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Constitutional Civil Law

by Albert Sidney Johnson

and

Susan Cole Mullis

During the 1992 survey period, the most noticeable aspect of the constitutional civil law jurisprudence of the United States Court of Appeals for the Eleventh Circuit was the large body of circuit jurisprudence concerning the First Amendment, both in the context of ballot access and the rights of public employees. The Eleventh Circuit also issued several opinions on constitutionalized procedural issues such as standing, abstention, preclusion, and ripeness. The court's receptiveness to these preliminary defenses provides an opportunity for government defendants to avoid litigation on the merits in appropriate cases.

Once again, the circuit's qualified immunity opinions illustrate the continuing circuit discord over the application of the defense. However, during 1992, the court issued several opinions clarifying the role of the defense at trial. The circuit extended immediate appealability of pretrial denials of immunity to orders denying state law sovereign immunity.

During 1992, the Eleventh Circuit, like most circuit courts, failed to resolve the issue of the applicability of the Fourth Amendment to pretrial detainees. However, the court did make important contributions to its Fifth Amendment jurisprudence during the survey period.

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I. PRELIMINARY ISSUES

A. Immunity

Qualified Immunity. Over the past several years, the intracircuit conflict over the appropriate application of the qualified immunity defense in civil rights cases brought pursuant to 42 U.S.C. § 1983 ("section 1983") has been discussed in detail in this Article. A government official has immunity to 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].'" In Anderson v. Creighton, 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. The Court 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." The Supreme Court’s recent decisions on qualified immunity have been protective of the breadth of the doctrine.

Eleventh Circuit decisions applying the Anderson "bright line test" do not provide a consistent rule as to the level of generality of the legal rule

   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.


5. Id. at 641-42.

6. Id. at 639.

7. See, e.g., Hunter v. Bryant, 112 S. Ct. 534 (1992) (qualified immunity should be decided prior to trial and should protect all but the "plainly incompetent or those who knowingly violate the law"); Siegert v. Gilley, 111 S. Ct. 1789, 1793 (1991) (district court must first determine whether the plaintiff has stated a constitutional violation before reaching qualified immunity issue). But see Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 113 S. Ct. 1160 (1993) (rejecting higher pleading standard for municipal liability, but declining to decide whether there is a heightened pleading standard for qualified immunity purposes).
by which the defendant's conduct is to be judged. The division of the panel in *Adams v. St. Lucie County Sheriff's Department* illustrates the intracircuit conflict over the application of the "clearly established law" element of the qualified immunity test. Although the court denied qualified immunity to the defendant sheriff deputies on the grounds that the law was clearly established that their conduct was unconstitutional, each member of the panel gave a divergent assessment of whether the law was clearly established. The precise issue on appeal was whether it was clearly established law in May 1985, the time of the incident, that the intentional ramming of a vehicle during a high-speed chase by a law enforcement officer, causing the pursued vehicle to crash and thereby terminating the freedom of movement of a passenger in the vehicle, constituted an unreasonable seizure in violation of the Fourth Amendment.

The incident in question occurred some six weeks after the United States Supreme Court decided *Tennessee v. Garner*. Judge Hatchett, writing for the court, upheld the district court's denial of summary judgment on qualified immunity grounds. Judge Hatchett determined that the decision in *Garner*, decided shortly before the incident in question, established that a law enforcement officer may not use deadly force to seize an unarmed nondangerous suspect. Although the opinion recognized that *Garner* did not address high-speed car chases, the court held that "the very conduct in question need not have been explicitly held to be unlawful."

8. For example, some Eleventh Circuit decisions applying the *Anderson* "bright line test" have held that it must be clearly established law that the defendant's specific conduct was unconstitutional. See, e.g., *Edwards v. Gilbert*, 867 F.2d 1271 (11th Cir. 1989); *Dartland v. Metropolitan Dade County*, 866 F.2d 1321 (11th Cir. 1989); *Barts v. Joyner*, 865 F.2d 1187 (11th Cir.), *cert. denied*, 493 U.S. 831 (1989). 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. See, e.g., *Greason v. Kemp*, 891 F.2d 829 (11th Cir. 1990); *Powell v. Lennon*, 914 F.2d 1459 (11th Cir. 1990). 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 unconstitutional. See, e.g., *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499 (11th Cir. 1990); *Dartland v. Metropolitan Dade County*, 866 F.2d 1321 (11th Cir. 1989).

9. 962 F.2d 1563 (11th Cir. 1992), *reh'g en banc granted and panel opinion vacated*, 982 F.2d 472 (11th Cir. 1993).

10. 962 F.2d at 1563. Circuit Judge Hatchett wrote the opinion denying qualified immunity to two deputy sheriffs; Senior Circuit Judge Hill wrote a concurring opinion. Id. at 1572 (Hill, J., concurring). Judge Edmondson wrote a strong dissent. Id. at 1573 (Edmondson, J., dissenting).

11. Id. at 1566.

12. Id. at 1568.

13. 471 U.S. 1 (1985). In this case, the Supreme Court held that a police officer's fatal shooting of a fleeing suspect constituted a violation of the Fourth Amendment. Id. at 7.

14. 962 F.2d at 1568-69.
ful prior to the time the official acted.’”15 The court held that the defendants were required to relate the established law of Garner to what it deemed to be a factually analogous situation.16 The concurring opinion of Senior Circuit Judge Hill held that qualified immunity should be denied because one resolution of the facts in dispute would be that the deputies intentionally rammed the vehicle for the purpose of stopping the driver, which he determined would constitute a Fourth Amendment seizure.17 Judge Edmondson dissented, stating that “the court today has carved out an exception to the general rule of qualified immunity and would require police officers to foretell perfectly the evolution of Fourth Amendment law, even when that evolution has still not clearly established that the events in this case violated the Constitution.”18 Judge Edmondson disagreed with the court’s application of the “clearly established law” standard, stating that while the plaintiff is not required to establish that the exact factual precedent was clearly established, the facts in the case relied on as precedent must be “materially similar.”19

In Wright v. Whiddon,20 in contrast, the court of appeals reversed the district court and held that an officer was entitled to qualified immunity from the Fourth Amendment claims of a pretrial detainee who was shot and killed during an escape attempt.21 In Wright the unarmed pretrial detainee escaped from the courthouse and was shot by sheriff officers in pursuit.22 The incident in question occurred approximately six months after the decision in Garner.23 The panel distinguished Garner on the grounds that the plaintiff was a pretrial detainee, not a suspect fleeing to avoid custody.24 Relying on Graham v. Connor,25 the court determined that the issue of whether a pretrial detainee may press a claim of excessive force under the Fourth Amendment was unresolved. Accordingly, the court concluded that “[t]he presence of such doubt about the existence and content of the constitutional right that [the defendant] is alleged to have violated is enough to entitled him to qualified immunity.”26

15. Id. at 1569 (quoting Stewart, 908 F.2d at 1504).
16. Id.
17. Id. at 1572-73.
18. Id. at 1574.
19. Id. at 1576.
20. 951 F.2d 297 (11th Cir. 1992).
21. Id. at 300.
22. Id. at 298.
23. Id. at 299.
24. Id. at 300.
26. 951 F.2d at 300. Similarly, in Bank of Jackson County v. Cherry, 980 F.2d 1362 (11th Cir. 1993) (on rehearing), modifying 966 F.2d 1406 (11th Cir. 1992), the panel held that “a right is clearly established only if the unlawfulness of the conduct that allegedly violates the
The Eleventh Circuit granted rehearing en banc in *Adams*\(^\text{27}\) in early 1993, vacating the panel opinion. The rehearing en banc promises an attempt to resolve the intracircuit conflict over the clearly established law prong of the qualified immunity analysis.\(^\text{28}\)

Once pretrial immunity has been denied because of the existence of factual disputes precluding an immunity determination, the issue becomes what role qualified immunity is to play in the trial of the case. In the 1991 case of *Ansley v. Heinrich*,\(^\text{29}\) 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."\(^\text{30}\)

The court revisited the jury trial issue in 1992 in *Stone v. Peacock*.\(^\text{31}\) In *Stone* defendants' pretrial assertions of qualified immunity were defeated, as were their motions for directed verdict at trial.\(^\text{32}\) The district court instructed the jury on the merits of plaintiff's case and on defendants' qualified immunity defense. The jury returned verdicts for defendants.\(^\text{33}\) The Eleventh Circuit held that the district court's instruction to the jury on the qualified immunity defense was harmful error requiring reversal of defendants' general jury verdict.\(^\text{34}\) The court held that the qualified immunity issue was a legal determination that should be decided before trial, during trial, or after trial, but that should "seldom, if

right would have been apparent to an objective, reasonable official 'in light of clearly established law and the information possessed by the official at the time the conduct occurred.'" *Cherry*, 980 F.2d at 1369 (quoting *Nicholson v. Georgia Dep't of Human Resources*, 918 F.2d 145, 147 (11th Cir. 1990)). The court held that qualified immunity was appropriate because the "legal similarity" between plaintiff's claim and the existing development of the law "would not have been readily apparent to government officials attempting to do their jobs on a day-to-day basis." *Id.* at 1370.

27. *Adams v. St. Lucie County Sheriff's Dep't*, 982 F.2d 472 (11th Cir. 1993).

28. The circuit has made at least two prior efforts to hear a qualified immunity case en banc in recent years. See *Howell v. Evans*, 922 F.2d 712, vacated, 931 F.2d 711 (11th Cir. 1991).

29. 925 F.2d 1339 (11th Cir. 1991).

30. *Id.* at 1348.

31. 968 F.2d 1163 (11th Cir. 1992). *Cf. Hancock v. Hobbs*, 967 F.2d 462, 465-69 (11th Cir. 1992) (The court did not address plaintiff's assertion that the district court erred in submitting the issue of qualified immunity to the jury. The court held that plaintiff waived the issue for the purposes of appeal by failing to object to the qualified immunity charge before the jury began deliberating. Moreover, the special interrogatories regarding the liability issues established that there was no harmful error; see also *Adams v. St. Lucie County Sheriff's Dep't*, 962 F.2d 1563, 1567 & n.2 (11th Cir. 1992), *reh'g en banc granted and opinion vacated*, 982 F.2d 472 (11th Cir. 1993) and *Bailey v. Board of County Comm'rs of Alachua County*, 956 F.2d 1112, 1126 n.17 (11th Cir.), *cert. denied*, 113 S. Ct. 98 (1992).

32. 968 F.2d at 1165.

33. *Id.*

34. *Id.* at 1165-66.
ever” be submitted to the jury. The instruction of the jury on the qualified immunity defense was harmful error because it could not be determined from the general jury verdict that the jury decided the case on the merits and not on the basis of the qualified immunity defense. The court remanded the case for the district court to determine the legal issue of whether qualified immunity was appropriate, on a motion for judgment notwithstanding the verdict. The district court was instructed that if it determined that defendants were not entitled to the immunity, then the merits of the case should be submitted to the jury without mention of the qualified immunity defense. The Eleventh Circuit held that if disputed issues of fact prevented the district court from making the qualified immunity determination, then special interrogatories to the jury would be appropriate.

Absolute Immunity. During 1992, the Eleventh Circuit issued two opinions clarifying the scope of the doctrine of absolute legislative immunity. An official is entitled to absolute immunity when the official acts in a legislative capacity. The official must establish that the absolute immunity is justified for the governmental function at issue. The legislative immunity extends to state and local legislators. In 1991 in Crymes v. DeKalb County, the court adopted the rationale of Front Royal &

35. Id., at 1165.
36. Id. at 1166 (citing Ansley, 925 F.2d at 1347-49). The court explained that the instruction in Ansley was not harmful error because the court employed special interrogatories. Id.; see also Stevens v. Gay, 792 F.2d 1000, 1005 (11th Cir. 1986) (cited for comparative purposes by the court in Stone, in which the panel held that the charge was not reversible error).
37. 968 F.2d at 1165.
38. Id.
39. Id. at 1166. See Hancock, 967 F.2d at 465-69 (even though the court submitted the qualified immunity issue to the jury, the special interrogatories on the liability issues determined that the instruction was not harmful error).
42. Tenney v. Brandhove, 341 U.S. 367 (1951) (state legislators); Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) (regional officials). While the Supreme Court has not held that the immunity applies to local legislators specifically, in Spallone v. United States, 493 U.S. 265, 278 (1990), the Court held that some of the same considerations in determining absolute immunity for state legislators must govern a court's exercise of discretion in cases involving local legislators. The Eleventh Circuit extended the immunity to local legislators in Hernandez, 643 F.2d at 1193, as have the majority of circuit courts. See Spallone v. United States, 487 U.S. 1251, 1259 (1988).
43. 923 F.2d 1482 (11th Cir. 1991) (per curiam).
Warren County Industrial Park Corp. v. Front Royal\textsuperscript{44} and held that local legislators were not entitled to absolute immunity in voting to deny a development permit because acts of zoning enforcement, rather than rulemaking, were not legislative activities.\textsuperscript{46} In Brown v. Crawford County, Georgia,\textsuperscript{46} the Eleventh Circuit appeared to withdraw from its statement in Crymes, and its reliance on the Front Royal rationale.\textsuperscript{47} In Brown the court held that local county commissioners were acting in a legislative capacity in voting to enact a resolution placing a temporary moratorium on applications for mobile home permits for a specified area of the county until a revised zoning development plan could be reviewed.\textsuperscript{48} The immunity was not defeated by plaintiff's allegation that the legislators acted in bad faith in enacting the moratorium in order to deny his application for a permit to develop a mobile home subdivision. The absolute immunity shielded the legislators from claims of conspiracy or bad faith.\textsuperscript{49}

In Yeldell v. Cooper Green Hospital, Inc.,\textsuperscript{50} the court held that a county commissioner was not entitled to absolute immunity from claims of intentional race discrimination in personnel decisions that he made in his role as overseer of the county's health and human services matters.\textsuperscript{51} The challenged personnel decisions were administrative actions that were not "an integral part of the deliberative and communicative processes' by which legislators pass laws."\textsuperscript{52} The remaining commissioners, however, were entitled to absolute immunity from claims that they did not act to

\begin{footnotes}
\item[45] 923 F.2d at 1484-86. In comparison, the Board's vote to remove a road from the county truck route ordinance was legislative in nature.
\item[46] 960 F.2d 1002 (11th Cir. 1992).
\item[47] The court cited Crymes for the proposition that the commissioners were entitled to absolute immunity from a claim that they voted to deny a development permit. Id. at 1012. However, it was precisely for that claim that the court in Crymes held absolute immunity was not available at the motion to dismiss stage. The court in Crymes actually held that the legislators were entitled to immunity from a claim that they voted in bad faith to remove a road from a county truck route ordinance, which they determined to be an action of general policymaking rather than enforcement. 923 F.2d at 1485.
\item[48] 960 F.2d at 1012.
\item[49] Id. Indeed, the court in Brown held that even though the county was not a party to the appeal, the district court should dismiss the action against all the remaining defendants on remand. Because Brown's only claim against the county was for the alleged discriminatory action of the commissioners to which they were entitled to absolute immunity, Brown had not stated a claim against the county. Id. at 1012 & n.17.
\item[50] 956 F.2d 1056 (11th Cir. 1992).
\item[51] Id. at 1062-63.
\item[52] Id. at 1062 (quoting Gravel v. United States, 408 U.S. 606, 625 (1972)).
\end{footnotes}
stop the improper personnel decisions from being made. The commissioners could not be held liable for failing to introduce a resolution calling for the redistribution of commission assignments because "the decision of whether or not to introduce legislation is one of the most purely legislative acts that there is."^

Eleventh Amendment Immunity. The Eleventh Amendment\textsuperscript{54} prohibits suits in federal court against an unconsenting state, even when brought by citizens of the state.\textsuperscript{55} To determine whether the state is the "real, substantial party in interest"\textsuperscript{56} in an action brought against a state official or agency, the court considers the law of the state creating the entity.\textsuperscript{57} If the state would pay any award of damages, it is the real party in interest.\textsuperscript{58} In Robinson v. Georgia Department of Transportation,\textsuperscript{59} the court addressed the issue of whether the Georgia Department of Transportation was a state agency entitled to Eleventh Amendment immunity. Plaintiff argued on appeal that because the Department of Transportation was entitled under state law to sue and be sued in its own name, and because it was fiscally autonomous from the state, that the Department was more akin to a political subdivision, which was not entitled to the immunity. The court rejected the argument, holding that the Department was not financially independent from the state because of a state law that provided that the Department had control and supervision of all funds appropriated for road work by the state and from certain tax revenues. Although the Department was fiscally autonomous in the sense that it could allocate and spend its dedicated funds in its discretion without intervention by the state legislature, it could not raise its own revenue through bonds or other devices and thus remained dependent on the state for its funds.\textsuperscript{60} Moreover, any judgment would be paid out of state funds,

\textsuperscript{53} Id. at 1063.

\textsuperscript{54} The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. CONST. amend. XI.

\textsuperscript{55} Carr v. City of Florence, 916 F.2d 1521, 1524 (11th Cir. 1990) (citing Hans v. Louisiana, 134 U.S. 1 (1890)).

\textsuperscript{56} Id. at 1524 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984)).

\textsuperscript{57} Id. at 1525 (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 280 (1977)).

\textsuperscript{58} Id. at 1524 (citing Edelman v. Jordan, 415 U.S. 651, 663 (1974)).

\textsuperscript{59} 966 F.2d 637 (11th Cir.), cert. denied, 113 S. Ct. 660 (1992).

\textsuperscript{60} 966 F.2d at 639-40.
since the Department's source of revenue was from a motor fuel tax set forth in the state constitution.\textsuperscript{61}

**Appeals From Orders Denying Immunity.** The pretrial denial of qualified immunity may be immediately appealed as a collateral order, pursuant to the Supreme Court's decision in *Mitchell v. Forsyth.*\textsuperscript{62} In *Burrell v. Board of Trustees of Georgia Military College,*\textsuperscript{63} the Eleventh Circuit held that the immediate appealability of the denial of qualified immunity extended to a private defendant who asserted qualified immunity to the plaintiff's claims that he conspired with municipal officers to remove her from her position as a savings and loan employee.\textsuperscript{64} The Eleventh Circuit has been more hesitant to decide the issue of whether an immediate appeal is available under the collateral order doctrine for denials of other forms of immunity. However, in *Griesel v. Hamlin,*\textsuperscript{65} the court determined that sovereign immunity under Georgia law satisfied the requirements for a collateral order as expressed in *Mitchell.* The defendant, an emergency medical technician in a diversity case, sought to immediately appeal the district court's denial of state law sovereign immunity as a collateral order.\textsuperscript{66} Because sovereign immunity in Georgia included the attribute of immunity from suit,\textsuperscript{67} and because that immunity would be effectively lost if the case was to erroneously proceed to trial,

\textsuperscript{61} Id. at 640. The Robinson panel held that the Department had not waived its Eleventh Amendment immunity by consenting to suit in state court. Relying on Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 n.1 (1985), the court held that a state's general waiver of sovereign immunity in state court is not enough to waive the immunity guaranteed by the Eleventh Amendment. 966 F.2d at 640.


\textsuperscript{63} 970 F.2d 785 (11th Cir. 1992), cert. denied, 61 U.S.L.W. 3545 (U.S. Apr. 5, 1993) (No. 92-1262).

\textsuperscript{64} 970 F.2d at 788. The saving and loan officer's assertion of qualified immunity was denied based on the Supreme Court's decision in Wyatt v. Cole, 112 S. Ct. 1827, 1829 (1992), which overruled Eleventh Circuit precedent, as well as that of other circuits holding that private defendants were entitled to qualified immunity from section 1983 claims seeking to impose liability based on the use of state replevin garnishment, or attachment action. 970 F.2d at 794-96. See, e.g., Jones v. Preuit & Mauldin, 851 F.2d 1321, 1323-24 (11th Cir. 1988) (en banc), vacated on other grounds, 489 U.S. 1002 (1989).

\textsuperscript{65} 963 F.2d 338 (11th Cir. 1992).

\textsuperscript{66} Id. at 339.

\textsuperscript{67} Id. at 340 (citing Crowder v. Department of State Parks, 228 Ga. 436, 438, 185 S.E.2d 908, 910 (1971) (suit may not be maintained against the state without its consent) and Sikes v. Candler County, 247 Ga. 115, 117, 274 S.E.2d 464, 466 (1981) (immunity from suit is a basic attribute of sovereign immunity)).
the denial of sovereign immunity was an immediately appealable collateral order under the Cohen doctrine.68

B. Preclusion

The Full Faith and Credit Statute69 provides that federal courts will 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 1983.70 In a decision intertwining the federalism concerns of full faith and credit and the Article III concerns embodied in the ripeness doctrine, the Eleventh Circuit in Fields v. Sarasota Manatee Airport Authority71 created an exception to the application of full faith and credit for property owners' alleging federal due process and takings claims who are required by the ripeness doctrine to first pursue state court remedies.72 The ripeness doctrine for claims arising under the Fifth and Fourteenth Amendments alleging the taking of property without just compensation requires that a plaintiff first pursue any available state court remedies for just compensation prior to bringing suit in federal court.73 However, if a plaintiff litigates his claim in state court, applicable laws of preclusion might bar the plaintiff from later suing in federal court on the same cause of action.74 In Fields the Eleventh Circuit held that the

68. Id. at 340-41. The Eleventh Circuit noted that the Second Circuit had held that the principles supporting immediate appealability for qualified immunity orders applied equally to the assertion of state law sovereign immunity in a diversity case. Id. at 340. See Napolitano v. Flynn, 949 F.2d 617 (2d Cir. 1991). Because federal law determines the appealability of a district court order denying summary judgment on state law immunity grounds in a diversity case, and the Cohen factors were applicable to the denial of sovereign immunity, immediate appellate jurisdiction existed to review the denial of immunity. Napolitano, 949 F.2d at 621.
69. 28 U.S.C. § 1738 (1982). Section 1738 provides in relevant part:
Such Acts, records and judicial proceedings or copies thereof, 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.
71. 953 F.2d 1299 (11th Cir. 1992).
72. Id. at 1305-06.
74. See generally Migra, 465 U.S. at 75 (res judicata); Allen, 449 U.S. at 90 (collateral estoppel).
England reservation procedure was not strictly applicable to federal takings claims because the plaintiff has no right to sue in federal court first, due to the lack of ripeness, and thus could not comply with the first step of the England procedure. In order to resolve the difficulty, the court resurrected a procedure it styled as a Jennings reservation, relying on the 1976 Fifth Circuit decision of Jennings v. Caddo Parish School Board. The court held that "would-be federal court litigants who are forced to pursue state court proceedings in order to satisfy exhaustion requirements imposed by federal law incident to a takings clause claim are 'involuntarily' in the state courts" and thus may make a reservation in state court of the right to litigate their federal claims in federal court. The court noted that a Jennings reservation is effective only when: (1) the litigant is precluded from filing suit in federal court in the first instance; and (2) the litigant is in state court involuntarily. In Fields the litigant failed to make a Jennings reservation in the state court. The mere failure to raise the federal claims in state court was not an effective reservation of a federal forum for litigation of the federal claims.

75. In England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411 (1964), the Supreme Court held that a litigant who has the option of going into state or federal court with a § 1983 claim, and who is required to proceed involuntarily into state court, may reserve the right to litigate his federal claims in federal court by making a so-called England reservation, an announcement to the state court of his intention to litigate his federal claims in federal court after litigating the state claims in state court. Id. at 415. The procedure is for the litigant to first file in federal court; the district court will then stay the federal proceedings to allow the state court to consider the state law claims, and then the litigant will make an England reservation of his federal claims in state court. Id. at 417-22.

76. 953 F.2d at 1305.

77. 531 F.2d 1331, 1332 (5th Cir.), cert. denied, 429 U.S. 897 (1976). The Eleventh Circuit noted that the decision in Jennings abolished the England reservation requirement of filing first in federal court and noted that the Jennings panel may have misread England and thus unduly broadened the England exception to full faith and credit. 953 F.2d at 1305. However, because takings clause plaintiffs are in a sense "involuntarily" in state court, the court in Fields held that the decision in Jennings could be brought within the Supreme Court's decision in England. Id. at 1306.

78. 953 F.2d at 1306.

79. Id. The court noted that it could identify only two situations in which the criteria would be met: "(1) when a defendant in a non-removable state court action wishes to pursue a federal law counterclaim; and (2) when federal law imposes an exhaustion requirement upon a would-be federal court litigant as a precondition of bringing his federal claims in federal court." Id. However, the court noted that if other circumstances existed meeting the requirement for a Jennings reservation, the doctrine would be applicable to reserve a federal court forum for federal claims. Id. at 1306 n.6.

80. Id. at 1308-09.
C. Subject Matter Jurisdiction

Abstention. Abstention is a judicial doctrine that embodies federalism and comity concerns and can be an important preliminary defense to state law claims proceeding in federal courts.\(^8\) The 1992 case of Luckey v. Miller\(^8\) concerned the plaintiffs' challenge to Georgia's indigent criminal defense system, alleging that it violated the Sixth, Eighth, and Fourteenth Amendments. After a tortuous appellate history, the Eleventh Circuit affirmed the district court's determination that the suit was barred on Younger abstention\(^8\) grounds. The court rejected plaintiffs' argument that the Younger abstention only prevented the court from restraining ongoing criminal prosecution and was not warranted when the injunction related to systemic issues that could not be raised in individual cases. The district court, as affirmed by the Eleventh Circuit, held that the abstention was warranted because the systemic relief sought by plaintiffs would interfere with every state criminal proceeding, and the state courts had the authority to consider the claims raised by plaintiffs.\(^8\)

Standing. Article III of the Constitution, addressing the federal court system, restricts federal court jurisdiction to "cases" or "controversies" and establishes the scope of matters that federal courts can determine.\(^8\) The concept of standing, a party's right to have a federal forum decide matters, thus has constitutional dimensions. The ability of the plaintiff to establish an injury to himself is a central part of that inquiry. In its pivotal 1992 decision in Lujan v. Defenders of Wildlife,\(^8\) the Supreme Court reaffirmed standing requirements which have particular significance for government defendants in federal court. In Lujan the Court addressed constitutional standing implications of statutes containing the so-called

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81. See Rindley v. Gallagher, 929 F.2d 1552 (11th Cir. 1991), for a thorough overview of the forms of the doctrine.
82. 976 F.2d 673 (11th Cir. 1992).
83. Younger v. Harris, 401 U.S. 37 (1971). In Younger the Supreme Court held 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. Id. at 43-44. See also Cate v. Oldham, 707 F.2d 1176, 1183 (11th Cir. 1983); Middlesex County Ethics Comm'n v. Garden State Bar Ass'n, 457 U.S. 423 (1982) (the state had an important state interest in maintaining and assuring the professional conduct of attorneys it licensed).
84. 976 F.2d at 677. The court relied on the Supreme Court decision in O'Shea v. Littleton, 414 U.S. 488 (1974), in which the Supreme Court held that Younger abstention also was appropriate when the plaintiff seeks to enjoin or control specific events that might take place in future criminal trials.
85. U.S. Const. art. III.
"citizen's suit" provision, permitting any person to commence an action for injunctive relief to enforce violations of the statute. The issue was whether a provision\(^8\) of the Endangered Species Act of 1973\(^8\) permitting any person to file an action to enjoin violations of the statute was sufficient to establish standing on behalf of the plaintiff environmental association. The Court, in an opinion by Justice Scalia, held that when plaintiff could not allege an injury to itself or its members sufficient to constitute Article III standing,\(^8\) plaintiffs could not base standing on a "procedural injury" arising from the citizen's suit provision in the statute.\(^9\) The Court held that to permit the citizen's suit provision to confer standing, without the existence of an individualized injury, would violate Article III and the separation of powers doctrine.\(^9\)

The Eleventh Circuit has also reinforced standing barriers to certain constitutional claims. During 1991, the Eleventh Circuit enunciated a strict standing threshold that required plaintiffs asserting equal protection challenges to minority set aside and affirmative action programs to allege their constitutional injury with specificity. In \textit{S.J. Groves & Sons Co. v. Fulton County}\(^8\) and in \textit{Cone Corp. v. Florida Department of Transportation},\(^9\) the court held that unsuccessful bidders on government projects had not met the injury-in-fact requirement for standing to challenge minority business enterprise regulations when the plaintiffs failed to establish that they had been denied specific projects because of the regulation.\(^9\) In its 1992 decision in \textit{Northeastern Florida Chapter of the

\footnotesize{\textit{87. 16 U.S.C. § 1540(g) (1988).}
\textit{89. The Court held that plaintiffs did not have standing, independent from the statute, to meet the constitutional requirements of Article III. 112 S. Ct. at 2136-39. Plaintiffs' allegations that they had visited certain projects funded by the United States in foreign lands, had observed the existence of endangered species at the site and that they planned to revisit the project at some future time and hoped to observe these species did not establish a concrete actual or imminent injury individualized to plaintiffs as a result of the United States' funding of the project. Id. The Court also rejected several theories of standing based on generalized public harm. Id. at 2139-40. Plaintiffs argued an "ecosystem nexus" theory of standing, whereby any person who uses any part of a contiguous ecosystem has standing to challenge any activity regarding any other part of the ecosystem. The second theory, called the "animal nexus" approach, would grant standing to anyone who has an interest in studying or seeing an endangered species. The final theory, the "vocational nexus" would provide that anyone with a professional interest in an animal had standing. Id. at 2139.}
\textit{90. 112 S. Ct. at 2145. The statute provided that any person may commence a civil action against the United States or any other government agency alleged to be in violation of the Endangered Species Act. 16 U.S.C. § 1540(g) (1988).}
\textit{91. 112 S. Ct. at 2145.}
\textit{92. 920 F.2d 752 (11th Cir.), cert. denied, 111 S. Ct. 2274 (1991).}
\textit{93. 921 F.2d 1190 (11th Cir.), cert. denied, 111 S. Ct. 2238 (1991).}
\textit{94. 920 F.2d at 756-59.}
Associated General Contractors of America v. City of Jacksonville, the court confirmed its adherence to the specificity requirement. The district court, after a previous appeal, held that the City of Jacksonville's minority set-aside program violated the equal protection concerns set forth in Richmond v. J.A. Croson Co. for voluntary affirmative action programs and issued a permanent injunction. On appeal, the Eleventh Circuit reversed on standing grounds and remanded the case for dismissal with prejudice. The court held that to invoke Article III standing, plaintiff was required to demonstrate direct injury, resulting from the defendants' alleged violation, which established that plaintiff was within the zone of interests protected. Because plaintiff sought only injunctive and declaratory relief, it was required to establish that it would suffer future injury and to plead standing through "specific concrete facts." The court held that plaintiff association had failed to establish any injury. While plaintiff alleged that the Jacksonville ordinance established an absolute bar for certain contracts, thereby prohibiting its nonminority members from bidding on those contracts, plaintiff had failed to establish that any of its members would have bid successfully on any of the set-aside contracts but for the ordinance. Plaintiff was required to allege a specific contract that was lost because of the ordinance and to establish that but for the ordinance a specific contract would have been awarded to one of its members. Plaintiff also failed to allege with specificity its claim that it was forced to discriminate in the award of subcontracts in order to comply with the ordinance because it failed to establish the specific subcontracts and loss of profit associated with the alleged injury. 

Ripeness. The ripeness doctrine addresses constitutional and prudential concerns that a claim does not constitute a "case" or "controversy" within the meaning of Article III. In the land use context, because the Fifth and Fourteenth Amendments prohibit the taking of property without just compensation, a plaintiff asserting a regulatory takings claim must obtain a final decision that he has been denied state court remedies.

95. 951 F.2d 1217 (11th Cir.), cert. granted, 113 S. Ct. 50 (1992).
97. 951 F.2d at 1218.
98. Id. at 1219-20. Although the case was decided on the merits, the Eleventh Circuit determined that the law of the case doctrine did not bar consideration of the standing of the plaintiff. The first appellate decision did not rule on standing and did not discuss it either expressly or implicitly. Id. at 1218 n.1.
99. Id. at 1219 (quoting Cone, 921 F.2d at 1203-04); see also Cone Corp. v. Hillsborough County, 983 F.2d 197 (11th Cir. 1993).
100. 951 F.2d at 1219.
101. Id. at 1220.
for inverse condemnation before the takings claim is ripe. The finality prong of the ripeness inquiry is required in order for the court to determine "the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit [development]." In Lucas v. South Carolina Coastal Council, the Supreme Court addressed the issue of whether the claim of a landowner that a coastal protection statute that designated the property as a protected area and prohibited all development constituted a Fifth Amendment taking. On appeal, the state coastal council argued that an amendment of the coastal development act that provided for "special permits" rendered the plaintiff's claim of permanent deprivation unripe because the Court could not determine whether or not the plaintiff would be able to develop the property under a "special permit." The majority opinion, authored by Justice Scalia, rejected the ripeness argument. The majority held that although lack of ripeness would have precluded judicial review under other circumstances, because the South Carolina Supreme Court decided the case on the merits, the failure to review the case would result in plaintiff being precluded from seeking remedy for past deprivation. The Court thus determined that plaintiff's temporary takings claim was ripe for review.

II. ATTORNEY FEES

42 U.S.C. § 1988 provides that a district court may award attorney fees to the "prevailing party" in civil rights actions brought pursuant to section 1983 and related civil rights statutes. In prior cases, the Supreme Court has indicated that a plaintiff who wins nominal damages may be designated as a "prevailing party" for purposes of section 1988. The Court has defined the prevailing party as one who "succeed[s] on any significant issue in litigation which achieves some of

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103. Id. at 2891 (quoting MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 351 (1986)).
105. Id. at 2890-91.
106. Id.
108. 42 U.S.C.A. § 1988(b) provides, in relevant part: "In any action or proceeding to enforce a provision of sections 1981, 1981(a), 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Id.
the benefit the parties sought in bringing suit,"\(^{109}\) and who establishes a "material alteration of the legal relationship of the parties."\(^{110}\) However, circuit courts had split over whether a plaintiff seeking compensatory damages who wins only nominal damages is entitled to attorney fees.

The Supreme Court’s decision in *Farrar v. Hobby*\(^{111}\) recognized that a party who wins nominal damages is a prevailing party and that the "prevailing party" inquiry is not dependent "on the magnitude of the relief obtained."\(^{112}\) However, as indicated in *Garland*, the Supreme Court held in *Farrar* that the "technical" nature of a nominal damages award does impact on whether it is appropriate to award fees pursuant to section 1988.\(^{113}\) At this point in the inquiry, the "degree of success" is the most important part of the inquiry.\(^{114}\) The Court held that "[w]hen a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, [cit. omitted], the only reasonable fee is usually no fee at all."\(^{115}\)

In *Ruffin v. Great Dane Trailers*,\(^{116}\) a case decided before *Farrar*, the Eleventh Circuit held that a plaintiff who failed to prevail on damages claims, but was awarded limited injunctive relief, was a prevailing party under section 1988.\(^{117}\) The Title VII plaintiff sued his employer for alleged race discrimination, seeking a promotion, lost benefits and backpay, compensatory damages, and a permanent injunction to order his employer to cease violating Title VII. The district court denied all monetary relief to the plaintiff but ordered that the employer increase its efforts to eliminate racial joking and slurs among its employees.\(^{118}\) The appellate court rejected the employer’s claim that given the nature of the relief awarded, as opposed to the requested relief, that the award of injunctive relief was a mere technical victory ordering defendant to do more of what


\(^{111}\) 113 S. Ct. 566 (1992). In the case below, Estate of *Farrar v. Cain*, 941 F.2d 1311 (5th Cir. 1991), Judge Higginbotham of the Fifth Circuit held that plaintiffs who sought $17 million in damages, and who recovered only $1 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 the plaintiffs. Although the jury found that plaintiffs’ constitutional rights had been violated, the court held that the suit was merely a damages suit and was not the vindication of an important constitutional right. 941 F.2d at 1314-17.

\(^{112}\) 113 S. Ct. at 573-74.

\(^{113}\) Id. at 574.

\(^{114}\) Id.

\(^{115}\) Id. at 575.

\(^{116}\) 969 F.2d 989 (11th Cir. 1992), cert. denied, 113 S. Ct. 1257 (1993).

\(^{117}\) 969 F.2d at 993.

\(^{118}\) Id. at 991.
it had already done in the past to correct the work environment situation. The Eleventh Circuit held that the injunction had changed the legal relationship of the parties, as the employer was now required by law to take affirmative action to correct the hostile work environment, and plaintiff could protect his rights through seeking a contempt proceeding.\textsuperscript{119}

III. \textbf{Substantive Issues}

\textbf{A. First Amendment}

\textbf{Prior Restraint.} In \textit{Forsyth County v. The Nationalist Movement},\textsuperscript{120} the Supreme Court affirmed the Eleventh Circuit's en banc decision in \textit{Nationalist Movement v. City of Cumming},\textsuperscript{121} invalidating a parade ordinance as facially unconstitutional because it required advance payment of a fee of up to one thousand dollars per day for a permit to conduct a parade or public meeting in the county. The Eleventh Circuit had held that the size of the permit fee exceeded the constitutional requirement that the fee be nominal, thus constituting a prior restraint on speech.\textsuperscript{122} In its majority opinion, authored by Justice Blackmun, the Supreme Court affirmed, holding that the parade ordinance was unconstitutional on several grounds. The Court first held that the ordinance was an invalid permit scheme because the ordinance did not contain "narrow, objective and definite standards" to control the discretion of the administrator in assessing permit fees.\textsuperscript{123} The ordinance allowed the administrator to assess a fee that could reflect the county's police and administrative costs associated with the activity to be permitted, with the permit fee ranging from a nominal fee to a maximum of one thousand dollars per day. Because the administrator could assess the maximum fee or no fee at all, and could include the costs of police services and administration or not, Justice Blackmun held that the ordinance vested unbridled discretion in the administrator.\textsuperscript{124} Additionally, the majority held that the ordinance was not content-neutral because it permitted the administrator to impose fees based on the costs for security for the county to meet the response of others to the message given by the speaker; the Court held that a "[l]istener's reaction to speech is not a content-neutral basis for regula-

\begin{itemize}
\item \textsuperscript{119} \textit{Id.} at 994.
\item \textsuperscript{120} 112 S. Ct. 2395 (1992).
\item \textsuperscript{121} 934 F.2d 1482 (11th Cir. 1991) (per curiam), \textit{aff'd}, 112 S. Ct. 2395 (1992).
\item \textsuperscript{122} 934 F.2d at 1483; \textit{see also} Sentinel Communications Co. v. Watts, 936 F.2d 1189 (11th Cir. 1991), when the court held that there was insufficient evidence in the record to support the district court's determination that a five cents per paper administrative fee was reasonably related to the costs of administering the newsracks at rest areas. \textit{Id.} at 1205-06.
\item \textsuperscript{123} 112 S. Ct. at 2401.
\item \textsuperscript{124} \textit{Id.} at 2401-03.
\end{itemize}
tion." The court held capping the ordinance's permit fee at one thousand dollars did not save the ordinance; even a nominal fee could not remedy the fact that the ordinance tied the amount of the fee to the content of the speech and lacked adequate procedural safeguards.

**Government Regulation Impacting Speech.** In *R.A.V. v. City of St. Paul*, the Supreme Court addressed the issue of whether an ordinance that deemed it disorderly conduct for a person to place on public or private property a symbol, object, appellation, characterization, or graffiti that the person knew or had reasonable grounds to know aroused anger, alarm, or resentment in others based on race, color, creed, religion, or gender was facially unconstitutional under the First Amendment. The petitioner, a juvenile, was charged with a misdemeanor under the St. Paul Bias-Motivated Crime Ordinance for burning a cross inside the fenced yard of a black family in his neighborhood. Even assuming that the ordinance only prohibited "fighting words," the Court held that the ordinance was facially invalid because it prohibited speech based on the content of the message. The Court held that even when speech was proscribable because of a content element such as obscenity or "fighting words," the First Amendment prohibited the government from singling out any type of prohibited speech, based on its content, for different treatment.

In *Abramson v. Gonzalez*, the Eleventh Circuit held that a Florida licensing scheme for psychologists which prohibited unlicensed practitioners from holding themselves out as "psychologists" placed an unconstitutional burden on commercial speech. The statute sought to regulate the practice of psychology by providing that only persons certified by the state could hold themselves out as "psychologists"; however, the statute placed no ban on the practice of psychology until a later date. The Eleventh Circuit held that so long as Florida did not restrict the practice of psychology, it could not constitutionally prohibit the practitioners from

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125. *Id.* at 2403. "Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." *Id.* at 2404.
126. *Id.* at 2404-05.
128. *Id.* at 2547.
129. *Id.* at 2541.
130. *Id.* at 2542.
131. *Id.* at 2544-47.
132. 949 F.2d 1567 (11th Cir. 1992).
133. *Id.* at 1578.
134. *Id.* at 1575.
holding themselves out as psychologists. Because the information was not actually misleading, but only potentially misleading, the state could only regulate in a manner that would directly advance its interests in protecting the public from untruthful or misleading information.

In *Messer v. City of Douglasville*, the Eleventh Circuit addressed the issue of whether a city ordinance that permitted onsite noncommercial signs but prohibited offsite commercial signs in its historic district was content-neutral. The court determined that the ordinance was content-neutral because it regulated signs based on their location, not on the content of the message of the sign. The ordinance was a reasonable time, place, and manner restriction because it advanced an important government interest in aesthetics in its historic district and left open alternative channels of communication, in that it permitted off-premise signs in all parts of the city not designated as a historic district.

**Public Employment.** The Eleventh Circuit addressed the scope of a public employee's right of free speech in his role as a citizen on several occasions during the survey period. A governmental employer's restrictions or actions violate the First Amendment if the employee is sanctioned for speaking out on a matter of public concern in his role as a citizen and the employee's interest in the speech is not outweighed by the employer's interest in providing orderly and efficient government services. The "public concern" element is determined on a case-by-case basis by determining whether the content, form, and context of the speech indicate that the speech is a matter of general public concern.

In *Goffer v. Marbury*, a former university staff attorney sued her former employer alleging that her termination violated her First Amendment right of free speech. The Eleventh Circuit reversed the jury verdict in favor of plaintiff because the district court erred in its application of the balancing test of *Pickering v. Board of Education*. The Eleventh Circuit held that the district court erred in treating diverse instances of speech, made under different circumstances, regarding different matters, to different audiences, as a unitary incident of speech on matters concern-

135. Id. at 1576. However, the state could permissibly prevent non-licensed practitioners from untruthfully holding themselves out as "licensed psychologists." Id.
136. Id. at 1576-77.
137. 975 F.2d 1505 (11th Cir. 1992), petition for cert. filed, March 25, 1993.
138. Id. at 1510-11.
141. 956 F.2d 1045 (11th Cir. 1992).
ing the "operation of the university." The trial court was required to assess the form, content, and context of each alleged incident of abridged speech. Also, the court erred in its refusal to give an appropriate jury instruction regarding plaintiff's duty to protect client confidences with respect to her employment, and whether the failure to keep those confidences constituted a legitimate reason for her termination. The Eleventh Circuit held that while not dispositive of the attorney's First Amendment rights to speak on matters of public concern, the determination of the attorney-client role was critical in defining the employer's interest and in determining whether plaintiff's speech destroyed "close working relationships" or destroyed her effectiveness in her role as an attorney.

In Pearson v. Macon-Bibb County Hospital Authority, the court held that an operating room nurse's speech on the overall cleanliness of operating rooms and the assignment of cleanup responsibilities in a publicly funded facility were matters of personal interest relating to her employment and not matters of public concern. Plaintiff's speech concerned the allocation of blame for the staff's neglect of cleaning duties and only incidentally touched on matters potentially hazardous to patients. The court concluded that "the private and self-interested character of Pearson's speech in no way draws the public at large or its concerns into the picture."

In Stough v. Gallagher, the Eleventh Circuit held that a sheriff violated the First Amendment rights of a deputy sheriff in demoting him because he worked for the sheriff's political opposition. The sheriff argued that the demotion was the least restrictive means of meeting the needs of public service, and that the deputy, who held the rank of captain, held a high level confidential policy making and public contact position, and thus was within the situation in which the sheriff could properly base employment decisions on political patronage. The Eleventh Circuit held that the case was properly viewed under the Pickering analysis, since the case primarily concerned the deputy sheriff's political speech in support of the sheriff's opponent. Conducting the rough balancing test appropriate in immunity determinations, the court held that plaintiff's political speech was a matter of public concern and that the sheriff had

143. 956 F.2d at 1048-49.
144. Id.
145. Id. at 1051.
146. 952 F.2d 1274 (11th Cir. 1992).
147. Id. at 1278-79.
148. Id. at 1279.
149. 967 F.2d 1274 (11th Cir. 1992).
150. Id. at 1279.
151. Id. at 1280.
152. Id.
failed to establish how plaintiff's speech had adversely affected the efficiency of the public services. The court rejected the sheriff's argument that plaintiff's position required a close working relationship because the sheriff's policies did not require political loyalty for employment up through the rank of captain, plaintiff's position, and because two levels of command existed between the sheriff and plaintiff.

In *Sims v. Metropolitan Dade County*, the court held that city officials were entitled to qualified immunity from plaintiff's First Amendment free speech claims arising from his suspension despite defendant's stipulation of the public concern issue. Plaintiff was employed by the Department of Community Affairs, whose function was to foster harmonious relations between ethnic groups in the county. Sims, a pastor and a leader among the county's black community, engaged in a series of sermons and other public speeches in which he made various remarks regarding alleged racially discriminatory practices by the county. He supported his remarks by a boycott of Hispanic businesses and ethnically divisive remarks regarding Hispanics. Plaintiff's remarks were published in the newspaper and infuriated members of the Hispanic community. Defendant officials first counseled plaintiff regarding his remarks and then suspended him for three days. The court concluded that the interest of the county in providing government services and the disruption caused by plaintiff's divisive public statements outweighed his interest in speaking on matters of public concern because "[i]t is clear that the First Amendment does not provide a right to continued government employment in a capacity that is inconsistent with, and undermined by, one's off-duty expressive conduct."

**Free Exercise and the Establishment Clause.** In *Chabad-Lubavitch of Georgia v. Miller*, the Eleventh Circuit addressed the interplay of the free exercise and establishment clauses of the First Amendment. In the per curiam opinion, the court adopted the holding of

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153. *Id.*
154. *Id.* at 1529. Similarly, in *Martinez v. City of Opa-Locka*, 971 F.2d 708 (11th Cir. 1992), the Eleventh Circuit held that the employee's interest in speaking out on a matter of public concern regarding her employer's purchasing practices was not outweighed by the employer's interest in providing government services, particularly when the employer had failed to establish a legitimate reason for plaintiff's termination. *Id.* at 712.
155. 972 F.2d 1230 (11th Cir. 1992).
156. *Id.* at 1238.
157. *Id.* at 1231.
158. *Id.* at 1232.
159. *Id.* at 1236, 1238.
160. 976 F.2d 1386 (11th Cir. 1992), *reh'g in banc granted, opinion in panel vacated*, 1993 U.S. App. LEXIS 7516 (11th Cir. 1993).
the district court that the rotunda of the Georgia state capital was a created public forum and that the state could not constitutionally prohibit a Jewish organization from placing a menorah in observance of Chanukah. However, the court adopted the finding of the district court that the state could prohibit a fifteen foot high metal menorah in isolation from other holiday symbols, because the isolation of the conspicuous symbol would communicate the impermissible message that the state was endorsing a particular religion, rather than recognizing general holiday season activities.

Access To Courts. In Brown v. Advantage Engineering, Inc., the issue before the appellate court was the public's right to access sealed judicial records in a civil action. In a prior action, defendant corporation had settled a personal injury suit with an employee after the district court had rejected the defendant's argument that it was the employer's (a subsidiary corporation) alter-ego under Georgia's law of worker's compensation; a key provision of the settlement was the sealing of the court records. Three years later, in an unrelated suit, a plaintiff in a contract dispute sought to compel the production of the sealed court records in the employee's personal injury litigation, specifically the corporation's pleadings on its claim that it was that subsidiary's alter-ego. Plaintiff water district then sought to permissively intervene in the dismissed personal injury action for the purpose of unsealing the record; the district court denied the request for intervention on the grounds of untimeliness. Relying on its 1985 decision in Wilson v. American Motors Corp., the Eleventh Circuit reiterated that the standard in balancing the competing interests of the district court's authority to encourage settlement and the public's right of access was that the denial must be " 'necessitated by a compelling governmental interest, and is narrowly tailored to [...] that interest.' " Thus, the court held that the fact that the sealing of the court records was an integral part of the settlement agreement, or that the court actively encouraged the settlement, was irrelevant; "[o]nce a matter is brought before a court for resolution, it is no

161. 976 F.2d at 1387.
162. Id.
163. 960 F.2d 1013 (11th Cir. 1992).
164. Id. at 1014.
165. Id.
166. Id. at 1015.
167. 759 F.2d 1568 (11th Cir. 1985). In Brown the court held that the fact that Wilson involved the sealing of the record after trial was "a distinction without a difference." 960 F.2d at 1015.
168. 960 F.2d at 1015-1016 (quoting 759 F.2d at 1571).
longer solely the parties' case, but also the public's case.\footnote{169} Accordingly, "absent a showing of extraordinary circumstances set forth by the district court in the record consistent with \textit{Wilson},\footnote{170} an absent third party had standing to enforce the public's right to move the court to unseal and to view improperly sealed records.\footnote{171}

The court also addressed the balancing of the concerns of the generally public nature of litigation as against the privacy concerns of individual litigants in \textit{Doe v. Frank}.\footnote{172} In \textit{Doe} the issue was whether the district court abused its discretion in denying a former postal service employee's motion to proceed under a fictitious name in suing his employer.\footnote{173} The court held that the test for permitting a plaintiff to proceed anonymously in a lawsuit was whether the plaintiff had "a substantial privacy right which outweigh[ed] the 'customary and constitutionally-embedded presumption of openness in judicial proceedings.' "\footnote{174} The court held that because lawsuits are "public events," "a plaintiff should be permitted to proceed anonymously only in those exceptional cases involving matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity."\footnote{175} Thus, the fact that the plaintiff in \textit{Doe} would be personally embarrassed from the disclosure involved in suing his governmental employer for an alleged improper termination was not sufficient.\footnote{176}

In \textit{Bank of Jackson County v. Cherry},\footnote{177} the panel opinion was modified on rehearing to clarify that while a bank's claims that it had a First Amendment right to petition for redress of grievances provided "addi-
tional justification” for the district court’s order reinstating the bank to a Farmers Home Administration’s loan guaranty program, there was no basis for the appellate court to hold that the debarment of the bank by the Farmer’s Home Administration in order to coerce the bank to settle a dispute over the proceeds from a guaranteed loan violated the bank’s First Amendment rights. The court determined that it did not need to confront the issue of whether the bank had a First Amendment right under those circumstances to determine that the officials were entitled to qualified immunity from the claim. Cases holding that the government violates the First Amendment right of access to the courts when it prosecutes an individual solely because the person refuses to release civil claims against the government did not constitute “clearly established law” for the purpose of holding that reasonable officials should have known that the bank’s debarment might violate its First Amendment rights. Unlike retaliatory prosecution cases, the bank’s debarment did not include the “loss of freedom or lasting stigma associated with criminal prosecution,” and although the government proceeded improperly in using summary debarment, it had legitimate reasons for pursuing settlement of the dispute with the bank.

Ballot Access. The presidential election year yielded two opinions regarding ballot access. Duke v. Cleveland involved the issue of whether a candidate has a First Amendment right to appear on a party’s primary ballot. After David Duke announced his candidacy for the Republican nomination for President, the Georgia Secretary of State prepared an initial list of presidential candidates for the Republican presidential preference primary for submission to the presidential candidate selection committee, the statutory body that selects the candidates who will appear on the presidential preference primary ballot. Duke’s name appeared on the initial list presented to the presidential candidate selection committee. Under state law, each person contained on the list prepared by the Secre-

178. 980 F.2d at 1364. The original panel hearing had determined that the debarment did not impact on the bank’s First Amendment rights. 966 F.2d at 1413.
179. 980 F.2d at 1370.
180. E.g., Haynesworth v. Miller, 820 F.2d 1245 (D.C. Cir. 1987) (prosecution did not have legitimate law enforcement objective in seeking release of plaintiff’s civil claims against the government) and Wilson v. Thompson, 593 F.2d 1375, 1386 (5th Cir. 1979) (federal court may enjoin state criminal prosecution when it finds that purpose of prosecution is to deter constitutionally protected conduct).
181. 980 F.2d at 1370.
182. 954 F.2d 1526 (11th Cir. 1992). Under state law, the Georgia Secretary of State certifies presidential candidates “who are generally advocated or recognized in news media throughout the United States as aspirants for that office and who are members of a political party or body which will conduct a presidential preference primary” in Georgia. Id. at 1527 (quoting O.C.G.A. § 21-2-193(a) (1987)).
tary of State will appear on the ballot for the presidential preference primary "unless all committee members of the same political party or body as the candidate agree to delete such candidate's name from the ballot."\textsuperscript{188} All Republican committee members agreed to delete Duke's name from the ballot, and Duke's name was omitted from the ballot by the Secretary of State.\textsuperscript{184} Duke and several registered voters then brought suit alleging that his exclusion from the ballot denied them their First Amendment rights of free speech and association. On expedited appeal, the Eleventh Circuit held that the district court did not abuse its discretion in denying preliminary injunctive relief because Duke had failed to establish the likelihood of success on the merits of his claim.\textsuperscript{186} Without deciding the issue of whether Duke's claims were subject to a strict scrutiny analysis, the Eleventh Circuit held that the state had legitimate and compelling reasons to justify any burden to Duke and others. Duke had no First Amendment right to association with the unwilling Georgia Republican party, since the party legitimately exercised its right to "'identify the people who constitute the association, and to limit the association to those people only.'"\textsuperscript{186} Concomitant to the party's right to define its membership,\textsuperscript{187} was its ability to identify Duke as "ideologically outside the party." The court decided that because the appellant voters were only foreclosed from voting for Duke as a Republican in the preference primary, and not as a third party or write-in candidate in the primary or general election, the appellants' denial of a right to vote was attenuated, if it existed at all.\textsuperscript{188} However, assuming that there was some burden on the appellants' right to vote, the court determined that Georgia had a compelling interest which justified any burden. The Republican party had a constitutionally protected right of freedom of association that encompassed the decision to exclude Duke from the presidential preference primary ballot.\textsuperscript{190}

\textsuperscript{183} 954 F.2d at 1527 (citing O.C.G.A. § 21-2-193(a)).
\textsuperscript{184} Id. at 1527-28. Under state law, if any Republican member of the Committee had requested that Duke's name be placed on the ballot, the Committee would have been bound to require the Secretary of State to include his name on the primary ballot. O.C.G.A § 21-2-193(a).
\textsuperscript{185} 954 F.2d at 1530.
\textsuperscript{186} Id. at 1530-31 (quoting Democratic Party v. Wisconsin, 450 U.S. 107, 122 (1981)).
\textsuperscript{187} Id. (citing Wisconsin, 450-U.S. at 122 and Tashjian v. Republican Party, 479 U.S. 208, 216 n.6 (1986)).
\textsuperscript{188} Id. at 1531.
\textsuperscript{189} Id. The court noted that there was a strong argument that there was no right to vote for any particular candidate in a party primary because the party had the right to select its candidates. Id. at 1531 n.6.
\textsuperscript{190} Id. at 1531-33 (Kravitch, J., dissenting).
The issue in *Fulani v. Krivanek*\(^{191}\) was whether Florida had imposed an unequal burden on minority party candidates who qualified by petition for the general ballot by denying them the option of waiving an unduly burdensome signature verification fee.\(^{192}\) The Eleventh Circuit reversed the district court's holding that the statute did not violate the minor party's equal protection and First Amendment rights.\(^{193}\) Plaintiffs, the New Alliance Party, and its presidential candidate in 1988, alleged that excluding minority party candidates from the waiver of the signature-verification fee of ten cents per signature when it was unduly burdensome imposed an unequal burden on minority party candidates.\(^{194}\) The court first held that its decision in *Libertarian Party of Florida v. Florida*,\(^{195}\) in which the court upheld the constitutionality of the similar state petition requirements for minority candidates for state-wide office, was not controlling because that case did not address the constitutionality of the fee-waiver provision.\(^{196}\) The Eleventh Circuit expressed some doubt as to the

\(^{191}\) 973 F.2d 1539 (11th Cir. 1992).

\(^{192}\) Florida's ballot scheme provides that minority party and independent candidates for United States President must submit petitions containing the signatures of at least one percent of the registered voters in Florida. *Id.* at 1539 (citing FLA. STAT. § 103.021(3) (1992)). The court in *Fulani* held that it was well-established that the difference in treatment between minority and independent candidates, and major political parties (whose names are placed on the ballot by the governor) was not unconstitutional. *Id.* (citing American Party of Texas v. White, 415 U.S. 767, 793-94 (1974)). The candidate must pay ten cents per signature, or the actual cost, which ever is less, to the state for verifying the signatures. If the candidate obtains 1.15 percent of the registered voters, then the candidate can have the state conduct a random sample of the signatures, at the cost of ten cents per signature actually checked. Plaintiffs argued that the cost savings from the random sample alternative might be offset by the additional cost incurred in obtaining additional signatures. *Id.* at 1540.

\(^{193}\) *Id.* at 1539.

\(^{194}\) The Florida statutory scheme provided for a waiver of the petition verification fee for reasons of undue hardship for major-party candidates and for independent candidates and ballot initiatives, but expressly excluded minority parties seeking to obtain a ballot position. *Id.* at 1540. The court held that there was no issue of the unconstitutionality of conditioning access to the ballot on payment of the signature verification fee because it had previously held Florida's fees for signature verification not unconstitutional. *Id.* (quoting Libertarian Party v. Florida, 710 F.2d 790, 794 (11th Cir. 1983), *cert. denied*, 469 U.S. 831 (1984)).


\(^{196}\) 973 F.2d at 1541-42. The court in *Fulani* held that the decision in *Libertarian* decided that the petition requirement for state offices (three percent) was constitutional because it advanced the state's important interest in insuring some amount of popular support before putting the candidate's name on the ballot. The court in *Libertarian* also decided that the fact that the petition requirement applied only to minority party candidates, and that independent candidates were not subject to the petition requirement, was not unconstitutional because it was justified to achieve the goal of assuring the voters that the party designation was an ongoing statewide political organization. *Id.* As addressed previously, the
appropriate standard to apply in a ballot access case that alleged a denial of equal protection, following the Supreme Court's 1992 precedents in the area,\textsuperscript{197} but concluded that the balancing test set forth in \textit{Anderson v. Celebrezze}\textsuperscript{198} was the correct standard, as opposed to the traditional strict scrutiny test.\textsuperscript{199} Even applying the balancing test, however, the Eleventh Circuit held that the fee waiver provision violated plaintiffs' right to equal protection.\textsuperscript{200} The fee waiver provision directly discriminated against minority parties and imposed an unequal burden the Eleventh Circuit found akin to requiring an early filing deadline for independent or minority candidates.\textsuperscript{201}

\textbf{B. Fourth Amendment}

Several cases decided during 1992 illustrate that the Eleventh Circuit is undecided as to the appropriate standard to apply to claims of excessive force in connection with pretrial detainees. In its 1989 decision in \textit{Graham v. Connor},\textsuperscript{202} the Supreme Court held that excessive force claims brought pursuant to section 1983 must identify the "specific constitutional right allegedly infringed by the challenged application of force."\textsuperscript{203} The Supreme Court acknowledged that the constitutional standard under

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  \item court in \textit{Libertarian} also decided that the signature requirement was not "unduly burdensome" as to cost and did not constitute an equal protection violation. The court noted that in Clean-up '84 v. Heinrich, 590 F. Supp. 928, 932-33 (M.D. Fla. 1984), aff'd on other grounds, 759 F.2d 1511 (11th Cir. 1985), the district court held that the same fee-waiver provision violated the equal protection clause, rejecting the argument that the issue was decided in \textit{Libertarian}. 973 F.2d at 1543. \textsuperscript{197} See \textit{Burdick v. Takushi}, 112 S. Ct. 2059 (1992) and \textit{Norman v. Reed}, 112 S. Ct. 698 (1992).
  \item 460 U.S. 780 (1983). In \textit{Anderson} the Supreme Court held that when addressing a First Amendment challenge to state election law, a court should apply a balancing test that ranges from strict scrutiny to rational basis, depending on the circumstances. \textit{Id.} at 789. In its 1992 decision in \textit{Burdick v. Takushi}, 112 S. Ct. 2059 (1992), the Supreme Court reaffirmed that every voting regulation was not required to be subject to the strict scrutiny analysis because that would "tie the hands of States seeking to assure that elections are operated equitably and efficiently." \textit{Id.} at 2063. \textit{See generally \textit{Fulani}}, 973 F.2d at 1543. \textsuperscript{198} 973 F.2d at 1543. The \textit{Fulani} panel noted that the Supreme Court's decisions in \textit{Burdick} and \textit{Anderson} both involved challenges based solely on the First Amendment; the Court in \textit{Anderson} noted that it did not engage in a separate equal protection analysis. 460 U.S. at 787 n.7. \textsuperscript{199} 973 F.2d at 1544-45.
  \item \textit{Id.}, see, e.g., 460 U.S. at 792 (invalidating Ohio early filing deadline for independent candidates on grounds, \textit{inter alia}, that it compounded an independent candidates organizing efforts since voters were less interested in the campaign); \textit{New Alliance Party v. Hand}, 933 F.2d 1568 (11th Cir. 1991) (invalidating Alabama's deadline for independent and minority party candidates). \textsuperscript{200} 490 U.S. 386 (1989).
  \item \textit{Id.} at 394. \textsuperscript{201}
\end{itemize}
which the excessive force claim of a pretrial detainee is to be analyzed is unclear.\textsuperscript{204} In \textit{Wright v. Whiddon},\textsuperscript{205} the Eleventh Circuit avoided deciding whether any Fourth Amendment rights of a pretrial detainee were violated by use of excessive force against him because "the presence of such doubt about the existence and content of the constitutional right" was sufficient to entitle the officer to qualified immunity.\textsuperscript{206} In \textit{United States v. Myers},\textsuperscript{207} concerning the criminal conviction of a city police officer for depriving two arrestees of their civil rights by using a stun gun, defendant officer objected to the court’s use of a jury instruction on the Fourth Amendment on the grounds that the proper standard was the Eighth Amendment "malicious and sadistic force" standard.\textsuperscript{208} The appellate court refused to address defendant’s asserted error that the Fourteenth Amendment “shocking to the conscience” standard applied because defendant waived its right to object on that ground at trial. The court held that the Eighth Amendment standard was not applicable to the defendant officer’s conduct.\textsuperscript{209} However, the court explicitly stated that it was not holding that the Fourteenth Amendment standard was inapplicable in analyzing excessive force claims.\textsuperscript{210}

\section*{C. Fifth Amendment}

During the survey period, the United States Supreme Court decided the case of \textit{Lucas v. South Carolina Coastal Council}\textsuperscript{211} and held that a ban on construction on coastal lots deprived the owner of all economically viable use of his property and constituted a regulatory taking of property that required just compensation under the Fifth Amendment.\textsuperscript{212} The Court rejected the South Carolina Supreme Court’s determination that the statute was valid as a regulation of harmful or noxious uses, pursuant to the Supreme Court’s line of cases holding that harmful or noxious uses

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\item \textsuperscript{204} \textit{Id.} at 388. The Court held that the it had “not resolved the question of whether the Fourth Amendment continues to provide individuals with protection against the deliberate use of excessive physical force beyond the point at which the arrest ends and the pretrial detention begins.”\textit{Id.} at 395 n.10. The Court noted that “[i]t is clear, however, that the Due Process Clause protects a pretrial detainee from the use of excessive force that amounts to punishment.”\textit{Id.}
\item \textsuperscript{205} 951 F.2d 297 (11th Cir. 1992).
\item \textsuperscript{206} \textit{Id.} at 300.
\item \textsuperscript{207} 972 F.2d 1566 (11th Cir. 1992), \textit{cert. denied}, 123 L.E.2d 445 (1993).
\item \textsuperscript{208} 972 F.2d at 1571.
\item \textsuperscript{209} \textit{Id.} at 1571-72.
\item \textsuperscript{210} \textit{Id.} at 1572.
\item \textsuperscript{211} 112 S. Ct. 2886 (1992).
\item \textsuperscript{212} \textit{Id.} at 2899.
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may be prohibited by regulation without requiring compensation. The Court held that the “harmful or noxious use” principle was simply the “progenitor of [the Court’s] more contemporary statements that land-use regulation does not effect a taking if it substantially advances legitimate state interests.” The Court held that the harm regulation/benefit conferring analysis was not useful because it “depend[ed] primarily upon one’s evaluation of the worth of competing uses of real estate.” Accordingly, the Court held that “noxious-use logic cannot serve as a touchstone to distinguish regulatory ‘takings’—which require compensation—from regulatory deprivations that do not require compensation.” The Court thus held that

[w]here the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.

The Court held that regulations that deprive an owner of all economically beneficial use of land should be treated similarly to the per se rule requiring compensation for physical takings of property: “[a]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.” When the regulatory action is based upon background principles of nuisance law, compensation is not required even when the effect is to eliminate all economically productive use, because that use was not previously a productive use under nuisance principles. The Eleventh Circuit awaited the decision in Lucas to decide the issue in Reahard v. Lee County: how the categorical takings rule applies

213. Id. at 2897. See, e.g., Mugler v. Kansas, 123 U.S. 623 (1887) (law prohibiting manufacture of alcoholic beverages); Miller v. Schoene, 276 U.S. 272 (1928) (order to destroy diseased cedar trees to prevent infection of nearby orchards).
214. 112 S. Ct. at 2897 (quoting Nollan v. California Coastal Comm’n, 483 U.S. 825, 834 (1987)).
215. Id. at 2898.
216. Id. at 2899.
217. Id.
218. Id. at 2900.
219. Id. at 2900-01. For example, the Court wrote that the owner of a nuclear generating plant would not be entitled to compensation when it was ordered to remove the plant because it sits on an earthquake fault; similarly, an owner of a lake bed would not be entitled to compensation for denial of a permit to engage in landfilling which would flood another’s land. Id.
220. 968 F.2d 1131 (11th Cir.), modified, 978 F.2d 1212 (11th Cir. 1992). In an addendum opinion, the court further instructed the district court on remand to address whether
when only a part of a landowner's property is rendered unusable by regulation.\textsuperscript{231} In \textit{Reahard} the lower court held that a county's adoption of a comprehensive land use plan that classified the plaintiff's property as a Resource Protection Area, limiting development to a single resident or for uses of a recreational nature, constituted a partial regulatory taking under the Fifth Amendment.\textsuperscript{232} On appeal, noting that \textit{Lucas} had not resolved the categorical partial takings issue, the Eleventh Circuit reversed and remanded the case. The Eleventh Circuit held that the landowner's claim for compensation admitted and assumed that the legislation substantially advanced a legitimate state interest and the only issue was whether the owner had been denied all or substantially all economically viable use of the property.\textsuperscript{233} The court remanded the case for an appropriate takings analysis, which the court held would involve inquiry into the history of the property, the nature of the title, the nature of the land and its former uses, the history of development, the history of zoning and regulation, the present nature of the property, the reasonable expectation of the owner under state common law, the reasonable expectations of neighboring property owners under common law, and the diminution in investment-backed expectations of the landowner after passage of the ordinance.\textsuperscript{234}

The Supreme Court has held that a physical taking of property, regardless of how incidental, is a \textit{per se} violation of the Fifth Amendment.\textsuperscript{235} When the government acts to prohibit an owner's right to exclude other's physical presence on the property without payment of compensation, the action constitutes a violation of the Fifth Amendment because the right to exclude others is a fundamental property right.\textsuperscript{236} In \textit{Cable Holdings of Georgia v. McNeil Real Estate Fund VI, Ltd.},\textsuperscript{237} the issue was whether the federal statute granting cable franchisees the right of access to public rights of way and easements "dedicated for compatible uses" constituted

the court lacked subject matter jurisdiction over the takings claim on ripeness grounds. 978 F.2d at 1213.
221. 968 F.2d at 1134 n.5.
222. \textit{Id.} at 1133-34.
223. \textit{Id.} at 1136.
224. \textit{Id.}
225. \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 433 (1982). In \textit{Loretto} the Court held that a requirement that an owner of an apartment building permit a cable company to install its cable on his property was a \textit{per se} taking of property which required compensation, regardless of the importance of the state's interest in providing cable access. \textit{Id.} at 426.
226. \textit{Id.} at 433. See \textit{Yee v. City of Escondido}, 112 S. Ct. 1522 (1992) (\textit{local rent control} ordinance regarding mobile home "pads" did not constitute a \textit{per se} physical taking of the plaintiff's property requiring compensation).
a taking of the property of the owner of apartment buildings. On appeal, the Eleventh Circuit reversed and remanded the district court's grant of access to the cable company. The court held that the district court's construction of the statute to permit a cable company access whenever the owner granted private access to other utilities was suspect since it effectively granted cable companies the unencumbered right of access held to require compensation in Loretto v. Teleprompter Manhattan CATV Corp. To resolve the constitutional difficulty, the court construed the federal statute to only require an owner to permit access to a cable company when the owner had formally dedicated such easements for general utility use, and not in the case of wholly private easements.

D. Eighth Amendment

In Hudson v. McMillan, the Supreme Court clarified that excessive force claims brought by inmates under the Eighth Amendment, unlike cases alleging deliberate indifference to medical needs or prison conditions, need not allege a significant injury. The difference in treatment of claims was based on the "due regard for differences in the kind of conduct against which an Eighth Amendment objection is lodged." Because the Eighth Amendment was violated whenever prison officials "maliciously and sadistically use force to cause harm," the presence of an injury resulting from the cruel and unusual conduct was not required.

E. Privacy

In Planned Parenthood v. Casey, the Supreme Court issued a fractionalized opinion in which the Court, while "reaffirming" Roe v. Wade

229. 953 F.2d at 600.
230. 458 U.S. 419 (1992); 953 F.2d at 605-08.
231. 953 F.2d at 605.
233. Id. at 1000 (a claim of deliberate indifference to medical needs requires that the deprivation of medical care be "serious").
234. Wilson v. Seiter, 111 S. Ct. 2321, 2324 (1991) (in cases alleging unconstitutional jail conditions, only the deprivation of "minimal civilized measure of life's necessities" are sufficient to state an Eighth Amendment claim).
235. 112 S. Ct. at 1000.
236. Id. (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986)).
237. Id. However, the Court noted that the analysis of whether conduct was cruel or unusual "necessarily excludes from constitutional recognition de minimus uses of physical force, provided that the use of force is not of a sort 'repugnant to the conscience of mankind.'" Id. (quoting Whitley, 475 U.S. at 327).
239. 410 U.S. 113 (1973).
held that "[t]he woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted."\textsuperscript{240} In \textit{Lucero v. Operation Rescue},\textsuperscript{241} the issue before the Eleventh Circuit was whether the district court had abused its discretion in denying a preliminary injunction to the plaintiff gynecologist and his patients to enjoin organized and disruptive protests of the clinic where abortions were performed. Plaintiffs sought relief on the grounds that defendant Operation Rescue and other persons had conspired to deprive the doctor's patients of their right to equal protection of the laws and to deprive them of the right to travel.\textsuperscript{242} The Eleventh Circuit held that the district court did have subject matter jurisdiction, but that plaintiffs were not entitled to preliminary injunctive relief because they had not established that the challenged activity had "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."\textsuperscript{243} Rather, the appellate court held that there was no evidence in the record to establish that the conduct of the protestors was motivated by gender-based animus. The court held that "the record amply supports a finding that defendants' actions were motivated by a disapproval of a certain activity," namely the practice of abortion, rather than an animus at women as members of the female gender.\textsuperscript{244} Judge Kravitche, in her dissent, argued that "[t]he majority's insistence that Operation Rescue opposes a 'practice' that has nothing to do with women brings abstraction to a new level of absurdity."\textsuperscript{245}

\textbf{F. Fourteenth Amendment}

\textbf{Property Interest.} In order to state a claim that a challenged action constitutes a deprivation of property without due process, a plaintiff must establish that he or she has a protectible property interest, or a "legitimate claim of entitlement."\textsuperscript{246} In two cases during 1992, the Eleventh Circuit addressed when government contractors are entitled to allege violations of their due process as a result of the termination of business with

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\item \textsuperscript{240} 112 S. Ct. at 2816.
\item \textsuperscript{241} 954 F.2d 624 (11th Cir. 1992). See Bray v. Alexandria Women's Health Clinic, 113 S. Ct. 753 (1993).
\item \textsuperscript{242} 954 F.2d at 626.
\item \textsuperscript{243} Id. at 628 (quoting United Bhd. of Carpenters & Joiners of America v. Scott, 463 U.S. 825, 829 (1983)).
\item \textsuperscript{244} Id. at 628-29.
\item \textsuperscript{245} Id. at 632.
\item \textsuperscript{246} Board of Regents v. Roth, 408 U.S. 564, 577 (1972).
\end{itemize}
the government. In *Bank of Jackson County v. Cherry*, the Eleventh Circuit held that a bank debarred from participation in a Farmers Home Administration loan guaranty program had not stated a procedural due process claim for violation of debarment procedures because federal law did not create an entitlement in the loan guaranties. In *Pataula Electric Membership Corp. v. Whitworth*, however, the court held that a disappointed bidder for a state contract had a protectible property interest under Georgia law based upon the state department's manual that interpreted the provisions of the state purchasing statute. Even though the determination of the lowest responsible bidder was left to the discretion of the purchasing official, plaintiffs had at least stated a claim for defendants' abuse of their discretion by ignoring competitive bidding requirements.

**Procedural Due Process.** In *Battle v. Barton*, a prison inmate sued prison officials based on his removal from a disciplinary hearing on the grounds that the removal violated his procedural due process rights. A prisoner at a disciplinary proceeding is entitled to certain due process rights. In *Battle* the Eleventh Circuit concluded that those rights included a due process right to be present at the disciplinary hearing. The disciplinary panel's removal of Battle because of his deliberate obstruction of the hearing was logically related to the correctional goals of maintaining order and discipline. Therefore, the removal did not violate the inmate's constitutional rights.

**Substantive Due Process.** In *Burton v. State*, plaintiffs sought to invalidate on substantive due process grounds a state constitutional
amendment that amended Georgia's law of sovereign and official immunity. The Eleventh Circuit found that because plaintiffs were not alleging systematic constitutional deficiencies, but only a dilution of their right to vote with respect to the proposed constitutional amendment, that plaintiffs were required to "[demonstrate] that the state's choice of ballot language so upset the evenhandedness of the referendum that it worked a 'patent and fundamental unfairness.'" Because the ballot language was not so misleading that the voters could not recognize the subject matter of the amendment, there was no violation of due process.

**Equal Protection.** In *H.K. Porter v. Metropolitan Dade County*, the court addressed the problems faced by a local government enacting a self-initiated affirmative action plan. Following the Supreme Court's decision in *Richmond v. J.A. Croson Co.* regarding the strict scrutiny standard to be applied to state and local affirmative action plans, the Eleventh Circuit held that a federal statute which merely required "affirmative action," without an express set-aside requirement, leaving to the state or local government the decision of the appropriate type of affirmative action policy, was not an express Congressional mandate warranting that the court review the county's set-aside ordinance on the intermediate, rather than strict, scrutiny basis. Under a strict scrutiny standard, the appellate court held that the decision in *Croson* required at least that there be a finding of earlier discrimination that affected the industry; the government must be able to establish that there were actual instances of past discrimination and that the set-aside plan is necessary to remedy that discrimination, and is narrowly tailored to achieve that goal. Because the county made no investigation to determine if there was discrimination in the industry prior to enacting the ordinance, the ordinance was void.

**IV. Conclusion**

The Eleventh Circuit Court of Appeals issued a number of opinions during 1992 that were considerable contributions to the court's constitutional civil law jurisprudence. However, the court failed to provide for a consistent application of the qualified immunity defense. The court's decisions limiting the defense at trial, and the inconsistent application of

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257. Id. at 1267.
258. Id. at 1269 (quoting *Curry v. Baker*, 802 F.2d 1302, 1315 (11th Cir. 1986)).
259. Id. at 1270-71.
260. 975 F.2d 762 (11th Cir. 1992).
262. 975 F.2d at 764-65.
263. Id. at 766.
the defense in circuit decisions, not only strikes at the very purpose of the defense, but skews the analysis of the underlying substantive law. The grant of rehearing en banc in *Adams v. St. Lucie County Sheriff's Department* during 1993 provides an excellent opportunity for the court to address the intracircuit conflict.

The survey period was a prodigious one for the Eleventh Circuit in the arena of the First Amendment. The Eleventh Circuit issued a line of opinions addressing the free speech rights of public employees and ballot access. The court also was active in defining the appropriate role of the government in regulating activities with the potential for impact on rights of free speech and association.

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264. 962 F.2d 1563 (11th Cir. 1992), *reh'g en banc granted and panel opinion vacated*, 982 F.2d 472 (11th Cir. 1993).