Mercer Law Review

Volume 43
Number 4 *Annual Eleventh Circuit Survey*

Article 6

7-1992

Constitutional Law—Civil

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Constitutional Law—Civil

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During the 1991 survey period, the United States Court of Appeals for the Eleventh Circuit continued to struggle with the application of the qualified immunity defense in civil rights actions. Although the court failed to resolve the intracircuit conflict on this issue, the court's opinions did solidify its various approaches to application of the doctrine.

On substantive issues, the court was asked to clarify the constitutionality of governmental action on the controversial issue of AIDS, in both the public employment and custodial contexts. In four cases involving minority set aside and affirmative action programs, the court reinforced standing requirements to assert challenges of reverse discrimination. The court also issued significant decisions concerning governmental regulation of employee speech on matters of public concern.

I. Procedural Issues

A. *Immunity*

Qualified Immunity. During 1991, the Eleventh Circuit failed to harmonize conflicting panel decisions concerning the defense of qualified immunity to civil rights actions brought pursuant to 42 U.S.C. § 1983 ("section 1983").[1] While intracircuit conflicts remain unsettled, the court's opinions during 1991 did indicate that the appropriateness of qualified

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1. 42 U.S.C. § 1983 (1988) provides, in relevant part:

immunity is dependent upon the degree of particularity with which the constitutional right alleged to be violated is required to be enunciated, as well as the analysis particular to the specific constitutional right.

A government official has immunity from an action for civil damages unless the plaintiff can establish that the official "*knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff]."[2] In *Anderson v. Creighton*,[3] the Supreme Court determined that the constitutional right alleged to be violated must be sufficiently established to inform the official that his conduct violated the law, when viewed in light of the information available to a reasonable official.[4] The Court in *Anderson* warned that the viability of an "objective reasonableness" standard in preserving immunity depended on the "level of generality at which the relevant 'legal rule' is to be identified."[5]

Eleventh Circuit decisions applying the *Anderson* "bright line test" have held that the plaintiff must show that it was clearly established law that the defendant's *specific* conduct amounted to a violation of clearly established law.[6] However, other panel decisions have required only that the general constitutional right that was allegedly violated be clearly established, without regard to whether the specific alleged conduct has been held in prior cases to violate that constitutional right.[7] In still other cases, in which the constitutional analysis requires the balancing of interests, the court has found immunity appropriate unless the "inevitable conclusion" of the balancing of interests is that the conduct was unconstitu-

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

Id.

2. Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982) (brackets in original) (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)).

3. 483 U.S. 635 (1987).

4. *Id.* at 641.

5. *Id.* at 639. Justice Scalia, writing for the majority, cautioned that strict application of the "clearly established law" requirement was necessary to prevent the erosion of immunity into a mere "rule of pleading." *Id.*

6. *See* Edwards v. Gilbert, 867 F.2d 1271, 1273 (11th Cir. 1989); Barts v. Joyner, 865 F.2d 1187, 1190 (11th Cir. 1989), *cert. denied*, 493 U.S. 831 (1989). *See generally*, Albert Sidney Johnson, *Constitutional Law—Civil*, 41 MERCER L. REV. 1261, 1263-64 (1990) and Albert Sidney Johnson & Susan Cole Mullis, *Constitutional Law—Civil*, 42 MERCER L. REV. 1313, 1313-20 (1991).

7. *See* Greason v. Kemp, 891 F.2d 829, 833-34 & n.10 (11th Cir. 1990); Powell v. Lennon, 914 F.2d 1459, 1463 (11th Cir. 1990). For a discussion of these cases, see Johnson & Mullis, *supra* note 6, at 1315-20.

tional.[8] During 1991, the court continued to analyze the "clearly established law" standard from the context of the analysis of the constitutional right alleged to have been violated, applying at least three discernible standards: (1) the specific conduct approach, (2) the conceptual approach, and (3) the inevitable conclusion approach.

In some panel opinions, the court has employed a fact-intensive approach which examines whether it was clearly established at the time of the incident that defendant's specific conduct was unconstitutional.[9] In *Courson v. McMillian*,[10] a deputy sheriff stopped a speeding all-terrain vehicle in which plaintiff was a passenger.[11] After the driver's arrest, plaintiff was told she was free to go but was not provided transportation home.[12] On appeal from the denial of qualified immunity to the officer from plaintiff's claims of unlawful detention and reckless endangerment, the court held that the legal issue for determination was whether

> in May, 1985, it was unconstitutional for a law enforcement officer to detain a passenger of a vehicle, stopped for exceeding the lawful speed limit; to require that individual to lie on the ground . . . while the officer held a shotgun on [her] during the time that he awaited assistance and conducted an investigation; and to leave the unarrested passenger alone without transportation home.[13]

Applying the two prong test set forth in *Rich v. Dollar*,[14] the court held that the law was not clearly established in 1985 that the defendant's conduct was unconstitutional because no Supreme Court or Eleventh Circuit precedent existing at the time of the incident in *Courson* had held that a

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8. Stewart v. Baldwin County Bd. of Educ., 908 F.2d 1499, 1506 (11th Cir. 1990); Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1323 (11th Cir. 1989).

9. *See* Courson v. McMillian, 939 F.2d 1479, 1486 (11th Cir. 1991); *see also* Barts v. Joyner, 865 F.2d 1187, 1189 (11th Cir.), *cert. denied*, 493 U.S. 831 (1989).

10. 939 F.2d 1479 (11th Cir. 1991).

11. *Id.* at 1482-83. During the investigation of the vehicle and subsequent arrest of her companions, which lasted about thirty minutes, plaintiff was required to lay on the ground at gunpoint but was not searched, touched, interrogated, or charged with any crime. *Id.* at 1483-84.

12. *Id.* at 1484-85. Plaintiff walked to a nearby resort to phone a friend to take her home. Her only alleged damage was a mistrust of police officers. *Id.*

13. *Id.* at 1486. *See* Barts v. Joyner, 865 F.2d 1187 (11th Cir.), *cert. denied*, 493 U.S. 831 (1989). In *Barts*, the court held that the immunity analysis required a determination of whether the law was clearly established as to the precise factual issue. 865 F.2d at 1190.

14. 841 F.2d 1558 (11th Cir. 1988). The defendant must first prove that "he was acting within the scope of his discretionary authority when the allegedly wrongful acts occurred." *Id.* at 1563 (citing Ziegler v. Jackson, 716 F.2d 847 (11th Cir. 1983)). "Once the defendant public official satisfies his burden of moving forward with the evidence, the burden shifts to the plaintiff to establish lack of good faith on the defendant's part," which is established by proving that the defendant's actions violated clearly established law. *Id.* at 1564 (citing Ziegler v. Jackson, 716 F.2d at 849).

law enforcement officer acts unconstitutionally in abandoning a passenger in a vehicle that was impounded and the other passengers arrested.[15]

Other panel opinions, particularly cases alleging deliberate indifference to medical care, have eschewed the specific conduct approach and have required that the plaintiff establish only that the defendant should have been aware that his conduct constituted a violation of the plaintiff's constitutional rights, in light of the general contours of the constitutional right, and without reference to the defendants' specific conduct.[16] When the court employs this conceptual approach to the "clearly established law" issue, the plaintiff is not required to show that the defendant's particular conduct was in direct violation of prior decisional law, such as in *Courson v. McMillian* and other cases. In *Howell v. Evans*,[17] a case subsequently vacated due to settlement,[18] the court determined that a plaintiff alleging deliberate indifference to medical care need not depend solely on prior decisional law to show that the defendant violated clearly established law:

> The law must therefore be clear and specific enough for the medical official to know that his actions rise to the level of deliberate indifference and are not just negligent. A medical treatment case is also unique, however, because the standard for deliberate indifference need not depend solely on prior court decisions; the contemporary standards and opinions of the medical profession also are highly relevant in determining what constitutes deliberate indifference to medical care.[19]

In *Howell*, the court held that plaintiff could defeat an immunity defense in deliberate indifference cases in two ways: (1) by establishing that defendant's actions violated the "specific standards set forth and applied in *Estelle [v. Gamble]*[20] and other cases prior to the incident,"[21] or alternatively, (2) where the official's actions required "medical judgments," by

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15. 939 F.2d 1479, 1496-98 (11th Cir. 1991). In dicta, the court noted that "clearly established law" could be established by the decisions of the highest state court in states comprising the circuit, when the state court had addressed a federal constitutional issue that had not been decided by the United States Supreme Court or the Eleventh Circuit. *Id.* at 1498 n.32.

16. *See, e.g.*, Greason v. Kemp, 891 F.2d 829 (11th Cir. 1990).

17. 922 F.2d 712 (11th Cir.), *motion to withdraw petition for reh'g en banc granted and opinion vacated*, 931 F.2d 711 (11th Cir. 1991) (following settlement). In *Howell*, the widow of a prison inmate alleged that defendants, prison officials and contractual medical care providers, were deliberately indifferent to her husband's serious medical needs because the prison did not act to obtain necessary resources to properly treat the inmate's serious asthma condition. *Id.* at 716.

18. 931 F.2d 711 (11th Cir. 1991).

19. 922 F.2d at 719.

20. 429 U.S. 97, 104 (1976).

21. 922 F.2d at 719.

submitting opinions of medical experts showing that the "official's actions were so grossly contrary to accepted medical practices as to amount to deliberate indifference."[22] The court held that "if the plaintiff demonstrates that a reasonable doctor in the defendant's position would have known that his actions were grossly incompetent by medical standards, then a jury could find deliberate indifference and qualified immunity would be inappropriate."[23] The attending physician in *Howell* had qualified immunity from plaintiff's claims because none of the allegations rose beyond negligence to the level of a refusal to treat as set forth in *Estelle v. Gamble*.[24] The affidavit of a medical expert was insufficient to defeat summary judgment because it merely asserted that defendant deviated from established conduct and did not assert that the actions were grossly inadequate or plainly wrong.[25] The court has also broadly construed the "clearly established" standard with respect to claims of racial discrimination[26] and with respect to the nebulous contours of the right to privacy.[27]

When the constitutional analysis requires a balancing of interests, the court requires that the plaintiff establish that the "inevitable conclusion" of the constitutional balancing is that the defendant's conduct violated the plaintiff's constitutional rights.[28] In *Busby v. City of Orlando*,[29] the court addressed the requirements of showing clearly established law when the constitutional analysis involved required a balancing of the plaintiff's right to free speech against the public employer's interest in maintaining

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22. *Id.* at 719-20.

23. *Id.* at 720. In Greason v. Kemp, 891 F.2d 829 (11th Cir. 1990), Judge Edmondson dissented, rejecting a "clearly established" standard that depended upon the "simple expedient" of filing an expert affidavit on the ultimate factual issue. *Id.* at 842. He wrote that "[i]mmunity contemplates exemption from liability that would otherwise exist on the merits; today's court seems to suggest that immunity is available in only those cases in which the doctrine is superfluous." *Id.* at 841.

24. 922 F.2d at 721-22.

25. *Id.* However, the prison superintendent was not entitled to qualified immunity. The court held that it was clearly established at the time of the incident that "an official's denial of or delay in obtaining proper treatment could constitute deliberate indifference." *Id.* at 722. The court concluded that when defendant was aware of the need to provide proper treatment and knew that delay could be hazardous, defendant's lack of action could constitute deliberate indifference sufficient to defeat immunity. *Id.* at 722-23.

26. *See* Busby v. City of Orlando, 931 F.2d 764 (11th Cir. 1991) (per curiam); Brown v. City of Fort Lauderdale, 923 F.2d 1474 (11th Cir. 1991).

27. James v. City of Douglas, 941 F.2d 1539 (11th Cir. 1991) (per curiam). Police officers who showed to other police and sheriff officers a videotape of a police informant having sex with an arson suspect were not entitled to qualified immunity from plaintiff's claims of invasion of privacy. *Id.* at 1544. After assuring plaintiff that the videotape would be handled discreetly, defendants allegedly permitted a number of persons unrelated to the investigation to view the tape. *Id.* at 1541.

28. *See* Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1323 (11th Cir. 1989).

29. 931 F.2d 764 (11th Cir. 1991) (per curiam).

the reputation and *esprit de corps* of the police department.[30] Busby, a discharged black employee of the city police department, sued the city and various officials alleging that her termination for refusing to follow policy regarding criticism of supervisors violated the First Amendment.[31] On appeal, the court held that because "no bright-line standard exists to put the employer on notice of a constitutional violation, this circuit has recognized that a public employer is entitled to immunity from suit unless the *Pickering* balance 'would lead to the inevitable conclusion that the discharge of the employee was unlawful.' "[32] As a result, the court did not need to decide the precise result of the *Pickering* balance, but needed only to determine if "such a result would be so evidently in favor of protecting the employee's right to speak that reasonable officials in appellees' place 'would necessarily know that the termination of [Busby] under these circumstances violated [Busby's] constitutional rights.' "[33] The court held that defendants' interest in maintaining loyalty, discipline, and, in general, the police department's reputation, as well as the quasi-military nature of the police force, weighed significantly in determining that the *Pickering* balance was not so in favor of plaintiff's expression as to deny qualified immunity.[34]

In addition to the intracircuit conflict over the "clearly established law" requirement, there is also disagreement within the circuit concerning the impact of a factual dispute upon the pretrial grant of qualified immunity.[35] One line of cases has held that a pretrial immunity determination is not appropriate when there is "insufficient factual development" or the existence of a genuine factual dispute concerning the conduct underlying the immunity defense.[36] Other panel opinions have held that qualified immunity is always a question of law for the court, with the court resolv-

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30. *Id.* at 773-74.

31. *Id.* at 769-71.

32. *Id.* at 774 (quoting Dartland v. Metropolitan Dade County, 866 F.2d 1321, 1323 (11th Cir. 1989)).

33. *Id.* (quoting *Dartland*, 866 F.2d at 1323).

34. *Id.* at 774-75. In particular, because the police department was a quasi-military organization, comments such as those made by plaintiff could affect the *esprit de corps* and interfere with the efficient operation of the department. *Id.* at 774. The court noted that defendants had not sought to deny plaintiff access to a public forum to voice her complaints but merely to delay that access until the department could investigate the complaints. *Id.*

35. *See* Howell v. Evans, 922 F.2d 712 (11th Cir.), *motion to withdraw petition for reh'g en banc granted and opinion vacated*, 931 F.2d 711 (11th Cir. 1991) (following settlement) for a discussion of the intracircuit conflict on this issue.

36. 922 F.2d at 717. *See, e.g.*, Riley v. Wainright, 810 F.2d 1006 (11th Cir. 1986); Peppers v. Coates, 887 F.2d 1493, 1496-97 n.7 (11th Cir. 1989); Goddard v. Urrea, 847 F.2d 765, 769 (11th Cir. 1988).

ing factual disputes in favor of the plaintiff.[37] Still other panel opinions, including the leading case of *Rich v. Dollar*,[38] have held that a summary judgment standard is used to determine the primarily legal issue of whether the right was clearly established.[39]

During 1991, two panels recognized the appropriateness of the *Rich v. Dollar* summary judgment standard as the proper analysis for determination of whether a factual dispute exists. In *Howell v. Evans*,[40] the panel held that Supreme Court precedent demands a pretrial determination of immunity "in order to preserve the defendant's right to be free from the burdens of trial."[41] Where factual development is necessary, such development should occur through further discovery, while still preserving the opportunity to determine the legal issues prior to trial.[42] In *Courson v. McMillian*,[43] the court also adopted the *Rich* test, holding that factual issues that can not be resolved on summary judgment must be resolved at trial by the trier of fact.[44]

In *Ansley v. Heinrich*,[45] however, one panel of the court determined that immunity is not an appropriate issue for jury trial determination. The court held that "qualified immunity is an affirmative defense from trial and not a defense to liability issues raised during trial."[46] In the context of plaintiff's challenge to the trial court's jury instruction on qualified immunity, the court held that "once the defense of qualified immunity has been denied pretrial due to disputed issues of material fact, the jury should determine the factual issues without any mention of qualified

37. James v. City of Douglas, 941 F.2d 1539 (11th Cir. 1991) (per curiam); McDaniel v. Woodard, 886 F.2d 311, 313 (11th Cir. 1989).

38. 841 F.2d 1558 (11th Cir. 1988).

39. *Id.* at 1564-65. Under the *Rich v. Dollar* approach, if the law is not clearly established at the time of the incident, then immunity should be granted regardless of the existence of a factual dispute. *Id.* If the law was clearly established, the court should proceed to an analysis of the facts as alleged by the plaintiff and presented in the record, viewing such facts in favor of the party opposing summary judgment. Howell v. Evans, 922 F.2d at 718 (construing Rich v. Dollar, 841 F.2d at 1564-65). If the record so construed demonstrates a factual issue regarding whether the official violated the law, then summary judgment should be denied. At that point, the trier of fact determines whether the official violates clearly established law. *Id.* (construing Rich v. Dollar, 841 F.2d at 1564-65).

40. 922 F.2d 712, 717 (11th Cir.), *motion to withdraw petition for reh'g en banc granted and opinion vacated*, 931 F.2d 711 (11th Cir. 1991) (following settlement).

41. *Id.* at 718; *see also* the discussion set forth in the concurring opinion of Judge Tjoflat in Bennett v. Parker, 898 F.2d 1530, 1535-37 (11th Cir. 1990) (Tjoflat, C.J., concurring), *cert. denied*, 111 S. Ct. 1003 (1991).

42. 922 F.2d at 718.

43. 939 F.2d 1479 (11th Cir. 1991).

44. *Id.* at 1486-87.

45. 925 F.2d 1339 (11th Cir. 1991).

46. *Id.* at 1348.

immunity."[47] The court held that if qualified immunity is denied pretrial, then immunity is lost and the only issue at trial is whether the plaintiff proves his versions of the facts.[48] If the plaintiff fails, the defendant is not liable; if the plaintiff proves his allegations, then immunity is not available.[49] This panel interpreted qualified immunity as solely an immunity from trial, and not also an immunity from liability.[50] Other Eleventh Circuit decisions on qualified immunity, applying existing precedent to the facts, decided during the survey period are discussed in the notes to this article.[51]

Absolute Immunity. An official is entitled to absolute immunity from damages actions when the official acts in a legislative capacity.[52] In *Crymes v. DeKalb County*,[53] the court adopted the rationale of *Front Royal & Warren County Industrial Park Corp. v. Front Royal*[54] in holding that local legislators were not entitled to absolute immunity in voting to deny plaintiff a development permit for a landfill. In applying the legislative function test, the court held that acts of zoning enforcement,

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47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. Chandler v. Baird, 926 F.2d 1057, 1065-66 (11th Cir. 1991) (Defendants were not entitled to qualified immunity because of the existence of factual disputes with respect to the constitutionality of jail conditions); Wilson v. Bailey, 934 F.2d 301, 304 n.1 (11th Cir. 1991) (Sheriff and members of a county personnel board acting pursuant to an affirmative action consent decree were entitled to qualified immunity in a reverse discrimination suit); Lindsey v. Storey, 936 F.2d 554, 562 (11th Cir. 1991) (Patrol officer was entitled to immunity because the officer did not clearly lack reasonable suspicion and thus did not violate clearly established law); Davis v. Locke, 936 F.2d 1208, 1213 (11th Cir. 1991) (Prison guards were not entitled to immunity from an inmate's claims that guards dropped the inmate headfirst, from back of pickup truck with hands shackled behind his back, after recapturing the inmate during an attempted escape); Williams v. City of Albany, 936 F.2d 1256, 1260 (11th Cir. 1991) (Defendants were entitled to qualified immunity from plaintiff's claims that defendants had presented a witness to the district attorney whose allegations against plaintiff they knew to be false, for the purpose of obtaining plaintiff's termination from the police force); Ortega v. Schramm, 922 F.2d 684, 695 (11th Cir. 1991) (per curiam) (Judgment notwithstanding the verdict in favor of deputy sheriff accused of employing excessive force in violation of the Fourth Amendment was reversed because there was a possibility that a reasonable jury might have found in favor of the nonmoving party); Moore v. Morgan, 922 F.2d 1553, 1557-58 (11th Cir. 1991) (Failure to plead qualified immunity as a defense waived county commissioners' immunity from individual capacity claims of deliberate indifference to unconstitutional jail conditions)).

52. Hernandez v. City of Lafayette, 643 F.2d 1188, 1192-93 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

53. 923 F.2d 1482 (11th Cir. 1991) (per curiam).

54. 865 F.2d 77, 79 (4th Cir. 1989), *appeal following remand*, 945 F.2d 760, 762-65 (4th Cir.), *cert. denied*, 112 S. Ct. 1477 (1991).

rather than rulemaking, are not legislative activities to which immunity attaches.[55] Because the decision to uphold the denial of the development permit for a landfill was the application of policy to a specific individual, rather than the general population, defendants were not entitled to absolute immunity as a matter of law.[56]

Appeals From Orders Denying Immunity. In *Mitchell v. Forsyth*,[57] the Supreme Court held that orders denying immunity were immediately appealable as collateral orders, since the benefit of the immunity would be effectively lost if defendant were required to stand trial.[58] In its most important decision regarding appellate jurisdiction over orders denying immunity during 1991, the court, sitting en banc, reversed the 1990 panel decision of *Green v. Brantley*.[59] The reversed panel decision had held that the purpose of the collateral order doctrine was not served when appellate review could not prevent the defendant from standing trial facing monetary liability on the "same common nucleus of operative facts."[60] The reversed opinion distinguished *Marx v. Gumbinner*,[61] in which the court held that the right to interlocutory appeal exists even where the defendants will have to face trial on equitable claims to which there is no immunity,[62] because in *Green* the court could, at most, reduce the amount of liability that defendants faced.[63]

The court, en banc, held that the fact that the defendant would continue to trial on claims that could not be resolved on immunity grounds prior to trial was immaterial to the issue of whether appellate jurisdiction existed to hear appeals from denial of qualified immunity to applicable claims.[64] Because the defendant is entitled to immunity from trial and

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55. 923 F.2d at 1484-85; *but see* Brown v. Crawford County, 960 F.2d 1002 (11th Cir. 1992) (local officials had absolute legislative immunity in enacting temporary moratorium on issuance of mobile home permits in portion of county).

56. 923 F.2d at 1485-86. In comparison, the board's vote to remove a road from the county truck route ordinance was legislative in nature. *Id.* at 1485.

57. 472 U.S. 511 (1985).

58. *Id.* at 524-30.

59. 895 F.2d 1387 (11th Cir.), *reh'g en banc granted and opinion vacated*, 921 F.2d 1124 (11th Cir. 1990), *remanded to panel on merits of appeal*, 941 F.2d 1146 (11th Cir. 1991).

60. 895 F.2d at 1393-94. In *Green* defendants moved for summary judgment on only one of plaintiff's two claims. *Id.* at 1389. Defendants admitted on appeal that a trial or further pretrial proceedings was necessary to resolve the immunity issue on the remaining claim. *Id.* at 1392.

61. 855 F.2d 783 (11th Cir. 1988).

62. *Id.* at 787-88.

63. 895 F.2d at 1393. The panel in *Green* found unpersuasive the argument that it could terminate trial and liability as to one claim by immediate judicial review. *Id.*

64. 941 F.2d 1146, 1150-51 (11th Cir. 1991). Judges Johnson and Kravitch dissented, on the grounds that the interlocutory appeal violated the final order doctrine. *Id.* at 1152-57.

the "other burdens of litigation," the defendant's opportunity to avoid trial on allegedly insubstantial claims is effectively lost if appeal is denied.[65]

In *Howell v. Evans*,[66] subsequently vacated due to settlement, the court decided that the existence of a factual dispute did not render the court without appellate jurisdiction over denials of qualified immunity.[67] In *Mitchell v. Forsyth*,[68] the Supreme Court held that collateral order appellate jurisdiction existed for orders denying qualified immunity "to the extent that [the denial of qualified immunity] turns on an issue of law."[69] Prior Eleventh Circuit decisions have held that appellate jurisdiction did not exist where the denial was based upon "insufficient factual development" or on the existence of a genuine factual dispute concerning the conduct underlying the immunity defense.[70] The court in *Howell* rejected the potential limitation on appellate jurisdiction, holding that the immunity determination must be made prior to trial in order to preserve the defendant's right to be free from the burdens of trial.[71]

B. Preclusion

The Full Faith and Credit Statute[72] provides that federal courts must give the same preclusive effect to state court judgments that the state from which the judgment emerged would give the judgment. The Supreme Court has held that preclusion is applicable to claims brought pursuant to section 1983.[73] During 1991, the Eleventh Circuit continued to

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65. *Id.* at 1149-50.

66. 922 F.2d 712 (11th Cir.), *motion to withdraw petition for reh'g en banc granted and opinion vacated*, 931 F.2d 711 (11th Cir. 1991) (following settlement).

67. 922 F.2d at 718.

68. 472 U.S. 511 (1985).

69. *Id.* at 530.

70. 922 F.2d at 717. *See, e.g.*, Riley v. Wainright, 810 F.2d 1006 (11th Cir. 1986); Pepper v. Coates, 887 F.2d 1493, 1496-97 n.7 (11th Cir. 1989).

71. 922 F.2d at 718.

72. 28 U.S.C. § 1738 (1988). Section 1738 provides in relevant part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

Id.

73. Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75 (1984) (claim preclusion); Allen v. McCurry, 449 U.S. 90 (1980) (issue preclusion).

delineate the circumstances in which a plaintiff's section 1983 claims would be barred by prior state court litigation.

Claim Preclusion. In *Adams v. Sewell*,[74] the court held that a Florida state court action for mandamus, backpay, and reinstatement did not preclude a subsequent federal court action asserting a claim pursuant to Section 1983 alleging that the basis for his discharge was pretextual.[75] The court determined that the claim was not precluded under Florida law because the state court had not addressed the merits of the plaintiff's claims, and thus plaintiff did not receive a full and fair opportunity to litigate his section 1983 claims in state court.[76]

Issue Preclusion. The court held issue preclusion inapplicable in two cases in which the defendants argued that the plaintiffs were estopped from challenging administrative findings. In *JSK v. Hendry County School Board*,[77] the court determined that the district court erred in extending full faith and credit pursuant to 28 U.S.C. § 1738 to an administrative order that had not been reviewed by a state court.[78]

In *Steadham v. Sanders*,[79] the Eleventh Circuit rejected the argument that a county commission's evidentiary findings in connection with an employee's civil rights claim had preclusive effect in a subsequent wrongful termination suit.[80] Pursuant to state law, plaintiff sought a hearing before the commission alleging that his positions were terminated for political reasons. The commission held an evidentiary hearing and found

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74. 946 F.2d 757 (11th Cir. 1991).

75. *Id.* at 759-60. Plaintiff claimed that his discharge based on poor management practices was pretextual and that he was actually terminated because the county feared adverse publicity arising from a former subordinate's claims that he sexually harassed her. *Id.*

76. *Id.* at 762. *Compare* JSK By & Through JK v. Hendry County Sch. Bd., 941 F.2d 1563, 1567-68 (11th Cir. 1991) (The district court properly dismissed on preclusion grounds the challenge to an administrative determination that an education plan as written was appropriate). *Id.* at 1567-68.

77. 941 F.2d 1563 (11th Cir. 1991).

78. *Id.* at 1567 (citing Astoria Fed. Sav. & Loan Ass'n v. Solimino, 111 S. Ct. 2166, 2170 (1991)). Relying on University of Tennessee v. Elliot, 478 U.S. 788 (1986), the court also held that the legislative intent of the Education of the Handicapped Act, 20 U.S.C.A. §§ 1400-1485 (West 1990 & Supp. 1991), was to deny preclusive effect to administrative hearings. 941 F.2d at 1567-70.

79. 941 F.2d 1534 (11th Cir. 1991) (per curiam). *See also* Adams v. Sewell, 946 F.2d 757 (11th Cir. 1991), *supra* note 74 and accompanying text. Defendants in *Adams* argued that the district court erred in allowing plaintiff relitigate the factual basis of his discharge, on the grounds that the district court's jurisdiction was limited to determining whether the procedures violated due process protections. *Id.* at 763. The court rejected this argument, holding that plaintiff could establish that the basis for his discharge was pretextual. *Id.* at 764.

80. 941 F.2d at 1536.

that all of the commissioners had voted to eliminate the positions for legitimate financial reasons.[81] The court, relying on *University of Tennessee v. Elliot*,[82] held that preclusion was not applicable to estop judicial inquiry into the findings because the county commission was not acting in a judicial capacity in resolving disputed issues of fact properly before it.[83] Alabama law did not give preclusive weight to the findings made by the commission in passing on claims.[84] The commission had no authority under state law to make binding findings of fact on the merits of the claim.[85]

Binding Precedent. In two cases, the court addressed the impact of summary appellate decisions on the parties' arguments on remand. The doctrine of binding precedent provides that an appellate court's findings are binding in all subsequent proceedings on all issues that the appellate court decided, either expressly or by necessary implication.[86] In *Luckey v. Miller*,[87] the court held that the summary denial of rehearing en banc did not preclude defendants from asserting, on remand, that the district court should abstain from deciding plaintiff's claims.[88] The issue was not raised by necessary implication in the previous appeal, even though the dissent, sua sponte, had asserted that abstention was warranted in this case.[89] The summary denial of rehearing en banc was insufficient to confer any implication or inference regarding the court's opinion relative to the merits of the case.[90]

In *Lucas v. Townsend*,[91] the court determined that the Supreme Court's summary affirmance of the denial of relief as to the plaintiff's claim, pursuant to section 5 of the Voting Rights Act,[92] did not constitute

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81. *Id.* at 1535. Plaintiff alleged that he was actually fired because he had acted as a pollwatcher for a commissioner's political adversary. *Id.*

82. 478 U.S. 788 (1986).

83. 941 F.2d at 1536.

84. *Id.* The court distinguished cases in which a commission determined an applicant's entitlement to licensing and permits because in those cases the findings were only subject to limited judicial review. *Id.* at 1537.

85. *Id.* at 1536-38.

86. Luckey v. Miller, 929 F.2d 618 (11th Cir. 1991) (citing Heathcoat v. Potts, 905 F.2d 367, 370 (11th Cir. 1990); Litman v. Massachusetts Mut. Life Ins. Co., 825 F.2d 1506, 1511 (11th Cir. 1987) (en banc), *cert. denied*, 484 U.S. 1006 (1988)).

87. 929 F.2d 618 (11th Cir. 1991).

88. *Id.* at 622.

89. *Id.* at 621-22.

90. *Id.* The court noted that assigning precedential value to the denial of rehearing en banc would be unmanageable. *Id.*

91. 908 F.2d 851 (11th Cir. 1990), *vacated*, 111 S. Ct. 2845, *on remand*, 943 F.2d 38 (11th Cir. 1991). The decision was vacated and remanded for clarification of the jurisdictional issue as to whether the plaintiffs had waived their constitutional claims. 943 F.2d at 38.

92. 42 U.S.C. § 1973.

binding precedent as to the legal issues presented in plaintiffs' related remaining claim pursuant to section 2 of the Act.[93] While the Supreme Court summarily affirmed the judgment, it did not necessarily affirm the lower court's reasoning supporting the judgment.[94] Although any question clearly decided in affirming the judgment was binding on all other courts facing the same issue, the doctrine was not applicable where one of the two possible reasons for the affirmance would not constitute binding precedent to the remaining claim.[95]

C. Subject Matter Jurisdiction

Pendent Party Jurisdiction. In *Ortega v. Schramm*,[96] the court held that subject matter jurisdiction did not exist to exercise pendent party jurisdiction for state law claims over a defendant against whom all federal claims had been dismissed.[97] The Eleventh Circuit held that 28 U.S.C. § 1343(a)(3),[98] which authorizes section 1983 claims, does not affirmatively provide for pendent state law jurisdiction over parties.[99] The court's decision was in line with the result reached by the First, Second, and Sixth Circuits.[100]

Abstention. The abstention doctrine is a little recognized but important defense tool against state law claims proceeding in federal court.[101] In *Rindley v. Gallagher*,[102] the court held that the district court abused its discretion in dismissing, on *Pullman* abstention grounds, plaintiff's claims that state professional regulatory agencies selectively enforced

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93. The Supreme Court summarily affirmed the judgment of the three judge panel denying relief for the claims pursuant to § 5 of the Voting Rights Act. 908 F.2d at 854. The question before the Eleventh Circuit, on remand, was whether the ruling on the § 5 claim was binding on the § 2 claim. *Id.*

94. *Id.* at 855.

95. *Id.* at 855.

96. 922 F.2d 684 (11th Cir. 1991) (per curiam).

97. *Id.* at 688.

98. 28 U.S.C. § 1343(a)(3) provides, in relevant part, that district courts have jurisdiction over "any civil action authorized by law to be commenced by any person" to "redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution." *Id.*

99. 922 F.2d at 689-90 (citing Finley v. United States, 490 U.S. 545 (1989)).

100. *See, e.g.*, Rodriguez v. Comas, 888 F.2d 899, 905-06 (1st Cir. 1989); Powell v. Gardner, 891 F.2d 1039, 1047 (2d Cir. 1989); Stallworth v. City of Cleveland, 893 F.2d 830, 836-38 (6th Cir. 1990); *but see* McCray v. Holt, 777 F. Supp. 945 (S.D. Fla. 1991) (holding 28 U.S.C. § 1367(a), as amended, permits pendent party jurisdiction in these circumstances).

101. *See* Rindley v. Gallagher, 929 F.2d 1552 (11th Cir. 1991), for a thorough overview of the various abstention doctrines.

102. 929 F.2d 1552 (11th Cir. 1991).

state regulations governing dentistry against dentists who advertised.[103] The district court dismissed the suit on *Pullman* abstention grounds because it determined that the regulations at issue were "unsettled" issues of state law that should first be decided by the state courts.[104] The Eleventh Circuit reversed, holding that in order to exercise its discretion to abstain under the *Pullman* doctrine, the district court must determine that "(1) the case presents an unsettled question of state law and (2) that the question of state law is dispositive of the case or would avoid, or substantially modify, the constitutional question presented."[105] A question of state law is unsettled for purposes of abstention where the statute to be construed is "*fairly subject* to an avoiding construction."[106] Because plaintiff's central challenge in *Rindley* was not to the validity of the regulations but to their selective enforcement, even a limiting state court construction of the regulations would not moot plaintiff's claims.[107] In deciding *Rindley*, the Eleventh Circuit also determined that *Burford* abstention[108] was not appropriate, even though the statute to be construed was a part of a complex regulatory scheme over various professions, because the statute at issue was but one part of the complex scheme and its reversal would not seriously affect the regulatory scheme.[109] The issue of whether *Younger* abstention[110] was warranted was remanded to the district court for a determination of whether plaintiff

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103. *Id.* at 1553-56. *See* Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). The *Pullman* abstention doctrine vests a district court " 'with discretion to decline to exercise or to postpone the exercise of its jurisdiction in deference to state court resolution of the underlying issues of state law.' " 929 F.2d at 1554 (quoting Harman v. Forssenius, 380 U.S. 528, 534 (1965)).

104. 929 F.2d at 1554.

105. *Id.* at 1554-55 (citing Duke v. James, 713 F.2d 1506, 1510 (11th Cir. 1983)).

106. *Id.* at 1555 (quoting Duke v. James, 713 F.2d 1506, 1510 (11th Cir. 1983)).

107. *Id.* at 1556.

108. *See* Burford v. Sun Oil Co., 319 U.S. 315 (1943). The *Burford* abstention doctrine applies where judicial review by the federal courts would be " 'disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.' " 929 F.2d at 1556 (quoting Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976) (citing Burford v. Sun Oil Co., 319 U.S. 315 (1943)).

109. 929 F.2d at 1556-57.

110. Younger v. Harris, 401 U.S. 37 (1971). The doctrine provides that district courts should abstain from enjoining ongoing criminal proceedings or civil proceedings in aid of criminal jurisdiction or involving enforcement-type proceedings in which vital state interests are involved, absent a showing of bad faith, harassment, or extraordinary instances of irreparable harm. *See also* Cate v. Oldham, 707 F.2d 1176 (11th Cir. 1983); Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423, 436 (1982) (The state had an "important state interest in maintaining and assuring the professional conduct of the attorneys it license[s]").

would have an adequate opportunity in the state proceedings to raise his constitutional challenges.[111]

In *Adams v. Sewell*,[112] the court held that the district court properly denied *Colorado River*[113] abstention in a suit alleging federal constitutional violations arising from plaintiff's termination during the pendency of a state court writ of mandamus proceeding brought by plaintiff.[114] The Eleventh Circuit held that although the doctrine recognizes that dismissal of a federal action might be warranted where there are concurrent state proceedings, even if traditional abstention principles were not present, the concurrent state court proceeding was not a bar to the federal litigation absent extraordinary circumstances not present in the case.[115]

Standing. In a series of opinions issued during 1991, the court required plaintiffs to allege their constitutional injuries with specificity, particularly in equal protection challenges to minority set aside and affirmative action programs. In *S.J. Groves & Sons Co. v. Fulton County*[116] and *Cone Corp. v. Florida Department of Transporation*,[117] the court held that unsuccessful bidders on government projects had not met the injury-in-fact requirement for standing sufficient to challenge minority business enterprise regulations because plaintiffs failed to establish that they had been denied specific projects because of the regulation.[118] In *S.J. Groves & Sons Co.*, plaintiff's threatened injuries of loss of potential profits did not state a constitutional injury because plaintiff had not shown it was rejected as the low bidder as the result of the ordinance.[119] Relying on the recent Supreme Court decision of *Whitmore v. Arkansas*,[120] the court in *Cone* held that plaintiffs had failed to demonstrate that the gov-

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111. 929 F.2d at 1557-58. *Compare* News-Journal v. Foxman, 939 F.2d 1499 (11th Cir. 1991), where the court held that *Younger* abstention was appropriate in a newspaper's challenge of a state court restrictive order preventing the litigants from making extrajudicial statements prior to and during a sensational murder trial. The newspaper had an adequate state forum in which to challenge the restrictive order and no irreparable harm resulted, since the state court entering the order had found that the restrictions were necessary to preserve the criminal defendant's Sixth Amendment right to a fair trial and there was no less restrictive means of protecting that right. *Id.* at 1507-16.

112. 946 F.2d 757 (11th Cir. 1991).

113. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976).

114. 946 F.2d at 762.

115. *Id.* at 762-63.

116. 920 F.2d 752 (11th Cir.), *cert. denied*, 111 S. Ct. 2274 (1991).

117. 921 F.2d 1190 (11th Cir.), *cert. denied*, 111 S. Ct. 2238 (1991).

118. 920 F.2d at 756-59; 921 F.2d at 1203. In *S.J. Groves* plaintiff also failed to show a constitutional injury as to an alleged lost opportunity to compete on an equal basis with other bidders. 920 F.2d at 758.

119. 920 F.2d at 758.

120. 110 S. Ct. 1717 (1990).

ernment's implementation of the regulation would cause them injury and that the injury was "fairly traceable" to defendants' conduct.[121] The highway construction contractors' conclusory allegation that they had lost contracts as the result of the program, without alleging specific contracts that were lost, was insufficient to allege a constitutional injury.[122]

The Eleventh Circuit also employed a more stringent standing hurdle in First Amendment cases, relying on recent Supreme Court precedent. In *Professional Fire Fighters Local 2238 v. City of Hallandale*,[123] a firefighters' union challenged the constitutionality of city policy and guidelines for criticism of supervisors and other city officials by city employees. Although the guidelines were in effect, they had not yet been enforced by city officials. The district court enjoined the implementation of the policy.[124] The Eleventh Circuit reversed, holding that plaintiff union's claims were not justiciable.[125] The court observed that First Amendment challenges to governmental actions traditionally warrant a loosening of the injury-in-fact requirement for standing.[126] However, the court held that even under that less stringent standard, plaintiff had not demonstrated either a concrete or impending injury caused by the city's policy where plaintiff or its members did not seek to pursue a definite course of action that was at least arguably in violation of the ordinance. An alleged "subjective chill" of speech was insufficient to confer Article III standing.[127]

By comparison, in *Harris v. Evans*,[128] a prisoner had standing to assert that a department policy prohibiting employees from making parole recommendations directly to the parole board violated prison employees' First Amendment rights.[129] Plaintiff's asserted injury, that the regulation had prevented employees from making such recommendations on his behalf to the parole board, was fairly traceable to the challenged action and could be addressed by a favorable decision. Plaintiff had standing to assert these rights as a third party because his own injury satisfied prudential concerns that the employees' rights would be vigorously repre-

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121. 921 F.2d at 1206-07 n.51.

122. *Id.*

123. 922 F.2d 756 (11th Cir. 1991).

124. *Id.* at 758-59.

125. *Id.* at 760-61.

126. *Id.* at 761.

127. *Id.* at 761-62. In addition to the constitutional requirement of injury, prudential concerns also militated against justiciability. The factual record was undeveloped, and the First Amendment analysis was highly fact-specific, requiring the federal court to balance the partys' respective interests. Given the fact-specific inquiry, prudential concerns required a more concrete delineation of interests and injury than that presently before the court. *Id.* at 763-64.

128. 920 F.2d 864 (11th Cir. 1991) (per curiam).

129. *Id.* at 866.

sented.[130] Similarly, in *Planned Parenthood Ass'n v. Miller*,[131] a physician had standing to challenge the constitutionality of a Georgia statute requiring parental notification of abortions performed on minors. Plaintiff physician met the injury-in-fact test because of threatened criminal penalties and direct economic harm to the physician. In addition, the physician had standing to challenge the alleged deprivation of rights to the third party minor, due to the closeness of the physician-patient relationship and the obstacles to the minor patient's enforcement of her own rights.[132]

Mootness. In *National Advertising Co. v. City of Fort Lauderdale*,[133] the court held that a city's amendment of its challenged sign ordinance did not moot plaintiff's challenge to the ordinance on First Amendment grounds. Defendant city had the power and authority to amend its sign code to the original form if it defeated jurisdiction in the case on mootness grounds.[134]

In *Wakefield v. Church of Scientology*,[135] the court held that an appeal in which newspapers challenged a state court's order sealing court records and closing proceedings pursuant to a confidentiality agreement did not fall within the "capable of repetition, yet evading review" exception to the mootness doctrine. The court held that the precise issue was unlikely to arise again and the action giving rise to the appeal was not of such a short duration as to evade appellate review.[136]

II. ATTORNEY'S FEES

Pursuant to 42 U.S.C. § 1988 ("Section 1988"), a court may award attorney fees to the "prevailing party" in civil rights actions.[137] During 1991, the Eleventh Circuit issued its fourth opinion in the case of *Gilmere v. City of Atlanta*.[138] The court remanded the case for a fourth time,

130. *Id.* at 866-67.
131. 934 F.2d 1462 (11th Cir. 1991).
132. *Id.* at 1465-66 n.2.
133. 934 F.2d 283 (11th Cir. 1991).
134. *Id.* at 285-86.
135. 938 F.2d 1226 (11th Cir. 1991).
136. *Id.* at 1229-30. The proceedings before the court were contempt proceedings for violation of the confidentiality provisions of the settlement agreement. The newspapers argued that sealing court files and closing proceedings violated both the newspaper's and the public's rights of access to judicial proceedings and records. On appeal, the newspapers argued that the case was not moot because the court could grant them relief by ordering access to the judicial documents. *Id.* at 1227-29.
137. 42 U.S.C.A. § 1988(b) (West 1990 & Supp. 1991). Pursuant to section 1988(c), an award of attorney fees may include expert witness fees.
138. 931 F.2d 811 (11th Cir. 1991) (per curiam).

holding that a district court must set forth its reasoning in determining the reasonableness of an attorney fee awarded pursuant to Section 1988.[139]

In *Davis v. Locke*,[140] the court held that a prison inmate who recovered $3,500 in damages on his excessive force claims against prison guards was a "prevailing party" within the meaning of Section 1988 and was entitled to $62,643.20 in attorney fees.[141] Plaintiff was not required to extricate hours spent in asserting interrelated successful claims from the total hours spent on the case, even though he prevailed on only three of fifteen theories, because the claims were merely alternative theories based on one set of facts.[142] A lodestar enhancement was not improper due to the "modest results" obtained by plaintiff because plaintiff had vindicated important civil rights that could not be valued solely in monetary terms. Moreover, the court noted that the deterrent effect of the plaintiff's suit was as important as the dollar amount actually recovered.[143]

III. SUBSTANTIVE ISSUES

A. *Section 1983*

Capacity. Government officials may be sued as individuals or in their "official capacities" as agents of the state. However, official capacity claims against officials are merely a manner of pleading an action against the government body, who is the real party in interest.[144] In *Busby v. City of Orlando*,[145] the Eleventh Circuit held that the district court properly granted a directed verdict to the individual defendants in their official capacities because the city, the underlying defendant, remained a party in the action.[146] To retain both the city and the officials as defendants would have been "redundant" and possibly confusing to the jury.[147] However,

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139. *Id.* at 814-15.

140. 936 F.2d 1208 (11th Cir. 1991).

141. *Id.* at 1215.

142. *Id.* at 1214-15.

143. *Id. Cf.* Estate of Farrar v. Cain, 941 F.2d 1311 (5th Cir. 1991), *cert. granted sub nom.* Farrar v. Hobbs, 112 S. Ct. 1159 (1992). In *Estate of Farrar*, Judge Higginbotham of the Fifth Circuit wrote that plaintiffs who sought only damages, in the amount of $17 million, and who recovered only $1.00 in nominal damages, were not prevailing parties within the meaning of 42 U.S.C. § 1988 and reversed the district court's award of $300,000 in attorney fees to plaintiff. Although the jury found that plaintiff's constitutional rights had been violated, the court held that the suit was merely a damages action and was not the vindication of an important constitutional right. 941 F.2d at 1314-17.

144. Kentucky v. Graham, 473 U.S. 159, 165 (1985).

145. 931 F.2d 764 (11th Cir. 1991) (per curiam).

146. *Id.* at 776 (citing Kentucky v. Graham, 473 U.S. at 165).

147. *Id.*

the court's instruction to the jury regarding the grant of judgment notwithstanding the verdict to the official capacity defendants constituted prejudicial error because the instruction implied that the officers' conduct was constitutional.[148]

The requirements of adequate notice of official capacity claims to the local government, the underlying defendant, remain unclear. The Supreme Court has determined that a local government must have notice of official capacity claims in order to be held liable for such claims.[149] In *Moore v. Morgan*,[150] the Eleventh Circuit held that a county had sufficient notice from the style of a complaint against county commissioners that it was being sued to hold the county liable for unconstitutional jail conditions.[151] In *Brown v. City of Fort Lauderdale*,[152] however, the Eleventh Circuit appeared to apply a similar standard for when officials may be sued in their individual capacities. The court held that although plaintiff sued the individual defendants in their official capacities, as set forth in the caption of the complaint, the remainder of the complaint and the "[t]he course of proceedings" indicated that plaintiff sought to impose liability against the individual defendants in their personal capacities.[153]

Municipal Liability. A municipality may be held liable where the decision at issue is made by the final policy maker for the local government.[154] In *Pembaur v. City of Cincinnati*,[155] the Supreme Court set forth a three part test to determine whether an official's action can be said to constitute the policy, custom, or practice of the municipality.[156] Under *Pembaur* the municipality may only be held liable where "a deliberate choice to follow a course of action is made from among various alterna-

148. *Id.* The trial court told the jury that the individual defendants had been dismissed because "all of their actions were *legal actions* within the scope of their employment so that the only remaining defendant for your consideration is the City of Orlando." *Id.*

149. Kentucky v. Graham, 473 U.S. at 169 (citing Brandon v. Holt, 469 U.S. 464 (1985)).

150. 922 F.2d 1553 (11th Cir. 1991).

151. *Id.* at 1556.

152. 923 F.2d 1474 (11th Cir. 1991).

153. *Id.* at 1478 (citing Brandon v. Holt, 469 U.S. 464, 469 (1985); Farred v. Hicks, 915 F.2d 1530, 1533 (11th Cir. 1990)).

154. Monell v. Department of Social Servs., 436 U.S. 658, 691 (1978).

155. 475 U.S. 469 (1986).

156. *Id.* at 480-83. The court in *Pembaur* held that a single act of a municipal officer may constitute the policy of the municipality if the municipal official sanctioned or ordered the action; the officer is the final policy maker with respect to the action taken, as defined by state law; or the act was taken pursuant to a policy adopted by the official responsible under state law for making policy in that area. *Id.* at 480-83 n.12; *see also* Manor Healthcare Corp. v. Lomelo, 929 F.2d 633, 637 (11th Cir. 1991).

tives by the official or officials responsible for establishing final authority with respect to the subject matter in question."[157]

During 1991, the court illustrated the *Pembaur* principle by ruling that while the city of Sunrise, Florida, was not liable for a former mayor's extortion of a zoning applicant,[158] the city could be held liable for a former mayor's alleged retaliatory harassment of an employee for whistleblowing.[159] In *Manor Healthcare Corp. v. Lomelo*,[160] the court held that the municipality was not liable for the former mayor's extortion of a zoning applicant, even though the actions were within the official's area of responsibility, because the mayor was not the final policy maker with respect to the action alleged.[161] Although the mayor possessed a veto over the city council's zoning decisions, the city council could override the veto.[162]

In contrast, in *Wetzel v. Hoffman*,[163] the court held that a complaint alleging that plaintiff was terminated in retaliation for his role in exposing corruption in the Sunrise city government stated a claim against the municipality.[164] The court found that the city could be held liable on the theory that the persons responsible for the retaliation were final policy makers for the city in matters encompassing that action.[165]

A city may be held liable for a policy or custom that is the cause, or "moving force" behind a constitutional violation.[166] During 1991, the court dealt with municipal liability premised on allegations of informal policies or customs, and even policies of delay. In *Moore v. Morgan*,[167] the court held that a lack of funds to construct a new jail did not justify the county's maintenance of unconstitutional jail conditions.[168] The court

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157. 475 U.S. at 481-82.

158. Manor Healthcare Corp. v. Lomelo, 929 F.2d 633 (11th Cir. 1991).

159. Wetzel v. Hoffman, 928 F.2d 376 (11th Cir. 1991).

160. 929 F.2d 633 (11th Cir. 1991).

161. *Id.* at 637-38.

162. *Id.* The court also rejected plaintiff's argument that the mayor was the de facto final policy maker because of his longtime leadership and ability to intimidate the city council. *Id.* at 637-38.

163. 928 F.2d 376 (11th Cir. 1991).

164. *Id.* at 377. Plaintiff, a mechanic employed by the city, alleged that in retaliation for whistleblowing he was denied promotions, was harassed, and was illegally investigated by the police. Plaintiff amended his complaint to allege that the former mayor was the "final policy maker of the city with respect to such actions." *Id.*

165. *Id.* at 377.

166. City of Canton v. Harris, 489 U.S. 378, 389 (1989) (quoting Polk County v. Dodson, 454 U.S. 312, 326 (1981)).

167. 922 F.2d 1553 (11th Cir. 1991).

168. *Id.* at 1556 n.4. The county was unable to obtain state support of additional taxes without a county referendum, and the county overwhelmingly voted against the proposal to increase the sales tax. After the suit was brought, the county bought an additional facility,

held that "the ways in which the commissioners actually obtained the money to finance the necessary jail improvements, when put under the threat of litigation, provides compelling evidence of the fact that the commissioners could have taken steps to improve the jail at a much earlier date."[169] In *Brown v. City of Fort Lauderdale*,[170] the Eleventh Circuit held that the pro se plaintiff had stated a basis for municipal liability by alleging that the city had an informal policy or custom of racial discrimination which was accepted and acquiesced in by the final policy makers.[171] In *Wetzel v. Hoffman*,[172] plaintiff stated a cause of action for municipality liability for retaliatory discharge by alleging that there was a persistent and widespread practice of retaliatory actions against whistleblowers.[173] The court held that even if the alleged actions of retaliation violated express city policy or other authority, plaintiff could establish that the actual custom was inconsistent with the announced policy of the city.[174]

B. Ex Post Facto Clause

In *Akins v. Snow*,[175] the Eleventh Circuit held that the Georgia State Board of Pardon and Parole's ("Board") retroactive decrease in the frequency of parole reconsideration hearings violated the Ex Post Facto Clause as applied to prisoners whose crimes were committed before the amendment.[176] The amendment constituted a substantive change in the law applying retrospectively to the "substantial" disadvantage of the plaintiff inmates.[177]

In *Conlogue v. Shinbaum*,[178] however, the court, in a per curiam opinion, held that an Alabama early prison release program was discretionary and that the amendment of the governing state statute to provide that responsible officials could exercise their discretion to deny early release

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hired more jailors, and built a new facility by cutting funding of other county agencies. *Id.* at 1557.

169. *Id.*

170. 923 F.2d 1474 (11th Cir. 1991).

171. *Id.* at 1480-81.

172. 928 F.2d 376 (11th Cir. 1991).

173. *Id.* at 377.

174. *Id.* at 378.

175. 922 F.2d 1558 (11th Cir.), *cert. denied*, 111 S. Ct. 2915 (1991); *but see* Bailey v. Gardebring, 940 F.2d 1150 (8th Cir. 1991) (declining to follow), *cert. denied sub nom.* Bailey v. Woot, 112 S. Ct. 1516 (1992).

176. U.S. CONST. art I, § 10, cl. 1; 922 F.2d at 1565.

177. 922 F.2d at 1560-65.

178. 949 F.2d 378 (11th Cir. 1991) (per curiam), *petition for cert. filed*, 1992 Westlaw (U.S., May 11, 1992) (No. 91-8386).

based on prior convictions was not a violation of the Ex Post Facto Clause.[179]

C. *First Amendment*

The Nature of the Forum. In *United States v. Gilbert*,[180] the Eleventh Circuit addressed the limitations that a government may constitutionally place on speech occurring on government-owned property. In *Gilbert* the United States sought an injunction against defendant, a perennial protestor at the Richard B. Russell Federal Building in Atlanta who had made the courthouse his home.[181] On appeal from the district court's issuance of an injunction, defendant argued that his activity, including sleeping on the portico of the building, was expressive conduct protected by the First Amendment.[182] The Eleventh Circuit deemed the courthouse grounds a public forum and reviewed the restrictions on a strict scrutiny basis. Although the court affirmed the injunction, it modified the injunction to hold that defendant could sleep in the plaza area as a form of expressive conduct.[183] The inside of the building, however, was a nonpublic forum, thus requiring that restrictions only have a rational basis.[184] The court held that the government had not made a public forum of the portico surrounding the building by acquiescing in violations of the regulation prohibiting demonstrations on the portico.[185]

In *Bishop v. Aronov*,[186] the court held that a university professor's First Amendment rights to free speech and free exercise were not violated by a department head's memorandum to the professor instructing him not to interject his religious beliefs or preferences during class.[187] The university classroom was not an open forum during instructional time because it was reserved for the intended purpose of teaching university courses for credit. The restrictions set forth in the memorandum were not overly

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179. 949 F.2d at 381-82.

180. 920 F.2d 878 (11th Cir. 1991).

181. *Id.* at 880. Defendant slept outside the building, ate in its cafeteria, and used the building's rest rooms to bathe and to do his laundry. *Id.*

182. *Id.* at 883. The district court enjoined defendant from residing at the building or on its grounds and from protesting in the building, including the portico surrounding the building. Defendant was specifically not enjoined from protesting on the grounds or from having with him personal property used in conducting First Amendment activity. *Id.* at 881-83.

183. *Id.* at 884-85. The record indicated that others had been permitted to sleep on the grounds as a form of protest and the court determined that the government had not offered a compelling reason to prohibit Gilbert but not others. *Id.*

184. *Id.* at 884.

185. *Id.* at 885.

186. 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3154 (U.S., June 29, 1992) (No. 91-286).

187. 926 F.2d at 1078.

broad because the memorandum only prohibited the professor's non-course-related in-class remarks and his teaching of optional courses.[188]

Public Employment. In a quartet of cases, the court addressed the constitutional limitations on government employers' regulation of employee speech. Of the four cases decided, the court found the control violative of the First Amendment in only one case.[189] Two of the cases were decided on preliminary grounds, without reaching the First Amendment issue.[190]

In *Deremo v. Watkins*,[191] the court held that employees' private letters to county officials requesting compensation for alleged claims against the county were not protected by the First Amendment.[192] Plaintiffs, terminated employees of a state court, alleged that they were terminated of their written requests for compensation promised in return for their silence about their alleged sexual harassment by their former supervisor.[193] The Eleventh Circuit affirmed the district court's judgment for defendants on grounds that the letters were private letters of grievance, and not protected speech on matters of public concern, because the content, form, and context of the letters indicated that the speech was private rather than public.[194] The letters sought private compensation for past harm, not the resolution of wrongful conduct of a public official, were of interest only to plaintiffs, and were not directed to serve the public goal of insuring that the office was free of sexual harassment.[195]

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188. *Id.* at 1070-71.

189. *See* Harris v. Evans, 920 F.2d 864 (11th Cir. 1991) (per curiam).

190. Busby v. City of Orlando, 931 F.2d 764 (11th Cir. 1991) (per curiam); *see supra* note 26 and accompanying text. Officials who discharged a police force employee for failure to follow guidelines for the criticism of supervisors were entitled to qualified immunity. The quasi-military nature of the police force and the need for loyalty and discipline indicated that the result of a *Pickering* balance was not so clear that the officials would have understood their conduct violated the First Amendment. *Id.* at 773-74; Professional Fire Fighters Local 2238 v. City of Hallandale, 922 F.2d 756 (11th Cir. 1991); *see supra* note 123 and accompanying text. In *Hallandale*, the court held that the mere existence of city policy and guidelines for criticism of supervisors and other city officials by city employees did not give a firefighters' union standing to challenge the policy. *Id.* at 761-62.

191. 939 F.2d 908 (11th Cir. 1991).

192. *Id.* at 912.

193. *Id.* at 910.

194. *Id.* at 910-12. The court did not weigh appellant's failure to publicly communicate their speech against them because plaintiffs alleged that their silence was achieved at defendant clerk's direction. *Id.* at 911 n.3.

195. *Id.* at 912. The court assumed that an employee's complaint to a superior reporting the wrongful conduct of a public official, including sexual harassment, would ordinarily be a matter of public concern. *Id.*

In *Harris v. Evans*,[196] an inmate claimed that a policy prohibiting correctional employees from making parole recommendations directly to the parole board violated the First Amendment rights of the employees.[197] Applying the *Pickering* balancing test, the court found that the requirement that the warden "endorse" any employee recommendations of parole prior to its submission to the parole board violated the employees' First Amendment rights.[198] The court held that decisions made by the parole board were matters of public concern and thus the recommendations were not private speech, even though the recommendations were made with respect to individual parole decisions and not generally to parole policies.[199]

Prior Restraint. In *Nationalist Movement v. City of Cumming*,[200] the court re-instated a panel opinion[201] invalidating a parade ordinance as facially unconstitutional because it required advance payment of a fee of up to $1,000 per day for a permit to conduct a parade or public meeting in the county.[202] On rehearing en banc, the court held that the size of the permit fee exceeded the constitutional requirement that the fee be nominal, thus constituting a prior restraint on speech.[203]

In *Sentinel Communications Co. v. Watts*,[204] the court held that Florida's unwritten regulation of the placement of news racks at interstate rest areas was facially unconstitutional as a prior restraint on speech.[205] The state official had no written regulations, guidelines, or procedures to follow in granting or denying permits. Under the delegating statute, the official could grant or deny permits on any basis he thought appropriate,

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196. 920 F.2d 864 (11th Cir. 1991) (per curiam).

197. *Id.* at 867.

198. *Id.*

199. *Id.* The dissent argued that parole recommendations were not matter of public concern. *Id.* at 873-74 (Brown, J., dissenting).

200. 934 F.2d 1482 (11th Cir. 1991) (per curiam), *aff'd sub nom.* Forsyth County v. Nationalist Movement, 1992 WL 134457 (U.S., June 19, 1992) (No. 91-538).

201. *See* Nationalist Movement v. The City of Cumming, 913 F.2d 885 (1990), *vacated, reh'g en banc granted*, 921 F.2d 1125 (11th Cir. 1990), *aff'd sub nom.* Forsyth County v. Nationalist Movement, 1992 WL 134457 (U.S., June 19, 1992) (No. 91-538).

202. 934 F.2d at 1483.

203. *Id.*

204. 936 F.2d 1189 (11th Cir. 1991).

205. *Id.* at 1207. Although plaintiff was a permittee, the court held that plaintiff had standing to assert a facial challenge to a licensing scheme that vested "unbridled discretion" in the government decision maker. *Id.* at 1197 (citing FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 223-24 (1990)).

without justifying his reasons; the court held the official's unbridled discretion was unconstitutional.[206]

Protected Speech. In *International Eateries of America v. Broward County*,[207] the court held that an ordinance prohibiting "adult nightclubs" within five hundred feet of a residential zoning district or one thousand feet of a church furthered a substantial governmental interest in protecting the quality of urban life from the "secondary effects" of "adult" businesses and was narrowly tailored to serve that interest.[208] The court held further that the zoning ordinances allowed for reasonable alternative avenues of communication.[209] The court addressed the applicability of the recent Supreme Court decision of *Barnes v. Glen Theatre, Inc.*[210] and found that the "secondary effects" test of *City of Renton v. Playtime Theatres, Inc.*[211] was still applicable.[212] The court noted that a majority of the United States Supreme Court in *Barnes* did not hold that morality was a substantial governmental interest and, therefore, in order to uphold a statute regulating nude dancing specifically, ordinances still must meet the "secondary effects" test set forth in *Renton*.[213] Plaintiff's evidence establishing that its business had not caused adverse effects on the community was not probative since plaintiff could not establish the irrationality of the ordinance after the fact if the ordinance was narrowly tailored at the time of enactment.[214]

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206. *Id.* at 1199-1200.

207. 941 F.2d 1157 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1294 (1992).

208. 941 F.2d at 1162-63.

209. *Id.* at 1165.

210. 111 S. Ct. 2456 (1991). In *Barnes* a plurality of the Court upheld Indiana's public indecency statute. *Id.* at 2460. The three justice plurality held that the conduct was "marginally" protected by the First Amendment and that the framework to be applied to government regulation was the four-part inquiry for symbolic speech set forth in United States v. O'Brien, 391 U.S. 367, 377 (1968). 111 S. Ct. at 2460. The plurality held that the "purpose of protecting the societal order and morality" was a legitimate substantial governmental interest. *Id.* at 2461. The majority concluded that because the statute prohibited all public nudity, it was not targeted to the expression of nude dancing. *Id.* at 2463. The requirement of G-strings and pasties was narrowly tailored to fulfill the substantial governmental interest. *Id.*

Justice Souter concurred, but disagreed that morality was a substantial governmental interest. Instead, Justice Souter wrote that the state had a substantial interest in regulating the secondary effects of adult entertainment establishments. *Id.* at 2468 (Souter, J., concurring). Justice Scalia concurred in the judgment, opining that the law was a general law regulating conduct not specifically directed at expression and thus was not subject to First Amendment analysis. *Id.* at 2463 (Scalia, J., concurring).

211. 475 U.S. 41 (1986).

212. 941 F.2d at 1161-63.

213. *Id.*

214. *Id.* at 1162-63.

In *Fane v. Edenfield*,[215] the Eleventh Circuit held that a Florida statute barring certified public accountants ("CPAs") from soliciting business through in-person contacts impermissibly limited commercial speech in violation of the First Amendment.[216] The court concluded that the blanket prohibition on in-person commercial speech was not justified by the fear of abuse of clients.[217] Applying the four-part test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[218] the court held that the in-person solicitation ban was not narrowly tailored to meet its objective of protecting the public's ability to rely on the independence and objectivity of CPAs.[219] A prophylactic rule could not be based on unsupported assertions or unsubstantiated fears; the government presented no evidence that in-person solicitations were more likely to lead to dishonesty or oppression on the part of an accountant.[220] Moreover, there were existing regulations designed to achieve the objective of protecting the public.[221]

Free Exercise and the Establishment Clause. In *Powell v. United States*,[222] plaintiff, a member of the Church of Scientology of Florida ("Church") made contributions to the Church in exchange for participation in religious services and claimed them as charitable deductions on his federal income tax returns. The Internal Revenue Service ("IRS") disallowed the deductions. Plaintiff alleged that the IRS's inconsistent application of the charitable deduction provisions violated the First Amendment.[223] The Eleventh Circuit held that inconsistent treatment of quid pro quo payments to religious organizations, if proven, would violate the Establishment clause because it encouraged donations to certain sects and not to others.[224]

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215. 945 F.2d 1514 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 2272 (1992).

216. 945 F.2d at 1520.

217. *Id.*

218. 447 U.S. 557 (1980).

219. 945 F.2d at 1520.

220. *Id.* at 1518. The court distinguished the Supreme Court decisions of Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (upholding a ban on in-person solicitation by attorneys) and National Funeral Servs., Inc. v. Rockefeller, 870 F.2d 136 (4th Cir.), *cert. denied*, 493 U.S. 966 (1989) (upholding a ban on in-person solicitation by funeral directors selling burial services). In those cases, the record supported the conclusion that the harm to society or to the client outweighed the interests of the commercial speakers. 945 F.2d at 1519-20. In the case of CPAs, the Eleventh Circuit held that the opportunity for fraud, undue influence, or overreaching as the result of in-person solicitation was remote. *Id.* at 1518.

221. 945 F.2d at 1518.

222. 945 F.2d 374 (11th Cir. 1991).

223. *Id.* at 375.

224. *Id.* at 378.

In *Bishop v. Aronov*,[225] however, the court held that a university's acts did not violate the Free Exercise Clause by prohibiting a professor from making comments about religion during class time.[226] The restriction was not directed at the professor's religious practice but at his practice of teaching.[227] The restriction on in-class religious remarks did not constitute the establishment of religion in violation of the First Amendment because the restriction had a secular purpose that neither advanced nor inhibited religion and did not promote "excessive entanglement" with religion.[228]

Access To Courts. In *Chandler v. Baird*,[229] the court held that an inmate's alleged denial of access to the court during administrative confinement was not actionable where there was no relation between the alleged refusal of access to legal materials and any legal proceeding that could have been affected by the refusal.[230] The court held that at least in cases of short-lived deprivation of materials not implicating general policies, the inmate was required to show some sort of actual denial of access to the courts, or an injury, as opposed to a mere denial of legal services or materials.[231] In *Harris v. Thigpen*,[232] relief was warranted without a showing of prejudice because a general policy of access to legal materials was implicated. Plaintiffs, inmates who tested positive for the Human Immunodeficiency Virus ("HIV"), alleged that they had been denied access to the courts because they were not provided meaningful access to the prison law library or, in the alternative, to the assistance of persons with legal training, as a result of their segregation from the general prison population.[233] The trial court found that greater access to the library was needed but held that the policy did not constitute a denial of their right to access to the courts in violation of the First or Fourteenth Amendments.[234] The Eleventh Circuit remanded the issue to the district court for additional findings on the ground that the denial of relief was inconsistent with its finding of the inadequacy of access to the library.[235]

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225. 926 F.2d 1066 (11th Cir. 1991), *cert. denied*, 60 U.S.L.W. 3154 (U.S., June 29, 1992) (No. 91-286).

226. 926 F.2d at 1077.

227. *Id.*

228. *Id.* at 1077-78.

229. 926 F.2d 1057 (11th Cir. 1991).

230. *Id.* at 1061-63.

231. *Id.*

232. 941 F.2d 1495 (11th Cir. 1991).

233. *Id.* at 1527.

234. *Id.* at 1528.

235. *Id.*

D. Fourth Amendment

The Eleventh Circuit's 1991 decisions implicating the Fourth Amendment applied established precedent to the specific facts of the cases. In *Ortega v. Schramm*,[236] the court concluded that, viewing the evidence most favorably to plaintiffs, there was sufficient evidence that defendant deputy sheriff used excessive force in arresting plaintiffs where he entered plaintiff's building by shooting the lock off the door, kicked and injured plaintiffs, held them at gunpoint, and never told plaintiffs why they were being held.[237] In *Courson v. McMillian*,[238] the court held that a deputy's detention of a passenger in a vehicle he had stopped for speeding was not an unreasonable investigatory stop; the deputy did not use excessive force and did not violate plaintiff's constitutional rights in abandoning her on the highway without transportation home.[239] Finally, in *Lindsey v. Storey*,[240] the Eleventh Circuit concluded that an investigative detention for the purpose of searching a car was based upon reasonable suspicion where the car's occupants offered another motorist $2,500 to not report the accident and the officer's search of one passenger revealed $2,600 in cash.[241]

E. Fifth Amendment

In *Executive 100, Inc. v. Martin County*,[242] the court determined that plaintiff landowners' takings claims were not ripe for judicial review where plaintiffs had not submitted alternative plans of development to local officials in order to ascertain the scope and type of development that would be permitted on their property.[243] While the county had denied plaintiffs' application to rezone the property from a large lot residential zoning classification to an industrial classification, plaintiffs could not establish a taking without a showing that they had proposed less ambitious schemes for development and that the local government had reached a final determination of the nature and extent of development that the county would permit on plaintiffs' land.[244]

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236. 922 F.2d 684 (11th Cir. 1991) (per curiam).
237. *Id.* at 695-96.
238. 939 F.2d 1479 (11th Cir. 1991).
239. *Id.* at 1491-96.
240. 936 F.2d 554 (11th Cir. 1991).
241. *Id.* at 556-57.
242. 922 F.2d 1536 (11th Cir.), *cert. denied*, 112 S. Ct. 55 (1991).
243. 922 F.2d at 1538-40. *See also* Mackenzie v. City of Rockledge, 920 F.2d 1554 (11th Cir. 1991) (City's denial of a permit for a marina did not constitute a Fifth Amendment taking of his property because plaintiff had not property interest, under Florida law, in a permit for a marina). *Id.* at 1557-60.
244. 922 F.2d at 1540-41.

F. Eighth Amendment

Deliberate Indifference. A government actor's "deliberate indifference" to the medical needs of persons in the government's custody may rise to the level of a violation of the Eighth Amendment.[245] In *Howell v. Evans*,[246] subsequently vacated due to settlement, the widow of a prison inmate alleged that prison officials were deliberately indifferent to her husband's serious medical needs because the prison did not have proper resources to properly treat the inmate's serious asthma condition.[247] The court held that the standard for deliberate indifference to medical care could be established by reference to the "contemporary standards and opinions of the medical profession."[248] The court stated that "if the plaintiff demonstrates that a reasonable doctor in the defendants' position would have known that his actions were grossly incompetent by medical standards, then a jury could find deliberate indifference."[249] The attending physician on the date of the inmate's death was immune from plaintiff's claims because none of the allegations rose beyond negligence to "a gross violation of accepted practice."[250] The prison superintendent, however, was not entitled to qualified immunity because it was clearly established at the time of the incident that an official's denial or delay in obtaining proper treatment could constitute deliberate indifference.[251] Although defendant recommended a medical release, he did not seek treatment for the inmate at any other facility even though told such treatment was available.[252] The fact that defendant had a policy of allowing medical staff to make decisions regarding patient treatment did not relieve defendant of his responsibility in this case.[253] While the supervisor could rely on medical professionals for clinical determinations, that clinical determination had been made when it was decided that proper treatment could not be provided at the facility.[254]

In *Harris v. Thigpen*,[255] inmates who tested positive for the Human Immunodeficiency Virus ("HIV") challenged the prison policy of segregating HIV inmates from the general prison population as deliberate in-

245. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

246. 922 F.2d 712 (11th Cir.), *motion to withdraw petition for reh'g en banc granted and opinion vacated*, 931 F.2d 711 (11th Cir. 1991) (following settlement).

247. 922 F.2d at 715-16.

248. *Id.*

249. *Id.* at 720.

250. *Id.* at 719-22, 721 n.9.

251. *Id.* at 722-23.

252. *Id.*

253. *Id.* at 723.

254. *Id.*

255. 941 F.2d 1495 (11th Cir. 1991).

difference.[256] The Eleventh Circuit affirmed the denial of relief for deprivation of medical care pursuant to the Eighth Amendment.[257] Plaintiffs failed to establish systemic and gross deficiencies in staffing, facilities, equipment, or procedure that served to deprive the prison population of access to adequate medical care. Plaintiffs only established "isolated incidences of medical malpractice," which were insufficient to establish a systemic deprivation of medical care.[258]

While acknowledging problems in the quality of psychiatric care and the level of staffing for the HIV population, the court expressed reluctance to measure the constitutionality of the state's efforts to cope with the psychological effects of the fatal disease.[259] The court noted that assisting a terminally ill prisoner to "cope" with the psychological aspects of the illness "may be a more expansive view of mental health care than that contemplated by the Eighth Amendment."[260]

Cruel and Unusual Punishment. The 1991 decisions implicating the prohibition against "cruel and unusual punishment" under the Eighth Amendment represented the application of general legal principles to the specific facts of the cases. In *Chandler v. Baird*,[261] the court held that an inmate's allegations that he was kept in a cold filthy cell without adequate bedding or clothing and was deprived of basic toiletries were sufficient to warrant a trial regarding whether the conditions violated the Eighth Amendment.[262] In *Williams v. Burton*,[263] the court held that an inmate's rights were not violated by being placed or maintained in four point restraints and a gag for over twenty-eight hours.[264] The initial placement into restraints was proper; the inmate's "history of persistent disobedience and the potential for a disturbance in the segregation unit justified the continued use of the restraints and gag until the officers were reasonably assured the situation had abated."[265] In *Davis v. Locke*,[266] the Eleventh Circuit stated than an isolated attack by a guard on a prisoner

256. Under Alabama law, prisoners were required to be tested for various sexually transmitted diseases, including HIV. If an inmate had three positive screening tests for HIV, the inmate was assigned to one of two segregated HIV wards established by the state department of corrections. *Id.* at 1499-1501.

257. *Id.* at 1498.

258. *Id.* at 1506.

259. *Id.* at 1510.

260. *Id.* at 1511.

261. 926 F.2d 1057 (11th Cir. 1991).

262. *Id.* at 1063-66.

263. 943 F.2d 1572 (11th Cir. 1991) (per curiam), *cert. denied*, 1992 WL 94864 (U.S., June 22, 1992) (No. 91-8103).

264. 943 F.2d at 1575.

265. *Id.* at 1576.

266. 936 F.2d 1208 (11th Cir. 1991).

did not constitute a violation of the Eighth Amendment, but the evidence supported a jury determination that the guards intended to punish the inmate for his escape and used excessive force in order to do so in violation of the Fourteenth Amendment.[267]

G. Privacy

In *Planned Parenthood Ass'n v. Miller*,[268] the court upheld the constitutionality of a Georgia statute requiring parental notification of abortions performed on minors.[269] The statute was not defective because the notice provision mandated the use of regular mail notification over more expeditious means or because it subjected minors to a twenty-four hour delay following notification. Although the court noted that the statutory requirements were not perfectly fitted to the state's asserted interest, the notice procedures were reasonable, pursuant to the Supreme Court's opinion in *City of Akron v. Akron Center for Reproductive Health, Inc.*[270] The required twenty-four hour waiting period following notification was narrowly tailored to achieve the state's asserted interest.[271] The waiting period advanced the purpose of insuring that a minor made a knowing and intelligent decision, and the waiting period could be avoided by obtaining a statement from parents that they had been notified of the decision.[272] The judicial bypass procedure was not invalid for failing to guaranty anonymity; complete anonymity, as opposed to confidentiality, was not constitutionally required.[273]

In two cases, the court considered the privacy rights of prison inmates. In *Lemon v. Dugger*,[274] the court held that an inmate's allegations that prison officials opened and read "legal mail" from the inmate's attorney set forth a claim pursuant to section 1983.[275] In *Harris v. Thigpen*,[276] however, the court held that the department of corrections' policy of mandatory testing and segregation practices, as well as disclosure prac-

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267. *Id.* at 1212-14.

268. 934 F.2d 1462 (11th Cir. 1991).

269. *Id.* at 1471.

270. *Id.* at 1471-72 (relying on City of Akron v. Akron Center for Reproductive Health, Inc., 462 U.S. 416 (1983)).

271. *Id.* at 1482.

272. *Id.* at 1474-75.

273. *Id.* at 1479. Plaintiff argued that the procedure was insufficient because it did not require courts to issue orders stating that an abortion was authorized and thus physicians would be unwilling to perform abortions without parental notification. The court held that the requirement that the notification requirement is waived if the court takes no action within a certain time period effectively provided expediency. *Id.*

274. 931 F.2d 1465 (11th Cir. 1991).

275. *Id.* at 1466-67.

276. 941 F.2d 1495 (11th Cir. 1991), *cert. denied*, 111 S. Ct. 1073 (1991).

tices, did not violate the privacy rights of HIV positive inmates.[277] Balancing the inmate's privacy rights against the department's decision to segregate the prison population, the court found that mandatory testing and segregation was a reasonable restriction on the prisoner's privacy rights because of the need to control the prison population.[278]

In *James v. City of Douglas*,[279] the court held that plaintiff informant had stated a claim for violation of her right to privacy when police officers showed a videotape of plaintiff having sex with an arson suspect to persons unrelated to the investigation. Plaintiff alleged that the viewing of the videotape had no legitimate police purpose and was for the officers' own personal gratification.[280]

H. Due Process

Property Interest. In *Mackenzie v. City of Rockledge*,[281] the Eleventh Circuit held that plaintiff landowner had not established a protectable property interest in a building permit to operate a marina.[282] Plaintiff alleged that the city used illegal and arbitrary parking requirements to deprive him of a protected property interest in the building permit and that he substantially altered his position in reliance on the zoning official's interpretation of the land use regulations. The court determined that plaintiff had not established a property interest, as defined by state law, in the marina permit.[283] The doctrine of equitable estoppel did not prevent defendants from denying plaintiff's permit, as plaintiff could not estop the city from lawfully enforcing zoning ordinances "by using his efforts to fulfill legitimate conditions precedent to the issuance of a permit to establish reliance."[284]

In *Executive 100, Inc. v. Martin County*,[285] the court addressed the evolving ripeness requirements for land use claims. The court, following

277. 941 F.2d at 1520-21.

278. *Id.*

279. 941 F.2d 1539 (11th Cir. 1991) (per curiam).

280. *Id.* at 1544.

281. 920 F.2d 1554 (11th Cir. 1991).

282. *Id.* at 1559.

283. *Id.* (citing Marine One, Inc. v. Manatee County, 877 F.2d 892, 894 (11th Cir. 1989), *opinion modified on denial of rehearing en banc*, 898 F.2d 1490 (11th Cir. 1990) (per curiam)). In *Marine One*, the court held that plaintiff did not have a property interest in the permit in publicly owned lands. The court did not so limit its holding in *Mackenzie*, although apparently the same type of permit was involved. *See* Corn v. City of Lauderdale Lakes, 771 F. Supp. 1557, 1566 (S.D. Fla. 1991) (criticizing *Mackenzie* for reliance on panel opinion in *Marine One*, rather than on modified opinion).

284. 920 F.2d at 1559.

285. 922 F.2d 1536 (11th Cir.), *cert. denied*, 112 S. Ct. 55 (1991).

the dichotomy of land use claims set forth in *Eide v. Sarasota County*,[286] noted that the ripeness requirements depended on the nature of the claims asserted.[287] In this case, plaintiffs' claims arose from the denial of their applications to rezone their property from large lot residential zoning to industrial zoning. Plaintiffs' due process taking claims were not ripe because they had not alleged that they "sought variances or pursued alternative, less ambitious schemes of development."[288] However, plaintiffs's equal protection claim asserting that the city's decision was arbitrary and capricious and that the city treated them differently from similarly situated owners was ripe for judicial review, as plaintiffs only needed to establish that the decision denying industrial zoning was final.[289] On the merits, the court held that to establish a deprivation of a property right, plaintiffs must establish that the devaluation of their property was more than a fluctuation incidental to governmental decision making.[290]

The court addressed the scope of an employee's property right in employment based on mutual understandings or informal practice in several cases during 1991. In *Warren v. Crawford*,[291] the former superintendent of a county department of transportation sued the county alleging that a restructuring of the department, eliminating only his position, violated his rights to substantive and procedural due process. Although plaintiff believed that he could only be fired for cause, the court held that the department head had no property interest in the position because the employee handbook stated that department heads could be removed when the county administrator determined that it was in the best interest of the county.[292] The court rejected plaintiff's claim that past practices in terminating department heads created a protectable property interest where the state law did not provide for such a property interest.[293] Similarly, in *Todorov v. DCH Healthcare Authority*,[294] the court affirmed the lower court's decision that a physician did not have a protected property interest in obtaining additional staff privileges at a hospital.[295] The hospital procedures, designed to put order into applying for staff privileges, did

286. 908 F.2d 716, 719-23 (11th Cir. 1990).

287. 922 F.2d at 1540-41.

288. *Id.* The Eleventh Circuit has not resolved the issue of whether a property owner also must pursue state procedures for obtaining just compensation before a due process takings claim is ripe. *Id.* at 1540 n.12.

289. *Id.* at 1541.

290. *Id.*

291. 927 F.2d 559 (11th Cir. 1991).

292. *Id.* at 560-63.

293. *Id.* at 564.

294. 921 F.2d 1438 (11th Cir. 1991).

295. *Id.* at 1465.

not give the applicant a legitimate claim of entitlement to additional staff privileges.[296]

In contrast, in *Green v. City of Hamilton, Housing Authority*,[297] the court held that a terminated housing authority employee might have a property interest in continued employment based on an offer of "permanent employment."[298] The court reversed the district court's grant of summary judgment to defendants, holding that there were material issues of fact regarding whether plaintiff had an enforceable contract for employment under Alabama law.[299] The authority director's promise that the employment would be "permanent" after a probationary period, in order to induce plaintiff to move from another state and have his wife give up her job, created a genuine issue of material fact.[300] The employee handbook stated that employees become "permanent" after six months and stated that employees could be dismissed without notice for unsatisfactory service but that they would "have a right to a post-discharge hearing upon request."[301]

The employee's act of giving up his old job and moving from another state was more than nominal consideration sufficient to withstand summary judgment.[302] The apparent authority of the director to offer permanent employment, ratified by the employer, was sufficient to defeat summary judgment.[303]

Liberty Interest. In *Monroe v. Thigpen*,[304] an inmate alleged that his liberty interest in parole was denied when erroneous information in his prison file was used to deny parole. Plaintiff, Monroe, was convicted for murder and sentenced to life imprisonment after his death sentence was overturned.[305] Monroe alleged that a postmortem examination of the woman he murdered and other records retained in his prison file indicating he had sexually molested the murder victim were erroneous and had been improperly relied upon to deny him parole. The inmate was never

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296. *Id.* at 1464.

297. 937 F.2d 1561 (11th Cir. 1991).

298. *Id.* at 1564-66.

299. *Id.* Under Alabama law, "permanent" employment, as opposed to "at-will" employment, required (1) "a clear and unequivocal offer of 'permanent' employment, (2) the employee provided some substantial consideration for the contract apart from the services to be rendered, and (3) the individual making the offer had authority to bind the employer." *Id.* at 1564.

300. *Id.* at 1563, 1566.

301. *Id.* at 1563.

302. *Id.* at 1564-66.

303. *Id.* at 1566.

304. 932 F.2d 1437 (11th Cir. 1991).

305. *Id.* at 1438-40.

charged or convicted of a rape.[306] Defendant parole board later conceded that some documents in the file were false but refuse to correct the statements in plaintiff's prison record.[307]

The court held that although no liberty interest in parole was created in Alabama, the board's discretion was not unlimited, and it could not engage in " 'flagrant or unauthorized action.' "[308] The board could not rely on false information and, therefore, had treated plaintiff arbitrarily and capriciously.[309] The court distinguished the case of *Slocum v. Georgia State Board of Pardon & Parole*,[310] in which plaintiff merely asserted that erroneous information may have been used to deny him parole.[311] In *Monroe*, however, plaintiff established that the information was false and that the board relied upon that information knowing it was false.[312]

I. Equal Protection

During 1991, the court issued several opinions denying equal protection challenges to minority set aside and affirmative action programs. The court's approach suggests that it will require a plaintiff to establish a concrete and quantifiable injury resulting from the alleged reverse discrimination, particularly where there is a history of past discrimination against minorities. In *Peightal v. Metropolitan Dade County*,[313] an applicant for a firefighter position sued defendant municipality and fire department, alleging reverse discrimination in hiring practices because applicants who scored lower on the applicant exam were hired while he was not.[314] The fire department was hiring pursuant to an affirmative action plan to redress racial imbalances. In addition to a claim pursuant to Title VII, plaintiff alleged that the plan violated his right to equal protection of the laws.[315] The affirmative action plan at issue grouped applicants into racial and gender groups and compared applicant scores only against others in that racial-gender group. The goal of the plan was to have at least a seventy percent correspondence between the firefighter and the service population.[316] The district court held that the affirmative action plan was

306. *Id.* at 1438-39.
307. *Id.* at 1439.
308. *Id.* at 1442 (quoting Thomas v. Sellers, 691 F.2d 487, 489 (11th Cir. 1982) (per curiam)).
309. *Id.* at 1441-42.
310. 678 F.2d 940, 942 (11th Cir.), *cert. denied*, 459 U.S. 1043 (1982).
311. 678 F.2d at 941-42.
312. 932 F.2d at 1442.
313. 940 F.2d 1394 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 969 (1992).
314. 940 F.2d at 1395.
315. *Id.*
316. *Id.* at 1396-97.

valid pursuant to both Title VII and the equal protection clause.[317] The Eleventh Circuit, in a divided panel decision, upheld the plan as to Title VII, but remanded the action for a determination of whether the plan comported with the requirements of *City of Richmond v. J.A. Croson*.[318]

In two other cases, however, the court did not address the equal protection requirement because it found that the plaintiff contractors did not have constitutional standing to assert the challenges. In *S.J. Groves & Sons Co. v. Fulton County*,[319] the court determined that because plaintiff could not establish that he had lost specific projects as a result of the minority set aside ordinance, he did not have standing to challenge the ordinance.[320] Similarly, in *Cone Corp. v. Florida Department of Transportation*,[321] the court held that the causal nexus required for standing did not exist between the minority set aside regulation and plaintiffs' alleged loss of profits.[322] There was no basis upon which the court could determine if the state officials would in fact cause an injury to plaintiffs.[323] In *Wilson v. Bailey*,[324] the court upheld an affirmative action plan over the challenge of white male deputy sheriffs who alleged reverse discrimination.[325] The court held that it was not wrongful for the sheriff to consider race and gender in making promotions from a certified list of eligible candidates where race and gender were not dispositive factors and the decision to promote was made pursuant to an affirmative action plan.[326] The consideration of race and gender pursuant to a legitimate affirmative action plan was not actionable.[327]

In *Severino v. North Fort Myers Fire Control District*,[328] the court held that a firefighter placed on light duty because he had the HIV virus and subsequently terminated as a result of his refusal to accept light duty did not state a Fourteenth Amendment claim.[329] Plaintiff "was treated

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317. *Id.* at 1395.

318. 488 U.S. 469 (1989). Senior Circuit Judge Brown argued that the plan met the requirements of City of Richmond v. J.A. Croson, because the plan was based on past discrimination and was narrowly tailored. *Id.* at 1402-03.

319. 920 F.2d 752 (11th Cir.), *cert. denied*, 111 S. Ct. 2274 (1991).

320. 920 F.2d at 758-59.

321. 921 F.2d 1190 (11th Cir.), *cert. denied*, 111 S. Ct. 2238 (1991).

322. 921 F.2d at 1203-09.

323. *Id.* at 1209-10.

324. 934 F.2d 301 (11th Cir. 1991).

325. *Id.* at 302-05.

326. *Id.* at 304-05.

327. *Id.* at 303-05.

328. 935 F.2d 1179 (11th Cir. 1991).

329. *Id.* at 1182-83.

differently only to the extent of providing him an alternative to his initial voluntary resignation due to his HIV status."[330]

IV. CONCLUSION

As in 1990, the most salient feature of the Eleventh Circuit's 1991 constitutional jurisprudence is the failure of the court to reach a consensus in the application of the defense of qualified immunity. The court's divergence into a series of approaches to qualified immunity skews not only the law of qualified immunity, but also the law of the underlying substantive issues. The disharmony begs for the en banc consideration of the qualified immunity issue.

During 1991, the court was confronted with two of the most controversial current social issues in 1991—AIDS and affirmative action programs. With regard to challenges to governmental action regarding AIDS victims, the court was deferential to well-considered governmental action that dealt with the consequences of the disease. The court was also protective of governmental action with regard to affirmative action programs, requiring a substantial injury in order for disgruntled contractors to acquire standing.

330. *Id.* at 1183. The case was primarily under the Rehabilitation Act of 1973, and the court's basis for denial of relief as to the constitutional claims was premised on the reasons set forth in the analysis of the statutory claim. *Id.* Judge Kravitch filed a dissenting opinion. *Id.*