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I. SUITS BROUGHT UNDER THE FIRST AMENDMENT

During its 1983-1984 term, the Seventh Circuit decided a number of interesting cases in the area of freedom of speech, freedom of association, and freedom of religion.

A. Access to Public Forums for the Expression of First Amendment Rights

In *National Anti-Drug Coalition, Inc. v. Bolger*,[1] a non-profit corporation seeking to sell literature and solicit public contributions and memberships outside the post office, challenged a Postal Service regulation prohibiting all such solicitation on postal premises. The regulation was interpreted to include ingress and egress sidewalks located on United States Postal Service property. The court had little difficulty concluding that the solicitation of contributions and sale of literature are expressions of speech protected by the First Amendment.[2] However, it also recognized that the First Amendment does not grant carte blanche power to those wishing to engage in free expression.

Recent Supreme Court cases have focused on the nature of the public property in deciding the extent to which government regulation is permissible. As discussed in last year's Survey,[3] the Supreme Court in *Perry Education Association v. Perry Local Educator's Association*[4] delineated three categories of public property: (1) traditional public forums such as streets and parks, which by tradition have been used for expressive purposes; (2) "limited" public forums, "which the state has opened for use by the public as a place for expressive activity"; and (3) nonpublic forums, public property which is not by tradition a forum for public communication. As to the latter, the Supreme Court has held that

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1. 737 F.2d 717 (7th Cir. 1984).
2. *Id.* at 720.
3. Bodensteiner & Levinson, *Current Developments in Civil Liberties*, 60 CHI-KENT. L. REV. 455, 460-64 (1984) [hereinafter referred to as "Survey"].
4. 460 U.S. 37 (1983).

government can reserve such forums for their intended purposes and, provided the regulation is reasonable and does not suppress a particular viewpoint, it will be upheld. In the traditional or limited public forums, however, the state may only enforce regulations which are content neutral, narrowly tailored to serve a significant government interest, and which leave open ample alternative channels of communication.[5]

The difficult question raised by *Bolger* is how to categorize the ingress/egress sidewalks that connect the municipal sidewalks to the post office buildings. If such constitute a traditional public forum, it will be much more difficult to justify a flat ban on communication. A recent Supreme Court decision, United States v. Grace,[6] holds that the Supreme Court grounds, as defined to include the exterior premises and the municipal sidewalks, cannot be foreclosed as a forum for First Amendment purposes. Such an absolute prohibition on expressive activities can be upheld only if narrowly tailored to accomplish a compelling government interest.[7] Because the facts in *Bolger* indicate that postal property was open for the free distribution of literature and other First Amendment activity, it is at least arguable that the property here constituted a "limited" public forum under the *Perry* analysis. The Seventh Circuit, however, refused to decide the issue because of a lack of evidence regarding the physical characteristics of the ingress/egress sidewalks and other municipal sidewalks—evidence it deemed critical in determining whether the postal service property indeed was "open" to the public for expressive activity.[8] Instead it held that, even as a public forum, the regulation could be sustained as a reasonable time, manner, place restriction, because it was content neutral, narrowly tailored to serve a significant government interest, and it left open ample alternative channels of communication.

The court justified its holding by noting that prior to 1978 postal property was available for expressive activities, and this had resulted in much disturbance in the performance of postal duties. The history behind the regulation indicates that the postal service deemed the rule necessary to prevent disruption and hindrances to the conduct of postal business.[9] The court further held that there was a need for a flat ban in all postal offices because of the importance of adopting uniform regula-

5. *Id.* at 45.
6. 103 S. Ct. 1702 (1983).
7. *Id.* at 1707.
8. *National Anti-Drug Coalition*, 737 F.2d at 722-23.
9. *Id.* at 726.

tions.[10] Finally, the court reasoned that the rule provided more than ample alternative channels for free expression in that it permitted solicitation of public contributions on the municipal sidewalks surrounding postal property, as well as other types of communication, i.e., free distribution of literature on postal property.

The Seventh Circuit's analysis is disturbing because of its failure to distinguish between the interior postal property and the exterior sidewalks. As to the former, the trend in recent years has been to characterize most government-owned property as a non-public forum justifying even a flat ban on speech.[11] Aside from the decision in *Heffron v. International Society for Krishna Consciousness*,[12] in which state fair grounds were held to be a limited public forum, the Supreme Court has generally taken the position that government-owned property may be reserved for its intended purposes without impermissibly infringing on free speech rights.[13] The evidence surrounding passage of the 1978 postal regulation indicates that the use of postal lobby space for expressive activity had been "highly unsatisfactory" in that it disturbed postal employees in their performance of their duties, and it impeded the public in transacting postal business.[14] Thus the court really did not even have to use the more stringent time, manner, place analysis in upholding the exclusion of interior postal service property. As a non-public forum, it would have sufficed that the state had a reasonable interest and that the provision was viewpoint neutral.

The problem, however, is that the regulation was interpreted to include ingress and egress sidewalks, although there was no evidence indicating that solicitation on such sidewalks created a disturbance. If the sidewalks had been categorized as a public forum, the Supreme Court's analysis in *United States v. Grace,* indicates that the flat ban could not be upheld. Once a forum is designated as public, flat bans are presumptively impermissible and will not be upheld as reasonable time, manner, place restrictions. Instead, regulations must be narrowly drawn, i.e., no

10. *Id.* at 727.

11. In *Perry*, 460 U.S. at 45, the Court held that public school mail facilities constitute a non-public forum. Similarly, in U.S. Postal Service v. Greenburgh Civic Ass'ns., 453 U.S. 114 (1981), the Court held that a letter box was a non-public forum; in Greer v. Spock, 424 U.S. 828 (1976), it held that a military base was a non-public forum; and in Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), it held that advertising space on public transportation was a non-public forum. Most recently, in Members of City Council v. Taxpayers for Vincent, 104 S. Ct. 2118 (1984), it upheld a flat ban on posting signs on public property, reasoning in part that such property constituted a non-public forum.

12. 452 U.S. 640 (1981).

13. Members of City Council v. Taxpayers for Vincent, 104 S. Ct. at 2134; U.S. Postal Service v. Greenburgh Civic Ass'ns., 453 U.S. at 131 n.7.

14. *Nat'l Anti-Drug Coalition*, 737 F.2d at 725.

more restrictive of speech than is absolutely necessary to serve a compelling government interest.[15] Although the Supreme Court in the recent decision of *Members of the City Council v. Taxpayers for Vincent*[16] did uphold a flat ban on the use of public property, it recognized that as a flat ban, a more stringent analysis was required.[17] Here, the post office failed to demonstrate that the problems of using ingress/egress sidewalks were of a sufficient magnitude to justify a total ban on all solicitation. Since potential disruption is governed by the specific layout of different post offices, a general ban is not narrowly drawn to accomplish the government's interest. Although conceding that the ban in the long run may be upheld, the dissenting judge persuasively argued that summary judgment was not appropriate in light of the limited record.[18]

B. Political Patronage and Public Contracts

A second case in which the Seventh Circuit rejected a First Amendment claim was *LaFalce v. Houston*,[19] holding that the First Amendment does not forbid a city from using political criteria in awarding public contracts. The Seventh Circuit refused to extend earlier Supreme Court holdings that the discharge of a non-policymaking public employee solely because of his political beliefs violates the First Amendment.[20] In this case, plaintiff argued that although he was the lowest bidder on a city contract, the contract was awarded to another business which was a political supporter of the mayor. In its rulings, the Supreme Court did not comment on whether its decisions applied to patronage hirings as well as patronage dismissals; however, most lower courts have extended

15. *Grace*, 103 S. Ct. at 1707.

16. 104 S. Ct. 2118 (1984).

17. Indeed, in that case the Court used the stricter analysis even though it proceeded to hold that it was dealing with speech in a non-public forum. Note, however, that *Vincent*, as well as this case, indicates a growing indifference to the free speech rights of those too poor to afford more expensive methods of communication. In *Vincent*, the Supreme Court upheld a flat ban on posting signs on public property even though such was an extremely effective and inexpensive method of communication. Similarly, in this case the court rejected the equal protection argument that this prohibition interferred with the speech of organizations which could not afford to distribute free literature. *Nat'l Anti-Drug Coalition*, 737 F.2d at 728. The same indifference to communication by those with limited resources is reflected in Clark v. Community for Creative Non-Violence, 104 S. Ct. 3065 (1984), upholding government's right to prohibit "overnight sleeping" as part of a demonstration to draw attention to the plight of the homeless. The Court's reluctance to closely scrutinize the regulation is clearly reflected in its statement that the judiciary is not endowed "with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained." *Id.* at 3072. Despite the terminology used regarding "necessary" or "narrowly drawn" means, the trend in recent years has been to give an unwarranted amount of deference to government's asserted need to regulate.

18. *National Anti-Drug Coalition*, 737 F.2d at 729 (Wood, J., dissenting).

19. 712 F.2d 292 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 712 (1984).

20. Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980).

First Amendment protection to political hirings.[21] Without focusing on this distinction, the Seventh Circuit more generally concluded that political patronage protection does not extend to government contractors, and thus the suit was properly dismissed.

The court focused on both the magnitude of the loss, as well as the cost to government. It noted that unlike government employees, most government contractors also have private customers, and thus are less dependent and less chilled in their speech rights than an employee would be. Further, the court reasoned that since many firms are "political hermaphrodites," supporting both major parties, it is unlikely that even a constitutional rule against allowing politics to influence the contracting process would have much of an impact on these entities.[22] On the other hand, the court stressed the potentially large cost to the operation of our system of government where patronage has been such a vital force in American politics. Thus, it was "reluctant to tamper with political institutions when the competing First Amendment interests are as attenuated as they appear to be here."[23]

The court refused to extend the standard utilized by the Supreme Court in the government employee patronage cases—namely compelling interest and least restrictive means.[24] Instead it used a general balancing approach based on a perceived difference in the degree of coercion imposed on contractors versus employees. However, as one authority has argued, "available contracts are not necessarily more plentiful to a contractor than are jobs to an individual, especially for small or specialized contractors."[25] Because there is at least the potential that the denial of contracts may result in economic ruin for the contractor, it is unrealistic to minimize the burden imposed by the political patronage system in this context. The government interests cited by the court are no different than those deemed to be insufficient in the case of government employees. The effect of denying patronage on the political system, as well as the cost of having to defend such litigation, were considered, but deemed insufficient in the patronage employment cases. Although the burden of having to litigate a new category of patronage cases cannot be mini-

21. *See* cases cited in Comment, *Political Patronage in Public Contracting*, 51 U. CHI. L. REV. 518, 527-27, n.58 (1984).

22. *LaFalce*, 712 F.2d at 294.

23. *Id.*

24. Elrod v. Burns, 427 U.S. at 362-63.

25. Comment, *supra* note 21, at 533. The author notes that the coercion may even be greater in that having lost the power to coerce support through patronage employment practices, emphasis will instead be focused on patronage contracting. By contracting out government services now performed by employees, the holdings in *Elrod* and *Branti* could be avoided.

mized, it should be noted that only where political affiliation is a substantial motivating factor in contracting decisions will the government entity be subjected to litigation.[26] The court's affirmance of the dismissal of the action denies plaintiffs the opportunity to prove that in their situation, the patronage employment cases should control.[27]

C. *Government Regulation of Religious Entities*

Although the Establishment and Free Exercise Clauses of the First Amendment guarantee freedom of religion and non-entanglement between church and state, in general, the Supreme Court has upheld application of various government regulations, such as zoning, land use, building and fire codes, and labor laws to religious entities.[28] Thus, religious organizations have been required to comply with the minimum wage and overtime provisions of the Fair Labor Standards Act,[29] and in the recent decision of *United States v. Lee*, it was held that the free exercise clause does not relieve Amish taxpayers from their obligation to pay social security taxes.[30] On the other hand, in *N.L.R.B. v. Catholic Bishop of Chicago*,[31] the Supreme Court held that the National Labor Relation Board's jurisdiction does not extend to lay faculty employed by parochial schools. The Court, however, avoided the difficult religious questions that would be posed by applying the National Labor Relations Act (N.L.R.A.) to such pervasively religious institutions. It invoked instead a somewhat questionable rule of statutory interpretation, requiring affirmative Congressional intent to include parochial schools under the N.L.R.A.[32] Since it found no clear expression of Congressional intent to bring teachers in church-operated schools within the jurisdiction of the Board, it declined to construe the Act in a manner which would force it

26. *See* discussion of pleading and proof problems in last year's Survey, *supra* note 3, at 456-60.

27. The same conclusion was reached in two Eighth Circuit decisions, which are discussed and analyzed in Comment, *supra* note 21, at 553-58.

28. *See* Esbeck, *Establishment Clause Limits on Governmental Interference with Religious Organizations*, 41 WASH. & LEE L. REV. 347, 398-401 (1984).

29. Mitchell v. Pilgrim Holiness Church Corp., 210 F.2d 879 (7th Cir.), *cert. denied*, 347 U.S. 1013 (1954).

30. 455 U.S. 252 (1982). Note this term the Seventh Circuit in Templeton v. C.I.R., 719 F.2d 1408 (7th Cir. 1983) similarly rejected the claims of taxpayers who alleged exemption from the self-employment income tax. The court held that the taxpayers failed to furnish evidence establishing that they met the exemption for religious sects who are conscientiously opposed to acceptance of the benefits of private or public insurance, and thus they lacked standing to challenge the provisions as violative of their free exercise rights. In concurrence, Judge Eschbach felt that although the Templetons had standing to raise the free exercise issues, the Supreme Court decision in *Lee* makes it clear that the free exercise clause does not relieve taxpayers such as the Templetons of their obligation to pay social security taxes. *Id.* at 1414.

31. 440 U.S. 490 (1979).

32. *Id.* at 502.

to resolve difficult First Amendment religious freedom questions.[33]

The Seventh Circuit in *St. Elizabeth Hospital v. N.L.R.B.*[34] was faced with the question of whether the N.L.R.A. applied to religiously affiliated hospitals, requiring such hospitals to collectively bargain with a union. The court rejected the hospital's argument that the N.L.R.B.'s assertion of jurisdiction would "inevitably create an impermissible risk of government entanglement with the religious functioning of the hospital."[35] Instead it joined the Third, Eighth, and Ninth Circuits in holding that since a hospital's primary activity is secular, assertion of N.L.R.B. jurisdiction does not violate the institutions's first amendment rights.[36] The court distinguished *N.L.R.B. v. Catholic Bishop of Chicago*, noting that parochial schools are permeated with substantial religious activity, teachers in such schools have a critical role in fulfilling the school's religious mission, and the employment relationships in this environment differ from those in non-religious schools.[37]

Although the *Catholic Bishop* case was based on the Court's interpretation of Congressional intent, here this factor works against the hospital. As the Seventh Circuit notes, when Congress in 1974 amended the N.L.R.A. to include non-profit hospitals, it specifically rejected an amendment which would have excluded hospitals operated by religious organizations.[38] Having clearly intended to include religious hospitals, the question, therefore, is only whether Congress can constitutionally do so. Because hospital employees are engaged primarily in medical care, it is difficult to see how application of the N.L.R.A. would interfere with the religious mission of the institution. Generally, in assessing religious liberty cases, the court looks to the religious character of the organization, the intensity of church-state entanglements, and the resulting relationship between the religious body and government.[39] Although there is little likelihood that nurses or service and maintenance personnel are engaged in core religious activities, there appears to be no reason to deny them the collective bargaining protection afforded by the Act. Unlike a parochial school, where religious and non-religious functions are difficult to segregate, and thus excessive entanglement cannot be avoided, the "pervasively" secular character of a hospital justifies a different conclusion.

33. *Id.* at 507.
34. 715 F.2d 1193 (7th Cir. 1983).
35. *Id.* at 1195.
36. *Id.* at 1196-97.
37. *Id.*
38. *Id.* at 1197.
39. *See* Esbeck, *supra* note 28, and text accompanying notes 208-09.

II. Due Process and Equal Protection Challenges

The Seventh Circuit decided numerous cases involving challenges to government action based on the due process and equal protection clauses. In general, the decisions reflect an exceedingly deferential approach to government's right to regulate and a reluctance to find federal constitutional violations.

A. Protecting Property and Liberty Interests Through the Due Process Clause

The starting point for analysis in any due process challenge is determining whether plaintiffs have been deprived of any cognizable "property" or "liberty" interest. As explained in the case of *Altman v. Hurst*,[40] a property interest arises only if there are "such rules or mutually explicit understandings that support [a] claim of entitlement to the benefit."[41] As to identification of a liberty interest, a separate standard has evolved, which was discussed in a number of cases.

In *Lawson v. Sheriff of Tippecanoe County, Indiana*,[42] the court held that although the plaintiff did not have a property interest in her job as police radio dispatcher, if she lost her job and the government simultaneously impugned her moral character through public derogatory statements, a liberty interest would be created.[43] Judge Posner explains that the concept of liberty in the Fourteenth Amendment includes liberty to follow a trade, profession or calling. If a person is excluded from his calling by both loss of job and the making of statements which would preclude future employment, due process attaches.[44] In this case, the district court denied relief because at the time of the firing, it was alleged that plaintiff was offered alternative employment. Judge Posner notes, however, that an employer cannot avoid liability by offering an employee a job far beneath the one she occupied, because such would still constitute effective exclusion from one's trade or calling.[45] The case was therefore remanded to determine whether the job offered was degradingly inferior to the job of police radio dispatcher, such that the offer would not negate the deprivation of liberty.

It should be stressed that it is the coupling of a firing together with a public announcement which impugns an employee's moral character that

40. 734 F.2d 1240 (7th Cir.), *cert. denied*, 105 S. Ct. 385 (1984).
41. *Id.* at 1242, quoting Perry v. Sindermann, 408 U.S. 593, 601 (1972).
42. 725 F.2d 1136 (7th Cir. 1984).
43. *Id.* at 1138.
44. *Id.* at 1139.
45. *Id.*

gives rise to a liberty interest. Thus in the subsequent decision of *Hershinow v. Bonamarte*[46] the court held that where plaintiff police officer received a three-day suspension without pay, even if such a suspension on grounds of unprofessional conduct may have served as a "black mark" impeding the officer's future job advancement, he was not fired, and, therefore, the deprivation does not rise to a constitutional level.[47] Judge Posner cautioned that if every reprimand which became part of a public employee's file would be a potential basis for a Section 1983 case, "the federal courts would become the grievance machinery for public-sector employees."[48]

The most interesting Seventh Circuit decision discussing the meaning of "liberty" is *Jackson v. City of Joliet*.[49] In this case plaintiffs alleged that their decedents were deprived of life and liberty as a result of the actions of various government officials. The decedents were involved in a traffic accident in which their automobile burst into flames. The Joliet police officer who arrived at the scene failed to save anyone who might have been trapped in the car and also prevented other motorists from doing so by setting up a barricade. Further, when the firemen arrived, they failed to take any action to rescue the plaintiffs' decedents from the burning car or to assist them after the fire was out. In addition, the coroner had a rule which prevented the firemen and paramedics from aiding the decedents.[50] While conceding that the complaint stated good claims under general tort principles, in that an individual who starts to rescue someone must complete that rescue in a non-negligent fashion, the court concluded that the complaint failed to state actionable claims under the Constitution.[51]

Judge Posner rejected the argument that the "liberty" clause protects certain positive liberties, i.e., the right to receive the elementary pro-

46. 735 F.2d 264 (7th Cir. 1984).

47. Note too the conclusion in Altman v. Hurst, 734 F.2d 1240, 1243, n.8, that the mayor's statement to the newspapers that Altman was being disciplined were not so defamatory and stigmatizing as to trigger a liberty interest.

48. *Hershinow*, 735 F.2d at 266. This same reluctance to constitutionalize employee grievances is reflected in Altman v. Hurst, 734 F.2d 1240 (7th Cir. 1984), holding that an employee's conduct did not involve a matter of public interest, but rather a private personnel dispute, and thus the Supreme Court decision in Connick v. Myers, 461 U.S. 138 (1983) controlled. *Connick* held that a federal court "is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior" unless there were unusual circumstances. *Id.* at 147.

49. 715 F.2d 1200 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1325 (1984).

50. *Id.* at 1202.

51. *Id.* at 1203.

tective services that the state routinely provides users of its highways.[52] Instead, he views the Constitution as a charter of negative liberties concerned with government interference with basic rights. In the absence of some type of discriminatory deprivation of government services, no federal claim exists. As to the allegation that the Fourteenth Amendment forbids a state from depriving anyone of his "life" without due process of law, plaintiff did not claim that defendants tried to harm the occupants of the car, but simply that they failed to help them—again stating no claim actionable under the due process clause.[53] The court distinguished earlier Seventh Circuit decisions, such as *White v. Rochford*,[54] where the police arrested a driver and left his child passengers stranded in a driverless car. In that situation, it was the police action which put the children in a situation of peril, and thus liability could be imposed. Here the decedents were in danger prior to the defendants' appearance on the scene.

The Court's refusal to find a cause of action here is based primarily on two theories. First, it reasons that the framers of the Fourteenth Amendment never intended to constitutionalize what is essentially government inaction.[55] Second, it relies upon basic federalism concerns, i.e., that there is no reason for federal judicial intervention where there is no showing that this type of incompetence "will flourish unchecked by state law."[56] Although both the reluctance to constitutionalize another area of law based on government inaction as well as the reluctance to allow federal intervention in state affairs are understandable, the egregious fact situation presented here, involving reckless indifference to human life warrants a different outcome. The focus on state remedies reflects the Supreme Court's analysis in *Parratt v. Taylor*,[57] holding that due process is not violated when the state negligently deprives a person of his property, provided an adequate state post-deprivation tort remedy exists. Here, however, it is not merely a deprivation of property—rather the most serious deprivations of life and liberty have occurred. Surely the court's concern with federalism should have taken a back seat.[58]

52. *Id.* at 1203-04. Judge Posner notes the Supreme Court's refusal to reinterpret the Fourteenth Amendment to guarantee provision of basic services such as education, poor relief, etc.

53. *Id.* at 1204.

54. 592 F.2d 381 (7th Cir. 1979).

55. *Jackson*, 715 F.2d at 1205.

56. *Id.*

57. *See* text accompanying notes 80-86, *infra*.

58. Several courts have refused to extend *Parratt* to deprivations of liberty, relying upon the concurring opinions in Parratt v. Taylor, 451 U.S. 527, 545 (1981) (Blackmun, J., concurring). *See, e.g.*, Wilson v. Beebe, 743 F.2d 342 (6th Cir. 1984); Burtnieks v. City of New York, 716 F.2d 982 (2d Cir. 1983); Brewer v. Blackwell, 692 F.2d 387 (5th Cir. 1982); Wakinekona v. Olim, 664 F.2d 708 (9th Cir. 1981), *rev'd. on other grounds*, 103 S. Ct. 1741 (1983). *See also* Note, *Parratt v. Taylor: Limitations on the Parratt Analysis in Section 1983 Actions*, 59 NOTRE DAME L. REV., 1388, 1404

As to the notion that government inaction does not give rise to a constitutional claim, although there is some support for this theory in the lower federal courts,[59] the Supreme Court has recognized that sometimes government inaction in face of a duty to act gives rise to a constitutional claim. For example, deliberate indifference to medical needs states an actionable Eighth Amendment claim.[60] At some point grossly negligent, egregious government behavior, falling short of "affirmative" action, should give rise to a due process claim.[61] This is especially true in a case such as *Jackson* where government officials took steps which prevented others from offering assistance to the decedents—thus involving more than purely government inaction. Some appellate courts have recognized actionable § 1983 suits under similar circumstances. In *Doe v. New York City Department of Social Services*,[62] the Second Circuit found a state hospital liable for the grossly negligent discharge of a patient resulting in his death, and in *Morrison v. Washington County*,[63] the Eleventh Circuit found violation of the duty to care for an inebriated person who died as a result of an alcohol-related syndrome while in police custody. The Supreme Court, as it did in these two decisions, again refused to grant review in *Jackson*, thus leaving the lower courts without definitive guidelines as to when tortious conduct by state officials rises to the level of a constitutional violation.

In addition to the narrowing trend in defining what constitutes property and liberty interests, the decisions of the Seventh Circuit also reflect a reluctance to protect identified interests through the imposition of specific procedural safeguards. As Judge Posner recently noted, "The test of due process in its procedural aspect is not the formality of the proceedings, but whether the risk of error is kept to a reasonable level in view of the nature of the issues and the size of the stakes in the proceed-

(1984), suggesting that the traditional hierarchy of constitutional interests, placing life and liberty above property, justifies this distinction.

59. *See, e.g.*, Dollar v. Haralson County, Ga., 704 F.2d 1540 (11th Cir. 1983) (negligent refusal to build a bridge is not actionable). *See also* the cases discussed in *Jackson*, 715 F.2d at 1204-05.

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

61. In another Seventh Circuit decision this term, State Bank of St. Charles v. Camic, 712 F.2d 1140, 1147 (7th Cir. 1983), the court acknowledged that government conduct so egregious that it "shocks the conscience" does give rise to a due process violation (citing to Rochin v. California, 342 U.S. 165, 172 (1952), where it was held that forcefully administering an emetic to obtain evidence violates due process). It concludes, however, that defendant's failure to adequately supervise the deceased, who committed suicide while incarcerated, did not rise to the level of a constitutional violation. *Id.* at 1148. Although suggesting that *Parratt* may preclude the litigation, in light of Illinois' wrongful death statute, it rested its ultimate holding on lack of intent to cause the suicide and the absence of any conduct which could be described as shocking to the conscience. *Id.*

62. 649 F.2d 134 (2d Cir. 1981), *after remand*, 709 F.2d 782 (2d Cir. 1982), *cert. denied*, 104 S. Ct. 195 (1983).

63. 700 F.2d 678 (11th Cir.), *cert. denied*, 104 S. Ct. 195 (1983).

ings."[64] Thus in *Lister v. Hoover*,[65] it was held that due process did not require the Committee of Appeals at the University of Wisconsin to give written reasons for its denial of a student's request to be classified as a state resident for tuition purposes. The majority opinion adopted the reasoning of the district court judge who applied the traditional *Mathews v. Eldridge*[66] approach, weighing the private interest affected, the government's interest, and the risk of erroneous deprivation together with the probable value of increased procedures. It found that the property interest at stake—the difference between resident and non-resident student tuition—was slight, whereas the government's interest in its financial resources and its interest in providing a college education for all Wisconsin high school graduates was great.[67] Further, the burden of requiring a statement of reasons in light of the large number of appeals filed annually would be significant. The risk of an erroneous deprivation was minimal because present procedures provided four opportunities for reclassification, each before a different body of decisionmakers. Finally, the subjective nature of the dispositive issue of student intent convinced the court that the risk of erroneous decisions was unlikely to be significantly reduced by a committee statement of reasons.[68]

Only Judge Swygert dissented, accusing the majority of minimizing the significance of the property interest at stake.[69] Requiring payment of the non-resident rate may delay or foreclose educational opportunities, whereas Wisconsin's interest in avoiding the administrative burden of providing a statement of reasons was minimal, especially since the appeals committee was already conducting individualized hearings. According to the dissenting judge, a statement of reasons is a "skeletal level of process due," assuring that the state's power to reclassify students is done in accordance with specific statutory criteria.[70] Although earlier Supreme Court decisions have imposed the procedural requirement of a statement of reasons,[71] more recently, in *Hewitt v. Helms*,[72] the Court

64. Baer v. City of Wauwatosa, 716 F.2d 1117, 1122-23 (7th Cir. 1983), holding that although the plaintiff was not given a trial when his license to sell guns was taken away, he was provided notice of a charge against him as well as two hearings at which he testified and cross-examined other witnesses. These procedures were deemed adequate assurance against mistaken judgment.

65. 706 F.2d 796 (7th Cir. 1983), previous opinion at 655 F.2d 123.

66. 424 U.S. 319 (1976).

67. *Lister*, 706 F.2d at 803.

68. *Id.* at 804-05.

69. *Id.* at 800. (Swygert, J., dissenting).

70. *Id.*

71. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539 (1974) (requiring a statement of reasons regarding revocation of a prisoner's good time credits); Gagnon v. Scarpelli, 411 U.S. 778 (1973) (revocation of probation); Morrissey v. Brewer, 408 U.S. 471 (1972) (revocation of parole); Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) (bar certification).

held that none was required when transferring a prisoner to administrative segregation pending investigation. Thus, again, the Seventh Circuit is simply following guidance provided by the Supreme Court.

The need for a pre-deprivation hearing was the issue in three Seventh Circuit decisions this term.[73] In *Simmons v. Drew*,[74] two participants in a public rent assistance program claimed that the Fourteenth Amendment entitled them to a hearing before the administrative state agency could expel them. In both cases, the plaintiffs were readmitted into the program following a hearing some two months after their expulsion. However, the housing authority claimed that it lacked power to award retroactive rent assistance payments for the excluded period of time.[75] The Seventh Circuit reversed the district court's grant of summary judgment against one of the plaintiffs, reasoning that the lack of authority to award retroactive rent assistance payments made it constitutionally mandatory that a participant be granted a hearing *prior* to expulsion.[76] The court acknowledged that only an informal hearing, similar to the type received after expulsion, was required, and it also suggested that a post-expulsion hearing might have sufficed if retroactive payments of rent assistance benefits were made available to the plaintiff.[77] This caveat, together with a general lack of analysis in terms of balancing competing interests, suggests that the decision is of limited precedential value.[78] The court's dicta ignores the irreparable harm—denial of shelter—which occurs regardless of the availability of retroactive rent payments.

72. 103 S. Ct. 864 (1983).

73. It was also an issue in Schall v. Martin, 104 S. Ct. 2403 (1984), upholding a New York law permitting the detention without a hearing of juveniles where there is a serious risk that the juvenile may commit a criminal act before his case is adjudicated. The Court reasoned that the statute provided sufficient post-detention procedures to satisfy due process requirements. Thus, the absence of a pre-deprivation hearing was not deemed unconstitutional. Compare Loudermill v. Cleveland Bd. of Educ., 721 F.2d 550 (6th Cir. 1983), *cert. granted*, 104 S. Ct. 2384 (1984), holding that public employees were entitled to an opportunity to present evidence to refute charges against them *before* discharge. The availability of a full evidentiary post-discharge hearing "does not suggest that no other process was due." *Id.* at 560.

74. 716 F.2d 1160 (7th Cir. 1983).

75. *Id.* at 1162.

76. *Id.* at 1164.

77. The court concluded that summary judgment was appropriate in the case of one of the plaintiffs because he had been given a bench trial in state court prior to his eviction, and this preceded the expulsion. Thus, the Seventh Circuit concluded that the local housing authority was not constitutionally required to afford a second hearing prior to the expulsion. *Id.* at 1163.

78. Note that in Holbrook v. Pitt, 643 F.2d 1261 (7th Cir. 1981), it was similarly held that due process only requires that some type of a hearing occur before retroactive benefits are *finally* denied. *Id.* at 1281. Thus, assuming some method to recoup retroactive benefits was made available, the majority probably would have had little difficulty upholding the expulsion even without a pre-deprivation hearing, regardless of the magnitude of the interim loss.

The other two decisions alleging due process violations concern breaches of government employment contracts. It is significant that neither involved actual termination of employment, but rather violations of certain terms in the employment contract. This distinction is relevant in that it invokes the court's general concern with federalizing less significant tortious conduct.[79] Both opinions cite *Parratt v. Taylor*,[80] holding that a claim for negligent interference with loss of property is not actionable in federal court where the state provides adequate post-deprivation remedies. Of significance to these cases is the Court's extension of *Parratt* last term to include intentional deprivations of property, based on its reasoning that whenever loss occurs as a result of random, unauthorized official misconduct, the existence of an adequate post-deprivation remedy satisfies due process.[81] On the other hand, the Supreme Court in *Board of Education of Paris Union School District No. 95 v. Vail*,[82] summarily affirmed by an equally divided court a Seventh Circuit ruling that the intentional termination of an implied contract of employment, without a hearing, constitutes a violation of the due process clause. The Seventh Circuit specifically held that *Parratt* and its progeny applied only where a pre-deprivation hearing would be meaningless.[83]

The approach reflected in *Vail* is supported by the Supreme Court's earlier decision in *Logan v. Zimmerman Brush Co.*,[84] holding that "absent the 'necessity of quick action by the State of the impracticality of providing any pre-deprivation process', a post-deprivation hearing . . . would be constitutionally inadequate." Because the property loss in *Logan* occurred as a result of an established state procedure, it remains unclear whether the same conclusion would be reached where only official misconduct is challenged.[85] The basic question is whether *Parratt* analysis rests on the availability of state tort remedies for official misconduct

79. *See* discussion of Joliet v. City of Jackson, *supra* notes 55-58 and accompanying text.

80. 451 U.S. 527 (1981). A lengthy and detailed analysis of *Parratt* and its progeny may be found in last year's Survey, *supra* note 3, at 480-92.

81. Hudson v. Palmer, 104 S. Ct. 3194, 3203-04 (1984).

82. 104 S. Ct. 2144 (1984).

83. Vail v. Board of Educ. of Paris Union School Dist. No. 95, 706 F.2d 1435, 1440-41 (7th Cir. 1983), discussed in last year's Survey, *supra* note 3, at 489.

84. 455 U.S. 422, 436 (1982).

85. The argument is that whenever random state official misconduct, as opposed to an established state procedure, has caused the wrong, a pre-deprivation hearing is "impractical." In determining whether action has been taken pursuant to an "established procedure," it is not necessary to point to an actual statute. At least one court has acknowledged that "decisions made by officials with final authority over significant matters" constitute "established procedure" and thus are effectively removed from *Parratt* consideration. Burtnieks v. City of New York, 716 F.2d 982, 988 (2d Cir. 1983). *See also Vail*, 706 F.2d at 1448. Note that this term the Supreme Court is considering whether the discharge of a public sector employee without a hearing violates due process where the State provides post-termination procedures. Cleveland Bd. of Educ. v. Loundermill, *infra* note 86.

as negating all due process challenges, or whether the impracticality of a pre-deprivation hearing is central to its application.[86] The former broader concept appears to prevail in the Seventh Circuit's most recent encounters with due process challenges.

In *Brown v. Brienen*, Judge Posner, who wrote a stinging dissent to the *Vail* decision last term,[87] framed the issue as

> whether 42 U.S.C. § 1983 displaces the whole of the state law of public contracts into the federal courts through the characterization of a breach of such a contract as a deprivation of property without due

86. For an excellent criticism of the *Parratt* development, *see* Note, *Unauthorized Deprivations of Property Under Color of Law: A Critique of the Supreme Court's Due Process Analysis in Parratt*, 36 RUTGERS L. REV. 179 (1983-84). Since publication of the last Survey, there have been numerous federal court decisions applying and expanding the *Parratt* doctrine. Many of these cases have ignored the "infeasibility" aspect of its analysis and have relied instead on the availability of state remedies as satisfying due process where only official misconduct is challenged. *Compare, e.g.*, Loudermill v. Cleveland Bd. of Educ., 721 F.2d 550, 562 (6th Cir. 1983), *cert. granted*, 104 S. Ct. 2384 (1984) (distinguishing *Parratt* as a case where a pre-deprivation hearing is not feasible or practical); Schultz v. Bangart, 738 F.2d 231 (7th Cir. 1984) (post-deprivation remedies do not satisfy due process if pre-deprivation remedies are practicable); Giglio v. Dunn, 732 F.2d 1133 (2nd Cir.), *cert. denied*, 105 S. Ct. 328 (1984) (tenured public school principal who resigned under pressure was not entitled to a "pre-coercion" hearing which was "not feasible"; and the post-deprivation remedy under state statute, which included a hearing and the availability of reinstatement and monetary relief, was adequate to satisfy due process); Daniels v. Williams, 720 F.2d 792 (4th Cir. 1983) (*Parratt* applies to a liberty deprivation for which a pre-deprivation hearing is impractical, even though it appeared that Virginia's doctrine of sovereign immunity would have precluded damages. Due process only requires the state grant a meaningful time and opportunity for a hearing, and is not violated by the existence of affirmative defenses); Coleman v. Turpen, 697 F.2d 1341 (9th Cir. 1982) (*Parratt* applies only where it would have been impractical for the state to have provided any pre-deprivation process) *with* Thibodeaux v. Bordelon, 34 Cr. L. 2454 (5th Cir. 1984) (the availability of state post-deprivation remedies precludes a § 1983 action based on the negligent deprivation of a liberty interest where an incarcerated inmate was injured in a fire set by a drunken inmate); Vicory v. Walton, 721 F.2d 1062 (6th Cir. 1983), *cert. denied* 105 S. Ct. 125 (1984) (*Parratt* requires that plaintiff in a § 1983 damage suit based on deprivation of property, whether intentional or negligent, must plead and prove that state procedures are inadequate to redress a claimed wrong. Here the state post-deprivation remedy for replevin or inverse condemnation satisfied due process); Cohen v. City of Philadelphia, 736 F.2d 81, 86 (3d Cir.), *cert. denied*, 105 S. Ct. 434 (1984) (the availability of state judicial review of a city's civil service commission's decision regarding a discharged police officer precludes the officer's action under § 1983. The court cites with approval First and Seventh Circuit holdings that "substantive mistakes by administrative bodies in applying local ordinances do not create a federal claim so long as correction is available by the state's judiciary." *Id.* at 86); Enright v. Milwaukee Bd. of Sch. Directors, 346 N.W.2d 771 (Wisc. S. Ct. 1984), *cert. denied*, 105 S. Ct. 365 (1984) (the availability of state wrongful death action precludes parents of a school child whose murder allegedly resulted from negligent supervision from maintaining a § 1983 action against the school board for deprivation of due process). Note that these latter decisions focus on language in *Parratt* suggesting that state action for purposes of § 1983 is not "complete" where only state official misconduct, instead of a challenge to an actual state law, is alleged and state law provides a means to make the plaintiff whole. *Parratt*, 451 U.S. at 542 (quoting with approval now-Justice Stevens' analysis in Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978). In simple terms, the Court has separated the action of state officers from the action of the state, contrary to its holdings in Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278, 294 (1913) and Monroe v. Pape, 365 U.S. 167, 172 (1961). The Court determined in these cases that the fact that conduct of state officials is in violation of state law does not prevent it from being action of the state or action "under color of state law."

87. *Vail*, 706 F.2d at 1449 (Posner, J., dissenting).

> process of law, even though most such disputes have nothing to do with civil rights as ordinarily understood.[88]

Posner expressed his concern that breach of employment contracts suits have become a burdensome part of the business of federal courts, noting seven such cases which were handed down by this court in recent months.[89]

In *Brown*, a sheriff breached his agreement to grant compensatory time off to employees in his department who worked overtime. Because of the growth in workload and a failure to appropriate money to hire additional employees, compensatory time off accrued faster than the sheriff could allow it to be taken without endangering public safety.[90] After expressing its concern as to whether breaches of public employment contracts should ever be considered deprivations of "property" within the meaning of the Fourteenth Amendment, the court assumed, without deciding, that a property interest existed.[91] In proceeding to balance the *Mathews* factors, however, it concluded that there was no denial of due process in the sheriff's failure to provide a hearing in advance of his decision to disallow the compensatory time off.[92] Initially the court noted that the plaintiff's interest was tenuous, in that no decision was made that the accrued compensatory leave would *never* be afforded—merely that current conditions precluded allowing time off. Further, any additional procedural safeguards would have been of little value to the plaintiffs, because it was clear that the sheriff would have reached the same conclusion, i.e., that he could not grant the leave without violating his duty to maintain public safety.[93] Finally, it would be a burden on local officials if they had to grant a hearing every time they wanted to change any contractual term of employment.[94]

The Seventh Circuit relied heavily on the fact that a state court hearing for breach of contract would have been available, and would in fact have provided a more elaborate process than an administrative hearing before the sheriff.[95] However, the focus on this factor does not necessarily mean that the court is applying *Parratt* to a situation where a pre-

88. *Brown*, 722 F.2d at 362-63 (7th Cir. 1983).

89. *Id.* at 362. Note several of the cited decisions are discussed in last year's Survey, *supra* note 3.

90. *Id.*

91. *Id.* at 363. Note though Posner's comment that in determining whether a particular breach should be deemed a deprivation of property, "we must bear in mind that the Fourteenth Amendment was not intended to shift the whole of the public law of the states into the federal courts." *Id.* at 364.

92. *Id.* at 365.

93. *Id.* at 366.

94. *Id.*

95. *Id.* at 365.

deprivation hearing would not be impractical. Rather the court arguably rests its decision on a balancing of all three factors in *Mathews*. The availability of a state remedy is relevant in determining the risk of erroneous deprivation and the added value of the procedural safeguards sought. Due process requires only that some form of hearing be given prior to *final* deprivation of a property interest.[96] In this case, no final determination was ever made that appellants would not receive their accrued compensatory leave. In fact, it was conceded that the personnel policy granting such leaves was still in effect and that documentation of overtime work continued.[97] Thus, in a sense, it is simply a case where rights are postponed, without any severe adverse impact on the parties, and where any hearing would have been gratuitous.

A much more egregious set of circumstances was present in *Altman v. Hurst*[98] in which the court upheld dismissal of a civil rights action brought by a police sergeant against his superior. Having been suspected of encouraging another officer to appeal a suspension, plaintiff was reassigned to a fixed post outside the sheriff's window in front of the police station. He was prohibited from leaving his post, even to go to the bathroom, without first requesting permission; and he was denied indoor duty even during inclement weather. Further, after initiating litigation, he was reassigned to foot patrol duty, denied overtime opportunities, and his vacation time was rescheduled.[99] The court found that state law did not require a pre-deprivation hearing prior to the imposition of departmental disciplinary sanctions, and that the only property interest created was one in receiving vacation time in a particular month. This interest, however, was considered trivial and insubstantial compared to the government's significant interest in managing the day-to-day work schedules of its employees, so the court concluded that no deprivation of property without due process had occurred.[100]

The court likened the fact situation to *Parratt* where plaintiff could receive all the process he was due in a post-deprivation hearing—"namely a state tort action for wrongful deprivation of his property."[101] While conceding that had the plaintiff quit his job, his constructive dis-

96. Logan v. Zimmerman Brush Co., 455 U.S. 422, 433 (1982); Ingraham v. Wright, 430 U.S. 651 (1977), noting that common law safeguards provided by the state significantly reduced the risk of erroneous deprivaton.

97. *Brown*, 722 F.2d at 366. Compare Fuentes v. Shevin, 407 U.S. 67, 85 (1972), stating that even "a temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment."

98. 734 F.2d 1240 (7th Cir.), *cert. denied*, 105 S. Ct. 385 (1984).

99. *Id.* at 1241.

100. *Id.* at 1242.

101. *Id.*

charge would have enabled him to maintain this action, it concluded nonetheless that permitting plaintiff to pursue this suit would "open the federal flood gates to all manner of petty personnel disputes," which are best left to the internal procedures established by employers.[102]

The court's concern with opening federal floodgates to "petty" personnel disputes rings hollow in the context of this case where the harassment reached a truly intolerable level. The indignities which plaintiff was forced to suffer, coupled with a clear change in his employment status, should have sufficed to create the type of liberty interest to which procedural safeguards attach. The fact that state law did not create an explicit right to a hearing prior to the imposition of departmental disciplinary actions should be immaterial, because federal law determines whether or not a mutually explicit understanding has been created between the parties and whether minimum federal procedural requirements are met.[103] In light of the clear mandate under state law that a hearing be given prior to imposition of disciplinary punishment for removal, discharge, or suspension, the police officer would arguably have thought himself entitled to some type of a hearing prior to being subjected to this type of disciplinary punishment.

The court further erred in its rejection of a substantive due process claim.[104] The court conceded that plaintiff could not be disciplined in retaliation for the exercise of his first amendment rights, but it concluded that even if plaintiff was punished for encouraging another officer to appeal her suspension, this was not the type of speech "of public concern" which required much protection.[105] What the court ignores in this case

102. *Id.* at 1244.

103. Logan v. Zimmerman, *supra* note 96, states: "[B]ecause 'minimun [procedural] requirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate for determining the preconditions to adverse official actions.' " Vitek v. Jones, 445 U.S. 480, 491 (1980); Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 9 (1978). *See also Vail*, 706 F.2d at 1440; Winkler v. De Kalb, 648 F.2d 411, 414 (5th Cir. 1981); Quinn v. Syracuse Model Neighborhood Corp., 613 F.2d 438, 447-48 (2d Cir. 1980).

104. Another Seventh Circuit decision dealing with substantive due process claims is Phillips v. Thompson, 715 F.2d 365 (7th Cir. 1983). Relying upon the Supreme Court's decision in Youngberg v. Romeo, 457 U.S. 307 (1982), the court upheld the district court's determination that substantive due process rights of mentally retarded adults were not violated because any constitutional right to liberty of movement requires only reasonable regulation determined by professionals. Thus the minimum requirements imposed by *Youngberg*, i.e., that professional judgment be exercised in balancing the liberty interest of mentally incapacitated persons against relevant state interest, was satisfied. Further, due process simply requires that minimally adequate training as is reasonable in light of plaintiff's freedom of movement be afforded, again with deference shown to the professional judgment of those directing the operation of the institution. Thus the court affirmed the findings of the district court that class members were receiving adequate training.

105. *Altman*, 734 F.2d at 1244. The court relied upon the recent Supreme Court decision in Connick v. Myers, 461 U.S. 138 (1983), holding that where an employee's speech only concerns

as well as in *Brown v. Brienen*,[106] is that due process also guarantees fundamental fairness.[107] Earlier Seventh Circuit decisions acknowledge that the due process clause embodies this assurance. For example, in *Ciechon v. City of Chicago*, the city's discharge of an employee, following an incomplete, biased investigation was held to violate plaintiff's due process rights.[108] The egregiousness of the sheriff's conduct in *Altman* warrants a finding that the plaintiff was similarly deprived of fundamental fairness in violation of his right to due process of law. Although the court's concern with federalizing employee grievances is understandable, its denial of relief in this case is unfortunate. The court's statement that "state court remedies provide sufficient relief for purposes of section 1983,"[109] flies in the face of *Monroe v. Pape*,[110] in which the Supreme Court first established that a suit is actionable under § 1983 regardless of what tort remedies the victim might have against the government under state law in a state court.

B. Equal Protection Challenges to Government Regulation

Most of the equal protection challenges to government regulation were rejected based on a finding that government was pursuing legitimate legislative objectives.[111] The most interesting equal protection analysis is

matters of a personal interest, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision. This case, and related Seventh Circuit decisions, are discussed in last year's Survey, *supra* note 3, at pp. 456-60.

106. In Brown v. Brienen, 722 F.2d 360, 366 (7th Cir. 1983), the court acknowledged plaintiff's claim regarding due process "in its primary sense of fair procedure," but it never really analyzed it.

107. 686 F.2d 511 (7th Cir. 1982). *See also* United Church of the Medical Center v. Medical Center Commission, 689 F.2d 693 (7th Cir. 1982).

108. *Altman*, 734 F.2d at 1243.

109. 365 U.S. 167 (1961). In *Monroe*, the Court succinctly stated: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.* at 183. The Court's niggardly approach to due process in these cases should be contrasted with the dicta in Schultz v. Baumgart, 738 F.2d 231 (7th Cir. 1984), involving the discharge of a Wisconsin fire fighter. The Seventh Circuit reversed the lower court's dismissal, finding that it could not, as a matter of law, hold that plaintiff was given adequate notice that he would be discharged. It added that for purposes of remand, the lower court should take note that the availability of a post-deprivation grievance procedure or a board hearing would not cure the constitutional wrong. In fact, the court cited *Vail, supra* note 75, and Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982) for the proposition that post-deprivation remedies do not satisfy due process if pre-deprivation remedies are practicable. *Id.* at 237, n.9.

110. *See, e.g.*, Braswell v. Flintkote Mines, Ltd., 723 F.2d 527 (7th Cir. 1983) upholding Indiana's ten-year statute of limitation for product liability suits as serving the legitimate legislative purpose of lessening the risk of loss which manufacturers face when they place a product into the stream of commerce. A similar challenge to the Indiana statute of limitations was rejected in Pitts v. Unarco Industries, Inc., 712 F.2d 276 (7th Cir. 1983).

111. 727 F.2d 633 (7th Cir. 1984).

found in *Sklar v. Byrne*,[112] raising the constitutionality of Chicago's handgun ordinance. The Seventh Circuit ruled in 1982 that a town could totally ban the use of hand guns without violating either federal or state constitutional rights.[113] It was held in that case that the Second Amendment of the United States Constitution, protecting the rights to bear arms, regulates only the federal government.[114] In this case rather than flatly banning the possession of firearms, the city created an exception for handguns validly registered to current owners in the City of Chicago prior to the Act's effective date on April 10, 1982. Suit was brought by a Skokie resident who moved to Chicago on April 15, 1982, just five days after the Chicago ordinance took effect. He owned a handgun and possessed a valid Illinois firearms owner identification card. The ordinance prevented him from keeping his gun because he was not a resident of the City of Chicago on April 10, 1982. He thus argued that the ordinance discriminated against new residents of Chicago who either owned or wished to own handguns.[115]

The court first wrestled with the question of the appropriate standard for review of the classification scheme. As the court noted, where a legislative classification works to the disadvantage of a constitutionally suspect class or impinged upon the exercise of a fundamental personal right, the classification must meet an exacting "compelling interest" standard. However, in the absence of such concerns, a lesser standard is applied requiring only reasonableness.[116] The court first notes that the handgun ordinance does not impinge upon any federal or state constitutional right to bear arms, the latter being narrow and subject to extensive regulation.[117] The more interesting question is whether the provision interferes with the right to travel. The Supreme Court has recognized in several cases that heightened scrutiny must be applied where the state creates rights and limits their availability to individuals depending in part upon the duration of their residence.[118] However, the court concludes

112. Quilici v. Village of Morton Grove, 695 F.2d 261 (7th Cir. 1982), *cert. denied*, 104 S. Ct. 194 (1983).

113. *Quilici*, 695 F.2d at 269-71.

114. *Sklar*, 727 F.2d at 636.

115. *Id.*

116. *Id.* at 637. The court's conclusion that the Morton Grove ordinance did not violate the Illinois constitution was reaffirmed by the Illinois Supreme Court in Kalodimos v. Village of Morton Grove, 103 Ill. 2d 483, 470 N.E.2d 266 (1984).

117. *See* cases cited 727 F.2d at 638. Such requirements are subject to heightened scrutiny because they are deemed to penalize exercise of the federally protected right to travel.

118. Zobel v. Williams, 457 U.S. 55 (1982). The Court in *Zobel* did not apply the stricter analysis, but rather held that the means were not even rationally related to any goal. Thus *Zobel* is an interesting example of stricter "traditional" equal protection analysis, even without a finding of a suspect class or a fundamental right. *See* discussion in last year's Survey, *supra* note 3, at 494.

that the classification in the Chicago ordinance is not a durational residence requirement, and that its effect on travel is only indirect. Unlike the recently invalidated Alaskan dividend program which distributed benefits based on length of residence in the state,[119] here the ordinance did not single out new residents of Chicago for discriminatory treatment. It also affected current Chicago residents who do not own handguns, those who own but have not registered their guns prior to the effective date, and even those with registered handguns, who were prohibited from replacing their guns.[120]

Although the court's determination that strict scrutiny is not warranted because the ordinance has only an "indirect effect" on freedom to travel is troublesome, in that even indirect burdens on fundamental rights should be impermissible, the key point here is that new residents are not the only group singled out for disparate treatment. Thus the need for active judicial intervention and strict scrutiny appears to be less warranted.[121]

The court properly characterizes the classification as imposing a grandfather provision which favors established residents over newer ones, the purpose being to protect reliance interests.[122] Despite the court's refusal to recognize any fundamental right or suspect classification, it does note that "courts must certainly scrutinize grandfather clauses to learn whether they are masks for exploitation or invidious discrimination,"[123] and it later notes that the rationality standard is not "toothless".[124] The court procedes to conclude, however, that the ordinance rationally furthers the purpose of protecting the reliance interests of those who purchased handguns legally in Chicago before the effective date of the ordinance. Numerous Supreme Court and lower federal court decisions, cited by the Seventh Circuit, have recognized the legitimacy of reliance interests in an equal protection challenge to a grandfather clause.[125] Although Chicago's ordinance could have protected the

119. *Sklar*, 727 F.2d at 638.
120. *Id.* at 639 n.8.
121. *Id.* at 639.
122. *Id.*
123. *Id.* at 640.
124. *Id.* at 642. *See also* Heckler v. Mathews, 104 S. Ct. 1387 (1984) upholding an exception to a pension offset requirement whereby spousal benefits under the Social Security Act are reduced by the amount of federal or state government pensions received by the applicant. The purpose of the exception was to protect spouses, largely women, who had come to rely upon a sexually discriminatory program, subsequently invalidated by the Court. Even applying the heightened scrutiny used with regard to gender-based classifications, the Court upheld the exception as being narrowly tailored to protect individuals who made retirement plans prior to changes in the law.
125. *Sklar*, 727 F.2d at 642. Note the court relies upon the Supreme Court decision in City of New Orleans v. Dukes, 427 U.S. 297 (1976), upholding a grandfather clause which protected estab-

reliance interests of all those who had validly registered handguns on the passage date, including non-residents, it cannot be said that the City of Chicago built up any type of expectation in non-residents that upon moving to Chicago they could possess firearms. In essence the Chicago ordinance provided that it would no longer permit registration of firearms in its city in order to freeze the current supply of handguns in Chicago. As the court concluded, "the fact that the ordinance stopped short of the complete ban and protected those who relied on prior law does not violate the equal protection clause."[126]

III. EMPLOYMENT DISCRIMINATION

Employment discrimination cases were litigated under both Title VII of the Civil Rights Act of 1964[127] and the Civil Rights Act of 1866.[128] In a case brought under the latter act,[129] *Anooya v. Hilton Hotels Corp.*,[130] the court addressed the question of whether a claim of discrimination based solely on national origin states a cause of action under Section 1981. The plaintiff alleged that he is "of Iraqi background" and that he "was discriminated against on account of his national origin, Iraq."[131] Relying on dicta in decisions by the Second and Fifth Circuits,[132] the court summarily affirmed the dismissal stating that "[i]n the absence of an allegation of racial animus, either explicit or reasonably inferable from the pleadings, plaintiff cannot maintain his section 1981 action."[133] In a concurring opinion, Judge Cudahy suggests the problem may have been in the plaintiff's pleading. He indicates the purpose of Section 1981 is to protect persons belonging to a group "distinct from 'white citizens' as a matter of race or color."[134] Indicating differences of

lished businesses by banning push cart vendors except for those who had been in business a certain number of years. It was similarly reasoned in that case that only long established businesses who relied on prior laws had the type of reliance interest which the city needed to protect. Although this case is somewhat different in that it discriminates against non-residents who are unable to participate in the political process, the group disadvantaged by the Chicago handgun ordinance also includes Chicago residents. Thus the need for more active judicial intervention to protect those in "a position of political powerlessness" is less apparent in this situation. *See* discussion at 727 F.2d at 639 n.8.

126. 42 U.S.C. § 2000e, *et seq.* (1982).

127. 42 U.S.C. § 1981 (1982).

128. The plaintiff also alleged a claim under Title VII but it was barred because the complaint was not filed until 91 days after receipt of the Notice of Right to Sue. 42 U.S.C. § 2000e-5(b)(1) (1982). *See infra* notes 136-42 and accompanying text.

129. 733 F.2d 48 (7th Cir. 1984).

130. *Id.* at 49.

131. Keating v. Carey, 706 F.2d 377, 383-84 (2nd Cir. 1983); Bullard v. OMI Georgia, Inc., 640 F.2d 632, 634 (5th Cir. 1981).

132. 733 F.2d at 50.

133. *Id.*

134. *Id.* at 51.

race and color are readily apparent, he would require allegations of fact which at least raise an inference of some basis in race or color.[135] Therefore, after this decision, plaintiffs stating a claim under Section 1981 should allege differences of race or color which distinguish them from "white citizens."[136]

Title VII plaintiffs frequently face dismissal of their cases for failure to comply with rather strict time limits. Two cases this term addressed the federal regulation which requires federal employees to bring complaints to the attention of the Equal Employment Opportunity (EEO) counselor within thirty (30) days of "the matter causing [complainant] to believe he had been discriminated against."[137] The plaintiff in *Wolfolk v. Rivera*[138] claimed discrimination in hiring. Although he was hired in September 1979, he did not learn until August 1980 that other employees in the same office performing the same job, with qualifications inferior to his, were receiving a higher salary. The question was whether his action was barred by the failure to bring the matter to the attention of the EEO counselor within thirty (30) days from the date of his hiring.

Because the plaintiff had no reason to suspect discrimination in hiring until several months after the thirty (30) day limit had passed and because he acted promptly in bringing the matter to the attention of the EEO counselor after learning of the disparity in pay, the court concluded he fit within the exception under the federal regulation.[139] "Circumstances beyond his control" prevented the plaintiff from bringing the matter to the attention of his EEO counselor within thirty (30) days. In reaching this conclusion the court adopted the Fifth Circuit standard:

> A person is prevented by circumstances beyond his control from submitting a discrimination charge until the time when "facts that would support a charge of discrimination under Title VII were apparent or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to the plaintiff."[140]

135. *See also,* Manzanares v. Safeway Stores, Inc., 593 F.2d 968, 971 (10th Cir. 1979) (plaintiff's allegation that he was of Mexican-American descent sufficient under § 1981); Gonzalez v. Stanford Applied Engineering, Inc., 597 F.2d 1298, 1300 (9th Cir. 1979) (allegation of discrimination against Mexican-Americans having a brown rather than a white skin sufficient under § 1981).

136. 29 C.F.R. § 1613.214(a)(1)(i) (1982). 29 C.F.R. § 1613.214(a)(4) (1982) provides for exceptions to the 30 day limit.

> (4) The agency shall extend the limits in this section: (i) when the complainant shows that he was not notified of the time limits and was not otherwise aware of them, or that he was prevented by circumstances beyond his control from submitting the matter within the time limits; or (ii) for other reasons considered sufficient by the agency.

137. 729 F.2d 1114 (7th Cir. 1984).

138. *Id.* at 1117. 29 C.F.R. § 1613.214(a)(4)(i). *See supra* note 136.

139. 729 F.2d at 1117, *quoting* Reeb v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 931 (5th Cir. 1975).

140. *Id.* In contrast, the plaintiff in Sims v. Heckler, 725 F.2d 1143 (7th Cir. 1984), failed to

This standard, the court indicated, strikes the appropriate balance between fairness to the complaining party and the importance of beginning the administrative process in a timely manner.[141]

While relying in party on private Title VII cases, the court was careful to point out that it was not eliminating the differences between private and federal employees who miss the filing deadlines under Title VII. The equitable exceptions available to private employees under *Zipes v. Trans World Airlines, Inc.*,[142] can be more extensive than the exceptions available to federal employees who are limited by the federal regulation. However, when an employee is claiming an exception based on lack of knowledge of the facts supporting a discrimination charge, then the result should be the same whether proceeding under the regulation or *Zipes*.[143]

Difficult questions concerning compensatory seniority were before the court in *Romasanta v. United Airlines, Inc.*[144] In this class action the court was required to apply the principles of two Supreme Court decisions[145] to flight attendants who had been discharged pursuant to the airline's "no marriage rule" and were eligible for reinstatement under the terms of a settlement. The most difficult questions arose in the context of "competitive seniority", *i.e.*, that which can have an adverse effect on other flight attendants not involved in the litigation.[146] Because of the adverse impact on other fight attendants, the lower court had refused to award the class members full, retroactive competitive seniority upon rehiring. The Seventh Circuit found this consistent with *Franks v. Bowman Transportation Co.* where the Court described the equitable powers of the district courts as follows:

> [D]istrict courts should take as their starting point the presumption in favor of rightful-place seniority relief, and proceed with further legal

make the required showing of exceptional circumstances. Perhaps more importantly, the *Sims* court noted that the equitable tolling principles announced in Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), should not be extended to cases involving federal defendants because of principles of sovereign immunity. 725 F.2d at 1145. A waiver of sovereign immunity must be strictly construed.

141. 455 U.S. 385 (1982).

142. 729 F.2d at 1119.

143. 717 F.2d 1140 (7th Cir. 1983).

144. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Franks v. Bowman Transp. Co., 424 U.S. 747 (1976).

145. Seniority is used by employers in a number of ways. It may determine both pay and benefits, such as the number of vacation days and the number of passes. To the extent that an award of retroactive seniority affects these aspects of employment, it represents a cost to the employer but it has little of any direct impact on other flight attendants. However, because seniority is also utilized to determine the relative rights of employees—choice of domicile, choice of flights, order of layoffs etc.—an award of retroactive seniority has an obvious, direct impact on other attendants not directly involved in the litigation. 717 F.2d at 1156-58.

146. 424 U.S. at 779 n.41.

> analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases.[147]

Therefore, there was a need to engage in the delicate balance between the statutory rights of the class members and the contractual rights of other flight attendants.

The key then is to determine what constitutes "unusual adverse impact." Here the court concluded it was appropriate to consider numerous factors, not just whether other flight attendants would lose their jobs as a result of a grant or an award of retroactive seniority. Based on its interpretation of *International Brotherhood of Teamsters v. United States*, the court found that the relevant considerations "include the number of victims, the number of non-victim employees affected, the alternatives available to incumbents, and the economic circumstances of the industry."[148] Relying quite heavily on the economic status of United Airlines and the fact that it has a significant number of furloughed flight attendants, the court applied the *Teamsters* factors and upheld the relief awarded by the district judge. As to competitive seniority, class members were credited with seniority based on the number of days they had worked for United as flight attendants. For purposes of benefits representing a cost to the airline but not directly affecting incumbent flight attendants, the district judge awarded class members seniority from the day they were originally hired.[149]

The seniority questions presented in *Romasanta* are very difficult and not uncommon today because the economic condition of many industries has required a reduction in the number of employees. Obviously it is more difficult to fashion meaningful retroactive seniority relief when an employer is cutting back rather than expanding.[150] Recognizing this, the plaintiffs presented two alternative proposals to the district court, but both were rejected. First, the class members suggested delaying their reinstatement until openings occurred on the condition that all class members be fully reinstated within two and one-half to three years. This was rejected because the district court concluded that the impact on incumbent flight attendants would be only slightly less than if the class were immediately reinstated.[151] Another proposal was to give the class mem-

147. 717 F.2d at 1150, referring to *Teamsters*, 431 U.S. at 376 n.62.
148. See, *e.g.*, Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984).
149. 717 F.2d at 1159.
150. *Id.* at 1154.
151. *Id.* at 1156.

bers "relative" seniority which would have placed them in the same relative position as when they were forced to leave United. While this would mitigate the impact on incumbent flight attendants, the district court found the impact on incumbents would still be substantial and therefore rejected it.[152] The Seventh Circuit found no abuse of discretion by the lower court in rejecting the class members' proposals.

A claim of racial discrimination in the denial of tenure required the court to balance the qualified academic privilege with the need of the Equal Employmetn Opportunity Commission (EEOC) to obtain full disclosure of information in order to investigate a charge. When the University of Notre Dame refused to comply with an administrative subpoena duces tecum requiring the university to provide "copies of the complete personnel records of [the] charging party . . . and all other teaching personnel in the Economics Department for the period January 1, 1980 to the present," the EEOC applied to the district court for an order to show cause why its subpoena should not be enforced.[153] While limiting the scope of the subpoena to the files of those faculty members granted tenure prior to the charging party's eligibility for tenure, the court refused to allow the university to delete the names and identities of faculty members participating in the peer review process and refused the university's request for a non-disclosure agreement from the charging party before the EEOC could release the information to him.

Referring to Rule 501 of the Federal Rules of Evidence[154] and the Supreme Court interpretation which allows courts "the flexibility to develop rules of privilege on a case-by-case basis . . . and to leave the door open to change,"[155] the court recognized "a qualified academic freedom privilege protecting academic institutions against the disclosure of the names and identities of persons participating in the peer review process . . . ."[156] After concluding that the district court erred in refusing to recognize a qualified privilege, the court addressed the scope of the privilege in this case.

The Seventh Circuit outlined in some detail the process to be followed by the district court. first, the university should be permitted to redact identifying information from the personnel files and then present both the redacted files and the original files to the district court for *in*

152. EEOC v. Univ. of Notre Dame Du Lac, 715 F.2d 331, 333 (7th Cir. 1983).

153. FED. R. EVID. 501.

154. Trammel v. United States, 445 U.S. 40, 47 (1980), *quoting* 120 Cong. Rec. 40891 (1974).

155. 715 F.2d at 337. *See also*, Gray v. Bd. of Higher Education, City of N.Y., 692 F.2d 901 (2nd Cir. 1982); *but see*, *In re* Dinnan, 661 F.2d 426 (5th Cir. 1981).

156. 715 F.2d at 338.

camera review by the court. If the court determines that the redactions are reasonably necessary to preserve the identity of the evaluating faculty members, then the redacted files should be turned over to the EEOC. Second, if the EEOC believes it needs additional information, it would be given an opportunity to make a "substantial showing of 'particularized need' for relevant information, a burden similar to that imposed on a party seeking disclosure of grand jury materials."[157] In discussing "particularized need" the court anticipated that disclosure of the identities of the evaluating faculty members would be required only under limited circumstances. By imposing a strict burden on the EEOC, the court reflected its reluctance to become involved in the review of tenure decisions.[158]

Finally, concerning the university's request for a non-disclosure agreement, the court required the issuance of a protective order to assure that the "privileged materials are not disclosed to persons not directly involved in this action up to and including the time any private action is filed by the charging party."[159] Thus the court guarded against disclosure of even the redacted files on the grounds that they are still highly confidential and pertain to a relatively small number of faculty members. The court saw the restrictions and limitations it imposed on the EEOC's access to the university's records as necessary to preserve the integrity of the university peer review process as well as other confidential relationships. Thus, while the EEOC subpoena would still be enforced, the university basically prevailed in its objections to the subpoena as issued by the EEOC.[160]

IV. ENFORCEMENT OF CIVIL RIGHTS

A. Relationship Between Section 1983 and Other Federal Statutes

Difficult questions concerning the availability of Section 1983[161] to

157. *Id.* at 339.

158. *Id.* at 340.

159. In another case involving the enforcement of an EEOC subpoena, EEOC v. A.E. Staley Mfg. Co., 711 F.2d 780 (7th Cir. 1983), the court upheld the district court's enforcement of an EEOC subpoena over several objections by the employer. The case did not involve a privilege; rather the employer argued that the agency did not have "reasonable cause to believe that a violation of the act had occurred." *Id.* at 784. Relying in part on EEOC v. K-Mart Corp., 694 F.2d 1055 (6th Cir. 1982), the court gave a broad interpretation to the investigative powers of the EEOC, pointing out that the purpose of the subpoena is to help determine whether probable cause exists. While fishing expeditions are not sanctioned, the EEOC certainly does not have to state facts sufficient to make out a *prima facie* case. *Id.* at 786.

160. 42 U.S.C. § 1983 (1982).

161. These difficult questions result from three recent Supreme Court decisions: Maine v. Thiboutot, 448 U.S. 1 (1980); Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981); Middlesex County Sewerage Authority v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1981). For back-

enforce federal statutory rights continue to arise.[162] This issue was considered by the court in three cases.[163] In *Huebschen v. Dept. of Health and Social Services*,[164] the plaintiff alleged sexual harassment by his supervisor in the course of his employment. He brought an action under both Section 1983 and Title VII; the defendants included his supervisor who is not an "employer" within the meaning of Title VII. Therefore, the plaintiff attempted to enforce Title VII rights against his supervisor through Section 1983. Without addressing the question whether Title VII provides the exclusive remedy for the employment discrimination alleged in this case, the Seventh Circuit decided that "a plaintiff cannot bring an action under Section 1983 based upon Title VII against a person who could not be sued directly under Title VII."[165] This ruling seems to simply confirm that Section 1983 provides only a cause of action, not substantive rights.

A more difficult question was raised in the second case. The plaintiff in *Polchowski v. Gorris*[166] claimed that a local police department had violated the Justice System Improvement Act[167] by disclosing certain statistical and criminal history information during a political campaign. A motion to dismiss for failure to state a claim under Section 1983 was granted by the lower court. After examining the federal statute, the court concluded that the plaintiff, although he has a right to be free from unwarranted disclosures of statistical information, could not use Section 1983 as a remedy because Congress provided comprehensive private remedies but limited them to unwarranted disclosures by agencies of the U.S. government.[168] Because the remedies provided by Congress were limited to action by federal agencies, the court found an intent to preclude private enforcement against state or local officials through Section 1983.

ground in this circuit, see Bodensteiner and Levinson, *Civil Liberties: Current Developments in the Seventh Circuit Regarding First Amendment, Procedural Due Process, Employment Discrimination and the Enforcement of Civil Rights*, 59 CHI. KENT L. REV. 403, 444-54 (1983).

162. In another case, Cannon v. Univ. of Health Sciences/Chicago Medical School, 710 F.2d 351 (7th Cir. 1983), the plaintiff did not attempt to enforce a federal statute through § 1983, but the relationship between constitutional claims under § 1983 and a statutory claim under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, was discussed in the context of determining whether the § 1983 claim was barred by laches. This case includes a fairly lengthy discussion of the application of laches to § 1983 actions. *Id.* at 357-63.

163. 716 F.2d 1167 (7th Cir. 1983).

164. *Id.* at 1170. Compare Day v. Wayne Cty Bd. of Auditors, 749 F.2d 1199, 1202-05 (6th Cir. 1984) (white public employees can sue under both Title VII and § 1983 when claiming a constitutional violation as well as a violation of Title VII, a claim of retaliation does not form basis for a § 1983 claim).

165. 714 F.2d 749 (7th Cir. 1983).

166. 42 U.S.C. § 3789g (1982).

167. 714 F.2d at 752. *See* Privacy Act 1974, 5 U.S.C. § 552a (1982).

168. *Id.* at 751.

This conclusion was supported by the fact that the first bill introduced in Congress contained a remedy for improper disclosures by local authorities, but it was deleted.

One of the key questions in this area is whether a plaintiff must demonstrate that Congress intended to create a right which could be privately enforced or whether the defendant must show that Congress intended to foreclose private enforcement of a federal statute through Section 1983. In *Polchowski*, the court concluded that Congress intended to foreclose such enforcement. However, in its preliminary discussion of the issue the court suggested that "the inquiry resembles the analysis used to determine whether a private cause of action may be implied from an enactment of Congress."[169] Under this analysis, the court noted that "a party must demonstrate that Congress intended to create a right which may be privately enforced."[170] Immediately following this, the court indicated that "a party may proceed under Sec. 1983 to remedy a violation of a federal statutory right unless Congress intended to foreclose private enforcement of the statute or unless the statute does not create an enforceable 'right' under Sec. 1983."[171] Because congressional intent is frequently not clear, this difference can be significant and Section 1983 should be eliminated only in situations where there is a clear indication of a "congressional intent to preclude the remedy of suits under Section 1983."[172]

The final case involves the role of Section 1983 in enforcing the educational rights of handicapped children. The plaintiff in *Doe v. Koger*[173] was expelled from school in accordance with regular disciplinary procedures rather than the change in placement procedures required by the Education of All Handicapped Children Act (EAHCA).[174] The lower court held that handicapped children can be expelled, but not without a determination of whether the child's handicap is the cause of the disruptive behavior in accordance with EAHCA procedures.[175] After the lower court ruled in favor of the plaintiff under the EAHCA, the parties

169. *Id.*

170. *Id.*

171. *Nat'l Sea Clammers Ass'n, supra*, 453 U.S. at 20; *see also* Bodensteiner and Levinson, *Civil Liberties: Adherence to Established Principles*, 58 CHI. KENT L. REV. 269, 328-30 (1982).

172. 710 F.2d 1209 (7th Cir. 1983).

173. 20 U.S.C. §§ 1401, *et seq.* (1982).

174. Another case raising issues under the EAHCA, Timms v. Metropolitan School Dist. of Wabash County, Ind., 722 F.2d 1310 (7th Cir. 1983), was dismissed for failure to exhaust the administrative remedies required under the Act. Claims under § 504 of The Rehabilitation Act, 29 U.S.C. § 794 (1976), were also dismissed for failure to exhaust the EAHCA mandated administrative remedies.

175. 42 U.S.C. § 1988 (1982).

agreed to the actual relief and reserved the question of attorney fees for later submission to the court. The issue on appeal was whether the plaintiff could recover fees under the Civil Rights Attorney's Fee Award Act of 1976[176] under the theory that the EAHCA had been enforced through Section 1983.

While recognizing that the Seventh Circuit had generally precluded the use of Section 1983 to enforce the EAHCA,[177] the plaintiff in *Koger* argued that her case was different because she was attacking the defendants' refusal to utilize the administrative procedures mandated by the EAHCA. Therefore, the plaintiff argued that Section 1983 should be available at least in an action to require a state to comply with the procedural mandates of the EAHCA. The Seventh Circuit rejected this argument, holding that handicapped children can bring actions under the jurisdictional provision of the EAHCA[178] even when they are suing to bring deficient state procedures into conformity with the EAHCA.[179] Once the court concluded that the relief obtained by the plaintiff was available in an action under Section 1415(e) of the EAHCA, it then relied upon *Anderson* in deciding that "section 1983 was superfluous to plaintiff's relief"[180] and thus could not be utilized for attorney fees under Section 1988.[181]

The decision in *Koger* is consistent with a later Supreme Court decision in *Smith v. Robinson*,[182] in which the Court concluded that

> [w]here the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim.[183]

Because Section 1983 is a statutory remedy, "Congress retains the authority to repeal it or replace it with an alternative remedy,"[184] and the

176. Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981).

177. 20 U.S.C. § 1415(e).

178. 710 F.2d at 1213. In reaching this conclusion, the court relied upon Bd. of Educ. of the Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176 (1982), which emphasizes that a court's inquiry and actions under the EAHCA should be to assure that the state has adopted the policies and procedural assurances required by the Act.

179. 710 F.2d at 1213.

180. *Id.*

181. 104 S. Ct. 3457 (1984).

182. *Id.* at 3470. The court found it unnecessary to decide whether Congress intended to preclude resort to § 1983 on a due process challenge. *Id* at 3470. It is suggested that such a claim under § 1983 right not be inconsistent with the EAHCA because suits to force schools to provide the process due under both the Constitution and the Act are different than utilizing the procedures mandated by the Act to obtain substantive educational rights. *Id.* at 3470-71 n.17.

183. *Id.* at 3469.

184. 29 U.S.C. § 794 (1982).

Court found that in passing the EAHCA, Congress did intend to make it the exclusive avenue for enforcing fourteenth amendment claims virtually identical to claims under the Act. The Court also held that Section 504 of the Rehabilitation Act[185] cannot be used as a source of attorney fees[186] "[w]here Section 504 adds nothing to the substantive rights of a handicapped child."[187]

This case is particularly troublesome because there was no express indication that Congress intended to replace Section 1983 actions to enforce the fourteenth amendment with statutory rights and remedies under the EAHCA. To the contrary, the history of the Act indicates that Congress wanted to assure compliance with cases establishing the rights of handicapped children to an equal educational opportunity under the fourteenth amendment by making funds available to the States.[188] While the EAHCA does generally provide rights as extensive as those under the fourteenth amendment, it is more limited in its reme-

185. Plaintiffs prevailing under § 504 are entitled to attorney fees under 29 U.S.C. § 794a (1982).

186. 104 S. Ct. at 3474.

187. Congress' recognition of the presumed enforceability of the constitutional rights of handicapped children appears throughout the legislative history accompanying the EAHCA. At the outset, Congress recognized that its consideration of the EAHCA "followed a series of landmark court cases establishing in law the right to education for all handicapped children." S. Rep. No. 168, 94th Cong., 2d Sess. 6 (1975). Two of the landmark cases, *Mills v. Bd. of Educ. of the District of Columbia*, 348 F. Supp. 866 (D.D.C. 1972), and *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972), both of which established that the exclusion of handicapped children from a free public education violates equal protection and due process, were repeatedly cited by Congress. See S. Rep No. 168, 94th Cong., lst Sess. 6-7, 22-23 (1975); H.R. Rep. No. 332, 94th Cong., 1st Sess. 3-4 (1975); *see generally Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 180 n.2, 192-200 (1982).

Based on Congress' belief that these landmark "court orders must be implemented," S. Rep. No. 168, 94th Cong., 1st Sess. 17 (1975), Congress enacted the EAHCA "*to provide assistance* to States in carrying out their responsibilities under State law and the Constitution of the United States, "*id.* at 13 (emphasis added); *see also* 121 Cong, Rec. 19492 (1975) (remarks of Sen. Williams); *id.* at 19504 (remarks of Sen. Humphrey). Congress in fact could not have been more explicit in its intent that the new EAHCA funding, as well as other federal funding, be utilized by "States to assist them in carrying our their responsibilities under State laws, State Constitutions, and U.S. Constitution," S. Rep. No. 168, 94th Cong., 1st Sess. 23 (1975) (emphasis added).

By providing judicial review to insure that participating states were complying with the restrictions which accompanied the use of EAHCA funding, *see Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 176, 204-08 (1982), Congress did not eliminate wholesale the enforcement of the state and other federal statutory rights of handicapped children, much less enforcement of their federal constitutional rights through § 1983. Congress quite specifically recognized that it was "discriminatory treatment and exclusion which Court cases [and] State and Federal laws are designed to remedy." S. Rep. No. 168, 94th Cong., 1st Sess. 27-28 (1975). And, lest there be any doubt, Congress specifically stated that it did "not intend" EAHCA emforcement "to limit the rights of individuals to seek redress of grievances through other avenues such as bringing civil action[s] in Federal or State courts to protect and enforce the rights of handicapped children under applicable law." *Id.* at 26.

188. *See* Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981).

dies in that it does not expressly provide for compensatory damages[189] or attorney fees.[190]

B. Application of Preclusion Principles to Civil Rights Actions

Two recent decisions of the Supreme Court make it clear that the usual rules of preclusion apply in Section 1983 actions. Pursuant to statute,[191] federal courts are required to give preclusive effect to state court judgments whenever the courts of the state issuing the judgments would do so. In *Allen v. McCurry*[192] the Court decided that Section 1983 does not create an exception to Section 1738. Therefore, a federal court plaintiff seeking damages for violations of the fourth and fourteenth amendments in a Section 1983 action may be precluded by a state court denial of his motion to suppress evidence based on the same grounds. Because the federal court plaintiff in *Allen v. McCurry*, as a defendant in the state criminal proceeding, had questioned the constitutionality of the search and seizure by moving to suppress the evidence, the constitutional issue raised by the plaintiff in federal court had already been decided adverse to him. Section 1983 does not guarantee plaintiffs a right to a federal court determination of their constitutional issues.[193] More generally, this case means that a plaintiff who raises and obtains a state court determination of a federal issue cannot get another determination of the same issue in a subsequent Section 1983 action in federal court.

In a later case, the Court further extended the application of preclusion principles of Section 1983 actions. The plaintiff, in *Migra v. Warren City School District Board of Education*,[194] brought an action challenging the decision of the Board of Education not to renew her employment as a supervisor of elementary education. She first challenged the Board's decision in state court arguing breach of contract and wrongful interference

189. *See* Bodensteiner, *Availability of Attorney Fees in Suits to Enforce the Educational Rights of Children with Handicaps*, 5 W. NEW ENG. L. REV. 391 (1983).

190. 28 U.S.C. § 1738 (1982).

191. 449 U.S. 90 (1980).

192. *Id.* at 103. *See also* Haring v. Prosise, 103 S. Ct. 2368 (1983), in which the Court held that a federal court § 1983 plaintiff, who pleaded guilty to a state court criminal charge, is not precluded from litigating the validity of the search conducted by police officials. Issue preclusion is not applicable because the state law requirements for this doctrine are not met by a guilty plea. The Court refused to adopt a common law form of claim preclusion based on the argument that the federal court plaintiff could have litigated the legality of the search in the context of the criminal proceeding. A plea of guilty does not constitute either an admission that the search was valid or a waiver of any civil claim under the fourth amendment. Adoption of such a rule of preclusion "would threaten" important interests in preserving federal courts as an available forum for the vindication of constitutional rights. *Id.* at 2378.

193. 104 S. Ct. 892 (1984).

194. 449 U.S. 90 (1980).

with an employment contract. The state court awarded her reinstatement and compensatory damages.

Subsequently Dr. Migra filed an action in federal court challenging the Board's actions under Section 1983 and raising claims under the first, fifth and fourteenth amendments. She sought compensatory and punitive damages as well as injunctive relief. Summary judgment was granted to the defendants on the basis of res judicata and the complaint was dismissed. Relying on *Allen v. McCurry*,[195] the Court concluded that Section 1738 requires a federal court in a Section 1983 action to preclude litigation of issues which could have been raised in the earlier state proceeding, if they would be precluded in a second state court case. In other words, Section 1738 applies not only to Section 1983 actions which attempt to relitigate issues previously decided in state court, but also to federal court actions under Section 1983 which attempt to raise issues which could have been litigated in a prior state court proceeding.[196]

The scope of Section 1738 was again examined in *McDonald v. City of West Branch, Mich.*,[197] in which the Court held that Section 1738 does not apply to arbitration decisions since arbitration is not a "judicial proceeding." Having concluded that Section 1738 does not require giving preclusive effect to an arbitration award, the Court refused to fashion a judicial rule requiring preclusion in this situation. The Court relied on four considerations in reaching this conclusion: first, arbitrators may not have the expertise to resolve the complex legal issues which arise in Section 1983 actions; second, arbitrators may not have the authority to enforce Section 1983; third, unions may not always present employees' grievances vigorously in arbitration proceedings because their interests may not be the same; and fourth, fact finding in arbitration proceedings is not generally equivalent to judicial fact finding in that the rules of evidence, discovery rules and cross examination are generally not available.[198]

These principles, particularly those enunciated in *Migra*, were applied this term by the Seventh Circuit. In *Hagee v. City of Evanston*,[199] developers challenged the city's revocation of a building permit in a state

195. The case was remanded to give the district court an opportunity to determine whether the second action would have been barred under Ohio law. 104 S. Ct. at 899. In another case, Marrese v. Amer. Acad. Ortho. Surgeons, 726 F.2d 1150, 1151-56 (7th Cir.), *cert. granted*, 104 S. Ct. 3553 (1984), the court held that a state court action barred a subsequent federal antitrust case even though federal courts have exclusive jurisdiction over Sherman Act claims.

196. 104 S. Ct. 1799 (1984).

197. *Id.* at 1803-04.

198. 729 F.2d 510 (7th Cir. 1984).

199. The court emphasized that the federal court cannot give a state court judgment greater preclusive effect than it would have in a subsequent state court action. *Id.* at 512.

court and obtained injunctive relief. After the construction project was completed, the developers sued the city in federal court under Section 1983 seeking damages for violation of their rights under the fifth and fourteenth amendments. Noting that under *Migra* the state court judgment is entitled to the same preclusive effect,[200] it would have in the courts of Illinois, the court examined Illinois preclusion law and concluded that the federal action was barred.

C. *Qualified Immunity*

The court was required to apply immunity doctrines set forth in *Harlow v. Fitzgerald*,[201] in the context of procedural due process and first amendment claims.[202] In *Benson v. Scott*,[203] the plaintiff claimed the Illinois Attorney General violated his rights under the first and fourteenth amendments in determining that Benson was not entitled to representation by the state in a civil suit against Benson arising out of his duties as a state employee. Because the exact requirements of procedural due process vary from situation to situation and are not precisely defined, it is not easy to determine whether a state official violated clearly established procedures of which a reasonable person should have been aware. While recognizing that the requirements of due process have been settled for a number of situations, the court concluded that "it is not clear even today that the Constitution required [the attorney general to use more elaborate procedures in deciding to deny representation to the plaintiff]."[204] Therefore, the attorney general was entitled to a qualified immunity.

The plaintiff also alleged that the decision to deny representation was in retaliation for the exercise of first amendment rights. Here the court indicated that the "right of employees to be free from retaliation for their exercise of First Amendment rights has been clear since at least 1968."[205] Therefore, the attorney general was not entitled to a qualified immunity on the first amendment claim. The court pointed out that the plaintiff would still have to prove the allegations of his complaint in order to prevail on the first amendment claim. In other words, denying a

200. 457 U.S. 800 (1982). *See generally* Survey, *supra* note 3, at 533-38.

201. In two other cases the court decided that a prison institutional disciplinary committee is entitled to only a qualified immunity rather than an absolute immunity as a *quasi* judicial body. *See* Saxner v. Benson, 727 F.2d 669, 675 (7th Cir. 1984); Redding v. Fairman, 717 F.2d 1105, 1117 (7th Cir. 1983).

202. 734 F.2d 1181 (7th Cir. 1984).

203. *Id.* at 1185.

204. *See*, Pickering v. Bd. of Educ., 391 U.S. 563 (1968). *Id.* at 1185. Whether the law is clearly established should be determined by the court rather than the jury. McKinley v. Trattles, 732 F.2d 1320, 1324 (7th Cir. 1984).

205. 734 F.2d at 1186.

qualified immunity does not establish liability.[206]

D. Damages

In the review of the Seventh Circuit decisions last term it was pointed out that the court had not resolved the dispute over the application of *Carey v. Piphus*[207] to cases alleging violation of substantive constitutional rights, such as the first amendment.[208] This term, in *Crawford v. Garnier*,[209] a case finding a violation of first amendment rights, the court upheld an award of compensatory damages for loss of wages, loss of fringe benefits, out-of-pocket costs, injury to reputation, and pain and suffering, but reduced an award of $10,000 for injury to civil rights to $1.00. The court based its holding on the earlier decision in *Kincaid v. Rusk*.[210] Therefore, despite earlier confusion, the court now seems to be favoring a strict application of *Carey v. Piphus* to first amendment claims with damages limited to compensation for actual injury.

The standard for awarding punitive damages in Section 1983 cases was discussed in several decisions. Basically, the Seventh Circuit applied the recent decision in *Smith v. Wade*,[211] in which the Court held that punitive damages may be awarded when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others.[212] Under *Smith* punitive damages can be awarded for the purpose of deterring or punishing constitutional violations,[213] and the Court rejected the notion that "the deterrent and punitive purposes of punitive damages are served only if the threshold for punitive damages is higher in every case than the underlying standard for liability in the first instance."[214] Therefore, where the standard for liability requires a showing of reckless disregard or intent, a finding of liability may entitle a plaintiff to punitive damages.

Applying *Smith v. Wade*, the court approved an award of punitive damages in *Merritt v. De Los Santos*[215] based on a finding that the de-

206. 435 U.S. 247 (1978).
207. *See* Survey, *supra* note 3, at 540-42.
208. 719 F.2d 1317 (7th Cir. 1983).
209. 670 F.2d 737, 745-46 (7th Cir. 1982).
210. 461 U.S. 30 (1983).
211. *Id.* at 56. Earlier the Seventh Circuit had required a "showing of aggravating circumstances or malicious intent." Endicott v. Huddleston, 644 F.2d 1208, 1217 (7th Cir. 1980).
212. 461 U.S. at 54.
213. *Id.* at 51.
214. 721 F.2d 598 (7th Cir. 1983).
215. 719 F.2d 1317, 1325 (7th Cir. 1983). *See also* McKinley v. Trattles, 732 F.2d 1320, 1326 (7th Cir. 1984), where the court approved a jury instruction indicating punitive damages were avail-

fendant had willfully and knowingly violated the plaintiff's right to an impartial tribunal. Similarly, in *Crawford v. Garnier*,[216] a finding that the defendant had acted "maliciously, wantonly, or oppressively in terminating the plaintiff's employment" supported an award of punitive damages. this expanded availability of punitive damages can obviously be important in Section 1983 cases, particularly in light of the application of *Carey v. Piphus* to violations of substantive constitutional rights such as those protected by the first amendment.

E. Attorney Fees

The court faced questions of first impression concerning the application of a Rule 68[217] offer of judgment which includes the plaintiff's attorney fees under the Civil Rights Attorney's Fees Awards Act of 1976.[218] The defendants in *Chesny v. Marek*[219] made a timely Rule 68 offer "for a sum, including costs now accrued and attorney's fees, of [$100,000]." The court first decided that the form of offer made by the defendants is valid under the Rule. In reaching this conclusion the court recognized that it might, in some cases, add to the burden of district judges in that they may have to determine how much of the fee accrued before the date of the judgment offer and whether the offer was actually more favorable than the judgment received by the plaintiff. Assuming plaintiff's counsel keep detailed records of when hours were incurred, such apportionment should not be overly difficult.[220] The court also rejected the suggestion that Rule 68 offers including attorney fees would cause a serious conflict of interest for the plaintiff's attorney. Here the court indicated that the potential conflict is no greater than in any case involving a contingent fee arrangement or an award of statutory fees when a settlement offer is made.[221]

The second question is whether the rejection of a valid Rule 68 offer, which is more favorable than the judgment ultimately obtained by the plaintiff, precludes the plaintiff from obtaining an award of fees for work done after the offer was made. This issue requires an interpretation of

able where the act or omission of the defendant was maliciously or wantonly or oppressively done. The court went on to define each of these terms. *Id.* at 1326 n.2. The court did find that the jury award of $15,000 was excessive and directed the lower court to reduce it to around $6,000. *Id.* at 1327.

216. Fed. R. Civ. P. 68.
217. 42 U.S.C. § 1988 (1982).
218. 720 F.2d 474 (7th Cir. 1983), *cert. granted*, 104 S. Ct. 2149 (1984).
219. *Id.* at 476-77.
220. *Id.* at 477-78.
221. *Id.* at 479.

the sanction in the Rule which provides that if the offer is rejected and "the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." More specifically, does "cost" in this context include attorney fees? Here the court concluded that "cost" did not include attorney fees available under Section 1988 because to do so would conflict with the policy behind Section 1988 which was intended to encourage meritorious civil rights actions. Attorneys "should not be deterred from bringing good faith actions to vindicate fundamental rights by the prospect of sacrificing all claims to attorney's fees for legal work at trial if they win, merely because on the eve of trial they turn down what turned out to be a more favorable settlement offer."[222] Characterizing the right to fees under Section 1988 as "substantive" for purposes of deciding the issue before it, the court indicated that any other interpretation of Rule 68 in this case might question its validity under the Rules Enabling Act[223] because it would infringe upon the substantive policy reflected in Section 1988.

Two cases deal with the application of the recent decision in *Hensley v. Eckerhart*[224] in which the Supreme Court established the standard for setting a fee award under Section 1988 where a plaintiff has achieved only limited success in the litigation. The plaintiffs in *Mary Beth G. v. City of Chicago*[225] sued the city and several police officers challenging the city's policy which required a strip search and visual inspection of the body cavities of all women arrested and detained in the city lock-ups. Claims against two arresting officers for false arrest and excessive force were unsuccessful. The plaintiffs were successful in their challenge to the strip search policy but only as to the city and not individual defendants.

In applying *Hensley* to this situation, the court stated:

> The case instructs, however, that the starting point for separating an unrelated, unsuccessful claim from a related, unsuccessful claim is to determine whether a particular unsuccessful claim shares a "common core of facts" with the successful claim or is based on a "related legal theory." We believe a useful tool for making this determination is to focus on whether the claims seek relief for essentially the same course of conduct. Under this analysis, an unsuccessful claim will be unrelated to a successful claim when the relief sought on the unsuccessful claim is intended to remedy a course of conduct entirely distinct and separate from the course of conduct that gave rise to the

222. 28 U.S.C. § 2072 (1982).
223. 461 U.S. 424 (1983). *See* Survey, *supra* note 3, at 513-15.
224. 723 F.2d 1263 (7th Cir. 1983).
225. *Id.* at 1279 (footnotes and citations omitted).

injury on which the relief granted is premised.[226]

Applying this, the court concluded that the plaintiffs were not entitled to fees for the two unsuccessful claims relating to the arrest because they related to conduct "distinctly different"[227] from the conduct relating to the strip search claim. However, the court concluded that the district court erred in excluding the time spent litigating the strip search claim against the individual defendants. The court stated that an "award of attorney's fees for time expended in remedying illegal conduct should not turn on whether only some or all of the defendants named in connection with the conduct are ultimately held liable."[228] The key here was the fact that the plaintiffs had obtained all relief sought under this claim, even though they did not recover from all defendants. Because the individual defendants were not named frivolously, the city was found liable for all time expended litigating the strip search claim.

Another case, *Illinois Welfare Rights Organization v. Miller*,[229] required application of *Hensley* principles in a case which was settled after extensive litigation resulted in partial summary judgment for the plaintiffs. First, the Court of Appeals agreed with the lower court determination that the plaintiffs were prevailing parties because the law suit was a "catalyst" in bringing about a legislative change.[230] The court then noted the problem in applying *Hensley* because it involved fully litigated claims rather than a settlement. Therefore, the court focused on the second aspect of the analysis required by *Hensley*, "*i.e.* whether the amount of the award is reasonable in light of the extent of plaintiffs' overall success."[231] This requires a factual inquiry and the court directed the district court on remand to compare the results obtained from the litigation with the plaintiffs' ultimate goals or motives in bringing the litigation. By comparing the relief obtained to the plaintiffs' objective as indicated in the pleadings, the court can determine the extent of the plaintiffs' success and award fees accordingly.[232]

While not discussed in the two cases referred to above, another Supreme Court decision, *Blum v. Stenson*,[233] is important in determining the amount of fees to be awarded to a prevailing plaintiff under Section 1988. *Blum* is significant for two reasons. First, it held that fees must be

226. *Id.* at 1280.
227. *Id.*
228. 723 F.2d 564 (7th Cir. 1983).
229. *Id.* at 568-69.
230. *Id.* at 568.
231. *Id.* at 569.
232. 104 S. Ct. 1541 (1984).
233. *Id.* at 1545-47.

calculated according to the prevailing market rates in the relevant community rather than on the basis of the cost of providing legal services. Therefore, fees should not be reduced because the prevailing plaintiff was presented by a non-profit legal aid organization.[234] Second, the Court considered the appropriateness of an upward adjustment or application of a multiplier to the base rate. While not precluding such upward adjustments under Section 1988, the Court overturned a fifty percent (50%) upward adjustment which the district court based on "the complexity of the litigation, the novelty of the issues, the high quality of representation, the 'great benefit' to the class, and the 'riskiness' of the law suit."[235] Because all of these factors are taken into account in calculating a reasonable, fully compensatory fee, they should not serve as the basis for an upward adjustment.

Certainly it appears that multipliers or upward adjustments will be more difficult to obtain after the decision in *Blum*. Such adjustments would seem to be most likely where the attorneys have a contingent fee arrangement with the risk of receiving no fee if their clients do not prevail.[236] However, the risks associated with the litigation and the reason why they support an upward adjustment should be in the record.

234. *Id.* at 1548-50. Regarding risk, it should be noted that the Court did not preclude "the risk of not being the prevailing party in a § 1983 case and therefore not being entitled to an award of attorney's fees from one's adversary." as a justification for an upward fee adjustment. *Id.* at 1550 n.17. Here the record simply did not justify such an adjustment based on risk.

235. *Id.* at 1550 n.17; *see also*, 104 S. Ct. at 1550-51 (Brennan, J., concurring).

236. ONE TOO MANY FOOTNOTE NUMBERS IN TEXT