug. 5, 1988).

67. No. 80 Civ. 6761, at 4-6 (S.D.N.Y. Aug. 2, 1988).

68. Beginning Aug. 1, each council member was ordered to pay $500 per day and the city was ordered to pay $100 (the latter fine to double in amount every day) until the legislation was passed. No. 80 Civ. 6761, at 5-6 (S.D.N.Y. Aug. 2, 1988) (holding city in contempt); No. 80 Civ. 6761, at 5-6 (S.D.N.Y. Aug. 2, 1988) (holding council members in contempt).

69. No. 80 Civ. 6761, at 6 (S.D.N.Y. Aug. 2, 1988) (holding council members in contempt). On September 1, 1988, the Supreme Court stayed the fines imposed on the individual council members but not those imposed on the city. Following the council's failure to pass the legislative package, Judge Sand designated specific sites for the low-income housing. N.Y. Times, Oct. 5, 1988, at B1, col. 1. *See also* N.Y. Times, Oct. 18, 1988, at B1, col. 2.

its consent decrees.[70] Because the Second Circuit decided *Yonkers* on such narrow grounds, it did not need to address the broad concern raised by Justice Marshall—whether a federal court generally has the authority to order an individual local legislator how to vote.[71] A court's power over public officials, however, has traditionally been limited by the doctrine of official immunity; thus, in order to address the Supreme Court's broader concern, the *Yonkers* case should also be explained through an official immunity analysis.[72]

A. Underlying Policies of Official Immunity

1. General Policy

The general policy behind all levels of official immunity is to allow officials to exercise discretion in the performance of their duties, free from the threat of personal liability.[73] Such uninhibited exercise is essential for an effectively functioning government.[74]

The Supreme Court in *Scheuer v. Rhodes*[75] set forth "two mutually dependant rationales"[76] which underlie official immunity.[77] First, denying officials[78] immunity from suit would create "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion . . . ."[79] Second, there would also exist "the danger that the threat of liability would deter [the official's] willingness to execute his office with the decisiveness and the judgment required by the public

70. United States v. City of Yonkers, 856 F.2d 444, 455 (2d Cir. 1988), *cert. granted sub nom.* Spallone v. United States, 57 U.S.L.W. 3183 (U.S. Sept. 1, 1988) (pending orders nos. A-172 – A-175). Because the Supreme Court did not issue an opinion in its decision to uphold the Second Circuit, the Court did not state its reasons for so deciding. *See supra* notes 1-23 and accompanying text.

71. *See supra* notes 13-17 and accompanying text.

72. Although neither the Southern District of New York nor the Second Circuit decided *Yonkers* on official immunity, both courts implicitly engaged in an official immunity analysis in their opinions. *See infra* notes 269-80 and accompanying text.

73. *See infra* notes 73-87 and accompanying text. The official immunity discussed in this Note arises primarily from federal common law. *See* United States v. Gillock, 445 U.S. 360, 372 n.10 (1980).

74. *Id.*

75. 416 U.S. 232 (1974).

76. *Id.* at 240.

77. *Id.* at 240-42. Although *Scheuer* involved only qualified executive immunity, the two rationales apply to every level of official immunity. For a discussion of qualified executive immunity, see *supra* notes 137-59, 187-215 and accompanying text.

78. Although *Scheuer* pertained only to executive officials (namely, police officers), the court's reasoning applies to officials in every branch of government. *See id.*; *see also infra* notes 79-87 and accompanying text.

79. 416 U.S. at 240.

good . . . ."[80] The *Scheuer* court concluded, therefore, that subjecting officials to liability for exercising their discretion could result both in an injustice to the individual officers, and in the possibility of inhibiting the exercise of their discretion.[81]

In addition to these two rationales, the Court in *Scheuer* addressed a related concern—that rather than face the risk of acting erroneously or unlawfully, the unimmunized official[82] will choose not to act at all.[83] In articulating this concern, the Court stated:

> [i]mplicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all.[84]

The Court concluded that although courts have justified official immunity through different rationales,[85] "one policy consideration seems to pervade the analysis."[86] This policy is that "the public interest requires decisions and action to enforce laws for the protection of the public."[87]

2. *Policy for Legislators*

Although persuasive policies exist for immunizing all officials, those underlying legislative immunity are even stronger.[88] First, the same efficiency rationale which applies to executive officials[89] also applies to legislators, i.e, that the absence or weakening of legislative immunity would substantially inhibit legislators from performing their legislative functions.[90] In addition, however, a broader concern has developed from this efficiency rationale: if the possibility of judi-

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80. *Id.*
81. *See supra* notes 79-80 and accompanying text.
82. *Id.*
83. *Scheuer*, 416 U.S. at 242.
84. *Id.*
85. *Id.* at 240-41.
86. *Id.* at 241.
87. *Id.*
88. *See generally*, Note, *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1200 (1977) [hereinafter *Developments*]; W. PROSSER, J. WADE & V. SCHWARTZ, THE LAW OF TORTS 1065 (5th ed. 1984) [hereinafter PROSSER, WADE & SCHWARTZ]. *See also* notes 89-105, 111-36 and accompanying text.
89. *See supra* notes 73-87 and accompanying text.
90. *Developments, supra* note 88, at 1200. The authors point out that "even to decide who would be an appropriate party defendant when a legislature enacted a constitutionally offensive statute would pose a massive problem." *Id.* This problem was mentioned by Judge Sand when he stated that identification of the "collective intent of a legislative or administrative body" was particularly difficult. United States v. Yonkers Bd. of Educ.,

cial interference inhibits legislators from performing their legislative duties, there arises the "concern for protecting the heart of the democratic process from judicial scrutiny."[91] Liability for a legislator's conduct not only interferes with the efficiency of legislative functioning, but also prevents the legislators from accurately representing the views of their constituents—a concern which does not apply to executive officials.[92] Thus, judicial interference with the activity of a legislator is thought of as more intrusive than interference with that of an executive branch official.

In *Tenney v. Brandhove*,[93] therefore, the Supreme Court argued that the policies which underlie all official immunities pertain especially to legislators.[94] The Court noted that the special need for legislative immunity[95] has been historically recognized in English law,[96] the Constitution,[97] the majority of state constitutions,[98] and a large body of case law.[99]

The *Tenney* court drew an analogy between legislative immunity at common law and legislative immunity as embodied in the Constitution.[100] In so analogizing, the *Tenney* Court articulated the underlying policies through the words of James Wilson, a drafter of the Constitution's speech or debate clause:[101]

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624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd sub nom.* United States v. City of Yonkers, 856 F.2d 444 (2d Cir. 1988).

91. *Developments, supra* note 88, at 1200.

92. Although this adequacy of representation policy has been highlighted by commentators, *see supra* note 90, it has only been obliquely referred to by the courts. In Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), Justice Marshall dissented from granting legislative immunity to the members of a regional planning agency because the officials were appointed, rather than elected: "[t]o cloak these officials with absolute protection where control by the electorate is so attenuated subverts the very system of checks and balances that the doctrine of legislative privilege was designed to secure." *Id.* at 407 (Marshall, J., dissenting). Furthermore, the First Circuit in *Colon Berios v. Hernandez Agosto* noted that injunctive relief against legislative officials would not be necessary in light of a court's traditional power over executive officials. 716 F.2d 85 (1st Cir. 1983). The court stated that ". . . it would seem that the undeniable power of the court to enjoin the *enforcement* of acts passed by the legislature would normally suffice to protect these interests [of the plaintiffs]." *Id.* at 91 (emphasis added) (holding that Senate activities were protected by common law legislative immunity).

93. 341 U.S. 367, *reh'g denied*, 342 U.S. 843 (1951).

94. *Id.* at 372-79 (holding state legislators immune from damages). *See infra* notes 106-59 and accompanying text.

95. *Tenney*, 341 U.S. at 372.

96. *Id.*

97. *Id.* at 373 (citing the speech or debate clause of the United States Constitution).

98. *Id.* at 375 & n.5.

99. *Id.* at 377.

100. *Id.* at 373.

101. The speech or debate clause of the federal Constitution applies to both senators and representatives and provides that "[f]or any [s]peech or [d]ebate in either House, they

> [i]n order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offen[s]e.[102]

Thus, the speech or debate clause serves to "prevent intimidation of legislators by the [e]xecutive and accountability before a possibly hostile judiciary."[103]

Moreover, the states emphasized these same underlying policies when they incorporated the federal speech or debate clause into their constitutions.[104] One state court explicitly articulated the scope of legislative immunity: " 'I will not confine [the privilege] to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to *the giving of a vote* . . . and to every other act resulting from the nature, and in the execution, of the office.' "[105] The federal speech or debate clause, therefore, provided the model by which states sought to protect their legislators from liability for their speech, debate and any act necessary to fulfill their legislative offices.

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shall not be questioned in any other [p]lace." U.S. CONST. art. I, § 6. This explicit protection of speech or debate extends to all acts necessary to the legislative process. Thus, congressional committe members, members of their staff, consultants, and investigators are absolutely immune under the speech or debate clause insofar as they engaged in the legislative acts of compiling reports, referring it to the House of Representatives and voting for its publication. Doe v. McMillan, 412 U.S. 306 (1972).

The Supreme Court has also equated the speech or debate clause's legislative immunity to the legislative immunity provided by 42 U.S.C. § 1983 (1982). Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 732 (1980). The *Consumers Union* Court noted that if the Virginia legislature (rather than the state supreme court) had enacted the legislation in question, its members would have had absolute legislative immunity. *Id.* at 733-34.

In criminal prosecutions, however, the speech or debate clause immunity does not extend to state legislators. United States v. Gillock, 445 U.S. 360, 371-73 (1980) (distinguishing *Tenney* as a civil action).

102. *Tenney*, 341 U.S. at 373.

103. Gravel v. United States, 408 U.S. 606, 617 (1972).

104. *Tenney*, 341 U.S. at 373-76. Moreover, the *Tenney* Court noted that "[i]t is significant that legislative freedom was so carefully protected by constitutional framers at a time when even Jefferson expressed fear of legislative excess." *Id.* at 375. Because after the American Revolution, the legislatures in most states were supreme to the executive and the judiciary, both Jefferson and Madison feared a "tyranny of the legislatures." *Id.* at n.4. The Supreme Court in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency* also noted the significance of the states' enacting their own speech or debate clauses in that such clauses "reflect the central importance attached to legislative freedom in our [n]ation." 440 U.S. 391, 404 (1978).

105. *Id.* at 374 (quoting Chief Justice Parsons' interpretion of the Massachusetts constitution in Coffin v. Coffin, 4 Mass. 1, 27 (1808)) (emphasis added).

B. Levels of Official Immunity

When a government official is sued, a court must, as a threshold matter,[106] determine the capacity in which the defendant-official acted by applying a "function" test.[107] Depending on which "function" category the official fits into, he or she may be insulated from all or only certain kinds of judicial remedies.[108] Based on this determination, the court will grant the official one of three levels of immunity: (1) an official acting in a legislative capacity will receive absolute immunity from both equitable relief and damages; (2) an official acting in a judicial or prosecutorial capacity will receive no immunity from equitable relief and absolute immunity from damages; and (3) an official acting in an executive capacity will receive no immunity from equitable relief, and only qualified immunity from damages.[109] For purposes of the *Yonkers* case, however, this Note will discuss only two of the three levels—absolute legislative immmunity and qualified executive immunity.[110]

1. Legislative Immunity

Legislators[111] are absolutely immune from damages and absolutely immune from injunctive relief.[112] In *Tenney*,[113] the Supreme Court established the doctrine of legislative immunity from damages.[114]

106. Official immunity is a threshold obstacle because it prevents a court from having jurisdiction over the particular official. Colon Berrios v. Hernandez Agosto, 716 F.2d 85, 88 (1st Cir. 1983); *see also infra* notes 106-59 and accompanying text.

107. *See infra* notes 138-58, 160-220 and accompanying text.

108. *See infra* notes 106-59 and accompanying text.

109. *See generally*, LOW & JEFFRIES, FEDERAL COURTS AND THE LAW OF FEDERAL STATE RELATIONS, 863-83 (immunity from damages), 890-99 (immunity from prospective relief) (1987) [hereinafter LOW & JEFFRIES]. *See also* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 405 & n.30 (1979); *see also* Jayvee Brand, Inc. v. United States, 721 F.2d 385, 395 (D.C. Cir. 1983) (immunity follows function, not office); Healey v. Bendick, 628 F. Supp. 681, 697 (D.R.I. 1986) (whether or not members of Marine Fisheries Council receive legislative immunity "is dependent in the first instance upon the due characterization of their functions and activities"); Forsyth v. Kleindienst, 599 F.2d 1203, 1212 & n.11 (1979) (executive immunity requires functional test rather than one based on status or title), *cert. denied*, 453 U.S. 913, *reh'g denied*, 453 U.S. 928 (1981).

110. The *Yonkers* case did not involve any judicial or prosecutorial functions on the part of the council members. *See supra* notes 24-69 and accompanying text.

111. For a discussion of what constitutes a "legislator" for the purposes of immunity, see *infra* notes 162-86 and accompanying text.

112. Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 737 (1980). For a discussion of why legislators are immune from both forms of relief, see *supra* notes 73-105 and accompanying text.

113. 341 U.S. 367. *See also supra* notes 88-105 and accompanying text.

114. 341 U.S. at 367, 372-79.

Tenney sued state legislators, alleging that they had deprived him of his federal constitutional rights in connection with their investigation into his political activities.[115] The Court, however, held that the state legislators were immune from any action seeking damages for allegedly unconstitutional legislative activity.[116] *Tenney*'s holding established "[t]he privilege of [state] legislators to be free from arrest or civil process for what they do or say in legislative proceedings."[117]

In *Lake Country Estates v. Tahoe Regional Planning Agency,*[118] the Supreme Court further extended *Tenney*'s legislative immunity to regional legislators.[119] The Court held that when the individual members of a regional planning agency[120] acted in a legislative capacity, they were entitled to absolute immunity from damages.[121] In so holding, the Court stated that "[*Tenney*'s] reasoning is equally applicable to federal, state, and *regional* legislators."[122]

Because the issue in *Lake Country Estates* involved regional legislators,[123] the Court declined to address whether local legislators enjoy the same immunity: "[w]hether individuals performing legislative functions at the purely local level, as opposed to the regional level, should be afforded absolute immunity from federal damages claims is a question not presented in this case."[124] In a dissenting opinion, however, Justice Marshall pointed out that the Court's reasoning "applies with equal force whether the officials occupy local or regional

115. *Id.* at 369-71.

116. *Id.* at 378-79.

117. *Id.* at 372. The Court reasoned that Congress did not intend the Civil Rights Act of 1871 to limit legislative immunity; thus, the Court narrowly held that the legislative committee members were acting in a field where legislators traditionally have the power to act and were therefore not liable under the 1871 statute. *Id.* at 379. Justice Black sought to clarify the meaning of this immunity in his concurring opinion by pointing out that "[i]t is not held that the validity of legislative action is coextensive with the personal immunity of the legislators." *Id.* at 379 (Black, J., concurring). According to Black, the holding that legislators are immune from suit is not a determination that their conduct was legal. *Id.*

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

119. *Id.* Specifically, the legislators were members of a regional political subdivision named the Tahoe Regional Planning Agency. *Id.* at 406-07.

120. The Tahoe Regional Planning Agency was an entity created by compact between California and Nevada. *Id.* at 393.

121. *See id.* at 405-06. A separate issue before the Court was whether the 11th amendment immunity (prohibiting suits against a state) barred the suit against this agency based on the rationale that the agency was an arm of either of the states that created it. The Court held that the agency was not an arm of either state, and therefore, was not insulated from suit by the 11th amendment. *Id.* at 402.

122. *Id.* at 405.

123. *See id.* at 404 & n.26.

124. *Id.*

positions."[125]

Although the Supreme Court has extended legislative immunity only as far as state and regional legislators,[126] lower courts have extended the Court's reasoning to municipal legislators.[127] The Fourth Circuit has held that "*Lake Country Estates*' extension of absolute legislative immunity is applicable to local legislators."[128] Moreover, in both the Southern District of Florida[129] and the Eastern District of Virginia,[130] courts have granted legislative immunity to city council members for enacting allegedly unconstitutional ordinances.[131]

In addition to immunity from damages, legislators are also absolutely immune from injunctive relief.[132] In *Supreme Court of Virginia v. Consumers Union*,[133] the United States Supreme Court explicitly stated that *Tenney*'s holding is equally applicable to actions seeking injunctive relief.[134] Specifically, the Supreme Court of Virginia was found to have functioned as an enforcer rather than as a legislator of the state's bar code, and therefore received only qualified executive immunity.[135] In so holding, however, the United States Supreme Court stated that if, in the alternative, the state supreme court had acted as a legislative body, it would have enjoyed absolute immunity from both damages and injunctive relief.[136]

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125. *Id.* at 407-08 (Marshall, J., dissenting). Marshall's main objection, however, did not involve the issue of whether the legislators were regional or local; his objection was that the now-immunized agency members had been appointed rather than elected. *Id.* at 406-07 (Marshall, J., dissenting). Marshall stated that "[t]o cloak these officials with absolute protection where control by the electorate is so attenuated subverts the very system of checks and balances that the doctrine of legislative privilege was designed to secure." *Id.* at 407 (Marshall, J., dissenting).

126. *See supra* notes 113-25 and accompanying text.

127. *See infra* note 132-36 and accompanying text. *See also* Star Distrib. v. Marino, 613 F.2d 4 (2d Cir. 1980) (state legislators immune from injunctive relief against enforcement of subpoenas duces tecum).

128. Bruce v. Riddle, 631 F.2d 272, 279 (4th Cir. 1980) (citing Owen v. City of Independence, 445 U.S. 622 (1980); Scheuer v. Rhodes, 416 U.S. 232 (1974); and Wood v. Strickland, 420 U.S. 308 (1975)). *Bruce*'s exact holding, however, is that "if legislators of any political subdivision of a state function in a legislative capacity, they are absolutely immune from being sued under the provisions of § 1983." *Bruce*, 631 F.2d at 279.

129. Church of Lukumi Babalu Aye v. City of Hialeah, 688 F. Supp. 1522 (S.D. Fla. 1988).

130. Davis v. City of Portsmouth, 579 F. Supp. 1205 (E.D. Va. 1983), *aff'd*, 742 F.2d 1448 (4th Cir. 1984).

131. *Church of Lukumi Babalu Aye*, 688 F. Supp. 1522; *Davis*, 579 F. Supp. 1205.

132. *See infra* notes 133-36 and accompanying text.

133. 446 U.S. 719 (1980).

134. *See id.* at 730-32.

135. *Id.* at 734-37. For a discussion of qualified executive immunity, see *infra* notes 137-59 and accompanying text.

136. *Id.* at 722.

Legislators, therefore, are absolutely immune from damages and injunctive relief. Although the Supreme Court has not yet squarely applied this rule to local legislators, the reasoning of both *Tenney* and *Consumers Union* applies just as cogently to local legislators as to those on the state and federal levels.

2. *Executive Immunity*

Agents of the executive branch[137] are not immune from injunctive relief, and are only qualifiedly immune from damages.[138] While the test for such qualification is an objective one, it can only be fully understood by examining its evolution through earlier cases. In *Scheuer v. Rhodes*,[139] the Supreme Court held that an executive officer is immune from damages only if the officer had a good faith and reasonable belief at the time of the act that the tortious conduct was not unlawful.[140] In *Scheuer*, plaintiffs sued the governor of Ohio, his assistants, and members of the National Guard for alleged tortious conduct in reaction to the civil uprising on the campus of Kent State University.[141] The Court stated that executive officers would have been afforded qualified immunity from damages if there had existed "reasonable grounds for the belief [that the conduct was lawful] formed at the time and in light of all the circumstances, coupled with a good-faith belief [that the conduct was lawful]."[142] According to *Scheuer*, therefore, in order for an executive official to qualify for im-

137. For a discussion of what constitutes an agent of the executive branch for the purposes of immunity, see *infra* notes 187-215 and accompanying text.

138. For a discussion of why executive officials receive less immunity than legislators, see *supra* notes 73-105 and accompanying text.

For a discussion of the executive immunity test, see *infra* notes 187-215 and accompanying text. Judges and prosecutors, while not immune from injunctive relief, are absolutely immune from damages. Pulliam v. Allen, 466 U.S. 522 (1984); *see also* Imbler v. Pachtman, 424 U.S. 409 (1976); Atcherson v. Siebenmann, 605 F.2d 1058 (8th Cir. 1979). In *Pulliam*, the Supreme Court held that judicial immunity did not bar injunctive relief against a state court magistrate who incarcerated defendants for nonjailable misdemeanors. *Pulliam*, 466 U.S. at 522. The Court reasoned that in the circumstances of the case, to grant judicial immunity against injunctive relief "would foreclose relief in situations where, in the opinion of a federal judge, that relief is constitutionally required and necessary to prevent irreparable harm." *Id.* at 539. In *Forrester v. White*, the Supreme Court held that a judge who demoted and discharged a public employee was found to have functioned in an administrative capacity, and was therefore afforded only qualified executive immunity. 484 U.S. 219 (1988). A judge, however, who has acted in a judicial capacity can also be denied judicial immunity if that judge acted "in the clear absence of all jurisdiction." Stump v. Sparkman, 435 U.S. 349, 356-57 (1978) (quoting Bradley v. Fisher, 13 Wall. 335, 351 (1872)).

139. 416 U.S. 232 (1974).

140. *Id.* at 240.

141. *Id.*

142. *Id.* at 247-48.

munity from damages, he must satisfy both a subjective standard (a good faith belief) and an objective standard (reasonable grounds for that belief) that his action was lawful.[143]

In two subsequent decisions,[144] the Court attempted to clarify these standards. The first case, *Wood v. Strickland*,[145] involved several high school students who sued the members of a school board for tortiously expelling them from school.[146] The Court held that "a school board member is not immune . . . if he knew or reasonably should have known that the action he took . . . would violate the constitutional rights of the student affected . . . ."[147] Furthermore, in articulating this standard, the Court required the official to have knowledge of "settled, indisputable law"[148]—a requirement which essentially objectifies the subjective good faith test of *Scheuer*.[149] If an executive official "can establish that the law was unsettled, and that he acted without malice, he will prevail on his claim of qualified immunity."[150]

Subsequent to *Wood*, the Supreme Court further reduced *Scheuer*'s subjective prong in *Harlow v. Fitzgerald*.[151] The Court noted that the application of the subjective good faith test almost always involves complex questions of fact about the executive official's state of mind, thus precluding the possibility of dismissing frivolous suits by summary judgment.[152] The practical reality of the test, therefore, entails inquiries which could be "peculiarly disruptive of effective government."[153] Thus, the Court concluded that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery."[154] In setting

143. *See id.*; *see also infra* notes 144-59 and accompanying text.

144. Harlow v. Fitzgerald, 457 U.S. 800 (1982); Wood v. Strickland, 420 U.S. 308 (1975), *reh'g denied*, 421 U.S. 921 (1975).

145. 420 U.S. 308, *reh'g denied*, 421 U.S. 921 (1975).

146. *Id.* at 313.

147. *Id.* at 322.

148. *Id.* at 329.

149. According to the court in *Forsyth v. Kleindienst*, however, *Wood* merely defines *Scheuer*'s good faith standard. *Forsyth*, 599 F.2d 1203, 1211 n.7 (3d Cir. 1979), *cert. denied*, 453 U.S. 913, *reh'g denied*, 453 U.S. 928 (1981).

150. *Id.* (citing *Wood*, 420 U.S. 308 (1975) and *Scheuer*, 416 U.S. 232 (1974)).

151. 457 U.S. 800 (1982). *Harlow* involved a defense department employee who sued a presidential aide and other executive officials for wrongful discharge. *Id.*

152. *Id.* at 814-15. The Court stated that "dismissal of insubstantial lawsuits without trial—a factor presupposed in the balance of competing interests struck by our prior cases—requires an adjustment of the 'good faith' standard established by our decisions." *Id.* Moreover, the Court argued specifically that "[t]he subjective element of the good-faith defense frequently has proved incompatible with our admonition . . . that insubstantial claims should not proceed to trial." *Id.* at 815-16.

153. *Id.* at 817.

154. *Id.* at 817-18.

forth the revised test, the Court held that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[155] This new objective test was later affirmed by the Supreme Court in *Davis v. Scherer*[156] when the Court stated that qualified immunity "depends upon the 'objective reasonableness of [the official's] conduct as measured by reference to clearly established law.' No other circumstances are relevant to the issue of qualified immunity."[157]

Executive officials, therefore, receive only qualified immunity from damages.[158] Moreover, that qualification requires the official's objectively reasonable belief that his action did not violate clearly established statutory or constitutional standards.[159]

C. The Function Test

The level of immunity which a public official receives depends on the capacity in which that official functioned at the time of the act in question.[160] An official, regardless of his title or office, will receive only the immunity that corresponds to actions which that official undertook.[161]

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155. *Id.* at 818.

156. Davis v. Scherer, 468 U.S. 183, 191 (1984) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)) (holding that plaintiff public employee did not overcome defendant official's qualified immunity by showing that his due process rights were clearly established at the time of the conduct at issue), *reh'g denied*, 468 U.S. 1226 (1984).

157. *Id. See also* Floyd v. Farrell, 765 F.2d 1, 4 (1st Cir. 1985) (police officer's subjective assessment of facts was immaterial to qualified official immunity).

158. *See supra* notes 137-57 and accompanying text.

159. *See supra* notes 151-57 and accompanying text. In contrast to executive immunity, judges and prosecutors enjoy absolute immunity from damage suits regardless of the eggregiousness or maliciousness of the conduct. *See generally*, P. LOW & J. JEFFRIES, *supra* note 109, at 864. For example, even though a justice of the peace convicted a defendant of a non-existent crime, he was immune from damages. Turner v. Raynes, 611 F.2d 92 (5th Cir. 1980); in addition, a judge who ordered the wrong operation for a 15 year-old girl was immune from damages. Stump v. Sparkman, 435 U.S. 349 (1978), *reh'g denied*, 436 U.S. 951 (1978).

160. *See generally*, LOW AND JEFFRIES, *supra* note 109, at 864-74.

161. *Id.* at 864. *See supra* notes 111-36 and accompanying text. *See also supra* notes 96, 118-19, 138 and accompanying text. *See, e.g.*, Atcherson v. Siebenmann, 605 F.2d 1058 (8th Cir. 1979) (judge acting in an administrative capacity enjoys only qualified immunity); Zarcone v. Perry, 572 F.2d 52 (2d Cir. 1978) (prosecutor, normally accorded absolute immunity from damages because intimately involved in judicial process, received only qualified immunity because he acted as an administrator). *See also supra* notes 106-59 and accompanying text.

1. The Legislative Function

The Supreme Court in *Tenney v. Brandhove*[162] articulated the standards for determining a legislative function.[163] The Court found that the defendants—legislators whose committee activities were allegedly unconstitutional—had acted within "the sphere of legitimate legislative activity."[164] The conduct in question had taken place in a committee meeting, the existence and function of which was traditionally legislative.[165] The *Tenney* majority, however, limited its holding by noting that "[t]his Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role."[166]

The Court provided a general rule to determine whether a legislator's activity has extended beyond his legitimate sphere: "it must be obvious that there was a usurpation of functions exclusively vested in the [j]udiciary or the [e]xecutive."[167] If a legislator, however, has acted within the legitimate sphere, "an unworthy purpose does not destroy the privilege."[168]

The Court in *Lake Country Estates*,[169] which applied *Tenney*'s function test to regional officials, held that if a regional official[170] acts within the legitimate legislative sphere, that official is accorded *Tenney*'s absolute legislative immunity.[171] Specifically, the legislative activity in *Lake Country Estates* consisted of adopting allegedly unconstitutional land use ordinances by the individual members of the

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162. 341 U.S. 367, *reh'g denied*, 342 U.S. 843 (1951).

163. *Id.*

164. *Id.* at 376. Pursuant to such a finding, the Court gave the legislators absolute immunity from the relief sought. *Id.* at 379. *See supra* notes 88-105, 111-36 and accompanying text.

165. *Tenney*, 341 U.S. at 376.

166. *Id.* at 377 (citations omitted).

167. *Id.* at 378.

168. *Id.* at 377. The Court also stated that "[o]ne must not expect uncommon courage even in legislators . . . . [T]hat it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned." *Id.* (citations omitted).

169. 440 U.S. 391 (1979).

170. *Id.* The official does not necessarily have to be a legislator, as long as he acted within the legitimate legislative sphere. *See, e.g.*, Healey v. Town of Pembroke Park, 831 F.2d 989, 993 (11th Cir. 1987) (mayor and municipal commissioners absolutely immune from personal liability if they acted in a legislative capacity).

171. Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. at 392. *See* Espanola Way Corp. v. Meyerson, 690 F.2d 827, 829 (11th Cir. 1982) (local legislators absolutely immune from federal damage claims for acting in their legislative capacity), *cert. denied*, 460 U.S. 1039 (1983); *see also* Aitchison v. Raffiani, 708 F.2d 96 (3rd Cir. 1983) (borough council members absolutely immune from damage suits under civil rights statutes for acts done in legislative capacity).

regional agency's governing body.[172] The adoption of ordinances, according to the Court, constituted legitimate legislative activity.[173]

Subsequent to *Lake Country Estates*,[174] lower courts have extended this function test to local legislators in order to grant such legislators absolute immunity when acting in a legislative capacity.[175] In *Bruce v. Riddle*,[176] for example, when county council members voted on allegedly unconstitutional ordinances, such action was held to constitute a legislative function, thus giving the council members absolute legislative immunity. Furthermore, a district court in *Church of Lukumi Babalu Aye v. City of Hialeah*[177] held city council members absolutely immune from damages for enacting allegedly unconstitional ordinances.[178] Similarly, a Virginia district court in *Davis v. City of Portsmouth*[179] decided that participation of the city council members "is within the realm of their legislative function."[180] Most recently, however, the Fourth Circuit in *Front Royal & Warren City v. Front Royal*,[181] decided that local legislators' failure to authorize sewage service did not constitute a legislative function.[182] In so holding, the *Front Royal* court stated that the council members' "decisions had to do with zoning *enforcement* rather than with *rulemaking*."[183]

In attempting to give substance to *Tenney's* function test, lower courts have cited certain factors which do not conclusively prove whether a function is legislative or not. First, the fact "[t]hat an act is called an ordinance or a resolution is not dispositive of its legislative nature."[184] Second, the council members' influence over the citizens, encouraging them to attend the council meeting in which the council enacted ordinances, did not diminish the legislators' absolute immunity.[185] Third, the fact that council members conduct private meet-

172. *Lake Country Estates*, 440 U.S. at 394-95.

173. *Id.* at 394, 405.

174. 440 U.S. 391 (1979).

175. *See also infra* notes 176-86 and accompanying text.

176. 631 F.2d 276 (4th Cir. 1980).

177. 688 F. Supp. 1522 (S.D. Fla. 1988).

178. *Id.* at 1522-25. *See also* Shoultes v. Laidlaw, No. 87-1499 (6th Cir. Sept. 18, 1989) (WESTLAW, Genfed library, CA6 database) (city council members absolutely immune from liability in civil rights action arising out of passage of zoning ordinance).

179. 579 F. Supp. 1205 (1983), *aff'd*, 742 F.2d 1448 (4th Cir. 1984).

180. *Id.* at 1206. The plaintiffs in *Davis* alleged that the council's proposal to redevelop the downtown area of Portsmouth was designed with the intention to racially discriminate against the black residents of the area. *Id.* at 1208.

181. 865 F.2d 77 (4th Cir. 1989), *reh'g denied*, 865 F.2d 77 (4th Cir. 1989).

182. *Id.* at 79.

183. *Id.* (emphasis added).

184. *Church of Lukumi Babalu*, 688 F. Supp. at 1525.

185. *Id.* at 1529.

ings with their constituents in order discuss the proposed legislation does not render the legislators' activity non-legislative.[186]

Public officials, therefore, who are legislators by office or title, will not necessarily receive absolute legislative immunity. The so-called legislator must have functioned in a legitimately legislative capacity in order to receive the immunity from both damages and injunctive relief.

2. *The Executive Function*

The executive function arises from the power to execute and enforce the law—a power which is "distinguished from the power to make the laws and the power to judge them."[187] However, because governmental officials often perform a wide range of functions, they may receive only qualified executive immunity, based on the nature of the particular function at the time of the conduct in question.[188]

When a legislative body has the power to perform more than one governmental function, i.e., both to make law and to enforce law, the members of that body may only receive qualified executive immunity, depending on which function they performed at the time.[189] The dis-

186. Bruce v. Riddle, 631 F.2d 272, 279-80 (4th Cir. 1980). The court explained that "[t]here may well be circumstances involved in private meetings by legislators that would remove them from the umbrella of legislative immunity. Illegal acts such as bribery are obviously not in aid of legislative activity and legislators can claim no immunity for illegal acts." *Id.* at 279. In regard to Greenville's county council, the court stated that the "[c]ounty [c]ouncil members met with constituents who, concededly, for their own interests, were interested in the passage of the ordinance. The [c]ouncil members might well have met with constituents who were conversely opposed to the ordinance." *Id.* at 279-80. As a general rule, however, the court asserted that:

> [m]eeting with 'interest' groups, professional or amateur, regardless of their motivation, is a part and parcel of the modern legislative procedures through which legislators receive information possibly bearing on the legislation they are to consider. The possibility that the legislators may be 'politically' motivated to attend such meetings cannot take away from the legislative character of the process.

Id. *But see infra* notes 201-15 and accompanying text.

187. BLACK'S LAW DICTIONARY 511 (5th ed. 1983). For a discussion of the distinction between the power to make and the power to enforce laws, see Bush v. Orleans Parish School Bd., 188 F. Supp. 916, 922 (E.D. La. 1960), *aff'd mem.*, 365 U.S. 569 (1961), and *see infra* notes 189-215 and accompanying text.

188. *See infra* notes 189-220 and accompanying text. This function test applies to judges and prosecutors as well as to legislators and executive agents. Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutor acting as an investigator received immunity only from damages); Atcherson v. Siebenmann, 605 F.2d 1058 (8th Cir. 1979) (judge acting in an administrative capacity received only qualified immunity).

189. *See infra* notes 190-220 and accompanying text. This principle also applies to judges. In *Supreme Court of Virginia v. Consumers Union*, the state of Virginia gave its highest court the statutory power both to promulgate and enforce the Virgina bar code. 446 U.S. 719, 721-22 (1980), *appeal dismissed*, 451 U.S. 1012 (1981). *See supra* notes

trict court in *Bush v. Orleans Parish School Board*[190] noted that the state legislature had acted in an executive capacity when it passed a statute which set forth penalties for federal judges who attempted to implement the Supreme Court's desegregation decisions.[191] Because the legislature had functioned as an executor of the law, its members were not immune from injunctive relief, and only qualifiedly immune from damages.[192] The court explained its holding through *Tenney*'s standards for legitimate legislative function:

> There is no effort to restrain the Louisiana [l]egislature as a whole, or any individual legislator, in the performance of a *legislative* function. It is only insofar as the lawmakers purport to act as *administrators* of the local schools that they, as well as all others concerned, are sought to be restrained from implementing measures which are alleged to violate the Constitution.[193]

Because the legislature was acting as an enforcement body,[194] the court had the power to enjoin its members: "when the legislature itself seeks to act as executor of its own laws, then, quite obviously, it is no longer legislating and is no more immune from the process than the *administrative* officials it supercedes."[195]

132-36 and accompanying text. When the state court exercised this power by enforcing an allegedly unconstitutional bar code, the members of the court received only qualified executive immunity. *Consumers Union*, 446 U.S. at 734-36. In so holding, the Supreme Court of the United States stated that "because of [the state court's] own inherent and statutory enforcement powers, immunity does not shield the Virginia [c]ourt and its chief justice from suit." *Id.* at 737. Therefore, because Virginia law gave the court powers of enforcement, "the Virginia [c]ourt and its members were proper defendants in a suit for declaratory and injunctive relief, just as other enforcement officers and agencies were." *Id.* at 736.

190. 188 F. Supp. 916 (E.D. La. 1960), *aff'd mem.*, 365 U.S. 569 (1961).

191. *Id.* at 922, 930. Another factor which may explain the *Bush* decision is that *Bush* was decided before any court had held that legislative immunity applies to equitable relief; *see Consumers Union*, 446 U.S. at 731-34; *see also supra* notes 106-59 and accompanying text.

192. *Bush*, 188 F. Supp. at 922, 930.

193. *Id.* at 922 (emphasis in original). For a discussion of adminstrative functions and the official immunities which attach to them, see *infra* notes 216-20 and accompanying text.

194. *Id.* The statute provided that Louisiana would not recognize the Supreme Court's decisions regarding school desegregation, and set forth criminal penalties for federal judges who attempted to implement those decisions. One year later, the court enjoined the same defendants from enforcing another statute which, in an effort to delay school desegregation, sought to replace the New Orleans school board. Bush v. Orleans Parish School Bd., 191 F. Supp. 871 (E.D. La. 1961), *aff'd mem. sub nom.* Denny v. Bush, 367 U.S. 908, *reh'g denied*, 368 U.S. 870 (1961).

195. *Bush*, 188 F. Supp. at 922 (emphasis added). For a discussion of administrative functions and the official immunities which attach to them, see *infra* notes 216-20 and accompanying text.

A more recent case similarly involved a local legislature acting in both a legislative and executive capacity. In *Scott v. Greenville County*,[196] the court held that legislative immunity did not apply to a county council which had the power to both enact and enforce zoning regulations, and which functioned in both of those capacities with regard to the act in question.[197] Specifically, the county council tried to prevent a developer from building public housing projects, by formulating a plan to rezone the area and, at the same time, instructing the county zoning administrator and all zoning officials to halt the processing of any building permits for the area in question.[198] Thus, because the council members acted as executors as well as legislators, the court decided to apply only an executive immunity analysis.[199] In so deciding, the court set forth the rule that "[w]hen local zoning officials do more than adopt prospective, legislative-type rules and take the next step into the area of enforcement, they can claim only the executive qualified immunity appropriate to that activity."[200]

Legislators who act in an administrative capacity[201] also receive only qualified executive immunity.[202] In *Miller v. City of Mission*,[203] the court held that the city council members were personally liable for deprivation of a public employee's right to procedural due process.[204] The court based its decision on the implicit finding that the council had acted as an administrative body[205] in its decision to terminate the plaintiff's employment.[206] In addition to its legal power to hire and fire public employees, the council exercised this power in a non-legislative manner:[207] the council held meetings at private homes regarding employment matters, did not announce their decisions to the

196. 716 F.2d 1409 (4th Cir. 1983).

197. *Id.* at 1423.

198. *Id.* at 1412-13.

199. *Id.* at 1423.

200. *Id.* (footnote omitted). The Fourth Circuit agreed with the South Carolina Supreme Court's analysis of *Scott* when that court "considered the [c]ouncil's actions as functionally in the nature of executive review of a specific building permit application, thus outside the [c]ouncil [m]embers' range of legitimate legislative duties." *Id.* at 1423 (footnote omitted) (citing Scott v. Carter, 273 S.C. 509, 257 S.E.2d 719 (1979)).

201. *See infra* notes 216-20 and accompanying text.

202. *See infra* notes 203-15 and accompanying text.

203. 705 F.2d 368 (10th Cir. 1983).

204. *Id.* at 374-77. (employee sued under 42 U.S.C. § 1983 (1982), making the city liable for any policy which violated the employee's federal rights).

205. For a discussion of administrative functions and the official immunities which attach to them, see *infra* notes 216-20 and accompanying text.

206. *See Miller*, 705 F.2d at 375-76.

207. Their methods were "non-legislative" in the sense that they did not conform with traditional methods of rule-making by representation. *See infra* note 208-09 and accompanying text. *Tenney* established that legitimate legislative activity would conform to

public,[208] and in one of these private meetings, the mayor and the council jointly decided to fire the plaintiff.[209] Thus, the court referred to the council as "the governing body of the city,"[210] and applied the executive immunity test without even mentioning the possibility of legislative immunity.[211] In applying the executive immunity test,[212] the court found that, because the individual members could not have reasonably believed their actions did not violate clearly established constitutional standards,[213] they were personally liable for their actions taken in their official capacities—actions taken as administrators[214] rather than legislators.[215]

3. *The Administrative Function*

An administrative agency performs both legislative and executive functions, i.e., it both makes and enforces rules.[216] Because the agency performs both functions, its legitimizing feature is its dependence on the legislative branch, which creates the agency, and the executive branch, which reviews the agency's policies and deci-

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traditional methods of rule-making. *See* Tenney v. Brandhove, 341 U.S. 367, 376, *reh'g denied*, 342 U.S. 843 (1951). *See also supra* notes 162-86 and accompanying text.

208. *Miller*, 705 F.2d at 371. *But see* Bruce v. Riddle, 631 F.2d 272, 279-80 (4th Cir. 1980) (fact that council members held private meetings with constituents did not diminish the legislative nature of their function when they voted for zoning ordinances) and *supra* note 128 and accompanying text.

209. The trial record revealed that "[t]he mayor polled the council at one of these meetings to determine whether he still had their backing to fire [plaintiff] Chief Pike." *Miller*, 705 F.2d at 371.

210. *Id.* at 376.

211. *See id.* at 375-76.

212. *See supra* notes 137-59 and accompanying text.

213. *See Miller*, 705 F.2d at 375-76.

214. For a discussion of administrative functions and the official immunities which attach to them, see *infra* notes 216-20 and accompanying text.

215. Although *Miller* does not distinguish between legislative and administrative actions, the court's immunity analysis is based on the premise that the council acted as an administrative body rather than as a legislature. If the council had acted as a legislature, the court would have been required to apply an absolute immunity analysis; instead, the court applied only the qualified immunity analysis of *Harlow*. *See supra* notes 151-57 and accompanying text. In *Miller*, the court specifically held that local legislators who failed to authorize sewage service for plaintiff landowners acted in a non-legislative capacity, and were therefore denied absolute legislative immunity. 705 F.2d at 374-76. *See also* Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 865 F.2d 77 (4th Cir. 1989). Although the court recognized "that local legislators enjoy absolute immunity from suit for decisions in their capacity as legislators," the court pointed out that "officials [who] 'do more than adopt prospective, legislative-type rules . . . can claim only the executive qualified immunity appropriate to that activity . . . .'" *Front Royal*, 865 F.2d at 79 (citations omitted).

216. *See* J. FREEDMAN, CRISIS AND LEGITIMACY 10-15 (1975); *see also* R. PIERCE, ADMINISTRATIVE LAW AND PROCESS 7-8 (1985).

sions.[217] Thus, although an administrative agency includes both legislative and executive functions, it does not contravene separation of powers because the agency's power is checked and balanced by the other branches of government.

Because administrative agencies perform both legislative and executive functions, the immunity which an administrative official receives will depend even more on the particular function performed at the time in question. Officials who are legislators by title, but who function as administrators, receive only qualified executive immunity. For example, when state legislators function as public school administrators,[218] or when city council members function as civil service administrators,[219] such officials receive only qualified executive immunity.[220]

IV. Separation of Powers As a Yardstick for Official Immunity—Discerning Official Functions

The doctrine of official immunity shields certain public officials from the power of the judiciary, depending on the particular function in which the official acted at the time in question.[221] This function test, however, is a conclusory one—an official "function" is never defined by a discrete class of particular actions, but rather, is determined by merely stating the conclusion that a certain action occurred while performing a certain official function.[222] In fact, the Supreme Court has explicitly admitted this by stating that "[t]his Court has never undertaken to articulate a precise and general definition of the class of acts entitled to immunity."[223] Because the function test is a conclusory one, the principle of separation of powers should serve as a yardstick to help a court determine the precise function in which the official acted. As a result, the function test will encompass not only the official's isolated act at the time in question, but also the relation-

217. *See* R. PIERCE, ADMINISTRATIVE LAW AND PROCESS 7-8 (1985).

218. Bush v. Orleans Parish School Bd., 188 F. Supp. 916 (E.D. La. 1960), *aff'd mem.*, 365 U.S. 569 (1961). *See supra* note 195 and accompanying text.

219. Miller v. City of Mission, 705 F.2d 368 (10th Cir. 1983). *See supra* notes 201-15 and accompanying text.

220. *Bush*, 188 F. Supp. at 922; *see also supra* notes 189-95 and accompanying text. *Miller*, 705 F.2d 371-75; *see also supra* notes 201-15 and accompanying text.

Another example of the importance of function was illustrated in Jayvee Brand, Inc. v. United States, 721 F.2d 385, 395 (D.C. Cir. 1983). The court stated that "as a general rule, regulations are an exercise of quasi-legislative administrative authority." *Id.* Thus, officials who are administrators by title, but who exercise "quasi-legislative regulatory authority," receive absolute legislative immunity. *Id.*

221. *See supra* notes 187-220 and accompanying text.

222. *Id.*

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

ship between that act and the power structure from which it arose. Such a use of separation of powers, however, should not be construed as imposing the federal scheme on the governments of states and municipalities.[224] Rather, the federal design of separation of powers should merely serve as a yardstick by which a court can determine the function in which a particular official acted.

Although no court has explicitly applied separation of powers to an official immunity analysis, the *Tenney* Court implicitly used the separation of powers principle in determining absolute legislative immunity.[225] When seeking to determine whether the state legislators had acted in a "legitimate" legislative role and thus should receive absolute legislative immunity, the Court engaged in a discussion which "sounded suspiciously like separation of powers . . . ."[226] The Court ultimately held that absolute legislative immunity barred judicial scrutiny of a state legislator's activity.[227] In applying the function test,[228] the Court concluded that the legislators had acted in a tradi-

224. *See generally*, O'Neil, *The Separation of Powers*, 37 EMORY L.J. 539 (1988) [hereinafter O'Neil]. O'Neil states that although particular governmental structures vary from state to state, "all [50] states do respect the principle of separation of powers in their own constitutions. . . . All have distinct legislative, executive, and judicial branches." *Id.* This phenomenon can be attributed in part to the fact that a state's admissibility to the Union might have been jeopardized if the state had "offered a radically different structure." *Id.*

At the turn of the century, the Supreme Court in *Dreyer v. Illinois* provided the basis for the relationship between separation of powers and federalism. 187 U.S. 71 (1902). The Court held that a state statute which gave members of the state's executive branch essentially judicial functions did not violate the principle of separation of powers. *Id.* at 71. In so holding, the *Dreyer* Court articulated the relationship between federal separation of powers and the states:

> [w]hether the legislative, executive and judicial powers of a [s]tate shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the [s]tate. And its determination one way or the other cannot be an element in the inquiry whether the due process of law prescribed by the [f]ourteenth [a]mendment has been respected by the [s]tate or its representatives when dealing with matters involving life or liberty.

Id. at 83-84. *Dreyer* and its progeny have firmly established the principle that federal rules regarding separation of powers do not necessarily apply to the states. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957) ("this Court has held that the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments"), *reh'g denied*, 355 U.S. 852 (1957); Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 615 n.13 (1974) ("Constitution does not impose on the [s]tates any particular plan for the distribution of governmental powers"), *noted in* O'Neil, *supra*, at 551.

225. *See* Tenney v. Brandhove, 341 U.S. 367, *reh'g denied*, 343 U.S. 843 (1951).

226. *See* O'Neil, *supra* note 224, at 544-45.

227. *Id.*

228. *See supra* notes 160-61 and accompanying text.

tionally legislative capacity.[229] Thus, in deciding what constituted a "legitimate" legislative capacity, the Court looked to "traditional" powers of legislators in general.[230] The Court also stated that in order to find that the legislators acted in a non-legislative capacity, "it must be obvious that there was a usurpation of functions exclusively vested in the [j]udiciary or the [e]xecutive."[231]

This discussion in *Tenney* posits the actual conduct of state officials against an extrinsic standard of an official's proper role.[232] One commentator has proposed that the *Tenney* analysis suggests that "in unusual circumstances, federal courts might impose upon the states—albeit for a limited purpose—some extrinsic concept of the proper role of a legislative body."[233] Moreover, if the *Tenney* Court had not viewed separation of powers as relevant to making such a determination, "the only logical disposition of the *Tenney* case would have been a dismissal on principle rather than the careful analysis actually undertaken" by the Court to ensure that the California legislature acted within its province.[234]

Although federal courts are usually unwilling to impose the federal standards for separation of powers on states and their political subdivisions,[235] *Tenney* illustrates how federal separation of powers is used as a guide for discerning legitimate legislative function:

> [s]omehow the Court was willing to consider—albeit for the narrow purpose of measuring a claim of legislative privilege in a federal civil rights suit—the degree to which a lawmaking body could be said to have strayed beyond its proper role.[236]

In addition to *Tenney*, one district court has come even closer to implementing the separation of powers principle into the official immunity analysis. The court in *Healey v. Bendick*[237] dismissed a suit seeking injunctive relief brought against the Rhode Island Marine Fisheries Council (MFC) and its members.[238]

In applying the official immunity analysis, the *Healey* court implic-

229. *Tenney*, 341 U.S. at 376; *see also supra* notes 162-86 and accompanying text.
230. Tenney v. Brandhove, 341 U.S. 367, 376, *reh'g denied*, 343 U.S. 842 (1951).
231. *Id.* at 378.
232. *See* O'Neil, *supra* note 224, at 545.
233. *Id.*
234. *Id.*
235. *See supra* note 224 and accompanying text.
236. O'Neil, *supra* note 224, at 551. O'Neil also asserts that nowhere else in the area of applying separation of powers to the states "has there ever been such serious consideration of the possible application to the states of federal principles of separation of powers." *Id. See also supra* note 224 and accompanying text.
237. 628 F. Supp. 681 (D.R.I. 1986).
238. *Id.*

itly invoked a separation of powers principle when determining the function in which the officials acted. Thus, the court stated that "[w]hat is dispositive . . . is whether there are effective checks on unconstitutional conduct, whatever particular form those safeguards might take."[239] Furthermore, the court explicitly linked the function test to the separation of powers: "[o]ne must employ a functional analysis, outlining the traditional duties attributable to the three distinct branches of government and aligning the party claiming the privilege to the appropriate branch."[240] In reference to the actions of the administrative agency in *Healey*, the court found that although "the sweep of the MFC's rulemaking jurisdiction is great, it is not linked to any enforcement powers or other executive responsibilities."[241] The court concluded that the MFC did not act as an executive body, and outlined the activities which are "commonly associated with the executive branch . . . . [the MFC] has no mechanism under its control for the enforcement of its pronouncements; it has no right to enter contracts; it has no ability to raise revenues for its own operation . . . ."[242]

Furthermore, even after concluding that the MFC should receive absolute legislative immunity, the *Healey* court added that "there is nothing in the calculus of checks and balances which forestalls this result."[243] The court went on to list the ways in which the powers of the MFC are checked by the structure of the Rhode Island government.[244] The court's additional attention not only to the particular acts of the MFC members, but to where their acts and powers fit into the stucture of the local government,[245] can only serve to emphasize the importance of the separation of powers principle in an official immunity analysis.

When applied to a local government of mixed powers, this separation of powers yardstick will create a rebuttable presumption against the particular official—a presumption that the official acted in an exective capacity, thus affording him only qualified executive immunity.[246] This presumption, however, should be rebuttable by the official's showing that the act in question was clearly legislative, i.e., that no reasonable person would disagree as to the act's legislative

239. *Healey*, 628 F. Supp. at 697.
240. *Id.*
241. *Id.*
242. Healey v. Bendick, 628 F. Supp. 681, 697-98 (D.R.I. 1986).
243. *Id.* at 698.
244. *Id.*
245. *Id.* at 697-98.
246. *See supra* notes 189-215 and accompanying text.

nature.[247] As only a yardstick, therefore, separation of powers will not supercede the traditional function test,[248] but rather, will give the test substance as to what precise actions a particular function entails.

V. Official Immunity Applied to *Yonkers* Using the Separation of Powers Yardstick

The members of the Yonkers city council should not have received absolute legislative immunity because they did not act in a legitimate legislative capacity.[249] This failure of the council members to act in such a capacity was caused by the unusual power structure of the Yonkers government.[250] Specifically, because the legislative and the executive branches are systemically intertwined, the council both created and executed the law.[251] This mixture of powers creates a presumption that the council members functioned in an executive, rather then legislative capacity. Moreover, the council members could not rebut this presumption because their actions were not "clearly legislative."

A. Structure of the Yonkers Government

The political structure of Yonkers consists of a ward system in which twelve council members are elected from twelve districts in twelve separate elections.[252] The mayor, who is also a member of the council, has no veto power.[253] In addition, the city manager, who is the chief executive and administrative officer, is appointed for an indefinite term by the city council, and may be removed by the council in its "absolute discretion."[254]

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247. *See supra* notes 162-86 and accompanying text.

248. *See supra* notes 160-61 and accompanying text.

249. *See supra* notes 162-86 and accompanying text.

250. *See infra* notes 252-70 and accompanying text.

251. *Id.*

252. United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1294-95 (S.D.N.Y. 1985), *aff'd*, 856 F.2d 444, 458 (2d Cir. 1988) (upholding contempt order).

253. CITY OF YONKERS, N.Y., CHARTER art. 3, § C3-7, at 12039-40 (1984). *See also Yonkers*, 624 F. Supp. at 1294-95; 856 F.2d at 458.

254. CITY OF YONKERS, N.Y., CHARTER art. 4, § C4-1 - C4-4, at 12043-45 (1985). *See also Yonkers*, 624 F. Supp. at 1295; 856 F.2d at 458.

In contrast, the governmental structure of New York City consists of a clear separation between the legislative and executive branches. CITY OF NEW YORK, N.Y. CHARTER AND ADMIN. CODE §§ 3–32 (1986). The mayor of New York is the chief executive officer of the city, while the council is vested with the legislative power. CITY OF NEW YORK, N.Y. CHARTER AND ADMIN. CODE §§ 3, 21. Unlike Yonkers, the mayor of New York is not a member of the council. The Board of Estimate, however, is an administrative board on which sit the mayor, the comptroller, the president of the council, and the presidents of the boroughs. CITY OF NEW YORK, N.Y. CHARTER AND ADMIN. CODE at

Since the 1950s,[255] the political power in Yonkers has been concentrated in its city council.[256] The city charter essentially gives the council full power over all of Yonker's government officials:

> the [c]ity [c]ouncil shall have and possess all the powers of and shall either perform or supervise and provide for the performance of all the duties heretofore or herein imposed upon the [c]ity [c]ouncil, the various city deparments, city boards and commissions, the heads of city departments and all other officers of the city whether elective or appointive.[257]

With regard to the housing issues of the *Yonkers* case,[258] even the urban development agencies are politically controlled by the legislative branch.[259] The members of the city's planning board are appointed by the mayor (who is a council member-at-large), and the members of the city's housing board are appointed by the city manager (who is appointed by the city council).[260] Thus, although both of these administrative agencies are controlled primarily by the Yonkers executive branch, that executive branch is ultimately controlled by the city council.

The council also controls Yonker's board of education—the administrative body[261] in the *Yonkers* case which was found guilty of intentional racial segregation.[262] The mayor appoints the board members, and the council has full control over the board's budget.[263] The city officials and the board are so closely connected that "[t]he people of Yonkers in actual fact have two boards of education operating their schools. The city council and manager constitute one board and the legally designated board of education [constitutes] the other."[264]

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§ 61. Although the Supreme Court recently struck down New York City's charter as unconstitutional, the reasons for that charter's unconstitutionality are beyond the scope of this Note. *See* Board of Estimate v. Morris, 109 S. Ct. 1433 (1989).

255. *See* United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987) (upholding determination of liability).

256. *See id.*; *see also infra* notes 257-68.

257. CITY OF YONKERS, N.Y., CHARTER art. 3, § C3-2, at 12037-38 (1984).

258. *See supra* notes 24-69 and accompanying text.

259. *Yonkers*, 624 F. Supp. at 1294-5.

260. *Id.* Furthermore, the MHA's housing proposals must be approved by a majority of both the planning board and the council; if the planning board rejects the proposal, then approval by three-quarters of the city council is required. *Id.*

261. A board of education is usually regarded as an administrative body. *See* Bush v. Orleans School Bd., 188 F. Supp. 916, 922 (E.D. La. 1960), *aff'd mem.*, 365 U.S. 569 (1961); *see also supra* notes 189-95 and accompanying text.

262. *Yonkers*, 624 F. Supp. at 1377, 1500.

263. *Id.* at 1377.

264. *Id.* at 1500 (citing a 1957 New York State Education Department study of the Yonkers public schools).

In addition to the particular governmental structure of Yonkers, a ward system gener-

The district court, the Court of Appeals, and the Supreme Court took special notice of Yonkers' unusual concentration of political power.[265] In response to the city's defense of impossibility—that as a corporate entity, the city was powerless to compel the council members to act—the Court of Appeals noted that such a defense rests upon "a scheme of separated powers that does not obtain in Yonkers. . . . For purposes of taking official governmental action, the [c]ity of Yonkers is the [c]ity [c]ouncil and vice versa."[266] The court went on to describe the details of this concentration of power:

> [t]he [c]ouncil sets municipal policy . . . it appoints and can replace the city manager, and it is the principal agency of governance for the [c]ity. . . . There is not even a separately elected executive authority.[267]

Furthermore, in affirming the Court of Appeals' decision, the Supreme Court cited this very passage by stating that "the [c]ity has no separate executive authority in that its mayor merely serves on the [c]ouncil, and that the [c]ity manager serves at the pleasure of the [c]ouncil."[268]

The unusual structure of the Yonkers government, therefore, blurs the traditional separation between the executive and the legislative branches.[269] The mayor, an executive official, is a member of the council, the city's legislative body, and has no veto power. The city manager, the highest executive official, is appointed by that same legislative body. The executive and the legislative branches, therefore, are systemically intertwined.[270]

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ally increases the effectiveness of community opposition to legislative proposals. 624 F. Supp. at 1369. *See* Gatreaux v. Chicago Housing Auth., 296 F. Supp. 907, 911-13 (N.D. Ill. 1969). The individual council members tend to defer to their constituents, and the council as a whole defers to the individual council members. *Yonkers*, 624 F. Supp. at 1369. The ward system, however, hinders adequate representation of some groups of citizens if those groups make up a majority of the entire Yonkers population, [but] reside in a minority of the total number of wards. *See Yonkers*, 624 F. Supp. at 1369-71 (noting that Yonkers political structure makes community opposition unusually effective). Although the representative nature of a ward system is not directly relevent to the separation of powers issue, it pertains to the concern of the *Healey* court, namely, "whether there are effective checks on unconstitutional conduct, whatever particular form those safeguards might take." Healey v. Bendick, 628 F. Supp. 681, 697 (D.R.I. 1986).

265. *Yonkers*, 624 F. Supp. at 1369, 1371; 856 F.2d at 458; Spallone v. United States, 57 U.S.L.W. 3184-85 (U.S. Sept. 1, 1988) (pending orders Nos. A-172 – A-175).

266. *Yonkers*, 856 F.2d at 458.

267. *Id.*

268. *Spallone*, 57 U.S.L.W. at 3184 (Marshall, J., concurring in part, dissenting in part).

269. *See supra* notes 252-68 and accompanying text.

270. *Id.*

B. Denial of Legislative Immunity

Given this concentration of power in the Yonkers City Council, the members would not have received legislative immunity for the failure to enact the proposed housing legislation because they did not function solely as legislators.[271] Because the structure of the Yonkers government allowed the council to exercise both legislative and executive powers,[272] this structure creates a presumption that the council members functioned in an executive capacity when they acted in regard to the low income housing.[273] This presumption could have been rebutted if the council members had shown that their actions were clearly legislative—that no reasonable person would disagree as to the act's legislative nature.[274] The council members' actions, however, were not clearly legislative.[275]

Generally, this concentration of power rendered the decisions made by the council regarding land use and housing more characteristic of an administrative agency[276] than that of a legislative body.[277] More specifically, the council members' votes were not those of traditional legislators, but rather were those of executive officials because they were circumscribed by their promises embodied in the consent decree[278]—a contract with the court[279] which is traditionally entered into only by executive officials.[280]

C. Grant of Qualified Executive Immunity

Because the city council did not function as a legitimate legislative body,[281] its members would have received only qualified executive immunity.[282] Such qualified immunity dictates that the council, and the members through which it acts, would not have been immune from the injunctive relief imposed against it.[283]

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271. *See supra* notes 162-86 and accompanying text.
272. *See supra* notes 252-70 and accompanying text.
273. *See supra* notes 221-48 and accompanying text.
274. *Id.*
275. *See supra* notes 162-86 and accompanying text.
276. *See supra* notes 187-220 and accompanying text.
277. The judicial orders and consent decree entailed provisions which were normally decided by the housing agency (MHA) and the city planning board. *See* No. 80 Civ. 6761 (S.D.N.Y. 1986) (Housing Remedy Order); No. 80 Civ. 6761 (S.D.N.Y. 1987) (Long Term Housing Plan); No. 80 Civ. 6761 (S.D.N.Y. 1988) (Long Term Plan Order); No. 80 Civ. 6761 (S.D.N.Y. 1988) (Remedial Consent Decree).
278. *See supra* notes 45-61 and accompanying text.
279. *Id.*
280. *See supra* notes 237-45 and accompanying text.
281. *See supra* notes 160-86 and accompanying text.
282. *See supra* notes 137-59, 187-215 and accompanying text.
283. *Id.*

Furthermore, the individual council members would have been only qualifiedly immune from the civil contempt damages[284]—immune only if their actions were performed without reasonable knowledge of "settled indisputable law."[285] The council members had already acknowledged their obligation to build low-income housing,[286] and agreed to terms which would satisfy that obligation.[287] Thus, when the council members' intentionally thwarted the court order to comply with their own consent decree, they undoubtedly violated clearly established law[288] of which they were well aware. According to the official immunity analysis, therefore, the council members should be liable for their recalcitrance in the form of injunctive relief and damages for civil contempt.[289]

D. Beyond *Yonkers*: Ordering Legitimate Local Legislators How to Vote

The issue which the *Yonkers* case leaves open is whether a federal court has the power to order a local legislator, acting in a proper legislative capacity, to vote for a particular piece of proposed legislation.[290] Although no authority exists which directly answers this question, the long line of school desegregation cases can provide guidance in addressing the issue.[291]

1. Power of a Federal Court Over Local Executive Officials

While a federal court's power over local legislators remains an open

284. The council members would also have been liable for damages requested by private plaintiffs who were injured by the council members' recalcitrance after the entry of the consent decree. *See supra* notes 137-59 and accompanying text.

285. *See supra* notes 151-59 and accompanying text.

286. No. 80 Civ. 6761 (S.D.N.Y. Jan. 1, 1988) (remedial consent decree).

287. *Id.* Although the council acknowledged its commitment to build low income housing and agreed not to seek appellate review of the *Yonkers* case (or any subsequently entered decree), the council did not explicitly waive its official immunity for acts prior to the consent decree. *Id.* Furthermore, it is not clear that public officials can waive their immunities through a consent decree. *See supra* notes 45-61 and accompanying text.

288. Harlow v. Fitzgerald, 457 U.S. 800, 818-19 (1982). *See supra* notes 137-59 and accompanying text.

289. *See supra* notes 137-59 and accompanying text.

290. *See supra* notes 1-23 and accompanying text.

291. Furthermore, the *Yonkers* case itself was brought as a school desegregation case. *See* United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 444 (2d Cir. 1987) (upholding determination of liability). *Yonkers*, however, differed from other school desegregation cases in that the city and its officials were implicated through their control of the school board and its public housing policies. *Id.* at 1526. According to Judge Sand, "[n]o case has ever previously been brought in which a court was asked to determine the liability of state actors for both housing and school desegregation." *Id.*

issue, a federal court does have the power to order local executive officials to perform certain actions to ensure that federal law is in fact executed. Since the function of an executive is to execute and enforce whatever law exists, lack of enforcement through an executive's inaction may legitimately be remedied through vast prospective orders from the judiciary.[292] Thus, the First Circuit in *Colon Berrios v. Hernandez Agosto*[293] stated that "it would seem that the undeniable power of the court to enjoin the *enforcement* of acts passed by the legislature would normally suffice to protect these interests."[294]

In *Swann v. Charlotte-Mecklenburg Board of Education*,[295] the Supreme Court affirmed a district court's power to order a local school board to implement racial desegregation in the public schools.[296] Specifically, the Court allowed the district court to order the board to implement assignment of teachers, racial quotas, alteration of attendance zones, and interdistrict busing.[297] Facing the constitutional violations of the public school boards, the Court stated that "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[298] Thus, *Swann* established a district court's broad remedial powers.

Subsequently, the Supreme Court in *Milliken v. Bradley*[299] further extended the federal courts' remedial power over executive branch officials.[300] In *Milliken*, the Court upheld a district court's power to order the Detroit school board to provide special educational programs in an effort to implement school desegregation.[301] The Court noted that the district court did not abuse its broad remedial powers: "[t]he established role of local school authorities was maintained invi-

292. *See infra* notes 293-322 and accompanying text.

293. 716 F.2d 85 (1st Cir. 1983).

294. *Id.* at 91 (emphasis added) (holding that Senate activities were protected by common law legislative immunity).

295. 402 U.S. 1, *reh'g denied*, 403 U.S. 912 (1971).

296. *Id.*

297. *Id.*

298. *Id.* at 15. *See also*, North Carolina State Bd. of Educ. v. Swann, 402 U.S. 43, 46 (1971) (in the event of a constitutional violation, "all reasonable methods . . . [are] available to formulate an effective remedy"); Davis v. School Comm'rs of Mobile County, 402 U.S. 33, 37 (1971) (federal court may use equitable power in order "to achieve the greatest possible degree of . . . [relief], taking into account the practicalities of the situation"). For a more recent case, see Liddell v. Board of Educ. of St. Louis, Mo., 718 F. Supp. 1434 (E.D. Mo. 1989) (ordering board of education to cooperate with state to develop comprehensive reassignment and consolidation plan).

299. 433 U.S. 267 (1977).

300. *Id.*

301. *Id.*

olate . . . . [t]he order does not punish anyone, nor does it impair or jeopardize the educational system in Detroit."[302]

In *Griffin v. County School Board of Prince Edward County*,[303] the Supreme Court upheld a district court's power to require local supervisors to levy taxes in order to fund the reopening and operation of desegregated public schools.[304] Although the Court upheld the district court's power to so order the supervisors because it was necessary to prevent further racial discrimination,[305] the power to levy and collect taxes is normally an executive function, which essentially consists of enforcing the tax allocation enacted by the legislature.[306]

The early desegregation cases establish that a federal court has vast remedial power over executive officials in order to ensure that federal rights are adequately and fully enforced. Moreover, the later desegregation cases show that a federal court has that same remedial power over any governmental official who performs executive-like functions.

2. *Power of a Federal Court Over Local Legislators*

Although a federal court has the power to order executive officials to act or not act in a prescribed manner, a federal court does not have that power over legislators who act in a purely legislative capacity. The district court in *United States v. Board of School Commissioners of Indianapolis*[307] explicitly limited the reach of its broad remedial power.[308] In setting forth the guidelines for school desegregation, the court explicitly stated that a court "cannot issue a positive order to the [g]eneral [a]ssembly to enact specific legislation."[309] Although the court did not supply any reason for this statement, it probably viewed

302. *Id.* at 288 (footnote omitted).

303. 377 U.S. 218 (1964).

304. *Id.* Recently, the Supreme Court granted certiorari to a similar case involving taxation as a remedy to racial segregation in public schools. *See* Missouri v. Jenkins, 57 U.S.L.W. 3704 (U.S. April 24, 1989) (No. 88-1150); *see also supra* note 14 and accompanying text.

305. 377 U.S. at 233. *See also* Arthur v. Nyquist, 712 F.2d 809 (2d Cir. 1983) (affirming district court's power to order mayor and common council to appropriate funds for school desegregation), *cert. denied*, 466 U.S. 936 (1984).

306. To levy is "[t]o assess; raise; *execute*; exact; tax; collect; gather; take up; seize. Thus, to levy (assess, exact, raise, or collect) a tax . . . ." BLACK'S LAW DICTIONARY 816 (5th ed. 1979) (emphasis added); *see also supra* notes 237-45 and accompanying text. If the legislature had both enacted and enforced the taxes, the court would have been faced with the same dilemma as in the *Yonkers* case. For a discussion of that dilemma, see *infra* notes 307-22 and accompanying text.

307. 368 F. Supp. 1191, *aff'd mem.*, 483 F.2d 1406 (7th Cir. 1973), *cert. denied*, 421 U.S. 929 (1975).

308. *Id.* at 1227.

309. *Id.*

such interference as being overly intrusive into the actions of public officials, namely legislators, whose actions are usually never questioned because of legislative immunity.[310] Furthermore, the court may also have thought that its power over the state's executive officials would suffice to vindicate the plaintiffs' constitutional rights.[311]

In *Arthur v. Nyquist*,[312] however, the Court of Appeals for the Second Circuit upheld a district court's decision ordering Buffalo's city council to appropriate funds necessary for racial desegregation in the city's public schools.[313] The court noted that "the [b]oard of [e]ducation is wholly dependent on the [m]ayor and the [c]ommon [c]ouncil of Buffalo for its basic appropriation. . . . It has no taxing authority of its own."[314] Although the court upheld the order, it emphasized that the district court was in the "unenviable position" of balancing the "obligation to determine the remedies necessary to eliminate a constitutional violation" and the "inadvisability of intruding excessively into the details of the administration of the Buffalo public school system."[315]

In upholding the order, the *Arthur* court stated that the power of the district court to order the legislature to appropriate the funds was not at issue.[316] In support of this contention, the court cited *Milliken*[317] for the proposition that "a district court may require the *expenditure* of funds to implement a desegregation remedy."[318] There is a difference, however, between appropriating funds and expending funds—a difference which corresponds to the distinction between legislative and executive functions; appropriating or allocating funds is usually a legislative function, whereas expending funds is an executive one.[319] Although *Milliken* allows a federal court to order the performance of an executive function, it does not follow that a federal court can order the performance of a legislative function. Thus, although the *Arthur* court did not regard as an issue the district court's power to order the council to appropriate funds, the court in

310. *See supra* notes 88-105 and accompanying text.

311. *See supra* note 92 and accompanying text.

312. 712 F.2d 809 (2d Cir. 1983) (affirming Arthur v. Nyquist, 547 F. Supp. 468 (W.D.N.Y. 1982)), *cert. denied*, 466 U.S. 936 (1984).

313. *Id.* at 811-12.

314. *Id.* at 811.

315. *Id.* at 812.

316. *See id.* at 813.

317. 433 U.S. 267 (1977). *See also supra* notes 290-306 and accompanying text.

318. *Arthur*, 712 F.2d at 813.

319. *See supra* notes 237-45 and accompanying text.

Board of School Commissioners of Indianapolis[320] explicitly limited the reach of its broad remedial power[321] by stating that the court "cannot issue a positive order to the [g]eneral [a]ssembly to enact specific legislation."[322]

VI. Conclusion

The doctrine of official immunity shields certain public officials from the power of the judiciary depending on the particular function in which the official acted at the time in question. This function test, however, is a conclusory one—an official "function" is never defined through a discrete class of particular actions, but rather, is determined by merely stating the conclusion that a certain action occurred while performing a certain official function. Because the function test is conclusory, the principle of separation of powers should serve as a yardstick to help a court determine the precise function in which the official acted. As a result, the function test will encompass not only the official's isolated act at the time in question, but also the relationship between that act and the power structure from which it arose.

The separation of powers yardstick, however, will be necessary only in close cases where the function of the official is unclear. Where an official act arose from a mixture of powers, that lack of separation of powers should create a rebuttable presumption against the official—a presumption that the official acted in an executive capacity and will therefore receive only qualified executive immunity. Such a presumption, however, can be rebutted by the official if the specific act in question was clearly legislative. Thus, as a yardstick, the separation of powers principle will not supercede the traditional function test, but rather will give it substance in determining what a legitimate legislative action entails. Furthermore, this use of separation of powers as a yardstick will not force local goverments to adopt the federal scheme of government, but will only create a stricter standard for those local officials who seek to hide behind the veil of official immunity.

By using the separation of powers principle in a close case like *Yonkers*, the council members who wield both legislative and executive powers should be presumed to have acted in an executive, rather than a legislative function. Because entering a consent decree and regulating land use are functions more characteristic of executive officials than of legislators, the council members would have failed to rebut

320. 368 F. Supp. 1191, *aff'd mem.*, 483 F.2d 1406 (7th Cir. 1973), *cert. denied*, 421 U.S. 929 (1975).

321. *Id.* at 1227.

322. *Id.*

this presumption. In a case beyond *Yonkers*, however, where there exists a well-defined separation of powers and where a legislator acts in a clearly legislative capacity, a federal court will not have the power to tell that legislator to vote in a particular way because of the threshhold barrier of legislative immunity. If there does exist a clear separation of powers, courts will be able to adequately vindicate federal rights through the executors of the law, rather than its creators.

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