Constitutional Civil Law

by Albert Sidney Johnson*

During the 1993 survey period, the United States Court of Appeals for the Eleventh Circuit considered three cases of first impression that are of interest to the constitutional practitioner. These cases addressed issues including the allowance of attorney fees for extrajudicial representation, the contours of bodily privacy in the custodial setting, and the survivability of excessive force Fourteenth Amendment[1] due process claims when there is no seizure of the person. The Eleventh Circuit revisited earlier opinions dealing with the application of the clearly established law element of the qualified immunity defense and the government's speech restrictions under the Establishment Clause of the First Amendment.[2] Significantly, the Eleventh Circuit also expressed chagrin at being prevented by the binding precedent rule from revisiting other earlier decisions involving the ripeness issue in land use cases and the application of substantive due process in public employment. The court also showed increased interest in the application *vel non* of Fourteenth Amendment claims, particularly when the fundamental interests to be protected are marginal.

I. PRELIMINARY ISSUES

A. Immunity

Qualified Immunity. Earlier surveys[3] have discussed in detail the

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1. U.S. CONST. amend. XIV.

2. U.S. CONST. amend. I.

3. *See generally* Albert Sidney Johnson, *Constitutional Law—Civil*, 41 MERCER L. REV. 1261, 1261-64 (1990); Albert Sidney Johnson & Susan Cole Mullis, *Constitutional*

intracircuit conflict over the appropriate application of the qualified immunity defense in civil rights cases brought pursuant to 42 U.S.C. § 1983.[4] A government official has immunity from an action for civil damages unless the plaintiff can establish that the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff]."[5] In *Anderson v. Creighton*,[6] the United States Supreme Court determined that the constitutional right allegedly 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.[7] The court in *Anderson* warned that the viability of an "objective reasonableness" standard in preserving immunity depended on the "level of generality at which the relevant 'legal rule' is to be identified."[8] 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 by which the defendant's conduct is to be judged.[9]

Law—Civil, 42 MERCER L. REV. 1313, 1313-20 (1991); and Albert Sidney Johnson & Susan Cole Mullis, *Constitutional Civil Law*, 44 MERCER L. REV. 1107, 1108-09 (1993).

4. 42 U.S.C. § 1983 (1988) provides, in relevant part:

> 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.

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

6. 483 U.S. 635 (1987).

7. *Id.* at 641.

8. *Id.* at 639.

9. 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 amounted to a violation of clearly established law. *See* 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. 1989), *cert. denied*, 493 U.S. 831 (1989). However, other panel decisions have required only that the general constitutional right which 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* 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. 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).

The Eleventh Circuit made a prompt decision to revisit *Adams v. St. Lucie County Sheriff's Department*[10] which had brought into sharp focus the intracircuit conflict over the application of the "clearly established law" element of the qualified immunity test.[11] Although the court denied qualified immunity to defendant sheriff's deputies on the ground that the law was clearly established that their conduct was unconstitutional,[12] each member of the panel gave a divergent assessment of whether the law was clearly established.[13] On rehearing en banc, in a per curiam opinion,[14] the court reversed the district court's denial of summary judgment based on the reasoning set out in the dissenting opinion of Judge Edmondson.[15] In the dissent, Judge Edmonson asserted that, although in order to meet the clearly established law standard a plaintiff is not required to establish that the exact factual precedent was clearly established, the facts in the precedent relied upon must be "materially similar."[16]

In the previous survey period, the Eleventh Circuit confirmed that the issue of qualified immunity is a legal determination that should be decided before trial, during trial, or after trial, but "seldom, if ever" should be submitted to a jury.[17] In 1993 the Eleventh Circuit considered the qualified immunity defense in several procedural contexts. In *Collins v. School Board of Dade County, Florida*,[18] the defense arose before trial in a teacher's due process complaint arising from a delayed postsuspension hearing process.[19] A nineteen-month delay was caused

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10. 962 F.2d 1563 (11th Cir. 1992), *reh'g en banc granted and panel opinion vacated*, 982 F.2d 472 (11th Cir. 1993), *reh'g granted and order reversed*, 998 F.2d 923 (11th Cir. 1993).

11. 962 F.2d at 1563.

12. *Id.* at 1572.

13. 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. *Id.* at 1565-66. 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 (Edmonson, J., dissenting).

14. Adams v. St. Lucie County Sheriff's Dep't, 997 F.2d at 923 (11th Cir. 1993) (per curiam) (Hatchett, J., and Kravitch, J., dissenting). Circuit Judge Hatchett wrote a dissenting opinion in which Circuit Judge Kravitch joined. *Id.* at 923. Circuit Judge Hill wrote an opinion dissenting dubitante. *Id.* at 923.

15. *Id.*

16. Adams v. St. Lucie County Sheriff's Dep't, 962 F.2d 1563, 1575 (11th Cir. 1992).

17. Stone v. Peacock, 968 F.2d 1163, 1165 (11th Cir. 1992).

18. 981 F.2d 1203 (11th Cir. 1993).

19. *Id.* at 1204.

by the administrative appeal management of the state Division of Administrative Hearings, rather than the defendant school board members who were urging the qualified immunity defense.[20] In reversing the district court, the Eleventh Circuit found there was no controlling decision which involved facts "materially similar" to those in *Collins*; therefore, the law did not clearly proscribe the defendants' acts when they acted.[21]

McKinney v. DeKalb County, Georgia,[22] involved denials of immunity to police officials at three levels: command supervisors, the on-scene supervisor, and the officer who fired his weapon and inflicted the injuries upon a disturbed teenager.[23] Finding that plaintiffs had not clearly shown how the supervisory officers' conduct had violated their constitutional rights, the court reversed the district court's denial of summary judgment.[24] On the other hand, the court found that factual issues existed concerning events that led to the firing of the weapon and the infliction of injuries.[25]

Swint v. City of Wadley, Alabama[26] presented a complex factual situation compounded by a complex legal analysis of claims arising under the Fourth[27] and Fourteenth Amendments. This case resulted from two raids on a nightclub suspected of harboring illegal drug activity.[28] The raids were the culmination of a preliminary investigation[29] and commenced upon the signal of an undercover officer who purchased drugs from a patron of the club.[30] The court held that the contours of the Fourth Amendment claim and the Fourteenth Amendment equal protection claim were clearly established, thus preventing the qualified immunity defense.[31] On the other hand, the law was not clearly established that excessive force in connection with a search violated both the Fourth Amendment and the Due Process Clause.[32]

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20. *Id.* at 1206. The Court in Barry v. Barchi, 443 U.S. 55 (1979), first recognized a due process right to a prompt postsuspension hearing, but did not define the contours of the right. 443 U.S. at 64.
21. 981 F.2d at 1205.
22. 997 F.2d 1440 (11th Cir. 1993).
23. *Id.* at 1441.
24. *Id.* at 1442-43.
25. *Id.* at 1443.
26. 5 F.3d 1435 (11th Cir. 1993).
27. U.S. CONST. amend. IV.
28. 5 F.3d at 1439.
29. *Id.*
30. *Id.* at 1440.
31. *Id.* at 1445.
32. *Id.* at 1447.

The court in *Harris v. Coweta County*[33] considered whether a county sheriff was entitled to qualified immunity under Eighth[34] and Fourteenth Amendment claims alleging the denial of proper medical treatment.[35] Acknowledging there was no question that a prisoner's right to medical treatment was clearly established at the time of the sheriff's conduct,[36] the court affirmed the district court's denial of immunity because a factual dispute existed as to precisely what the sheriff knew and when, and how this caused delay in the plaintiff's medical treatment.[37]

In *Leeks v. Cunningham*,[38] the plaintiff based his complaint on the involuntary administration of an antipsychotic drug to a pretrial detainee.[39] The court's review of authorities led to the conclusion that it was not clearly established at the operative time that a county jail pretrial detainee had a right under the Due Process Clause to be free of unwanted administration of antipsychotic medication.[40]

Fortner v. Thomas[41] involved the application of the clearly established law doctrine and its interplay with claims for damages and equitable relief in the context of a constitutional claim of bodily privacy.[42] The court affirmed the district court's grant of summary judgment on the ground that, while prisoners retain certain fundamental rights of privacy, the precise nature and scope of the privacy right is far from settled.[43] The court rejected the district court's holding that qualified immunity also protected officials from a claim for equitable relief.[44]

An application of the qualified immunity doctrine after trial appeared in *Cannon v. Macon County*.[45] In a case arising from a false imprisonment claim, the district court granted judgment notwithstanding the verdict in favor of a deputy sheriff against whom the jury had awarded

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33. 5 F.3d 507 (11th Cir. 1993).
34. U.S. CONST. amend. VIII.
35. 5 F.3d at 508.
36. *Id.*
37. *Id.* at 509.
38. 997 F.2d 1330 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 609 (1993).
39. 997 F.2d at 1331.
40. *Id.* at 1334.
41. 983 F.2d 1024 (11th Cir. 1993).
42. *Id.* at 1027 (claims that female correctional officers engaged in spying on male inmates, engaged in other suggestive and demeaning conduct, followed by false disciplinary reports for obscene acts).
43. *Id.* at 1028.
44. *Id.* at 1028-29.
45. 1 F.3d 1558 (11th Cir. 1993).

damages.[46] In reviewing the district court's grant of the motion for judgment notwithstanding the verdict, the court resorted to the pretrial analysis of determining the existence of a cognizable Section 1983 claim and determining the applicability of the qualified immunity doctrine.[47]

Absolute Immunity. An official is entitled to absolute immunity when the official acts in a legislative capacity.[48] The official must establish that the absolute immunity is justified for the governmental function at issue.[49] The legislative immunity extends to state and local legislators.[50]

The Eleventh Circuit found absolute legislative immunity applicable in *Ellis v. Coffee County Board of Registrars*[51] in which the governmental function issue involved drawing electoral districts and determining qualified voters in the county.[52] In a claim by citizens that they had been erroneously and deliberately denied their Fourteenth Amendment right to vote,[53] the district court granted summary judgment to the commissioners and the county attorney in their official capacities, but denied judgment in their individual capacities.[54] Clarifying the principle that absolute immunity preempts any issues regarding individual liability,[55] the Eleventh Circuit reversed, holding that under Alabama law, the delineation of election boundaries and determination of voter residence are legislative functions.[56] Therefore, the absolute-

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46. *Id.* at 1561-62. The court held that, under Baker v. McCollan, 443 U.S. 137 (1979), the plaintiff had no due process right to have an officer investigate her claims of innocence and mistaken identify. 1 F.3d at 1562.

47. 1 F.3d at 1562.

48. *See* Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. Unit A May 1981), *cert. denied*, 455 U.S. 907 (1982).

49. Hafer v. Melo, 112 S.Ct. 358, 363 (1991) (citing Burns v. Reed, 111 S.Ct. 1934 (1991)).

50. *See* Tenney v. Brandhove, 341 U.S. 367 (1951) (state legislators); Lake Country 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 (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. *Id.* at 278. The Eleventh Circuit extended immunity to local legislators in Executive 100, Inc. v. Martin County, 922 F.2d 1536, 1539 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 55 (1991), as have the majority of circuit courts. *See* Spallone v. United States, 487 U.S. 1251, 1259 (1988).

51. 981 F.2d 1185 (11th Cir. 1993).

52. *Id.* at 1187.

53. *Id.* at 1189.

54. *Id.*

55. *Id.* at 1191.

56. *Id.* at 1190.

ness of legislative immunity, despite the legislators' motivations, precludes actions against them in their individual or personal capacities.[57]

Eleventh Amendment Immunity. The Eleventh Amendment[58] prohibits suits in federal court against an unconsenting state, even when brought by citizens of the state.[59] To determine whether the state is the "real, substantial party in interest"[60] in an action brought against a state official or agency, the court considers the law of the state creating the entity.[61] If the state would pay any award of damages, it is the real party in interest.[62]

In *Hobbs v. Roberts*,[63] the inquiry was whether state officials were sued in their individual capacities, as well as their official capacities, so that the Eleventh Amendment would not bar suit.[64] The court considered the existence of state-provided officials' coverage under an employees' liability trust fund,[65] description of the state officials in the case caption "as agents" of the Department of Transportation,[66] plaintiff's requested jury instructions regarding agency[67] and posttrial remarks indicating reliance on the state-provided liability coverage.[68] These contentions were not persuasive because the court determined that the action was brought against the individual defendants in their personal capacities as well as in their official capacities.[69]

Appeals From Orders Denying Immunity. The pretrial denial of qualified immunity may be immediately appealed as a collateral order,

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57. *Id.* at 1191.

58. 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.

59. Carr v. City of Florence, Ala., 916 F.2d 1521, 1524 (11th Cir. 1990) (citing Hans v. Louisiana, 134 U.S. 1 (1890)).

60. 916 F.2d at 1524 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101 (1984)).

61. *Id.* at 1525 (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)).

62. *Id.* at 1524 (citing Edelman v. Jordan, 415 U.S. 651, 663 (1974)).

63. 999 F.2d 1526 (11th Cir. 1993).

64. *Id.* at 1528.

65. *Id.* at 1529.

66. *Id.*

67. *Id.* at 1530.

68. *Id.*

69. *Id.* at 1531.

pursuant to the Supreme Court's decision in *Mitchell v. Forsyth*.[70] The Eleventh Circuit in *Collins v. School Board of Dade County, Florida*,[71] extended immediate appealability to reserved rulings.[72] Because nonappealable claims also existed, the district court reserved ruling on the defendants' motion for summary judgment based on qualified immunity.[73] "Because the 'reserved ruling' is not materially different from an outright denial of a summary judgment motion, an immediate appeal . . . is permissible."[74]

B. Subject Matter Jurisdiction

Standing. Article III of the United States Constitution,[75] addressing the federal court system, restricts federal court jurisdiction to "cases" or "controversies" and establishes the scope of matters which can be determined by federal courts.[76] 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 *Fortner v. Thomas*,[77] the court explored the interplay between relief sought by individual prison inmates and similar relief sought on behalf of a class.[78] The result requires an analysis of both the nature of the claim and the scope of relief sought. Plaintiff inmates asserted due process claims of unfair disciplinary procedures, including the lack of proper notice, admission of evidence, and excessive punishment in the context of bodily privacy issues.[79] The district court dismissed the claims after finding they were matters properly brought as a contempt action pursuant to procedures established by a prior class action.[80] In reversing the dismissal of the due process claim, the Eleventh Circuit held that a prisoner's claim for monetary damages or other particular-

70. 472 U.S. 511, 526-27 (1985); *see also* Burrell v. Board of Trustees of Georgia Military College, 970 F.2d 785, 787 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1814 (1993).

71. 981 F.2d 1203 (11th Cir. 1993).

72. *Id.* at 1204.

73. *Id.*

74. *Id.* at 1205.

75. U.S. CONST. art. III.

76. U.S. CONST. art. III.

77. 983 F.2d 1024 (11th Cir. 1993).

78. *Id.* at 1031.

79. *Id.* at 1030.

80. *Id. See* Guthrie v. Evans, CV 3068 (S.D.Ga. 1981) and Saleem v. Evans, 866 F.2d 1313 (11th Cir. 1989) (complaints that parallel those addressed in *Guthrie* may only be filed through the *Guthrie* class counsel).

ized relief is not barred if the class representative sought only declaratory and injunctive relief, even if the prisoner is a member of the pending class action.[81]

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.[82] In the land use context, because the Fifth[83] and Fourteenth Amendments prohibit the taking of property without just compensation, plaintiffs asserting regulatory takings must obtain a final decision that they have been denied state court remedies for inverse condemnation before the takings claims are ripe.[84] 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]."[85]

The interaction of the ripeness doctrine and the statute of limitations gave rise to *New Port Largo, Inc., v. Monroe County*.[86] In a case setting forth extremely convoluted fact contentions, plaintiff sought compensation against the county and its officials for a temporary regulatory taking by way of a zoning ordinance.[87] The usually delicate consideration of ripeness contentions was compounded in this case because plaintiff had sold his property three and one-half years before the state courts reached a final determination invalidating the zoning ordinance[88] but awarding no damages.[89] The court held that the statute of limitations began to run from the date of the final judgment invalidating the zoning ordinance, notwithstanding the earlier sale of the property.[90] The court strongly noted the difference between when the injury may have ended (upon sale of the property) and when the claim may have accrued (upon conclusion of the state proceedings).[91] Of greater impact and foretelling the continuing struggle to find some

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81. 983 F.2d at 1031.
82. U.S. CONST. art. III.
83. U.S. CONST. amend. V.
84. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2906-07 (1992) (Blackmun, J., dissenting).
85. 112 S. Ct. at 2891 (quoting MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 351 (1986)).
86. 985 F.2d 1488 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993).
87. 985 F.2d at 1491.
88. *Id.* at 1494.
89. *Id.* at 1491.
90. *Id.* at 1494.
91. *Id.*

satisfactory solution to regulatory takings issues are the concurring opinions of Judge Tjoflat[92] and Judge Edmondson.[93] Recognizing the Circuit's binding precedent rule,[94] the concurring opinions reflect a strong debate over the effect of *Corn v. City of Lauderdale Lakes*[95] (*"Corn III"*). Judge Tjoflat argues[96] that the *Corn III* test for determining the accrual date for Fifth Amendment claims directly conflicts with the Supreme Court's decision in *Williamson County Regional Planning Commission v. Hamilton National Bank*.[97] Judge Edmondson, author of *Corn III*, adhered to its holding, but confessed that the opinion might benefit by being "stripped of some obscuring and confusing dicta."[98]

II. ATTORNEY'S FEES

Under 42 U.S.C. § 1988[99] 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.[100] 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.[101] The Court has defined the prevailing party as one who "succeed[s] on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit"[102] and who establishes a "material alteration of the legal relationship of the parties."[103]

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92. *Id.* at 1495-98 (Tjoflat, J., concurring).

93. *Id.* at 1498-1502 (Edmonson, J., concurring).

94. Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1209 (11th Cir. 1981) (prior panel's holding can only be overruled by the court sitting en banc).

95. 904 F.2d 585 (11th Cir. 1990).

96. 985 F.2d at 1495.

97. 473 U.S. 172 (1985). Judge Tjoflat argues that the *Corn III* court erred by improperly expanding *Williamson's* final decision requirment so that accrual is postponed until "'state review entities'—rather than the initial decisionmakers—'have made a final determination on the status of the subject property.'" 985 F.2d at 1497 (quoting Corn v. City of Lauderdale Lakes, 904 F.2d 585, 588 (11th Cir. 1990)).

98. 985 F.2d at 1499.

99. 42 U.S.C. § 1988(b) (1993) provides, in relevant part:

In any action or proceeding to enforce a provision of §§ 1981, 1981a, 1982, 1983, 1985, and 1986 of this title . . . the court, in it discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. *Id.*

100. *Id.*

101. Farrar v. Hobby, 113 S. Ct. 5466, 573 (1992).

102. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983) (quoting Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978)).

103. Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792-93 (1989).

Two significant cases in 1993 directly involved attorney fees in the constitutional setting. *Church of Scientology Flag Service Organization, Inc. v. City of Clearwater*[104] was based on an attorney fees claim following an attack by the church on the validity of a city ordinance.[105] The city repealed the questioned ordinance by means of a subsequent ordinance which retained many of the provisions of the repealed ordinance.[106] The church then brought an action to invalidate the subsequent ordinance.[107] Rejecting the district court's judgment that the church had not prevailed because its rights were not vindicated as a result of its lawsuit, the Eleventh Circuit held that the suit brought by the church caused the city to amend its ordinance and the amendment significantly affected the parties' legal relationship.[108] The new ordinance abandoned certain challenged provisions.[109] These results, although only partially successful, were neither technical nor de minimus.[110]

In a case of first impression, *Brooks v. Georgia State Board of Elections*,[111] plaintiffs brought a class action challenging Georgia's method of electing superior court judges,[112] claiming that certain statutes had not been precleared under Section 5 of the Voting Rights Act[113] and that the method of electing judges violated Section 2 of the Voting Rights Act.[114] Plaintiffs had prevailed on the Section 5 claim[115] and, postjudgment, successfully opposed the state's preclearance submissions.[116] After an analysis of extra judicial work focusing on *Webb v. Board of Education of Dyer County, Tennessee*[117] and *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*,[118] the court concluded that the work opposing the Section 5 preclearance

104. 2 F.3d 1509 (11th Cir. 1993).
105. *Id.* at 1511.
106. *Id.*
107. *Id.*
108. *Id.* at 1513.
109. *Id.*
110. *Id.*
111. 997 F.2d 857 (11th Cir. 1993).
112. *Id.* at 859.
113. 42 U.S.C. § 1973 (1988).
114. *Id.*
115. 997 F.2d at 860.
116. *Id.*
117. 471 U.S. 234 (1985) (in the absence of a statutory exhaustion of administrative remedies, requirement fees are not allowable for time spent pursuing optional remedies).
118. 478 U.S. 546 (1986) (extra-judicial work is compensable if it is both useful and of a type ordinarily necessary to advance the civil rights litigation).

submission was crucial to the vindication of the rights of plaintiffs, and thus, an award of attorney fees was appropriate.[119]

Outside the purely constitutional context, the court decided several attorney fees cases which are instructive to the constitutional practitioner. In *Hollis v. Roberts*,[120] the court addressed the issue of whether an award of attorney fees under the Fair Debt Collection Practices Act[121] should be limited to actual costs because the appellee was represented by an attorney employed by the UAW Legal Services Plan.[122] The court, distinguishing *Harper v. Better Business Services, Inc.*,[123] held that the district court could properly award attorney fees based upon the prevailing market rate rather than actual costs.[124]

In *Pelletier v. Zweifel* (*"Pelletier II"*),[125] the court reminded the district court of the "mandate rule" that requires district courts to adhere closely to the dictates of their opinions.[126] Having previously found in *Pelletier v. Zweifel*,[127] (*"Pelletier I"*), that plaintiff's claims were frivolous, the court awarded defendant Rule 11[128] sanctions.[129] Accepting plaintiff's argument that defendant had incurred no attorney fees because defendant was substantially covered by insurance,[130] the district court awarded nothing for the litigation expenses paid by the insurance carrier.[131] In the absence of a dispute as to the amount expended, the Eleventh Circuit directed entry of judgment without further consideration.[132]

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119. 997 F.2d at 866.

120. 984 F.2d 1159 (11th Cir. 1993).

121. 15 U.S.C. § 1692 (1988).

122. 984 F.2d at 1160-61.

123. 961 F.2d 1561 (11th Cir. 1992).

124. 984 F.2d at 1161. In *Harper*, the denial of a market rate award was based on the questin of whether the UAW would benefit from the award and ethical considerations of sharing attorney fees with non-lawyers. 961 F.2d at 1564. In *Hollis*, the claimant showed that the legal services plan was an employee welfare benefit, separate entity from the UAW, and that it received no money from the UAW, and shared no funds with the UAW. 984 F.2d at 1161.

125. 987 F.2d 716 (11th Cir. 1993), *cert. denied*, 114 S. Ct. 311 (1993).

126. 987 F.2d at 718.

127. 921 F.2d 1465 (11th Cir. 1991), *reh'g denied*, 931 F.2d 901 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 167 (1991).

128. FED. R. CIV. P. 11.

129. 921 F.2d at 1514.

130. 987 F.2d at 717.

131. *Id.*

132. *Id.* at 719.

The court in *McKenzie v. Cooper, Levins & Pastko, Inc.*[133] reviewed an allowance of $206,000[134] in attorney fees for a $9,000 backpay award in a Title VII gender discrimination case.[135] The district court awarded a lodestar fee of $100,000, and enhanced the contingency fee for costs, and prejudgment interest.[136] Observing that the lodestar fee "seems preposterous" compared to the recovery[137] and expressing "considerable skepticism,"[138] the court could not set the findings aside as clearly erroneous.[139] However, under *City of Burlington v. Dague*,[140] the court deleted the contingency award.[141]

III. SUBSTANTIVE ISSUES

A. *First Amendment*

Government Regulation Impacting Speech. In the wake of *Barnes v. Glen Theatre, Inc.*,[142] adult entertainment and nudity cases appear to be subsiding in the Eleventh Circuit. In 1993, *Cafe 207, Inc. v. St. Johns County*[143] was the only representative of the genre. The issue before the court was the denial of a preliminary injunction against the enforcement of a *Barnes*-like ordinance.[144] The district court's denial was affirmed on the grounds that plaintiff did not have a substantial likelihood of prevailing on the merits.[145]

In *Crowder v. Housing Authority of Atlanta*[146] the court examined the right of a public housing tenant to use common areas in his building for group Bible study.[147] Although the statement of the issue suggests

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133. 990 F.2d 1183 (11th Cir. 1993).
134. The amounts have been rounded to even dollars for clarity.
135. 990 F.2d at 1183.
136. *Id.* at 1184.
137. *Id.* at 1185.
138. *Id.*
139. *Id.*
140. 112 S. Ct. 2638 (1992).
141. 990 F.2d at 1186. The district court had awarded the contingency enhancement under authority of Lattimore v. Oman Constr., 868 F.2d 437 (11th Cir. 1989) which the court of appeals acknowledged was still good law at the time, but found that it was effectively overruled by *Dague*. *Id.*
142. 111 S. Ct. 2456 (1991).
143. 989 F.2d 1136 (11th Cir. 1993).
144. *Id.* at 1136.
145. *Id.* at 1137.
146. 990 F.2d 586 (11th Cir. 1993).
147. *Id.* at 589.

an inquiry based on the Free Exercise Clause,[148] such is not the case. Plaintiff's efforts to carry on his Bible study activities in the building's common facilities met with a hostile reaction from some tenants and from the building's management. Over time, plaintiff was prohibited from using the auditorium because of scheduling problems and concerns about tenant safety; was told that he would have to obtain majority approval at a tenants' meeting to resume the studies; was told that he could hold his studies on Friday nights only; was not allowed to use the library for various stated reasons; and that, other than Friday nights, he would have to hold his studies in his room.[149] Plaintiff appealed from an adverse jury verdict, contending that the district court applied the wrong First Amendment standards to the common facilities and to the management's actions.[150] The Eleventh Circuit concluded the auditorium was a limited public forum for tenants, but the library was not a public forum.[151] Thus, denial of the use of the library to plaintiff did not violate the First Amendment.[152] However, the auditorium was subject to restricted access by content-neutral conditions for the time, place, and manner of access, all of which must be narrowly tailored to serve a significant government interest.[153] In considering management's actions, the court held that the prohibition was not narrowly tailored to meet the articulated governmental interests;[154] the majority vote requirement was an unguided content-based decision;[155] and the Friday-Night-Only limitation was not narrowly tailored to serve a significant government interest even if it passed muster as a content-neutral time, place, and manner restriction.[156] The case was remanded to the district court for a determination of damages.[157]

In *Hall v. Singletary*,[158] plaintiff challenged state regulations that limit mail between inmates at different places of confinement.[159]

148. U.S. CONST. amend. I.
149. *Id.* at 589-90.
150. *Id.* at 590.
151. *Id.* at 591.
152. *Id.*
153. *Id.* at 591-92.
154. *Id.* at 592.
155. *Id.*
156. *Id.* at 593.
157. *Id.* at 594.
158. 999 F.2d 1537 (11th Cir. 1993).
159. *Id.* at 1538.

Following *Turner v. Safley*,[160] the court affirmed the district court's grant of summary judgment to defendant prison officials.[161]

Public Employment. The Eleventh Circuit continued to address the scope of public employees' rights of free speech in their roles as citizens 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.[162] The courts determine the "public concern" element on a case by case basis by deciding whether the content, form, and context of the speech indicate that the speech was a matter of general public concern.[163]

In *Peterson v. Atlanta Housing Authority*,[164] a former employee brought an action to challenge her discharge as a violation of her First Amendment right to free speech. Plaintiff contended that she was discharged in retaliation for her objections to and failure to carry out Authority policies concerning pre-leasing practices and maintenance team scheduling.[165] Reversing the district court, the court held that for purposes of summary judgment, the court must review the content, form, and context of the speech to determine whether the speech involves matters of public concern or matters only of personal interest.[166] If the speech is capable of being fairly characterized as concerning a matter of public interest, summary judgment is inappropriate.[167]

In *Belyeu v. Coosa County Board of Education*,[168] plaintiff attributed the Board's failure to rehire her as a teacher's aid to her speech at a public meeting about the absence of a program for Black History Month.[169] Concurrently, plaintiff was in a series of other disputes with

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160. 482 U.S. 78 (1987).

161. 999 F.2d at 1539.

162. Bryson v. City of Waycross, 888 F.2d 1562, 1565-66 (11th Cir. 1989); *see also* Mt. Health City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

163. Rankin v. McPherson, 483 U.S. 378, 384-85 (1987).

164. 998 F.2d 904 (11th Cir. 1993).

165. *Id.* at 915.

166. *Id.*

167. *Id.* at 916. The court carefully noted that defendants still have the opportunity to show that the speech was either not the motivation for plaintiff's termination or that, under the balancing test of Pickering v. Board of Educ., 391 U.S. 563 (1968), their interest in promoting the efficiency of public services justified the termination, notwithstanding the legitimacy of plaintiff's speech. 998 F.2d at 917.

168. 998 F.2d 925 (11th Cir. 1993).

169. *Id.* at 927.

school officials.[170] The court affirmed the district court's finding that plaintiff's speech addressed matters of public concern,[171] but reversed the district court's conclusion that the school board's interest in avoiding racially divisive issues outweighed plaintiff's interest in free speech.[172]

Bates v. Hunt[173] further illustrates the proposition that an at-will public employee whose job requires extensive public contact on the employer's behalf does not have much protection under the First Amendment when the employee speaks or acts in a hostile way toward the employer.[174]

Free Exercise and the Establishment Clause. The court revisited *Chabad-Lubavitch of Georgia v. Miller*,[175] where it had held that placement of a menorah in a prominent position within the rotunda of the Georgia state capitol, isolated from other secular symbols, would communicate the impression that the state government was endorsing a particular religion in violation of the Establishment Clause.[176] On rehearing[177] the court accepted the district court's finding that the state's exclusion of the menorah from the rotunda was based solely on the religious context of Chabad's speech.[178] Therefore, the exclusion would be valid only if it withstood strict scrutiny, requiring the state to demonstrate that the exclusion was "'necessary to serve a compelling state interest and that it [was] narrowly drawn to achieve that end.'"[179] The sole state interest advanced was to avoid a violation of the Establishment Clause.[180] The court rejected this argument, finding that the rotunda is a public forum subject to a neutral open-access policy under which the state would be at risk if the exclusion were enforced.[181]

In an extensive opinion construing the Establishment Clause, the court in *Church of Scientology Flag Service Organization, Inc. v. City of Clearwater*[182] voided a city ordinance that regulated the solicitation of

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170. *Id.*
171. *Id.* at 928.
172. *Id.* at 929.
173. 3 F.3d 374 (11th Cir. 1993).
174. *Id.* at 378.
175. 976 F.2d 1386 (11th Cir. 1992).
176. *Id.* at 1387.
177. Chabad-Lubavitch of Ga. v. Miller, 5 F.3d 1383 (11th Cir. 1993).
178. *Id.* at 1387.
179. *Id.* (quoting Burson v. Freeman, 112 S. Ct. 1846, 1851 (1992)).
180. *Id.* at 1388.
181. *Id.* at 1394.
182. 2 F.3d 1514 (11th Cir. 1993).

funds by charitable organizations.[183] The pervasive nature of the ordinance provided city officials, both executive and judicial, ultimate authority to determine the appropriate level of disclosure of matters of the church's financial administration to church members and the public.[184] Furthermore, the ordinance had the effect of creating subtle but definite shifts in the balance of power between lay and ecclesiastical authority.[185]

B. Fourth Amendment

In *Graham v. Connor*,[186] the United States 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."[187] The Court acknowledged that the constitutional standard under which the excessive force claim of a pretrial detainee is to be analyzed is unclear.[188] The lack of clarity continues to influence the Eleventh Circuit in its decisions and its approach to excessive force claims as applied to pretrial detainees as well as others.

The Eleventh Circuit considered several Fourth Amendment issues during the survey period, but the cases substantially involved analyses of the "clearly established law" component of the qualified immunity doctrine. Thus, the court found Fourth Amendment law to be clearly established when a warrantless raid on a nightclub was conducted without probable cause[189] and when a police officer member of a code enforcement team arrested persons believed to be about to violate the law.[190]

In *Wilson v. Northcutt*,[191] the court considered an excessive force claim in a different context. The case arose when deputy sheriffs attempted to serve a bench warrant to arrest a person who failed to

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183. *Id.* at 1519.
184. *Id.* at 1535-36.
185. *Id.* at 1536-37.
186. 490 U.S. 386 (1989).
187. *Id.* at 394.
188. *Id.* at 395. The Court held that 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 arrest ends and pretrail detention begins." *Id.* at 395 n.10. The Court stated 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." *Id.*
189. Swint v. City of Wadley, Ala., 5 F.3d 1435, 1443 (11th Cir. 1993).
190. *See* Post v. City of Fort Lauderdale, 7 F.3d 1552 (11th Cir. 1993).
191. 987 F.2d 719 (11th Cir. 1993).

appear in traffic court.[192] After the deputies were unable to induce the individual to respond to their efforts the deputies' supervisor arrived and authorized the deputies to enter the dwelling through an open window. During the course of the deputies' search, the individual locked herself in the bathroom and in time, killed herself.[193] On these facts, the decedent's children filed an action against the deputies alleging violations of her Fourth Amendment rights by the deputies' use of unreasonable and excessive force in attempting to arrest her.[194] In affirming the district court's grant of motion for summary judgment in favor of the defendants on the Fourth Amendment claim, the court held that the decedent had not been seized under the standard established in *California v. Hodari D.*[195] In *Hodari D.*, the Supreme Court held that a person is not seized when in response to a show of authority, without physical force, the subject does not yield.[196]

C. *Fifth Amendment*

The unsettled conditions surrounding regulatory takings claims under Fifth Amendment considerations continued in the survey period, and the saga of Herman Corn remains at the vortex. In *Corn v. City of Lauderdale Lakes*,[197] plaintiff contested the city's refusal to allow him to proceed with a miniwarehouse project.[198] The property was appropriately zoned to accommodate the warehouses, but was adjacent to a residential area.[199] Applying a deferential standard of review,[200] the court held that the city's decision was substantially related to general welfare interests, including the effect that the project would have on traffic, congestion, noise, city services, aesthetics, and surrounding property values.[201]

D. *Eighth Amendment*

In *Hudson v. McMillian*,[202] the Supreme Court clarified that excessive force claims brought by inmates under the Eighth Amendment,

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192. *Id.* at 720.
193. *Id.* at 721.
194. *Id.*
195. 111 S. Ct. 1547 (1991).
196. *Id.* at 1550.
197. 997 F.2d 1369 (11th Cir. 1993).
198. *Id.* at 1371.
199. *Id.*
200. *Id.* at 1386.
201. *Id.*
202. 112 S. Ct. 995 (1992).

unlike cases alleging deliberate indifference to medical needs[203] or prison conditions,[204] need not allege a significant injury.[205] 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.'"[206] 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.[207]

These principles were under consideration in *LaMarca v. Turner*,[208] a prison conditions case, in which inmates brought action against a former superintendent alleging that he failed to provide them with reasonable protection from prison violence.[209] The thrust of the claim was that the superintendent failed to ensure the inmates' protection from the general danger arising from a prison environment that both stimulated and condoned violence.[210] Establishing the Eighth Amendment requirement that the plaintiffs must prove three elements,[211] the court found the evidence sufficient to establish liability on the damage claims against the superintendent.[212] However, the court determined that the district court erred in the legal standard it employed in assessing liability.[213] The court must apply a subjective standard to

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203. *Id.* at 1000 (a claim of deliberate indifference to medical needs requires that the deprivation of medical care be "serious").

204. Wilson v. Seiter, 111 S. Ct. 2321, 2324-25 (1991). In cases alleging unconstitutional jail conditions, only the deprivation of "a minimal civilized measure of life's necessities" is sufficient to state an Eighth Amendment claim. *Id.* at 2324 (quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981)).

205. 112 S. Ct. at 1000.

206. *Id.* (quoting Whitley v. Albers, 475 U.S. 312, 320 (1986)).

207. *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 v. Albers, 475 U.S. at 327).

208. 995 F.2d 1526 (11th Cir. 1993).

209. *Id.* at 1535.

210. *Id.*

211. *Id.*

> To prevail on their Eighth Amendment claim for damages brought under section 1983, the plaintiffs must prove three elements: (1) a condition of confinement that inflicted unnecessary pain or suffering, Rhodes v. Chapman, 452 U.S. 337, 347 (1981), (2) the defendant's "deliberate indifference" to that condition, Wilson v. Seiter, 111 S. Ct. 2321, 2327 (1991), and (3) causation, Williams v. Bennett, 689 F.2d 1370, 1389-90 (11th Cir. 1982).

Id.

212. 995 F.2d at 1539.

213. *Id.* at 1539-40.

Eighth Amendment claims to determine whether the defendant wantonly permitted the constitutionally infirm condition to exist.[214] Therefore, plaintiffs must prove that defendant "possessed knowledge both of the infirm condition and of the means to cure that condition, 'so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it.'"[215] Applying this standard, the court held that plaintiffs failed to show that the superintendent not only had the "means to correct the alleged constitutional infirmities, but also must have at least recklessly disregarded the inadequacy of the approach he took, the availability of other approaches, and their capacity to provide a cure."[216]

E. Privacy

In earlier surveys, privacy issues have concentrated mainly on clinical privacy.[217] In this survey the emphasis shifted to allegations in the custodial context which can best be described as voyeuristic. In *Fortner v. Thomas*,[218] the court recognized that prisoners retain a constitutional right to bodily privacy,[219] but it declined to define the precise parameters of the right.[220] Consequently, the court must approach the issue on a case by case basis.[221] The equitable relief portion of the case was remanded to the district court as a matter of first impression, to determine whether the prison correctional officers violated that right. In guiding the district court's inquiry, the court indicated that the standard of review to be applied was the four-part test[222] articulated

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214. *Id.*

215. *Id.* at 1535-36 (quoting Duckworth v. Franzen, 780 F.2d 645, 653 (7th Cir. 1985), *cert. denied*, 479 U.S. 816 (1986)).

216. *Id.* at 1541.

217. *See, e.g.*, Albert Sidney Johnson & Susan Cole Mullis, *Constitutional Civil Law*, 44 MERCER L. REV. 1107, 1137-38 (1993) reviewing Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992) and Luceroa v. Operation Rescue, 954 F.2d 624 (11th Cir. 1992).

218. 983 F.2d 1024 (11th Cir. 1993).

219. *Id.* at 1026.

220. *Id.* at 1030.

221. *Id.*

222. *Id.* Four factors

> govern the reasonableness review of prison regulations: (a) whether there is a "valid, rational connection" between the regulation and a legitimate government interest put forward to justify it; (b) whether there are alternative means of exercising the asserted constitutional right that remain open to the inmates; (c) whether and the extent to which accommodation of the asserted right will have an impact on prison staff, inmates and the allocation of prison resources generally; and (d) whether the regulation represents an "exaggerated response" to prison concerns.

by the Supreme Court in *Turner v. Safley*:[223] "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[224]

F. Fourteenth Amendment

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."[225] In two cases during 1992, the Eleventh Circuit addressed whether government contractors are entitled to allege violations of their due process as a result of the termination of business with the government. During the survey period, the Eleventh Circuit examined the concept of property interest in a land use setting and in the employment context.

In *Key West Harbour Development Corp. v. City of Key West, Florida*,[226] a developer alleged that he had a constitutionally protected property interest to redevelop certain property that the city had deprived him of without due process of law.[227] The City took several official actions to facilitate redevelopment of a naval base[228] under the Florida Community Redevelopment Act.[229] The city chose the developer to perform predevelopment services, and a city resolution authorized a project agreement which was entered into by the city commission, the redevelopment agency and the Florida Department of Community Affairs.[230] The court held that neither the Redevelopment Act nor the predevelopment contract created a constitutionally protected property interest.[231]

In the employment context, the court concluded in *Peterson v. Atlanta Housing Authority*[232] that the existence of employment property rights

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Id. (quoting Harris v. Thigpen, 941 F.2d 1495, 1516 (11th Cir. 1991)). The fourth factor is not "a 'least restrictive alternative' test, but rather it allows an inmate to 'point to an alternative that fully accommodates the prisoners' rights at *de minimis* cost to valid penalogical interest' as evidence that a restriction is not reasonable." *Id.* (quoting Turner v. Safley, 482 U.S. 78, 90-91 (1987)).

223. 482 U.S. 78 (1987).
224. *Id.* at 89.
225. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).
226. 987 F.2d 723 (11th Cir. 1993).
227. *Id.* at 724.
228. *Id.* at 724-25.
229. FLA. STAT. CH. 163.330-450 (1990).
230. 987 F.2d at 725.
231. *Id.* at 727-28.
232. 998 F.2d 904, 914 (11th Cir. 1993).

had already been decided favorably to plaintiff in *Barnett v. Housing Authority of Atlanta*[233] where essentially the same Personnel Policy & Procedure Manual was in use.[234] Vested property rights may be affected, even revoked or terminated, but only in accordance with constitutional standards of due process of law, including reasonable notice and an opportunity to respond, and where such a change can be demonstrated as in the public interest and not as a subterfuge to single out and discharge particular employees.[235]

The significance of *McKinney v. Pate*[236] lies not in the court's disposition of a discharged public employee's substantive due process claim, but in the direction and intensity of the concurring opinion. Plaintiff claimed that, under county policy, he could be discharged only for cause, but that in fact his discharge was founded on illegitimate motives, thus depriving him of a protected property interest in his job without substantive due process.[237] Acceding again to the Eleventh Circuit's binding precedent rule,[238] the court applied the established rule that deprivation of a property interest for an improper motive and by means which are pretextual, arbitrary, and capricious, and without any rational basis constitutes a substantive due process violation.[239] Chief Judge Tjoflat concurred specially,[240] surveying the circuit law on pretextual termination, examining the due process jurisprudence of the Supreme Court, and opining that circuit doctrine no longer complies with Supreme Court precedent.[241] Making a strong argument that pretextual discharge implicates only procedural due process,[242] the concurrence points out that the property right in employment derives from state law and is protected, not from termination as such, but against termination without procedural due process.[243] State-provided remedies are available and adequate.[244] Thus, there is no constitutional deprivation.[245]

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233. 707 F.2d 1571 (11th Cir. 1983).
234. *Id.* at 1576-77.
235. 998 F.2d at 914-15.
236. 985 F.2d 1502 (11th Cir. 1993).
237. *Id.* at 1505.
238. Bonner v. City of Pritchard, 661 F.2d 1206, 1209 (11th Cir. 1981).
239. 985 F.2d at 1505 (citing Hearn v. City of Gainesville, 688 F.2d 1328 (11th Cir. 1982)); *see also* Barnett v. Housing Auth. of Atlanta, 707 F.2d 1571 (11th Cir. 1983); and Adams v. Sewell, 946 F.2d 757 (11th Cir. 1991).
240. 985 F.2d at 1507-15 (Tjoflat, C.J., and Cox, J., concurring).
241. *Id.* at 1508.
242. *Id.* at 1513.
243. *Id.*
244. *Id.*
245. *Id.*

Procedural Due Process. *Collins v. School Board of Dade County, Florida*[246] concerned the nineteen-month duration of a teacher's postsuspension appeal.[247] In a qualified immunity context, the court held there was no clearly established law when a delay would become unconstitutional.[248] Absent evidence of unreasonable prolongation by defendants, the fact of a long hearing process may suggest only that the process was thorough.[249]

Substantive Due Process. In a case of first impression[250] in the Eleventh Circuit, the court followed the First, Sixth, and Ninth Circuits in holding that a Fourteenth Amendment substantive due process claim survives *Graham v. Connor*[251] when there is no seizure.[252] In *Wilson v. Northcutt*, a person against whom a bench warrant was issued committed suicide while taking refuge in the bathroom when deputies entered the subject's home in an attempt to serve the warrant.[253] The court found no violation concluding that the deputies were reasonably attempting to serve a valid warrant and their conduct was not grossly negligent.[254]

Following *Wilson v. Northcutt*,[255] the court considered *Swint v. City of Wadley, Alabama*,[256] and held that while *Wilson* clearly established that a non-seizure Fourteenth Amendment substantive due process claim of excessive force is viable,[257] the law was not clearly established at the time of the alleged violation in *Swint*.[258]

In *Corn v. City of Lauderdale Lakes*,[259] the court analyzed a substantive due process claim arising from the city's refusal to allow a developer

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246. 981 F.2d 1203 (11th Cir. 1993).
247. *Id.* at 1205.
248. *Id.*
249. *Id.*
250. Wilson v. Northcutt, 987 F.2d 719 (11th Cir. 1993).
251. 490 U.S. 386 (1989).
252. 987 F.2d at 722.
253. *Id.* at 720-21.
254. *Id.* at 722. The court noted that the, "Supreme Court has left open the question of 'whether something less than intentional conduct, such as recklessness or "gross negligence," is enough to trigger the protections of the Due Process Clause.'" *Id.* at 722-23 (quoting Daniels v. Williams, 474 U.S. 327, 334 n.3 (1986)), and the Eleventh Circuit has not resolved the issue of whether gross negligence is sufficient to support a § 1983 claim against a state actor. *Id.* at 723.
255. 987 F.2d 719 (11th Cir. 1993).
256. 5 F.3d 1435 (11th Cir. 1993).
257. *Id.* at 1448.
258. *Id.*
259. 997 F.2d 1369 (11th Cir. 1993).

to proceed with a miniwarehouse project in a residential area.[260] Rejecting plaintiff's contention that government cannot act in land use matters based upon facts gathered at public hearings,[261] the court said that when "citizens consistently come before their city council in public meetings on a number of occasions and present their individual, fact-based concerns that are rationally related to legitimate general welfare concerns, it is not arbitrary and capricious for a city council to decide without a more formal investigation that those concerns are valid and that the proposed development should not be permitted."[262]

Assessing liberty interest claims, the Eleventh Circuit considered cases in the employment and custodial contexts. In *Peterson v. Atlanta Housing Authority*,[263] a terminated employee claimed, *inter alia*, that she was deprived of her Fourteenth Amendment liberty interest.[264] Finding that plaintiff's complaint was devoid of reference to any injury inflicted upon her by her employer in any public statements concerning her termination, the court affirmed the district court's dismissal of plaintiff's claims based on any liberty interest.[265]

The court in *Sultenfuss v. Snow*[266] held that Georgia's parole system creates a liberty interest protected by the Due Process Clause.[267] The system derives from Official Code of Georgia Annotated ("O.C.G.A.") section 42-9-20[268] and Parole Decision Guidelines developed and rules promulgated pursuant thereto.[269] In reaching the conclusion that the system creates a due process liberty interest, the court found that it contains explicitly mandatory language, establishes specified substantive predicates that significantly limit the Board's discretion, and that the components of the system were legislatively enacted.[270]

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260. *Id.* at 1371.
261. *Id.* at 1387.
262. *Id.*
263. 998 F.2d 904 (11th Cir. 1993).
264. *Id.* at 912. "In order to state a claim based on a liberty interest the plaintiff must allege (1) stigmatizing information; (2) which is false; (3) made public; (4) by the governmental organization." *Id.* (citing Thomason v. McDaniel, 793 F.2d 1247, 1250 (11th Cir. 1986)).
265. *Id.* at 912.
266. 7 F.3d 1543 (11th Cir. 1993).
267. *Id.* at 1545.
268. O.C.G.A. § 42-9-20 (1991).
269. 7 F.3d at 1549-50.
270. *Id.* at 1550.

IV. CONCLUSION

The Eleventh Circuit is increasingly reflecting the fractionalization of the United States Supreme Court. The fractionalization may be a product of the court's effort to apply recent Supreme Court precedent, the transitional process in which the court finds itself, or just a fact of the diversity of modern life.

In the constitutional area, the Eleventh Circuit is obviously chafing under its binding precedent rule, demonstrated by an increasing number of two judge concurrences in per curiam opinions. On several constitutional issues, the court does appear to be charting its own course parallel to but separate from that of the Supreme Court. Any movement toward consensus appears to be in support of governmental action or policy and away from the earlier protection of individual claims, but this perceived movement is slight if not illusory. The short-term future course of the court appears to lie in the area of Fourteenth Amendment claims where there is greater opportunity to play the incorporation jurisprudence of the Supreme Court against the more flexible "shocks the conscience" or "fundamental interest" concept, where the Eleventh Circuit has been more inclined to put its own gloss on due process analyses notwithstanding Supreme Court guidance.