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Civil Liberties: Current Developments in the Seventh Circuit Regarding First Amendment, Procedural Due Process, Employment Discrimination and the Enforcement of Civil Rights

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CIVIL LIBERTIES: CURRENT DEVELOPMENTS IN THE SEVENTH CIRCUIT REGARDING FIRST AMENDMENT, PROCEDURAL DUE PROCESS, EMPLOYMENT DISCRIMINATION AND THE ENFORCEMENT OF CIVIL RIGHTS

BY
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I. INTRODUCTION

The civil liberties decisions of the 1981-82 Seventh Circuit Court of Appeals term fall under four major topics: first amendment, due process, employment discrimination and general enforcement issues—e.g., attorney fee awards, implied right of action and remedies, interrelationship between civil rights statutes, immunities and standing. Most of the first amendment issues examine the relationship between a government employer and its employees. Here the court generally upheld the first amendment rights of employees and attempted to clarify the relative burdens imposed in litigating first amendment retaliatory discharge suits.

The majority of the procedural due process cases represent an application of the two-step analysis required by Mathews v. Eldridge. More specifically, they address the adequacy of the process rather than the question of whether there was a protected interest. An exception is Ellis v. Hamilton, one of the first attempts by the Seventh Circuit to apply the troublesome Supreme Court decision in Parratt v. Taylor. While the result in Ellis may be appropriate, the application of Parratt is somewhat questionable.

Employment discrimination cases—involving race, sex, age and alienage—touch upon the different burdens of plaintiffs and defendants in disproportionate impact and disparate treatment situations, retaliation by employers against employees who take steps to enforce Title VII, the constitutionality of the age discrimination provision in the context of a challenge based on the tenth amendment, and the federal government's right to restrict the employment opportunities of aliens. The retaliation cases raise some interesting variations, such as a hospital employer's right to discharge an employee whose continued employment is violently opposed by the American Nazi Party.

Several interesting enforcement issues were decided. The court continued to address questions of both entitlement and amount under civil rights statutes providing for attorney fees. The availability of sec-

2. 669 F.2d 510 (7th Cir. 1982).
tion 1983 to enforce federal statutes which fail to provide full relief was decided in the context of the Education of All Handicapped Children Act with a ruling adverse to the plaintiff.\(^5\) Again the court faced the question of whether a remedy should be implied under a statute, this time in the context of a claim for damages under Title IX. With a strong dissent, the court concluded Congress did not intend to provide damages.\(^6\) In a very significant case, \textit{Tidwell v. Schweiker},\(^7\) the court held that case or controversy principles developed by the Supreme Court in the context of class suits involving mootness were applicable to the question of standing raised in a class action.

An effort was made to at least mention all of the decisions. Some of them, however, were relegated to a footnote. In addition, an effort was made to incorporate recent decisions of the Supreme Court wherever applicable and other federal appellate court decisions, particularly where there is a conflict among the circuits. Some of the issues confronted—\textit{e.g.}, the scope and application of \textit{Parratt} and the availability of section 1983 to enforce federal statutes—are the subject of much litigation today and could easily provide sufficient material for separate articles.

\section*{II. First Amendment Rights of Government Employees}

This term the Seventh Circuit decided several interesting cases involving the first amendment freedoms of government employees. The court was generally quite protective of the employees' rights holding that they have a right to campaign against their incumbent employer without facing subsequent dismissal,\(^8\) that their right to join unions cannot be unreasonably restricted by department regulations,\(^9\) that minority unions cannot be denied the right of access to communication channels guaranteed to majority unions,\(^10\) and that they have the right to academic freedom.\(^11\) The court further protected the right of government employees through its allocation of burdens of proof in first amendment retaliatory discharge cases.\(^12\)

\begin{flushright}
5. Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981).
7. 677 F.2d 560 (7th Cir. 1982).
8. Bart v. Telford, 677 F.2d 622 (7th Cir. 1982).
11. Dow Chemical Co. v. Allen, 672 F.2d 1262 (7th Cir. 1982).
\end{flushright}
A. Strict Scrutiny Analysis Required Where First Amendment Rights are Implicated

As to the substantive issues decided by the court, it generally took the position that any type of restriction on first amendment rights must be subjected to strict scrutiny analysis. The court reflected this position in three decisions. First, in the case of Mescall v. Rochford, the court invalidated Rule 54A of the Rules and Regulations of the Chicago Police Department which prohibited police officers from joining or retaining membership "in any labor organization whose membership is not exclusively limited to full-time law enforcement officers." The defendants had argued that the rule was justified because affiliation with other unions accepting non-police officers could result in a potential conflict of interest situation in which a union police officer acts in a labor dispute involving a non-police officer union to which he belongs. The Seventh Circuit, as well as the district court below, rejected these arguments asserting that any restrictions on the exercise of first amendment freedoms had to be strictly scrutinized: "[t]he state must show that the limits imposed serve a substantial and legitimate state interest, and that such purpose is achieved in the least restrictive manner."

Applying this strict analysis the Seventh Circuit concluded that the provision was unconstitutional for several reasons. First, it was overbroad, in that it forbade membership in organizations where no potential conflict could arise, e.g., organizations which did not even permit strikes. In addition, the regulation was invalid because it identified groups in which the membership was forbidden. The court found this to be both an impermissible as well as a drastic means to achieve the government purpose. Finally the court noted that other exceptions written into the rule, i.e., exceptions permitting membership in unions which admit non-police officers when that membership was related to approved secondary employment, further illustrated the arbitrariness of the rule since the same potential of dual allegiance would be raised under such circumstances. In short, the court concluded that the purpose of the rule was not sufficient to outweigh the first

13. 655 F.2d 111 (7th Cir. 1981).
14. Id. at 112.
15. Id.
17. Id.
18. Id. at 113.
19. Id.
amendment rights of the plaintiffs to be free from arbitrary and overbroad restraints.

The court applied similar strict scrutiny analysis in the case of *Perry Local Educators' Association v. Hohlt*. The issue involved the constitutionality of a collective bargaining agreement between a teachers' union and the school board that permitted the union to use the school district's internal mail system while at the same time compelling the school district to deny that right to competing unions. The district court, following the consensus of the federal courts that have dealt with the issue, upheld the provision as not violating first amendment rights. Granting summary judgment for the defendants, the trial court held that "the restrictions placed upon the use of facilities not open to the general public . . . are so inconsequential that . . . [they] cannot be considered an infringement of first amendment rights of free speech." The court proceeded to apply rational basis analysis to plaintiffs' equal protection claim, finding that the exclusive access policy was rationally related to the goal of preserving labor peace within the school system.

The Seventh Circuit reversed, holding that the provision violated both the equal protection clause as well as the first amendment. The court began by listing several Supreme Court cases in which it was found that the first amendment did place a wide variety of restrictions on government labor practices. It concluded that the government's interest in conducting its operations efficiently would justify restrictions on first amendment rights only if such were "reasonably necessary to that end." The court found it critical that the rule did not evenhandedly exclude all private communication from the government facility, but rather it denied access to certain groups while granting such to other groups. Thus, the issue here was not absolute access, but equal access. This required a heightened standard of review: "discriminatory treatment of speech on the basis of its content or on the basis of the identity of the speaker usually requires rigorous scrutiny because it presumptively violates the first amendment's primary and overriding pro-


23. See cases collected at 652 F.2d at 1291-92 n.16-25.

24. Id. at 1292.

25. Id. at 1300.
scription against censorship."26 Although noting some departure from this rule with regard to "subject matter provisions,"27 the court properly concluded that nothing but the most exacting scrutiny has been applied to a content or speaker restriction that substantially tended to favor the advocacy of one point of view on a given issue.28 Since the access policy adopted by the defendants here did favor a particular viewpoint on labor relations in the school system, it had to be "rigorously scrutinized." The court further held that strict scrutiny analysis was mandated by the equal protection claim, since free speech is a fundamental right and discrimination between speech or speakers implicates that right.29

The court proceeded to reject the various justifications asserted by the defendants as to both claims. First, it rejected the position adopted by the Second Circuit30 that the standard of scrutiny should be low because the communications of minority unions were thought to be "of limited public interest." The court noted that although a few recent Supreme Court decisions have suggested a "two-level" theory of the first amendment,31 it distinguished those cases as involving "virtually idealess near-obscenity speech on the fringe of first amendment protection."32 Here the minority union's criticism of the majority union and its efforts to persuade teachers to enter its ranks were classified as near the "apex" of any hierarchy of protected speech.33 The court also rejected the contention that the existence of alternative ways to communicate with the teachers satisfied the first amendment. It noted that the existence of alternative channels of communication is significant only to the extent that those channels are as effective as the restricted channels.34 Here the court concluded that the alternatives were not as effec-

26. Id. at 1293.
27. This term refers to content discrimination based on the subject matter of expression in a particular setting. The government may forbid an entire subject matter rather than singling out one particular point of view. This is said to be a more acceptable form of government regulation. For example, the Supreme Court applied a relatively deferential standard of review to rules forbidding all political expression in a military base. Greer v. Spock, 424 U.S. 828 (1976). Other examples are discussed by the court. See 652 F.2d at 1294-1295. The issue of subject matter neutrality was analyzed in last year's survey. See Bodensteiner & Levinson, Civil Liberties, 58 CHICAGO KENT L. REV. 270, 272 (1982).
28. 652 F.2d at 1296.
29. Id.
32. 652 F.2d at 1299.
33. Id.
34. Id.
tive, either being more expensive, more cumbersome, or less able to reach teachers swiftly and effectively.

As to the state's argument that the rule was necessary to insure labor peace, the court concluded that this policy was both under and over inclusive.35 The state argued that the majority union's use of the mail system had to be exclusive in light of its special legal duties. However, the exclusive use was not limited to messages related to these special duties and the rule did not prohibit other organizations with no special duties to the teachers from using the system. No evidence had been introduced to indicate how granting equal access to other unions would impose additional expenses on the school district or would interfere with the majority union's execution of its duties as bargaining representative. In general the defendants could point to no specific interference with school operations that would result from the use of the mail system by the plaintiffs. Applying this searching analysis, the Seventh Circuit rejected the precedent established in the other courts of appeals and struck the provision.36

A final case discussing the standard of review that should be utilized where first amendment rights are implicated is Dow Chemical Co. v. Allen.37 The issue arose in a case involving the district court's obligation to compel through administrative subpoenas the disclosure of information held by university professors. Dow Chemical Company was threatened with a possible ban on certain herbicides it manufactured and it wanted the university research information to use at the cancellation proceedings. In balancing the need for disclosure against the burden of compliance, the court stated that it was important to weigh the issue of academic freedom,38 even though the district court had not discussed the point. It found, based on Supreme Court precedent, that in order to prevail over academic freedom, "the interest of government must be strong and the extent of intrusion carefully limited."39

35. Id. at 1300.
36. Note that in addition to the two court of appeals decisions cited in note 21, supra, the Seventh Circuit listed a long line of district court decisions which reached the same conclusion. 652 F.2d at 1289 n.6. In fact the Seventh Circuit found only one case holding unconstitutional the school district's refusal to grant a minority union access to teachers' mailboxes or other facilities while granting such privileges to a majority union. See Teachers Local 399 v. Michigan City Area Schools, No. 72-S-94 (N.D. Ind. Jan. 24, 1973), vacated on other grounds, 499 F.2d 115 (7th Cir. 1974).
37. 672 F.2d 1262 (7th Cir. 1982).
38. Id. at 1274.
39. Id. at 1275. The court cited Justice Frankfurter's analysis in Sweezy v. New Hampshire, 354 U.S. 234 (1957), in which he stated that the government cannot intrude into academic freedom except for reasons "that are both exigent and obviously compelling." Id. at 262.
The court held that compliance with the broad administrative subpoena sought here would have a chilling effect on the exercise of academic freedom and that the burden of compliance would not be insubstantial. Although noting that academic freedom is obviously not absolute, it concluded that it should figure "into the legal calculation of whether forced disclosure would be reasonable." It then found little to justify this intrusion into university life "which would risk substantially chilling the exercise of academic freedom." 

The same emphasis on chilling the exercise of first amendment freedoms was the basis for reversal in two other Seventh Circuit decisions. In *Bart v. Telford*, the court upheld the mayor's action of forcing plaintiff to take a leave of absence from her job while running for public office. However, it noted that the plaintiff was subsequently harassed for expressing views. The court ruled that if the harassment would have deterred "a person of ordinary firmness" from engaging in protected speech, it raised a viable first amendment claim.

40. 672 F.2d at 1276.
41. *Id.* at 1277. Note that the Fifth Circuit recently rejected an evidentiary privilege based on academic freedom. *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981), *cert. denied* 102 S. Ct. 2904 (1982). For a critical analysis of this conclusion, see Comment, *A Privilege Based on Academic Freedom Does Not Insulate a University from Disclosing Confidential Employment Information*, 52 Miss. L.J. 493 (1982).
42. 677 F.2d 622 (7th Cir. 1982).
43. *Id.* The court held that the first amendment does not confer a right to run for public office. Since the restriction on plaintiff's candidacy was neutral with regard to first amendment values, the court found it indistinguishable from Supreme Court decisions upholding the Hatch Act and similar state restrictions on partisan political activities of employees. It concluded that, as a matter of law, the policy of compelling public employees to take a leave of absence if they run for public office is sufficiently important to the effective functioning of the government to justify the impairment of freedom of speech. The latter was found to be "indirect and probably very slight," while the benefits in preserving order, discipline, and efficiency in public employment were found to be great. *Id.* at 625.

The Supreme Court reached a similar conclusion in *Clements v. Fashing*, 102 S. Ct. 2836 (1982), upholding a Texas constitutional provision requiring the automatic resignation of certain office holders who become candidates for other state or federal offices. The Court also upheld a provision requiring certain officials to complete their current terms of office before they could be eligible to serve in the state legislature. Relying in part on *Civil Service Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973) and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Supreme Court held that the state interests were sufficient to warrant the "de minimus" interference with first amendment rights in candidacy. 102 S. Ct. at 2848.

*See also* *Morial v. Judiciary Comm'n of State of La.*, 565 F.2d 295 (5th Cir. 1977) (upholding a Louisiana law which required judges to resign their positions before announcing their candidacy for public office). *Contra*, *Vincent v. Maeras*, 447 F. Supp. 775 (S.D. Ill. 1978) (a communications technician in the sheriff's office, seeking the sheriff's position, may have been improperly required to take a leave of absence; the plaintiff showed probable success on the merits and therefore was granted preliminary injunctive relief).
44. 677 F.2d at 625. The court noted that although the effect on freedom of speech may be small where a public employee is subjected to harassment and ridicule, there is no justification for harassing people for exercising their constitutional rights. Thus, the effect need not be great in order to be actionable.
In all of these cases the Seventh Circuit thus reaffirmed basic first amendment principles, according free speech and association the protection which is critical to our constitutional system. The fact that the court did this in face of some rather discouraging signals from the Supreme Court\(^4\) and other federal courts,\(^5\) makes the decisions even more noteworthy.

B. Pleading and Proving Retaliatory Discharge

In two decisions the Seventh Circuit dealt with the procedural aspects of pleading and proving a retaliatory discharge suit. In *Egger v. Phillips*,\(^4\) a former FBI agent brought suit against his supervisor seeking damages based on allegations that his transfer and subsequent discharge were taken in violation of his constitutional rights. He alleged that during the course of his investigation of gambling operations in Indianapolis he became suspicious of a fellow agent, believing the agent was "on the take," and that his efforts to bring this to the attention of FBI superiors caused the defendant to unconstitutionally retaliate against him.

The Seventh Circuit held that the district court erred in granting summary judgment in favor of the defendant supervisor.\(^4\) It found the record sufficient to create a genuine issue of fact as to the actual motivation for the attempted transfer of the plaintiff. Furthermore, the court concluded that although a state employer does have a legitimate interest in maintaining discipline and preserving harmony among co-workers, the record was insufficient to conclude as a matter of law that plaintiff's actions were so abrasive or disruptive of office routine as to be denied first amendment protection.\(^4\)

The decision is significant because it adopts the position of other courts of appeals regarding the inappropriateness of granting summary judgment in favor of the defendant supervisor.\(^4\) It found the record sufficient to create a genuine issue of fact as to the actual motivation for the attempted transfer of the plaintiff. Furthermore, the court concluded that although a state employer does have a legitimate interest in maintaining discipline and preserving harmony among co-workers, the record was insufficient to conclude as a matter of law that plaintiff's actions were so abrasive or disruptive of office routine as to be denied first amendment protection.\(^4\)

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\(^{46}\) See, e.g., cases cited supra note 21.

\(^{47}\) 669 F.2d 497 (7th Cir. 1982).

\(^{48}\) Id. at 504.

\(^{49}\) Id. at 503. The court also rejected defendant's argument that he was entitled to summary judgment on the ground of qualified immunity. Again the court found that this was a question of fact which had to be determined by a jury, i.e., defendant is entitled to prevail on an immunity defense only if he acted for reasons other than in retaliation for plaintiff's exercise of his first amendment rights. If first amendment retaliation was a motivation, the defendant was not protected in light of the clear Supreme Court precedent upholding the first amendment rights of government employees. Id. at 504.
judgment in a retaliatory discharge case. Although the Supreme Court in *Mt. Healthy City School District Board of Education v. Doyle* placed the initial burden on the plaintiff to establish that his constitutionally protected conduct played a motivating role in the employer’s decisions, the Seventh Circuit held it sufficient that the evidence submitted by the plaintiff raises an inference that he would not have been transferred but for his first amendment activity. It criticizes the district court for weighing the evidence regarding plaintiff’s activities since issues of motive were involved. Further, the district court’s finding that plaintiff’s activity “substantially contributed to creating havoc in the Indianapolis office” was found to be an inappropriate conclusion for the court to reach, without submitting the issue to a jury.

Issues regarding burdens and standards of proof in retaliation suits were further clarified in the decision of *Nekolny v. Painter*. Plaintiffs alleged that they lost their jobs because they had campaigned for the Township Supervisor’s opponent in an election. The court specifically rejected defendant’s argument that a plaintiff must show his protected activity was the sole reason for the defendant’s unfavorable action. Although *Mt. Healthy* made it clear that the plaintiff’s burden is only to establish that the unfavorable conduct was motivated in part by protected speech, the defendant tried to distinguish that case in light of the fact that the firings here were for partisan political reasons. Rejecting this distinction, the court found the defendant was sufficiently protected by imposing on the plaintiff the initial burden of proving that the protected conduct was “a substantial or motivating factor.” Because of this requirement, “a disgruntled employee fired for legitimate reasons would not be able to satisfy his burden merely by showing that he carried the political card of the opposition party or that he favored the defendant’s opponent in the election.” Here the court found the

50. See, e.g., Kim v. Koppin State College, 662 F.2d 1055 (4th Cir. 1981); Nathanson v. United States, 630 F.2d 1260 (8th Cir. 1980).
52. *Id.* at 287.
53. 669 F.2d at 503.
54. *Id.*
55. *Id.* at 503.
56. 653 F.2d 1164 (7th Cir. 1981).
57. *Id.* at 1168.
59. 653 F.2d at 1167.
60. *Id.* at 1168.
61. *Id.* The concurring judge, while agreeing that *Mt. Healthy* requires the defendant to bear the burden of persuasion once plaintiff has made a prima facie showing that political activity was a “motivating factor” in the discharge, argued this standard is inappropriate in partisan political termination decisions. Noting that *Mt. Healthy* did not address this issue, he argued that success-
evidence sufficient for a jury to conclude that plaintiff was terminated because he campaigned against the defendant.

The court further rejected the defendant's contention that plaintiff must prove "by clear and convincing weight of the evidence" that the dismissal resulted because of his political associations. The court properly relied on Mt. Healthy to conclude that plaintiff was required to prove illegal motivation only by a preponderance of the evidence. Citing an earlier ruling by then Judge Stevens, the court rejected defendant's concern that government officials not be harassed by vexatious lawsuits brought in the context of changes in administration. Stevens had concluded that political considerations would not motivate a large number of employment decisions, and to the extent that they do, government efficiency is really lost rather than enhanced. In any event, Stevens had noted that the value of individual liberties was well worth the cost of any loss in efficiency.

Thus in both of these decisions the Seventh Circuit properly allocated the burdens of proof in order to give sufficient protection to the important first amendment rights at stake while at the same time recognizing the importance of government interests. It imposed on the plaintiff the initial burden to establish by a preponderance of the evi-

62. 653 F.2d at 1168 n.1.


64. 653 F.2d at 1168 n.1, citing Illinois State Employee's Union v. Louis, 473 F.2d at 575. Note that the court did overturn the district court's directed verdict on the issue of whether the plaintiff was a policy maker and thus excepted from the prohibitions of Elrod v. Burns, 427 U.S. 347 (1976). The Supreme Court in that decision found that the government's interest in effectiveness and efficiency did justify patronage dismissals of individuals holding policy making positions. Id. at 367. In the subsequent decision of Branti v. Finkel, 445 U.S. 507 (1980), the Court framed the question as "whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." Id. at 518. The Seventh Circuit found that the determination of the status as a policy maker presents a difficult factual question which should have been submitted to the trier of fact. 653 F.2d at 1170.
dence that the speech incident was a motivating factor. It then placed upon the defendant the burden of showing that it would have reached the same decision even absent the protected speech incident. Or, as the *Eggers v. Phillips* decision suggests, the defendant can justify punishment of an employee's speech by establishing that the speech was so abrasive or disruptive as to warrant its curtailment.

### III. PROCEDURAL DUE PROCESS

There were several procedural due process cases decided this term with most of them representing a direct application of the two-step analysis required by *Mathews v. Eldridge*. Although none of the cases dealt with the problem of identifying property or liberty interests, several focused on the second step, *i.e.*, the adequacy of the process. One of the more interesting cases concerns the interpretation and application of the recent Supreme Court decision in *Parratt v. Taylor*. While the decision does not provide a detailed analysis, *Parratt* seems to be a key factor in the ruling in *Ellis v. Hamilton*. This issue will be discussed separately after a review of the other procedural due process cases.

#### A. Application of Mathews: Adequacy of Process

The most extensive discussion of the adequacy of the process aspect of *Mathews* is found in *Sutton v. City of Milwaukee*. The question in this case is whether "it is unconstitutional for the state or city to tow an illegally parked car without first giving the owner notice and opportunity to be heard, unless the illegally parked car is blocking traffic or otherwise creating an emergency." While the court recognized that a car is property and cannot be taken by the state without due process, it also noted that the property interest is a "slight one" because the taking did not result in a permanent loss of the car, but rather the loss of its use for a few hours. The starting point for analysis is obviously *Mathews* which "announced a simple cost-benefit test of general applicability for deciding whether due process requires notice and

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65. 669 F.2d 497 (7th Cir. 1982).
66. 424 U.S. 319 (1976). This requires first, an analysis of whether there was a protected interest, either property or liberty, and second, if there is a protected interest, an analysis of what procedural safeguards are due.
68. 669 F.2d 510 (7th Cir. 1982).
69. 672 F.2d 644 (7th Cir. 1982).
70. Id. at 645.
71. Id. at 646.
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hearing before government may deprive a person of property."

Application of this cost-benefit test was described as follows:

[It] require[s] comparing the benefit of the procedural safeguard sought, which is a function of the value of the property interest at stake and the probability of erroneous deprivations if the safeguard is not provided, with the cost of the safeguard. The benefit of the safeguard can be thought of as the product of multiplying the value of the property interest by the probability that the value will be destroyed by a government error if the safeguard is not provided. Quantification will rarely be possible but expressing mathematically the relationship between the value of the interest and the probability of its erroneous destruction may assist in thinking about the tests—which, being general, are as applicable to the towing of automobiles as to the termination or reduction of Social Security benefits. . . .

Having determined that 1) the property interest is slight, 2) further procedural safeguards would avert few errors in towing, and 3) the cost of advance notice and hearings is prohibitive, the court concluded that the benefits of towing illegally parked cars clearly outweigh the very "modest cost" resulting from the lack of procedural safeguards. Therefore, it is not a violation of the due process clause to tow an illegally parked car without first giving notice and an opportunity to be heard. Under these circumstances, post-towing procedures suffice.

Judge Posner's analysis of due process in economic terms is troublesome. Even if Mathews requires a cost-benefit analysis, it is not so clear that the Supreme Court anticipated a mathematical formula based solely on the dollar value a court might attach to the competing interests. Some interests, particularly liberty, cannot easily be assigned a dollar value. Even with property interests, the same deprivation can have different ramifications depending on people's circumstances. Is it apparent that one's interest in the continuous use of an automobile is always a slight one? Who pays the cost of towing? Assuming payment of this cost is required before the automobile is returned, persons without resources could go for an extended period without their car. What are the benefits of towing improperly parked cars in non-emergency situations? Why not start with a notice posted on the car giving the owner a set period of time to move the car? A penalty or fine could still

72. Id. at 645.
73. Id. at 645-46.
74. Id. at 646. The cost of advance notice and hearings was defined as "the cost of abandoning towing as a method of dealing with illegal parking," id., because it would simply not be feasible to provide advance notice and hearings.
75. Id. The court went on to find that towing illegally parked cars in non-emergency situations only if the owner has two or more unpaid tickets does not violate either due process or the equal protection clause. Id. at 648-49.
be imposed even if it is moved within the prescribed time. Does immediate towing really benefit anyone other than the towing companies? The undefined benefits of towing are simply presumed to outweigh the "modest costs" to the victims who own the automobiles.76

In *Illinois Physicians Union v. Miller*77 a doctor in the union challenged the state's audit procedures utilized to determine whether physicians had been overpaid through the medical assistance program. Based on an audit of several sample claims—in the case of the named plaintiff, 353 of 1302—the state would determine whether there was overpayment and, if so, the total amount, through an extrapolation process. The plaintiff doctor argued that this procedure violated due process because it established a presumption of overpayment based on statistics. This presumption, the doctor argued, shifted the burden to the physician to demonstrate that the state's calculations were incorrect. Disagreeing with the doctor's characterization of the issue, the court indicated that the burden is at all times on the physician to prove entitlement to medical assistance payments and, therefore, the presumption does not have the effect of shifting any burden. Since the burden is initially on the doctor, the court found the situation controlled by *Lavine v. Milne*.78 This case challenged a New York statute which presumed that an applicant for welfare, who voluntarily terminated employment and applied for assistance within seventy-five days of the termination, quit the job to become eligible for welfare or increased benefits. This was not an improper presumption because proving the lack of an improper motive for terminating employment was simply part of the applicant's burden of proving eligibility for welfare.

Next the court found that it was not unreasonable to require the physician to rebut the state's evidence which was based on a statistical sample and extrapolation. Because the physician had an opportunity to rebut any allegations of overpayments, "the audit procedures are not arbitrary, capricious or invidiously discriminatory."79 Finally, applying the three factors from *Mathews*,80 the court concluded that the bal-

77. 675 F.2d 151 (7th Cir. 1982).
79. 675 F.2d at 156.
80. "These factors are: (1) the private interest affected by the private action; (2) the risk of an erroneous deprivation of that interest; and (3) the governmental interest, including the function involved and the fiscal and administrative burdens that other procedures would entail." *Id.* at 157, quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976).
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ance "is heavily weighed in favor of the department." Because of the enormous number of claims and the resulting logistical problems of medicaid enforcement, "statistical sampling is the only feasible method available." The physician's opportunity and procedures for rebutting the state's initial findings were found to be reasonable, particularly in view of the fact that the evidence is uniquely in the control of the doctors.

An issue not before the Court of Appeals but worth noting concerns the district court's holding that due process was violated by the department's failure to give physicians notice of the audit procedures or their right to rebut the state's findings. The department was ordered to promulgate and publicize regulations notifying physicians of the sampling and extrapolation procedures and their right to rebut. These regulations apparently were adopted and that part of the order was not appealed.

In several other cases, after finding a protected interest, the court determined the process was adequate. In Dusanek v. Hannon, a tenured school teacher, whose psychological condition was determined to be unsatisfactory for him to continue teaching duties, was advised to seek a leave of absence or it would be recommended that his services be terminated in accordance with state procedures governing removal of tenured teachers. After requesting and receiving two leaves of absence, the teacher filed suit claiming the school board and its employees had deprived him of a protected property interest without due process. In essence he seemed to argue that he had been forced to take a leave by the threat of statutory removal proceedings. The lower court denied an injunction seeking reinstatement; however, the jury awarded him damages. The Seventh Circuit reversed, finding no violation of due process because the procedural protections available through the state statutory scheme satisfy the requirements of the fourteenth amendment. In other words, the plaintiff could have refused to take a voluntary leave of absence and thereby forced the defendants to utilize the statutory process for removal.

81. 675 F.2d at 157.
82. Id.
83. This is similar to a holding in Giacone v. Schweiker, 656 F.2d 1238, 1244 (7th Cir. 1981), that the administrative law judge's failure to inform Social Security claimants of the existence and importance of a "good cause" exception to the deadline for requesting reconsideration violates procedural due process. The applicant there was 10 days late in filing for reconsideration; however, neither the administration nor the ALJ informed him of the availability of a "good cause" exception.
84. 677 F.2d 538 (7th Cir.), cert. denied, 103 S. Ct. 379 (1982).
85. Id. at 542-43.
In *Lister v. Hoover*, the procedural safeguards required by the fourteenth amendment were met in an action by several University of Wisconsin law students who were denied resident status. The court found that the hearing held on the students' applications for reclassification was adequate and the university officials did not have to inform them more specifically of the standards utilized in determining the residence question because "the issue is one of intent and no catalogue of objective criteria could, in most circumstances, be conclusive or determinative." The court did, however, remand the case for determination of whether the defendants had given adequate reasons for their refusals to classify the plaintiffs as residents. The adequacy of reasons given for a decision was also at issue in *Solomon v. Elsea*. After finding that the federal parole statute creates a constitutional liberty interest in release on parole, the court held that the reasons given for denying the plaintiffs' parole were constitutionally sufficient. The standard, adopted from a Second Circuit decision, is whether the "statement of reasons [is] sufficient to enable a reviewing body to determine whether parole has been denied for an impermissible reason or for no reason at all." Provided the essential facts and the reasons are given, detailed findings of fact are not required.

The importance of state procedures to the due process inquiry is demonstrated by *Poats v. Given*. An applicant for admission to the Indiana Bar, who failed the examination four times, brought an action challenging the alleged lack of procedures for review of the examination determinations. Because, under Indiana law, the applicant could have sought review of each examination by the State Supreme Court, procedural due process was satisfied. The court also held that the limit on the number of times an applicant could take the examination was not arbitrary in that there is a rational connection between the requirement and the applicant's fitness or capacity to practice law. A final due process case was brought by non-tenured employees of the Illinois Department of Corrections seeking damages from state officials as a result of their discharge from employment. When they were dis-

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86. 655 F.2d 123 (7th Cir. 1981).
87. Id. at 126.
88. 676 F.2d 282 (7th Cir. 1982).
90. 676 F.2d at 286.
91. 651 F.2d 495 (7th Cir. 1981).
92. Id. at 496-97.
93. Id. at 497-99.
charged, there was a public announcement that they had been guilty of misconduct in office and they claimed their due process rights had been violated because they had not been given an opportunity to answer the charges against them. The lower court granted the defendants summary judgment on the grounds that they had established a qualified good faith immunity as a matter of law. The Seventh Circuit reversed finding that summary judgment was inappropriate because of the existence of factual disputes.

In order for the trial court to have entered judgment upon either of the alternative defenses, undisputed facts must have established (a) that plaintiffs had been afforded appropriate notice and an opportunity to be heard prior to the public announcement of the charges against them, or (b) that the charges were in fact true. Since disputed facts were present in both defenses, the case was not ripe for summary judgment.95

The lower court had confused the good faith test for qualified immunity with the absolute defense of truth. With respect to immunity, the question is "whether defendants, in good faith, had reason to believe the procedures they followed satisfied the due process requirements of [Roth]."96 As to the other defense, the question is simply whether the charges were in fact true. The fact that the defendants may have believed the charges to be true is not sufficient to establish the latter defense. Nor is this a sufficient basis to avoid the requirement of notice and opportunity to be heard.97

Several of the decisions discussed above stress the importance of available state or local procedures in determining whether the due process clause has been violated. For example, in Sutton the post-towing procedures agreed upon by the parties were prompt and found to be sufficient; in Poats review of the examination scores could be obtained in the Indiana Supreme Court; in Dusanek the teacher had available a state statutory procedure which the defendants would have been forced to utilize if he had simply refused to take a leave. Particularly where only a post-taking procedure is required or feasible, the availability of state procedures,98 including judicial remedies, becomes a very significant factor. This is discussed in the next section.

95. Id. at 832.
96. Id. at 831, citing Board of Regents v. Roth, 416 U.S. 232 (1972). Concerning the good faith immunity, see infra notes 431-39 and accompanying text.
97. Id.
98. The adequacy of the state procedures is, of course, subject to review in constitutional terms. Logan v. Zimmerman Brush Co., 102 S. Ct. 1148, 1155-56 (1982).
B. Application of Parratt: The Effect of Available State Remedies on Due Process Claims

Perhaps the most controversial due process decision rendered by the Seventh Circuit was *Ellis v. Hamilton*.99 The case involved the custodial rights of grandparents. The key plaintiffs were two sisters, one of whom had given her son, Larry, up for adoption to the other. Larry subsequently married and had four children. However, due to Larry and his wife's negligence, the children for long periods of time lived with the plaintiff sisters—their grandmother and great aunt. Eventually criminal charges were lodged as a result of the grandmother's complaint against Larry and his wife for cruelty and neglect, and an order was entered removing the children from their custody.100 Larry told the welfare defendants that he wanted two of the children to remain with his natural mother and two with his adopted mother and he and his wife then disappeared.

Although initially the defendants apparently acquiesced in the father's proposal to place the children in the homes of the two plaintiffs, a month later the defendant welfare officers ordered the plaintiffs, on two days notice and without any explanation, to surrender the children to them. The children were placed in foster homes and the defendants refused to tell the plaintiffs the name or location of the foster parents. The welfare officers then brought proceedings to terminate parental rights, but made no effort to notify the plaintiffs of the proceedings. Soon after an order was entered terminating parental rights, the plaintiffs sought to adopt the children. They were given a runaround by the defendant court officers who offered specious objections to the formal adequacy of the adoption petitions. After the plaintiffs filed three adoption petitions, the defendants informed them that the children had already been adopted by others.

Plaintiffs then filed suit against the welfare department in federal court under 42 U.S.C. § 1983 initially seeking nullification of the adoptions. However, after two years of litigation the plaintiffs decided it would do more harm than good to uproot the children. They, therefore, amended their complaint to ask only for visitation rights and damages for the deprivation of the custody of the children that they would have enjoyed but for the actions of the defendants.101

The first issue in the case was whether the plaintiffs had any con-

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99. 669 F.2d 510 (7th Cir. 1982).
100. Id. at 511.
101. Id. at 512.
stitutionally recognized liberty interest at all with regard to the children. Although noting that a grandparent has no rights when the children are in the custody of their parents, the court was reluctant to conclude that the plaintiffs here did not have a liberty interest, especially in light of the fact that the plaintiffs were really in loco parentis to the children when they were removed by the defendants. It, therefore, assumed the existence of a liberty interest, but proceeded to hold that defendants did not deprive plaintiffs of that interest without due process of law.

The court admitted the underhanded conduct of the defendants throughout the proceedings and more specifically the errors in Indiana law that had been committed in processing plaintiffs' adoption petitions. Nonetheless, the court held that plaintiffs had not established a denial of due process of law. The court stated its rationale as follows: "[d]ue process is denied in such a case only if the state fails to provide adequate machinery for the correction of the inevitable errors that occur in legal proceedings..." Since the court found that Indiana law provides a variety of remedies by which to correct the misbehavior in question, it failed to find a due process violation. The court pointed to several available state remedies, including habeas corpus when the welfare officers removed the children from plaintiffs' homes; mandamus when the judge refused to allow them to file their own adoption petition; an action based on fraud to enjoin the adoption away from the plaintiffs; as well as a petition for visitation rights. It argued that plaintiffs did none of these things but instead went to federal court, and by doing so made it "impossible" for the courts of Indiana to prevent the defendants' alleged misconduct.

The court cautioned that it was not imposing an exhaustion-of-

102. Id. at 513. The court engaged in a rather lengthy discussion of this issue, noting that here the natural grandmother voluntarily relinquished any prospective legal rights to the children when she gave her son up for adoption. It also suggested that the rights of an adoptive grandparent may not be the same as those of a natural grandparent. The distinct feature here, however, is that the grandchildren were in the plaintiffs' custody, making the situation more analogous to that in Moore v. City of East Cleveland, 431 U.S. 494 (1977), wherein the Supreme Court protected the rights of a custodial grandmother as against a restrictive zoning ordinance. See also Prince v. Commonwealth of Mass., 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923), all cases striking down state regulation which interfered with "the liberty of parents and guardians to direct the upbringing and education of children under their control." Pierce, 268 U.S. at 534-35 (1925).

103. 669 F.2d at 514.

104. Id.

105. Id.

106. Id. at 514-15.
state-remedies requirement on the plaintiffs. This imposition would clearly be contrary to well established law as recently reaffirmed by the Supreme Court in *Patsy v. Florida Board of Regents*. Instead it simply held that "there is no denial of due process if the state provides reasonable remedies for preventing families from being arbitrarily broken up by local domestic relations officers such as the defendants in this case." The court relied upon the Supreme Court decisions in *Parratt v. Taylor* and *Ingraham v. White* to support its view that the adequacy and availability of remedies under state law are relevant in determining whether or not a deprivation of life, liberty or property violates the due process clause. The court further stressed the fact that the case involved family law, *i.e.*, a matter of local concern. Finally it noted the inappropriateness of federal courts handling custody cases, especially where the decree sought would require continuous judicial supervision and adjustment until the last child had grown up.

Although the court's reluctance to become embroiled in custody disputes is understandable, its analysis is disturbing. Until the Supreme Court's decision in *Parratt v. Taylor*, it was well established that the federal courts provided through § 1983 a supplementary method of seeking relief for violation of constitutional rights. The existence of state remedies was immaterial, the choice resting with the plaintiff as to which tribunal to choose. The Supreme Court in *Ingraham v. White* really did not alter this principle. There the Court, after recognizing a liberty interest, applied the traditional *Mathews* ap-
The issue raised was whether procedural due process required a hearing before a teacher could impose corporal punishment on a student. In considering the nature of the right implicated and the risk of erroneous deprivation, the Court noted the teacher's common law right to use reasonable corporal punishment as well as the availability of state remedies to rectify abuse. Its conclusion that a pre-paddling hearing was not required was based in part on the existence of state remedies that already provided some degree of protection to the liberty interest in question. However, the Court did not stray from the traditional Mathews analysis used in deciding procedural due process challenges and it never even reached any substantive due process claims.

In this case the plaintiffs are not attacking the adequacy of Indiana's adoption proceedings. They are not saying that Indiana law should require a pre-adoption hearing with participation on the part of custodial grandparents. Rather plaintiffs are alleging that defendants' conduct in their case deprived them of a protected liberty interest. Thus Ingraham and Mathews are inapposite. The Court's subsequent decision in Parratt is more analogous in that government conduct, as opposed to established procedures, was challenged. However, the similarity ends there. The case involved a suit by a prisoner seeking damages for the negligent loss of hobby materials he had ordered. The materials were worth a nominal amount and there were no allegations

115. 430 U.S. at 675. See supra notes 69-82 and accompanying text for a discussion of the Mathews approach to procedural due process issues.

116. 430 U.S. at 675-77. The Court also stressed the minimal risk of error which did not warrant intrusion into this area of primary educational responsibility. Id.

117. Id. at 682. Note that the dissent questioned whether Florida law provided meaningful protection. The plaintiffs alleged that the theoretical right to sue after the fact was not good enough because it was too late and illusory in that no such suit had ever succeeded. Id. at 693-94, n.11.

118. The Court specifically refused to grant certiorari on the issue of whether corporal punishment is so arbitrary and capricious so as to violate due process. 430 U.S. at 659 n.12. This distinction was noted in Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980), holding that the minor's substantive due process claims based on the infliction of disciplinary corporal punishment were cognizable under § 1983. In this case it is arguable that plaintiffs are entitled to damages for the violation of their substantive liberty interests, in light of the egregious nature of the defendants' conduct. Justice Blackmun, in his concurrence in Parratt, specified that "... there are certain governmental actions that, even if undertaken with a full panoply of procedural protection, are, in and of themselves, antithetical to fundamental notions of due process." 101 S. Ct. at 1918. Similarly, Justice Powell noted that the due process clause imposes substantive limitations on state action, permitting suit for intentional deprivations of liberty. Id. at 1921-22. Both Justices commented that Parratt should certainly not be read to alter this principle, which is unaffected by the availability of state remedies.

119. 669 F.2d at 514. The court in fact conceded that if Indiana law placed them at the mercy of county officials, that would raise a serious due process question. Instead they characterized this as involving merely isolated errors of executive and judicial officials. Id.
of intentional deprivation of the plaintiff's property rights.\textsuperscript{120} The Court reasoned that only post deprivation procedures were required in light of the impossibility of predicting in advance when a negligent deprivation of property will occur.\textsuperscript{121} It also concluded that the state tort remedies were sufficient to fully compensate plaintiff for his property loss.\textsuperscript{122}

Many subsequent decisions have read Parratt as being limited to cases involving only negligent interference with loss of property,\textsuperscript{123} relying perhaps in part on the five concurring opinions in Parratt which urged a more limited reading of the Court's holding.\textsuperscript{124} Ellis was dif-

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\item \textsuperscript{120} 451 U.S. at 536-37.
\item \textsuperscript{121} \textit{Id.} at 540.
\item \textsuperscript{122} \textit{Id.} at 544. In part Parratt rested on the notion that not every tort constitutes a violation of the fourteenth amendment. The same principle was expressed in an earlier Supreme Court decision: "Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles." Baker v. McCollan, 443 U.S. 137, 146 (1979).
\item Lower courts have relied on Parratt to hold that the misuse of legal procedure must be so egregious as to subject the aggrieved individual to a deprivation of constitutional dimensions. \textit{See} Wise v. Bravo, 666 F.2d 1328, 1333-34 (10th Cir. 1981); Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981); Creative Environments, Inc. v. Estabrook, 680 F.2d 822 (1st Cir. 1982); Hull v. City of Duncanville, 678 F.2d 582 (5th Cir. 1982). Here plaintiffs are claiming more than a violation of common law tort or Indiana statute; they are arguing that the defendants deprived them of an established liberty interest. \textit{See supra} note 101.
\item \textsuperscript{123} \textit{See} Duncan v. Poythress, 657 F.2d 691 (5th Cir. 1981), \textit{cert. dism'd}, 103 S. Ct. 368 (1982), in which the court rejected the argument that Parratt precluded a § 1983 claim for violation of voting rights because the state provided an adequate remedy through mandamus; Howse v. DeBerry Correctional Institute, 31 CRIM. L. REP. 2210 (M.D. Tenn. 1982), discussed \textit{infra} notes 126-28 and accompanying text; Romeo v. Youngberg, 644 F.2d 147 (3d Cir. 1980), \textit{aff'd} 102 S. Ct. 2452 (1982), where the court specifically noted that the availability of a state law remedy is irrelevant in a § 1983 suit seeking damages for improper care; Tarkowski v. Hoogasian, 532 F. Supp. 791 (1982), finding that a state agent's intentional deprivation of plaintiff's property was actionable under § 1983 despite the availability of a state tort remedy; Parker v. Rockefeller, 521 F. Supp. 1013 (N.D. W.Va. 1981), holding that Parratt does not preclude claims based on intentional deprivation of property, and that Parratt did not alter the distinction previously recognized by the Seventh Circuit between intentional and negligent acts, \textit{citing} Kimbrough v. O'Neil, 545 F.2d 1059 (7th Cir. 1976); Wakinekona v. Olem, 664 F.2d 708 (9th Cir. 1982), holding Parratt inapplicable on the basis of Blackmun's concurrence confining the opinion to deprivations of property and not liberty interests.
\item Professor Tribe has suggested that in light of the four or five separate opinions in the Parratt case, the only common denominator that can be extracted is that intent is not invariably required to make out a § 1983 cause of action, but that when only a property interest is involved, and it is the type of claim that could be redressed by subsequent relief in the state courts, some systematic defect must exist in the scheme of subsequent relief. 3 \textit{SUPREME COURT: TRENDS & DEVELOPMENTS} 1980-81, at 289. Tribe's analysis is reflected in the Supreme Court's most recent decision, Logan v. Zimmerman Brush Co., 102 S. Ct. 1148 (1982). The Court found that the state-created employment discrimination claim was a "property interest" which triggered the fourteenth amendment guarantee of a meaningful hearing, which the state failed to provide. In a sense the Court in Parratt suggested that the prisoner only had a "property interest" in a cause of action for negligent property loss, which the state satisfied through its tort claims statute.
\item \textsuperscript{124} 451 U.S. at 545-66. Justice Blackmun in fact specified that the Court's opinion should not be read as applicable to a case concerning deprivation of liberty, citing Moore v. City of East
ferent in two respects. First, the allegations were *intentional* acts on the part of the welfare officials to deprive the plaintiffs of their protected constitutional rights. Where intentional, as opposed to merely negligent acts are perpetrated, the importance of § 1983 as a deterrent of wrongful conduct comes into play. Second, the interests involved here were not simply property but rather very significant, well-established liberty interests involving the right of custody to these grandchildren. Plaintiffs alleged that the defendants unreasonably deprived them of the society of the children and later stymied their efforts to obtain custody by adoption.

Other courts have stressed these distinguishing factors. For example, in *Howse v. DeBerry Correctional Institute* the court refused to extend *Parratt* to a case involving intentional deprivation of a prisoner's liberty interest. The court stated that the Supreme Court in *Parratt* did not intend that all § 1983 constitutional claims be rejected simply because a state may provide a similar remedy. It noted that a state employee's intentional deprivation of another's clearly protected liberty interest is the prime target of § 1983. Furthermore, it cautioned that the extension of *Parratt* to all cases in which the state provides a parallel remedy would render § 1983 meaningless in many instances. Unfortunately, many courts of appeals have applied the *Parratt* analysis without distinguishing between intentional or negligent official misconduct, although almost all of the cases have involved deprivation of property—not liberty interests as were implicated in *Ellis*.

Cleveland, 431 U.S. 494 (1977), as authority. *Id.* at 545. The latter decision involved the custodial rights of a grandmother, and thus clearly indicates the inappropriateness of applying *Parratt* to the fact situation facing the Seventh Circuit. Note that in the earlier *Ingraham* decision the dissent went on record as opposing a *Parratt* approach to intentional deprivations of liberty, 430 U.S. at 700 (White, J., Brennan, J., Marshall, J., and Stevens, J., dissenting).


126. 31 CRIM. L. REP. 2210 (M.D. Tenn. 1982).

127. *Id.* Professor Tribe has noted that the Supreme Court has never denied relief in the federal courts when a federal constitutional right is jeopardized. Rather it has stated that in certain circumstances there is no federal substantive right infringed upon because the right in question is only a right to a constitutionally adequate system of state law. When you have that—when the state provides enough preventive and remedial relief—you do not have a federal claim on the merits. 3 SUPREME COURT: TRENDS & DEVELOPMENTS 1980-1981 at 240.

128. 31 CRIM. L. REP. 2212. Note, however, that the court does dismiss the case, deciding that the injury (a physical assault) does not amount to a deprivation of constitutional rights. *Id.* at 2212.

129. Flower Cab Co. v. Petite, 685 F.2d 192 (7th Cir. 1982) (denial of cab license was adequately protected by post-deprivation state law remedies); Engbloom v. Carey, 677 F.2d 957 (2d
In *Ellis* the Seventh Circuit cited as authority an earlier Sixth Circuit decision in which a grandmother and uncle were seeking custody via habeas corpus.\textsuperscript{130} That case is clearly distinguishable, because the habeas corpus statute specifically requires exhaustion of state remedies.\textsuperscript{131} Furthermore, the Supreme Court this term specifically renounced the use of habeas corpus as a means of relitigating child custody disputes.\textsuperscript{132} Here the plaintiffs relied not upon the habeas corpus provision but on § 1983 which has traditionally been used as a means of vindicating deprivations of civil rights. The court's broad reading of the *Parratt* decision is unwarranted in light of the circumstances of this particular decision, where intentional deprivation of substantive liberty interests was pleaded.\textsuperscript{133} Although the court perhaps correctly concluded that part of the relief sought, *i.e.*, visitation rights, could not be properly administered by the federal court, its holding that due process was not violated because of the existence of state remedies sets a dangerous precedent.

### IV. Employment Discrimination Litigation

The Seventh Circuit handed down several decisions dealing with employment discrimination. Most arose in the context of interpreting

\textsuperscript{Cir. 1982} (although striking officers had a property interest in their living quarters, state law post-deprivation procedures provided sufficient protection of the due process rights); Pedersen v. South Williamsport Area School Dist., 677 F.2d 312 (3d Cir. 1982) (availability of post-termination hearing under state law satisfied the due process rights of a discharged school employee); Loftin v. Thomas, 681 F.2d 364 (5th Cir. 1982) (adequate state remedy protected due process rights of a prisoner claiming negligent loss of his clothing by the sheriff); Tymiak v. Omodt, 676 F.2d 306 (8th Cir. 1982) (state court proceedings sufficiently protected plaintiff's property interest in his home); Sheppard v. Moore, 514 F. Supp. 1372 (M.D.N.C. 1981) (state common law action in conversion adequately protected plaintiff's property interest); Keystone Cable-Vision Corp. v. FCC, 464 F. Supp. 740 (W.D. Pa. 1979) (city's revocation of electrical permit does not violate due process in light of the post-revocation hearings provided by the state).

On the other hand, at least one other circuit has already extended *Parratt* in cases implicating liberty concerns. In *Rutledge* v. Arizona Bd. of Regents, 660 F.2d 1345 (9th Cir. 1981), the court applied *Parratt* to a suit by an athlete alleging assault and battery, harassment, etc. by the athletic director and coaches. The court concluded that the post-deprivation hearing provided under state law satisfied the due process requirement even though liberty concerns were at stake. *Id.* at 1352. Although the court may have concluded that the defendant's conduct was not sufficiently egregious to state a constitutional claim (see supra note 122), its reliance on *Parratt* to justify relegating plaintiff to state tort remedies is clearly erroneous.


133. Note that this was the conclusion reached by the Third Circuit in a case involving liberty interests: "... understandable concerns with stemming the federalization of common law tort actions must not overcome a court's duty to safeguard legitimate constitutional rights." *Romeo* v. *Younberg*, 644 F.2d 147, 157 (3d Cir. 1980), *aff'd*, 102 S. Ct. 2452 (1982).
Title VII of the Civil Rights Act of 1964, which bars discrimination on the basis of race, sex, religion and national origin. Difficult issues were raised as to the proper allocation and quantum of proof as well as appropriate defenses. In addition, the court dealt with the constitutionality of the 1974 amendment to the Age Discrimination in Employment Act, which extended the proscriptions of the Act to cover state and local governments. Finally, in a case clearly implicating employment opportunities, the Seventh Circuit upheld the power of the federal government to deny commercial radio operator licenses to aliens.

A. Title VII: Establishing a Prima Facie Case

1. Retaliatory Discharge

Before dealing with the more traditional Title VII cases, two decisions should be noted which interpreted a provision of Title VII barring retaliatory discharges. Section 704(a) of Title VII provides: "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this title. . . ." In two decisions, the appellate court overturned the lower courts' narrow interpretations of this clause.

First, in the case of EEOC v. St. Anne's Hospital of Chicago, Inc., the Seventh Circuit rejected the defendant's contention that the "opposition clause" of § 704(a) applies solely to an individual who opposes a practice of the employer which constitutes unlawful discrimination against minorities. The white plaintiff had hired a black employee and, allegedly as a result of her action, she lost her job. Since the hospital employer took no adverse action against the black employee, i.e., a member of a minority group, it urged dismissal of the suit. The Seventh Circuit disagreed and instead adopted a broader interpretation which would protect an employee who hires a minority applicant and is subsequently discharged. Despite the literal reading of § 704, the court concluded that it would impede compliance with Title VII if employees in decision-making positions who hired minority applicants

135. See infra, notes 139-222 and accompanying text.
136. See infra, notes 223-38 and accompanying text.
137. See infra, notes 239-51 and accompanying text.
139. 664 F.2d 128 (7th Cir. 1981).
140. Id. at 132.
had to fear losing their own jobs because of the racial bias of others.\textsuperscript{141} Since § 704(a) was specifically designed to encourage employees to protect Title VII rights, the court concluded that the provision was broad enough to protect the plaintiff in this case.

The Seventh Circuit reached the same conclusion in \textit{Rucker v. Higher Educational Aids Board},\textsuperscript{142} where plaintiff contended that he was fired because he opposed the efforts of his superiors to discriminate on racial and sexual grounds against a white woman whom he hired. The plaintiff alleged that his superiors instructed him to write a memorandum stating that the local black community did not want a white employee to serve as a counselor, and later instructed him to give the white employee a poor evaluation so that she would not receive permanent status at the end of her probationary period of employment. He contended that his refusal to cooperate with the proposed discrimination resulted in his suspension.\textsuperscript{143} The district court concluded that the white woman had not been the victim of race discrimination and it dismissed plaintiff’s claim.\textsuperscript{144}

The Seventh Circuit reversed, finding initially that the white employee probably had been a victim of sex discrimination,\textsuperscript{145} but concluding that, in any event, it is a violation of Title VII to fire an employee because he opposed discrimination against a fellow employee, even if he was mistaken and there was no discrimination.\textsuperscript{146} The court relied on earlier precedent\textsuperscript{147} protecting an employee who is acting in good faith and reasonably believes there has been discrimination against a fellow worker.\textsuperscript{148} The court concluded that a violation of Title VII is committed “when an employee opposes an attempt to discriminate against an employee so successfully that the employer desists from the attempt and then fires the ‘whistleblower’ for what he has done.”\textsuperscript{149}

Thus in both decisions the court correctly interpreted the retaliatory discharge provision as broad enough to protect non-minority employees who are trying to promote the goals of Title VII and are punished for their efforts. Although perhaps a literal reading of the

\textsuperscript{141} \textit{Id.} at 132-33.
\textsuperscript{142} 669 F.2d 1179 (7th Cir. 1982).
\textsuperscript{143} \textit{Id.} at 1180.
\textsuperscript{144} \textit{See} 669 F.2d at 1182, discussing the district court opinion.
\textsuperscript{145} \textit{See} discussion infra notes 183-186 and accompanying text.
\textsuperscript{146} 669 F.2d at 1182.
\textsuperscript{147} \textit{Id.}, citing \textit{Berg v. LaCrosse Cooler Co.}, 612 F.2d 1041 (7th Cir. 1980).
\textsuperscript{149} 669 F.2d at 1182.
section might limit its protection to employees opposing actual Title VII violations committed by their employers, this approach would leave an employer free to frustrate the goals of the Act by firing any employee who hires minority applicants or who seeks to protect their interests.

2. Disproportionate Impact and Disparate Treatment

In several decisions the Seventh Circuit had to determine whether plaintiffs had established a prima facie case of employment discrimination. The Supreme Court has recognized two different vehicles for satisfying this prima facie case requirement. First, plaintiff may allege that a facially neutral policy has a disproportionate impact on the minority group.\(^\text{150}\) This is generally established through the use of statistical data.\(^\text{151}\) In the alternative, plaintiff can satisfy the prima facie case in a so-called disparate treatment situation by showing that he is a member of a minority, that he applied for the position and was qualified for the job, and that the job remained open or was filled by a non-minority.\(^\text{152}\) As to the disproportionate impact situation, the burden then shifts to the defendant to establish that the policy is at least job related.\(^\text{153}\) In the disparate treatment cases, the Supreme Court has held that the burden which shifts to the defendant is simply a burden of production, \textit{i.e}., he must come forth with some legitimate nondiscriminatory reason for his treatment of the plaintiff.\(^\text{154}\)

The Seventh Circuit basically followed the Supreme Court rulings,


\(^\text{152}\) McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 798-800 (1973). Under the disparate treatment theory, plaintiff must show that the employer's actions were motivated by discrimination. \textit{Id} at 805-06. However, the Supreme Court in \textit{McDonnell-Douglas} held that plaintiff initially satisfied that burden by making the enumerated allegations. \textit{See} B. SCHLEI AND P. GROSSMAN, \textit{EMPLOYMENT DISCRIMINATION LAW} 1155 (1976).

\(^\text{153}\) Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Note that there is some disagreement as to whether the employer should have to satisfy the stricter standard of business necessity. The lower courts are divided on the question and the Supreme Court has not yet resolved the conflict. \textit{See} Comment, \textit{The Business Necessity Defense to Disparate Impact Liability under Title VII}, 46 U. CHI. L. REV. 911 (1976); Fisher, \textit{The Business Necessity Defense in the Ninth Circuit}, 12 GOLDEN GATE U. L. REV. 68 (1982) (noting the division within the Ninth Circuit). It is also unclear whether the burden which shifts to the defendant is merely a burden of production, as in disparate treatment cases, or a burden of persuasion. \textit{See}, \textit{e.g}., Johnson v. Uncle Ben's, Inc., 657 F.2d 750 (5th Cir. 1981), \textit{cert. denied}, 103 S. Ct. 293 (1982).

\(^\text{154}\) Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 (1981).
but its analysis was rather unclear and perhaps erroneous in one decision. In the case of *Garcia v. Rush-Presbyterian*,\(^{155}\) the employment discrimination allegations were based on both disproportionate impact as well as disparate treatment of Latinos. The court initially concluded that the plaintiff failed to make an adequate showing of either statistical or direct evidence to satisfy the disproportionate impact requirement.\(^{156}\) It noted that the trial judge had carefully analyzed the statistical information submitted to him and had made subsidiary findings to support his decision.\(^{157}\)

The court went on to deal with plaintiff's claim that he had been adversely treated because he was Latino. The plaintiff argued that he was a member of a minority group, that he applied for the position of maintenance mechanic, that he was qualified for the job, and that a white man was hired instead.\(^{158}\) On its face this should satisfy the requirements imposed pursuant to the Supreme Court decision in *McDonnell-Douglas*.\(^{159}\) The court, however, erroneously cited a later decision, *Texas Department of Community Affairs v. Burdine*,\(^{160}\) to support its holding that these allegations were insufficient "unless the circumstances give rise to an inference of unlawful discrimination."\(^{161}\) Although the Supreme Court in *Burdine* did state that plaintiff must prove by a preponderance of the evidence that he or she was rejected "under circumstances which give rise to an inference of unlawful discrimination," it specifically noted that this inference is established at the prima facie case stage of the litigation by satisfaction of the four-prong *McDonnell-Douglas* standard.\(^{162}\) In fact, the Supreme Court

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155. 660 F.2d 1217 (7th Cir. 1981).
156. *Id.* at 1221-25.
157. *Id.* The plaintiffs had argued that the requirement that an employee speak and read English had a disparate adverse impact on Latinos, but the statistical data simply failed to indicate that the impact was any greater on Latinos than on any other group. Also the court noted that the ability to speak and read some English was a necessary, job related requirement for virtually every job in the highly sophisticated medical care institution run by defendants. The evidence indicated that there was no statistically significant under-employment of Latinos at the defendant's institution.
158. *Id.* at 1226.
159. *See supra* note 152 and accompanying text.
161. 660 F.2d at 1226.
162. 450 U.S. at 253. Note that the relatively lax rebuttal burden imposed on the defendant, *i.e.*, simply producing some evidence of a legitimate non-discriminatory reason for the conduct, was perhaps intended to neutralize the plaintiff's easy burden to show a prima facie case. It is really at the third stage in the litigation that the analysis becomes critical. Plaintiff is required to prove that the defendant's justifications are pretextual. *McDonnell-Douglas Corp. v. Green*, 411 U.S. at 804 (1973); *Davis v. Weidner*, 596 F.2d 726, 729 (7th Cir. 1979). The problem with the analysis in *Garcia* is that the court has imposed a heavy burden on the plaintiffs at the initial stage of litigation, contrary to the remedial purposes of Title VII. *See Friedman, The Burger Court and*
specified that the prima facie case it refers to does not describe the plaintiff's ultimate burden of producing enough evidence to permit the trier of fact to infer the fact at issue. Instead the term is used to denote the establishment of a legally mandatory, rebuttable presumption. This explanation buttresses the conclusion that the Supreme Court in *Burdine* did not intend to in any way alter the analysis it had earlier approved in the *McDonnell-Douglas* decision. The focus in *Burdine* was on defendant's rebuttal burden only. Perhaps, in light of all the evidence presented during the trial, plaintiff indeed failed to carry his ultimate burden of persuasion. The court's statements regarding prima facie case are nonetheless misleading.

In another case, *Clark v. Chrysler Corp.*, the Seventh Circuit adhered to the four-prong *McDonnell-Douglas* standard, although it concluded that plaintiff failed to meet two of the requirements, *i.e.*, that plaintiff was qualified for the position she sought or that the position remained opened and the employer continued to seek applications from persons of her qualifications. The court noted that a plaintiff fails to establish a prima facie case by failing to "demonstrate qualifications or experience for an unskilled position when such qualifications of experience are consistently sought by the employer." Thus, it rejected her disparate treatment claim of race discrimination.

The court found that none of the practices of the employer had a disproportionate impact on blacks. It applied both the statistical analysis suggested by the Supreme Court in *Albermarle Paper Co. v. Moody*, comparing the percentage of blacks in the total hirees to the percentage of blacks in the total applicants, as well as the model set forth in the *Hazelwood School District v. United States*, comparing the percentage of black hirees in the total hirees to the percentage of

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163. 450 U.S. 254 n.7.

164. Id. The Court in *McDonnell-Douglas* inferred, upon proof of these four factors and the absence of any explanation by the defendant, that a rejection of the plaintiff-applicant was based on a consideration proscribed by Title VII. This scheme was reaffirmed by the Court in Board of Trustees v. Sweeney, 439 U.S. 24 (1978); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). The Seventh Circuit recently acknowledged this same principle. *DeLesstine v. Fort Wayne State Hosp.*, etc., 682 F.2d 130, 132 n.3 (7th Cir. 1982).

165. Texas Dep't of Community Affairs v. *Burdine*, 450 U.S. at 253.

166. 673 F.2d 921 (7th Cir. 1982).

167. Id. at 929-30.

168. Id. at 930 citing *Holder v. Old Ben Coal Co.*, 618 F.2d 1198 (7th Cir. 1980).

169. Id. at 929.

170. 422 U.S. 405 (1975).

blacks available in the relevant labor market. After an extended discussion of the statistical data pursuant to these two models, the court concluded that the plaintiffs had failed to meet the burden of proving discrimination by a preponderance of the evidence.\textsuperscript{172} The statistical data simply failed to demonstrate a significant or substantial disparity.\textsuperscript{173}

\textit{B. Title VII: Defenses to Claims of Discrimination}

1. Legitimate Business Purpose

The Seventh Circuit also dealt with several decisions concerning appropriate defenses to Title VII employment discrimination claims. In the case of \textit{Boyd v. Madison County Mutual Insurance Co.},\textsuperscript{174} the plaintiff, who was one of four management personnel, alleged that he was discriminated against when his company adopted an attendance bonus policy which applied only to clerical employees. He established that all clerical employees were female whereas all the supervisory positions as well as the adjustors for the company were men.\textsuperscript{175} The district court had dismissed plaintiff's complaint based on its belief that differentiation with regard to wages was only actionable if the discrimination violated the terms of the Equal Pay Act.\textsuperscript{176} Under this analysis the prohibition in Title VII against sex-based discrimination in compensation would be limited, as is the Equal Pay Act, to situations in which the employees were performing the same or substantially the same work. The Supreme Court in the recent case of \textit{County of Washington, Oregon v. Gunther}\textsuperscript{177} explicitly rejected this interpretation, concluding that plaintiffs can state claims of sex based discrimination in compensation under Title VII without proving they are performing a job substantially equal to that held by a higher paid member of the opposite sex.\textsuperscript{178} Based on the intervening \textit{Gunther} decision the Seventh Circuit proceeded to apply classic Title VII analysis, and found that plaintiff had indeed established a prima facie case of sex discrimination.\textsuperscript{179}

Continuing its analysis, the court held, however, that the defendant satisfied the rebuttal burden established by the Supreme Court in

\textsuperscript{172} 673 F.2d at 929.
\textsuperscript{173} \textit{Id.} See also \textit{supra} note 151 on the issue of statistical data.
\textsuperscript{174} 653 F.2d 1173 (7th Cir. 1981).
\textsuperscript{175} \textit{Id.} at 1175.
\textsuperscript{177} 452 U.S. 161 (1981).
\textsuperscript{178} \textit{Id.} at 181.
\textsuperscript{179} 653 F.2d at 1177-78.
Texas Department of Community Affairs v. Burdine, i.e., the burden to produce evidence of a legitimate non-discriminatory basis for its conduct.\textsuperscript{180} Here the evidence showed that the policy was implemented in response to a serious absenteeism problem with the clerical staff. Although the defendant obviously practiced discrimination in maintaining an all-female clerical staff, the Seventh Circuit held that this was not rebuttal evidence for the plaintiff.\textsuperscript{181} Rather he had to introduce evidence tending to show other discriminatory treatment by the defendant towards himself or other male employees or a general pattern of discrimination against male employees in order to establish that the legitimate non-discriminatory purpose stated by the defendant was pretextual.\textsuperscript{182} Since plaintiff presented no evidence to rebut defendant’s proof of a legitimate business purpose, judgment had to be rendered for the defendant.

2. Customer Preference and Threats

Two Seventh Circuit decisions involved less typical employer defenses to discrimination. First, in the case of \textit{Rucker v. Higher Educational Aids Board},\textsuperscript{183} a black man brought an employment discrimination action contending that the Board fired him because he opposed efforts of his superiors to discriminate on racial and sexual grounds against a white woman who worked for the Board. The district court found that the white woman was not a victim of discrimination because the Board was entitled to consider the preferences of its clientele, which was largely black, for the counselor position.\textsuperscript{184} Although occasionally customer preference has been argued in sex discrimination cases as constituting a bona fide occupational qualification insulating a Title VII claim,\textsuperscript{185} the Act specifically excludes race and

\textsuperscript{180} 450 U.S. at 254-55 (1981).
\textsuperscript{181} 653 F.2d at 1178. Note that the Ninth Circuit recently addressed this problem of employees in segregated jobs who claim a discriminatory practice, the difficulty being that such employees are unable to point to others similarly situated who are not similarly treated. \textit{See} Comment, \textit{Eschewing the Fat: Flight Attendant Weight Requirements and Title VII}, \textit{12 Golden Gate L. Rev.} 85 (1982).
\textsuperscript{182} 653 F.2d at 1178.
\textsuperscript{183} 669 F.2d 1179 (7th Cir. 1982). \textit{See} earlier discussion of this case \textit{supra} notes 142-49.
\textsuperscript{184} \textit{Id.} at 1181.
\textsuperscript{185} This customer preference argument is based on 42 U.S.C. § 2000e-2(e)(1) (1976), which permits employers to make employment decisions on the basis of “religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .” \textit{Note} that generally customer preference has been rejected as a justification for discrimination. \textit{See}, \textit{e.g.}, \textit{Fernandez v. Wynn Oil Co.}, 653 F.2d 1273, 1276-77 (9th Cir. 1981), and \textit{infra} note 189 and accompanying text.
color from this defense. The court noted that Title VII is a blanket prohibition of racial discrimination, even more so than of other forms of discrimination prohibited by Title VII. It concluded, therefore, that it is "clearly forbidden by Title VII to refuse on racial grounds to hire someone because your customers or clientele do not like his race."\(^{186}\) A similar defense was raised in the case of *EEOC v. St. Anne’s Hospital of Chicago*\(^{187}\) in which a white Jewish employee claimed she was discharged because she hired a black man to fill a position in her department. The defendant contended that the reason for discharge was not the hiring decision, but that the hiring decision was followed the same day by bomb threats from persons claiming membership in the American Nazi party. In addition to bomb threats, several unexplained fires were started at the hospital. Since one of the threats specifically named the plaintiff, the hospital administrator asked her to resign or be discharged, asserting that she was an irritant to the person or persons making the calls and/or setting the fires.\(^{188}\)

The Seventh Circuit analogized this argument to the "customer preference cases," wherein the courts generally require that customer preference be taken into account "only when it is based on the company’s inability to perform the primary function or service it offers."\(^{189}\) The court similarly noted that unlawful threats of violence motivated by racial hatred should not make lawful the discharge of an employee for a hiring decision that was itself required by Title VII.\(^{190}\) Adapting the customer preference argument to meet the present fact situation, the Seventh Circuit concluded that the discharge would be permissible only if the hospital could demonstrate "no alternative course of action was available and that it could not continue to function safely with [plaintiff] in its employ."\(^{191}\)

The case presents an extremely difficult issue. In a sense the analogy to the customer preference cases is rather inappropriate. Those cases hold that mere convenience of the business as reflected in customer preferences is insufficient to override sex discrimination.\(^{192}\) Here, on the other hand, the nature of the defense approached the concept of business necessity. The employer was a hospital where scares

\(^{186}\) 669 F.2d at 1181.

\(^{187}\) 664 F.2d 128 (7th Cir. 1981).

\(^{188}\) Id. at 130.

\(^{189}\) Id. at 133, citing *Diaz v. Pan Am World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir.), cert. denied, 404 U.S. 950 (1970).

\(^{190}\) Id. at 133.

\(^{191}\) Id.

\(^{192}\) *Diaz v. Pan Am World Airways, Inc.*, 442 F.2d at 389.
and unexplained fires are obviously more disastrous than in other situations. The dissent argued that while unqualified threats of violence should not make lawful the discharge of an employee for valid hiring decisions, it concluded that the particularized series of threats and actual fires here should have been sufficient to justify the hospital’s actions.\textsuperscript{193}

The problem with the dissent’s analysis is that even business necessity is not a defense to blatant race discrimination.\textsuperscript{194} Illegal scare tactics of a third party should not justify a practice expressly prohibited by federal law. The majority did not really answer this concern. The case reached the Seventh Circuit following a dismissal of the EEOC’s charges by the district court on jurisdictional grounds.\textsuperscript{195} The Seventh Circuit overturned the dismissal and remanded to determine whether St. Anne’s did all that it could as far as enlisting police protection and investigating the threats, before it fired the plaintiff.\textsuperscript{196} The remand suggests that at some point St. Anne’s might justify a dismissal. Even under extreme circumstances, however, it is arguable that Title VII prohibits termination, and that an employer could justify at best only a temporary leave with pay until the problem can be rectified.

3. Informal Affirmative Action

Another difficult issue involving employer defenses to discrimination was raised in \textit{Lehman v. Yellow Freight System, Inc.},\textsuperscript{197} in which a white applicant sued an employer after a less qualified black applicant was hired for a driving position. The employer contended the hiring was a valid affirmative action decision.\textsuperscript{198} The difficulty was due per-

\textsuperscript{193} 664 F.2d at 135 (Pell, dissenting).
\textsuperscript{194} Note that business necessity is a defense to a suit challenging an employment practice which has a disproportionate impact on a minority group. See \textit{supra} note 153. However, an employer can rebut a disparate treatment claim only by showing a legitimate non-discriminatory reason for his action. The discrimination of a third party should not qualify as a “non-discriminatory” reason. Other circuits have held that the business necessity doctrine does not apply to overt, intentional race discrimination. Knight v. Nassau County Civil Service Comm’n, 649 F.2d 157 (2d Cir. 1981); Miller v. Texas State Bd. of Barber Examiners, 615 F.2d 650 (5th Cir. 1980). The only exception to this is where race is taken into account for the purpose of remedying past discrimination. See \textit{infra} notes 198-211 and accompanying text for a discussion of the validity of such “affirmative action” programs.
\textsuperscript{195} 664 F.2d at 130. The district court held that the EEOC failed to satisfy the prerequisites to suit because it had not sought conciliation regarding the charge of retaliatory discharge before issuing its reasonable cause determination. The court rejected the argument, finding there is no requirement that an invitation to conciliate be issued prior to the reasonable cause determination. It concluded that the Commission satisfied all the necessary prerequisites to suit and that dismissal on that basis was erroneous. \textit{Id.} at 131.
\textsuperscript{196} \textit{Id.} at 133-34.
\textsuperscript{197} 651 F.2d 520 (7th Cir. 1981).
\textsuperscript{198} \textit{Id.} at 522.
haps in large part to the timing, \textit{i.e.}, the case was litigated subsequent to the Supreme Court's ruling in \textit{Regents of the University of California v. Bakke} but prior to the Court's decision in \textit{United Steel Workers of America v. Weber}. In the former case, the Supreme Court had ruled that the fourteenth amendment prohibited the use of strict quotas in affirmative action decisions. In the latter case, the Supreme Court upheld the use of at least certain types of formally adopted voluntary affirmative action programs as against Title VII challenges. However, the defendants had only the \textit{Bakke} precedent and their defense reflects the Court's analysis in that decision. The defendant testified that he did not hire the black employee pursuant to any plan, but that he simply counted his race as a factor in the employee's favor. The same emphasis on \textit{Bakke} was seen in the plaintiff's proposed findings and conclusions prior to trial, \textit{i.e.}, the plaintiff argued that the defendant was using a strict quota and the defendant strongly denied this.

Ironically, the evidence indicated that the national company, Yellow Freight System, did have a formal affirmative action program. The immediate employer simply argued that he was not "terribly aware" of the detailed plan for affirmative action and he was not acting pursuant to such a plan. Thus, even if Yellow Freight had adopted a valid affirmative action plan pursuant to the Court's analysis in \textit{Weber}, this could not provide a defense because the defendant claimed he was not acting pursuant to such a plan.

Having rejected defendant's after-the-fact reliance upon any formal program, the court proceeded to analyze the validity of his informal decision to give the black employee a plus factor based on his race and to hire him. The court noted the dearth of authority as to the legality of informal affirmative action decisions under Title VII. The two district court decisions that have dealt with the issue have reached diametrically opposed conclusions, \textit{i.e.}, one found that the \textit{Weber} decision should be extended to include informal individual acts favoring minorities, while the other rejected the preferential employment decision as not having been made pursuant to a "reasoned program."

\begin{itemize}
\item \textbf{200.} 443 U.S. 193 (1979).
\item \textbf{201.} 651 F.2d at 522.
\item \textbf{202.} \textit{Id}. at 523-24.
\item \textbf{203.} \textit{Id} at 525.
\item \textbf{204.} Meyers v. Ford Motor Co., 480 F. Supp. 894 (W.D. Mo. 1979). The court explicitly rejected plaintiff's argument that \textit{Weber} was limited to formal affirmative action programs. It interpreted it to allow employers to engage in unregulated race-related employment practices. \textit{Id}. at 899 n.5.
\end{itemize}
Seventh Circuit refused to select a single approach to this issue, but noted that *Weber* provided useful guidance as to the validity of informal affirmative action programs. The court cited the following as the most significant aspects of the *Weber* decision:

1. The purpose of the affirmative action plan must be to break down old patterns of segregation;
2. The plan must not unnecessarily infringe the rights of white employees;
3. The plan must be a temporary measure not intended to maintain racial balance but simply designed to eliminate racial imbalance in the work force.\(^\text{206}\)

Analyzed in light of these criteria the court concluded that the defendant's ad hoc informal affirmative action decision was not insulated from Title VII liability.\(^\text{207}\) First, the defendant's testimony made it obvious that the employer was not acting pursuant to a need to remedy some past discrimination, *i.e.*, based on some type of statistical disparity between the local labor force and the minority composition of the employer's work force. In fact, the defendant had testified that he had no clear idea about the percentage of blacks in the local labor force. The court, therefore, concluded that the employer hired the black employee without any idea as to the level minority hiring should reach. Since he was unaware of any goal, his actions could unfairly discriminate against non-minority employees.\(^\text{208}\) In addition, the plan failed to set any type of a time limit. Thus, his informal decision to give minorities a preference could have continued longer than needed. The court stressed that it was not trying to set a general precedent as to the validity of informal affirmative action programs, noting that the unique record in this case was due to its "interpositioning between . . . Bakke and . . . Weber."\(^\text{209}\) The court instead read *Weber* as generally seeking "to strike a balance between the societal interest in affirmative action and the right of individuals to be free from race discrimination."\(^\text{210}\) It concluded that here the activity of the defendant lacked sufficient "substantive and procedural safeguards to insure that all employees would be treated fairly."\(^\text{211}\)


\(^{207}\) *Id.* at 527.

\(^{208}\) *Id.*

\(^{209}\) *Id.* at 528.

\(^{210}\) *Id.* at 527.

\(^{211}\) *Id.* at 528. One recent authority has criticized the Seventh Circuit's analysis in *Lehman* as inconsistent with the affirmative action guidelines, 29 C.F.R. § 1608.3 (1979) which protect affirmative action in circumstances going beyond *Weber*. The author argues that the distinction between formal and informal affirmative action will often be illusory and that management
4. Res Judicata as a Defense

In the case of *Unger v. Consolidated Foods Corp.*, the plaintiff alleged that she was a sales representative who lost her position because of sex discrimination. Pursuant to Title VII's mandate, the case was initially heard via the state administrative route, i.e., a hearing examiner appointed by Illinois' Fair Employment Practice Commission (FEPC) heard the charges and its conclusions were then reviewed by the FEPC, which found against the plaintiff. The decision was reversed in the Circuit Court of Cook County, but the Illinois Appellate Court overturned the Circuit Court and reinstated the FEPC's findings in favor of the employer. Plaintiff's petition for leave to appeal to the Illinois Supreme Court was denied.

It was during the pendency of the Illinois proceedings that plaintiff received her right to sue letter from the EEOC and filed the instant action in federal court. At the time the case was decided the majority of circuit courts had held that a plaintiff was not precluded, under either principles of collateral estoppel or election of remedies, from relitigating a Title VII claim in a federal court subsequent to state administrative and judicial determinations. The Seventh Circuit adopted this position holding that plaintiff could turn to the federal court for adjudication of her claims under Title VII. The court rejected the demand that be given sufficient flexibility so as to promote the general goals of the Act. See Blumrosen, *Affirmative Action in Employment*, 34 RUTGERS L. REV. 1, 25-29 (1981). The guidelines, which are entitled to substantial deference, permit employers to adopt affirmative action plans based on an analysis which reveals facts constituting actual or potential adverse impact, or based on a desire to rectify the effects of prior discriminatory practices or to overcome the problems associated with a limited labor pool resulting from historical restrictions against minorities. The record in this case, however, fails to establish that the employer acted pursuant to any of these justifications. Therefore, even applying the affirmative action guidelines, it is arguable that the action taken here was in violation of Title VII. Note, in addition, that the employer did not argue he was acting in conformity with the guidelines. If he had, he could have relied upon § 713(b) of Title VII which protects such actions even if the employer does not receive an individualized opinion from the Commission with regard to his affirmative action plan. Although an employer may use the guidelines to support the legality of its affirmative action program even if the plan is not in writing and the employer was not aware of the guidelines, here even the guidelines probably would not save the employer.

212. 657 F.2d 909 (7th Cir. 1981).
213. Plaintiff was replaced by a man and no women were interviewed for the position. Plaintiff was later rehired and appointed sales representative for another territory, but following her filing of charges of discrimination, she was fired again. She thus alleged that the first termination was based on sex discrimination and that the second termination was in retaliation for filing the first charge. Id. at 912.
214. Note that plaintiff filed a complaint with the Equal Employment Opportunity Commission (EEOC) concurrently with her state FEPC. In light of the state proceedings the EEOC deferred action on the federal charges. See § 706(c) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(c) (1976).
215. 657 F.2d at 912.
216. See cases cited 657 F.2d at 913-14.
fendant's contention that since plaintiff decided to pursue state judicial review, she should be bound by the principle of election of remedies and precluded from relitigating the issues involved in the state proceedings. The court found that foreclosure of Title VII's federal judicial remedy "would serve to discourage plaintiffs from fully pursuing state proceedings and would conflict with Title VII's statutory scheme which encourages resolution of discrimination claims by state authorities while reserving the right to proceed in federal court."  

While the arguments appear persuasive, the Supreme Court this term specifically rejected this analysis in *Kremer v. Chemical Construction Corp.*, holding that the doctrine of preclusion, as embodied in 28 U.S.C. § 1738, bars a plaintiff who had pursued state judicial remedies from relitigating the same issues in federal court. Since Title VII contains no language exempting itself from the mandate of § 1738, the Supreme Court reasoned that federal review was prohibited. The Court further held that state proceedings only need to satisfy the minimal procedural requirements of the due process clause in order to qualify for the full faith and credit guaranteed by federal law. Since there was no question raised as to propriety of the Illinois proceedings, the *Kremer* rationale probably would result in the dismissal of the case.

### C. Age Discrimination in Employment Act: Application to Government Employers

In another interesting case this term the Seventh Circuit considered the constitutionality of the 1974 amendment to the Age Discrimination in Employment Act (ADEA), which extended the Act's proscriptions to state and local governments. The amendment has been ruled unconstitutional in another case, which the Supreme Court will review this term. Therefore, the analysis offered by the Seventh Circuit should be examined carefully. A preliminary issue is whether

217. *Id.* at 914.
218. *Id.*
220. 28 U.S.C. § 1738 (1976), provides that "The ... judicial proceedings of any court of any such State ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State ... ."
221. 102 S. Ct. at 1892-93.
222. Note that after this article went to press the Seventh Circuit did in fact reverse its earlier decision, finding no reason not to apply *Kremer* retroactively. Unger v. Consol. Foods Corp., 693 F.2d 703 (7th Cir. 1982).
223. EEOC v. Elrod, 674 F.2d 601 (7th Cir. 1982).
Congress acted pursuant to the fourteenth amendment or the commerce clause when it extended the prohibitions of ADEA to state and local governments. If Congress was acting pursuant to the commerce clause, a difficult tenth amendment state sovereignty issue is presented. The Seventh Circuit found that ADEA was a constitutional exercise of Congress' power under § 5 of the fourteenth amendment. It went on, however, to assert that even if Congress was acting pursuant to the commerce clause, its exercise was valid and was not prohibited by the tenth amendment.

As to the first finding, the court determined that the amendment constituted “appropriate legislation” under § 5 of the fourteenth amendment. Applying the prevailing standard, it found that the enactment was “plainly adapted to the end of enforcing the equal protection clause.” The court looked to the legislative history of the amendment which stated as its purpose the prohibition of discriminatory government conduct. Such was viewed by the court as the very essence of the guarantee of equal protection of the laws of the fourteenth amendment. Furthermore, the court noted the analogy to Title VII of the Civil Rights Act of 1964 which was extended by a 1972 amendment to similarly include state and local government. Although the Title VII amendments made explicit reference to the fourteenth amendment, the court found that the substantive similarity between the two acts both in structure and chronology of development indicated that the source of congressional authority was the same for both. The court cited the Supreme Court decision in Fullilove v. Klutznick, establishing that the legislative history of an act need not make explicit reference to the fourteenth amendment provided the objectives of an act are within its scope. Since the goals of the 1974 amendment to ADEA were clearly tied to the guarantees of the equal protection clause of the fourteenth amendment, the court concluded that Congress was acting pur-

226. 674 F.2d at 603.
227. Id. at 611.
228. Id. at 604.
229. The court noted that the extension of the ADEA to the states was originally proposed in 1972 at the same time the Title VII amendments were under consideration by Congress. Id. at 607.
230. Id.
232. 448 U.S. at 477-78. Note, however, the conflicting language on this issue in Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981) that “We should not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment,” Id. at 16. The Court urged careful analysis of the legislative history—an analysis which might still support the finding here that Congress intended to exercise its fourteenth amendment enforcement power.
suant to this provision.233

The Seventh Circuit proceeded to deal with the department's allegation that the commerce clause was the basis for the extension and that Congress' power to act pursuant to that clause is substantively limited by the tenth amendment as interpreted in *National League of Cities v. Usery.* In that case the Supreme Court held that extension of the Fair Labor Standards Act to cover state and local government employees violated states' rights in that it interfered with an attribute of state sovereignty in an area in which the separate and independent existence of the state was crucial.234

The court noted that even assuming the commerce clause as the source for extending ADEA, *Usery* could be distinguished on two points: 1) it is questionable whether an interest in arbitrary discrimination on the basis of age is an attribute of state sovereignty; and 2) compliance with ADEA unlike compliance with the FLSA would result in minimal, if any, costs and thus would not threaten substantial restructuring of government functions or services.235 The court noted that the primary effect of ADEA would simply be to modify permissible criteria in making employment choices, but it would not require the state to assume a burden, financial or otherwise, which substantially interferes with its sovereignty.236 The Seventh Circuit thus joins the majority of federal courts which have considered the constitutionality of the 1974 amendment to ADEA and which have concluded that ADEA was constitutionally applied to the states, regardless of whether Congress was

233. 674 F.2d at 609. The court notes that its analysis of the constitutional basis of Congress' authority is in accord with the majority of courts that have confronted the issues. See cases cited at 609 n.9. In addition to cases in the footnote, the same conclusion was reached in *EEOC v. Pennsylvania Liquor Control Bd.*, 503 F. Supp. 1051 (N.D. Penn. 1980) and *Adams v. James*, 526 F. Supp. 80 (N.D. Ala. 1981).


235. *Id.* at 852. The significance of these factors was stressed in the subsequent Supreme Court decision of *Hodel v. Virginia Surface Mining and Reclamation Assoc.*, 452 U.S. 264, 287-88 (1981). In that case the Court identified three separate inquiries underlying the result in *Usery*:

1. The federal law must regulate the "States as States";
2. The law must address "attributes of state sovereignty";
3. The law must directly impair the state's ability to "structure integral operations in areas of traditional governmental functions."

The Court's reluctance to find satisfaction of these three factors is reflected in the two most recent decisions of the Supreme Court, namely *United Transp. Union v. L.I. R. R. Co.*, 102 S. Ct. 1349 (1982) (upholding the application of the Railroad Labor Act to a state owned railroad) and *Federal Energy Regulatory Comm'n v. Mississippi*, 102 S. Ct. 2126 (1982) (upholding the validity of the Public Utility Regulatory Policies Act of 1978 which required state utility regulatory commissions to entertain various disputes under federal law as well as to "consider" certain federal proposals with regard to energy conservation and to comply with federally dictated notice and comment procedures in considering those proposals).

236. 674 F.2d at 611.
237. *Id.*
acting under the commerce clause or the fourteenth amendment.\textsuperscript{238}

\textbf{D. Discrimination Against Aliens}

The Seventh Circuit also dealt with the employment opportunities of another class. In \textit{Campos v. FCC}\textsuperscript{239} permanent resident aliens challenged the constitutionality of § 303(1) of the Communications Act of 1934 which prohibits the Federal Communications Commission (FCC) from granting a commercial radio operator license to aliens.\textsuperscript{240} One of the named plaintiffs was dismissed from his job as baggage handler for an airline when he was unable to obtain a restricted radio telephone operator permit deemed necessary for him in order to engage in radio communications with landed aircraft during the unloading of passengers and baggage. Two other named plaintiffs sought the operator permit in order to pursue careers as a radio broadcaster and a broadcast radio station engineer respectively. The plaintiffs, suing as a class, argued that the federal restriction deprived them of their right to equal protection as guaranteed by the due process clause of the fifth amendment.\textsuperscript{241}

In dealing with the question of alienage, the Supreme Court has adopted different standards depending upon whether the federal government or the state is doing the discrimination. The Court has held that state discrimination against aliens is inherently suspect and therefore subject to strict judicial review, whether or not a fundamental right is impaired.\textsuperscript{242} Although the Supreme Court has recently applied a more relaxed scrutiny to state classifications intended to protect certain government functions,\textsuperscript{243} the strict scrutiny analysis continues to apply where a state seeks to limit the private employment opportunities of aliens, as in the case here. On the other hand, the Court has held that federal regulation of aliens, where no substantive constitutional right is

\textsuperscript{238} \textit{Id.} at 612 n.15.
\textsuperscript{239} 650 F.2d 890 (7th Cir. 1981).
\textsuperscript{240} 47 U.S.C. § 303(1). The section gives the Commission authority to issue licenses to citizens or nationals of the United States. Certain exceptions for the waiver of the citizenship requirement are also stated in the provision. \textit{See} 650 F.2d at 891 n.1.
\textsuperscript{241} 650 F.2d at 891. Note equal protection is required by the due process clause of the fifth amendment as well as the equal protection clause of the fourteenth amendment and that the same level of judicial scrutiny is applied. \textit{See} Buckley v. Valeo, 424 U.S. 1 (1976); Bolling v. Sharpe, 347 U.S. 497 (1954).
\textsuperscript{242} Graham v. Richardson, 403 U.S. 365, 376 (1971).
impaired, must be upheld unless wholly irrational.\textsuperscript{244} It is argued that the power of Congress to proscribe the terms and conditions on which aliens may come into and stay in this country must be free from judicial intervention.\textsuperscript{245}

Plaintiffs contended, nonetheless, that since the provision challenged here bars aliens from private rather than public employment, the heightened scrutiny should be used. The Seventh Circuit flatly rejected this analysis, finding that deference is accorded federal regulation of aliens both because immigration is an exclusively federal interest and also because the federal power is of a political nature necessarily subject to narrow judicial review.\textsuperscript{246} Thus, it concluded that "alienage-based classifications are not . . . suspect in any category of cases for Fifth Amendment purposes."\textsuperscript{247}

Having rejected the analogy to state discrimination cases, the court turned to a decision upholding a citizenship requirement for federal civil service jobs. In \textit{Hampton v. Mow Sun Wong},\textsuperscript{248} the Supreme Court assumed without deciding that "the national interest in providing an incentive for aliens to become naturalized, or possibly even as providing the President with an expendable token for treaty negotiation purposes" was enough to justify the restriction.\textsuperscript{249} The FCC advanced the same interests as justification for § 303(1), and the court upheld the provision as not a "wholly irrational means" of serving federal interests.\textsuperscript{250} In light of the analysis which the court used to support the FCC regulation, it is highly unlikely that any federal statutory restriction on alien employment would be invalidated based on the irrationality standard. Nonetheless, the outcome is not surprising in light of the firm precedent of deferring to congressional determinations in dealing with questions regarding alienage.\textsuperscript{251}

\textsuperscript{244} See Mathews v. Diaz, 426 U.S. 67 (1976), upholding a federal statute denying Medicare benefits to aliens.

\textsuperscript{245} Sing v. United States, 158 U.S. 538, 547 (1895).

\textsuperscript{246} 650 F.2d at 894.

\textsuperscript{247} Id.

\textsuperscript{248} 426 U.S. 88 (1976).

\textsuperscript{249} Id. at 105. Note that the Supreme Court in this case found that although deference is due the Congress or the President, since the provision here had been promulgated by the Chairman of the Civil Service Commission, the Court invalidated the provision as violating the due process clause, i.e., an improper delegation of authority.

\textsuperscript{250} 650 F.2d at 894.

V. ENFORCEMENT OF CIVIL RIGHTS

This section addresses issues which frequently arise in litigation seeking to enforce civil rights. A plaintiff must have not only substantive rights but also a basis for pursuing relief in federal court. This is often provided by section 1983 but it may also be implied in the federal statute or constitutional provision relied upon for the substantive rights. The availability of attorney fees to a prevailing plaintiff is obviously a critical enforcement issue. Several other doctrines—immunity, standing and state action—can effectively limit the availability of relief for violations of substantive rights. All of these issues are discussed in the sections which follow.

A. Right of Action

Not surprisingly the court has again confronted the question whether a right of action can be implied under a federal statute and, if so, the type of relief intended. In addition, the court confronted the related question of when section 1983 can be used to enforce federal statutory rights. This issue, which seemed so simple and clear after Maine v. Thiboutot, was substantially complicated and clouded by subsequent decisions in Pennhurst State School and Hospital v. Halderman and Middlesex County Sewerage Authority v. National Sea Clammers Ass'n.

The Court, however, has recognized two exceptions to the application of § 1983 to statutory violations. In [Pennhurst] we remanded certain claims for a determination (i) whether Congress had foreclosed private enforcement of that statute in the enactment itself, and (ii) whether the statute at issue there was the kind that created enforceable "rights" under § 1983.

The amount of time consumed litigating the preliminary question whether a right of action and certain remedies should be implied under federal statutes is incredible. The Court has suggested that "[w]hen Congress intends private litigants to have a cause of action to support

253. This issue continues to appear in decisions of the Supreme Court; during the 1981-82 term, it was addressed at some length in Merrill Lynch, Pierce, Fenner & Smith v. Curran, 102 S. Ct. 1825, 1837-44 (1982).
254. 448 U.S. 1 (1980) (§ 1983 can be used to enforce federal statutes, including the Social Security Act).
255. 451 U.S. 1 (1981) (§ 1983 might not provide a cause of action in all situations where a plaintiff attempts to enforce federal statutory rights).
257. Id. at 19.
258. Justice Powell, dissenting in Merrill Lynch, gives some indication of the amount of time. "My research . . . indicates that in the past decade there have been at least 243 reported circuit
their statutory rights, the far better course is for it to specify as much when it creates those rights.” It is easy to agree that it would be “far better” if Congress expressly addressed remedies when it creates rights. However, given the manner in which Congress operates, it is unrealistic to expect such clarity in what is often controversial legislation. Getting into the technicalities of enforcement in every piece of legislation considered by Congress could lead to endless debates. Justice Powell suggests the courts could get out of this time consuming task by “discontinu[ing] the speculative creation of damages liability where the legislative branch has chosen to remain silent.”

There is another way for the courts to deal with this. Why not simply assume that Congress intends a remedy where it creates a right and further assume that it intends the courts to exercise the full range of their remedial powers unless expressly restricted by Congress? Instead of requiring Congress to address enforcement and remedy in each piece of legislation, Congress would have to face these questions only when it wants to change the general rule, i.e., where there is a right there is a remedy. This was suggested long ago in *Bell v. Hood*:

> [W]hen federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. And it is also well settled that where legal rights have been invaded and the federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.

Whatever the merit of the presumption suggested above, it does not represent the Court’s view today, and therefore we must continue to attempt to determine what Congress intended when it gives absolutely no indication of its intent. The effort in *Cort v. Ash* to establish a definitive, workable scheme for analyzing this issue has turned

court opinions and 515 district court opinions dealing with the existence of implied causes of action under various federal statutes.” 102 S. Ct. at 1855 n.17.


261. 102 S. Ct. at 1855 n.17.


263. There is some suggestion in *Merrill Lynch* that, at least where courts have been implying remedies under a statute prior to a substantial reconsideration of the statute by Congress, the failure of Congress to expressly disapprove the remedies represents its intention to affirm their availability. 102 S. Ct. at 1841-44. This is criticized by Justice Powell in dissent. *Id.* at 1850-52. The presumed knowledge of Congress of how the courts have interpreted an analogous statute has also been used by the Court as evidence of congressional intent to provide a judicial remedy. Cannon v. University of Chicago, 441 U.S. 677 (1979).

out to be a failure. However many factors the Court suggests, the question really boils down to a matter of what Congress intended:

More recently, the Court has emphasized that the determinative question in cases involving a claimed private right of action is whether Congress intended to create the particular right of action being asserted and has stated that the resolution of this question is strictly a matter of statutory interpretation. The four Cori factors are merely statutory interpretation aids. . . .

Not only are the courts attempting to determine whether or not Congress intended a private right of action; where the answer is yes, they must then determine which remedies Congress might have intended. This second level of inquiry is demonstrated by the decision in Transamerica Mortgage Advisors, Inc. v. Lewis where the Court, after finding an implied right of action under the Investment Advisers Act of 1940, concluded that the remedy is limited to equitable relief.

In Lieberman v. University of Chicago, the Seventh Circuit stated:

While the Supreme Court has made it clear that the issue of an implied remedy is distinct from the issue of an implied cause of action, guidance beyond that point is conflicting. It is agreed that the analysis required is one of statutory construction, however, there is authority that where a statute expressly provides a particular remedy it is improper to imply the existence of other remedies, while on the other hand the Court has stated that “the existence of a statutory right implies the existence of all necessary and appropriate remedies.”

Lieberman is a good example of this bifurcated inquiry. After the Supreme Court held, in Cannon v. University of Chicago, that there was an implied private right of action under Title IX and the plaintiffs’ claim for injunctive and declaratory relief had become moot, the court faced the question of whether the plaintiffs could recover damages under Title IX. Relying on its conclusion that Title IX was passed pursuant to the spending power of Congress, the court adopted the Pennhurst guidelines “for construing implied rights and remedies in the context of funding legislation,” and agreed with the lower court that

265. Barany v. Buller, 670 F.2d 726, 730 (7th Cir. 1982); the first two criteria under Cori are whether the plaintiff is a member of the class for whose special benefit the statute was enacted and whether there is any indication of legislative intent, explicit or implicit, to create or deny a remedy. See also, Merrill Lynch, 102 S. Ct. at 1838-39, where the Court recognizes that cases subsequent to Cori focus on the intent of Congress.


268. 660 F.2d 1185, 1187 n.4 (7th Cir. 1981) (citations omitted).


271. 660 F.2d at 1187. The guidelines are found in the following quote from Pennhurst: “Legislation enacted pursuant to the Spending Power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.
damages could not be recovered for Title IX violations. Applying the contract analysis of *Pennhurst*, the court indicated that absent express congressional language establishing a damage remedy, the schools could not possibly be agreeing to damage actions in accepting the federal funds which trigger the application of Title IX. Because the court characterized Title IX as part of a bill designed to assist educational institutions in "acute financial distress," it concluded that Congress did not intend to subject such institutions to "potentially massive financial liability" which might exceed the federal funds. In essence the court is suggesting that Congress could not have intended to impose additional financial burdens on schools accepting the federal funds when the purpose of the Act was to relieve some of the financial burdens.

In a persuasive dissent, Judge Swygert accepts the majority's conclusion that Title IX was passed pursuant to the spending power of Congress. However, he argues that *Pennhurst* is not controlling because the issue there was whether the federal statute imposed any conditions upon receipt of federal funding, *i.e.*, did the act involved in *Pennhurst* provide the plaintiffs with any rights? Because, in his view, the analysis in *Pennhurst* is simply irrelevant to an inquiry of whether a damage remedy should be implied and because the Supreme Court in *Cannon* had already determined that an implied private cause of action exists under Title IX, Judge Swygert relies on the principle of *Bell v. Hood* to conclude that damages are available. He indicates that the principle of *Bell v. Hood* serves two important purposes. First, "it recognizes the unique role that federal courts play in enforcing federal statutes." Second, "it gives courts guidance in analyzing matters of remedies for violations of federal statutes."

As to the latter purpose, Judge Swygert expresses concern that the majority opinion uses an analysis inapplicable to future cases in that it

The legitimacy of Congress' power to legislate under the Spending Power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." 451 U.S. at 17 (citations omitted).

See *Note, Injunctive Relief from State Violations of Federal Funding Conditions, 82 COLUM. L. REV. 1236 (1982).*

The reach of the spending power is "at least as broad as the regulatory powers of Congress." *Fullilove v. Klutznick*, 448 U.S. 448, 475 (1980). One of the regulatory powers is provided by section 5 of the fourteenth amendment which certainly gives Congress the power to prohibit sex discrimination in education, even absent federal funds. If Congress could have achieved its objective under section 5, then *Fullilove* suggests the fact that Congress acted under the spending power is not a limitation on the scope of the legislation. *Id.*

272. 660 F.2d at 1188.
273. *Id.* at 1189-90.
274. See *supra* note 262 and accompanying text.
275. 660 F.2d at 1192.
does not provide a principled method for resolving such cases. He also
indicates that the four factor analysis recommended in *Cort v. Ash*
often provides very little guidance, particularly with respect to the im-
plication of a damage remedy. This is true because when Congress
does not expressly address the availability of judicial enforcement, it is
less likely that it would even hint at the remedy question than at the
implied right of action question.276 Judge Swygert does not have the
confidence of the majority in drawing the required fine distinctions in
analyzing the legislative history of Title IX and finds that this can be
avoided by applying the principle of *Bell v. Hood*:

Therefore, the principle of *Bell v. Hood* alleviates the tensions inher-
ent in this separation of powers problem. It correctly recognizes that
federal courts have the role of providing broad and flexible remedies
for violations of federal statutory and constitutional rights and
presumes that absent convincing legislative intent to the contrary the
power is plenary.277

While Judge Swygert would not necessarily presume a right of action
absent some express indication to the contrary, once an implied right of
action is found, he would presume that the full range of a federal
court's remedial power is available to the plaintiff.278

The availability of § 1983 to enforce federal statutory rights was at
issue in *Anderson v. Thompson*.279 The plaintiff filed this action pursu-
ant to the Education of All Handicapped Children Act (EAHCA)280 to
seek judicial review of the decision of a state administrative agency.
On the merits, the lower court essentially ruled in favor of the plaintiff,
however, it denied her claim for damages and attorney fees. Clearly,
the EAHCA does not expressly provide for either attorney fees or dam-
ages. Therefore, the issues were whether a damage remedy should be
implied under the EAHCA and whether the EAHCA could be en-
forced through § 1983, thereby making fees available under § 1988.281

With respect to the former, Judge Swygert concluded that a dam-
age remedy was generally inconsistent with and not intended under the
EAHCA except in a couple of circumstances where a limited damage

276. *Id.* at 1193.
277. *Id.*
278. *Lieberman* is significant because it is the first Court of Appeals decision relating to the
implication of a damage remedy under Title IX. As noted in the opinion, the second circuit had
previously ruled that an action for damages is available under Title VI, 42 U.S.C. § 2000d (1976),
in Guardian's Ass'n of New York City v. Civil Serv. Comm'n, 633 F.2d 232 (2d Cir. 1980). The
analogy to Title VI was a key factor in the Supreme Court's decision in *Cannon* finding an implied
private right of action under Title IX.
279. 658 F.2d 1205 (7th Cir. 1981).
award might be appropriate. In summarizing its position, the court stated:

Congress enacted the EAHCA in order to aid the states in educating their handicapped children by providing the necessary funds. The legislative history shows an emphasis on procedural safeguards to ensure appropriate placements, a recognition that diagnosis of special education problems was difficult and uncertain, an awareness of severe budgeting constraints, and an acknowledgment that it would take time for all handicapped children to be helped. In those circumstances, and without even a word of discussion about damages, we infer that the remedy was not generally intended.

Two examples of exceptional circumstances which might justify an award of damages were given. First is where parents make alternate arrangements to those offered by the school system in order to avoid a serious risk of injury to the child's physical health. Where a court subsequently determines that such alternative arrangements were necessary to protect the health of the child and should have been provided by the school system, the courts have the power to reimburse parents for the costs of the alternative placement. The second circumstance is where a school system acts in bad faith in failing to make available the procedural protections of the EAHCA which could result in an appropriate placement. If the parents unilaterally arrange for the appropriate placement, they should be awarded money damages for the cost of such services in the event they ultimately prevail in court.

While the decisions in Lieberman and Anderson are consistent in that both refuse to imply a damage remedy under a federal statute which is silent on the topic, Judge Swygert's dissent in Lieberman is somewhat curious because he wrote the Anderson opinion only a few weeks earlier and it is not mentioned in Lieberman. There are some obvious differences in the statutes involved. For example, Title IX does not expressly deal with right of action whereas the EAHCA provides for judicial review but is silent on the subject of damages. Maybe it is more difficult to imply a right to damages when Congress expressly provides a right of action but fails to mention damages than where Congress doesn't expressly address either. Nevertheless, the

282. 658 F.2d at 1213. On this point, the opinion of Judge Swygert should be compared with his dissent, written only a few weeks later, in Lieberman v. Univ. of Chicago, 660 F.2d 1185 (7th Cir. 1981).
283. Id.
285. 658 F.2d at 1214.
286. It should be noted that the EAHCA gives the courts power to "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(e)(2) (1976).
concern expressed in *Anderson* for the budget constraints of states and local school systems is the same concern expressed by the majority in *Lieberman*. There is a split of authority on the question of whether damages are available for violations of the EAHCA;287 however, Judge Swygert's well written opinion in *Anderson* seems persuasive to most courts addressing the issue.288

The court next turned to the question whether § 1983 could be used to enforce the EAHCA, thereby making fees available under § 1988.289 Relying on *Pennhurst*, the court stated that "despite *Thiboutot*, section 1983 is not available in situations 'where the governing statute provides an exclusive remedy for violations of the Act.'"290 The EAHCA does not expressly indicate that it provides an exclusive remedy. To determine whether the statutory remedy under the EAHCA was intended to be exclusive, the court looked to *Brown v. General Services Administration*291 and *Great American Federal Savings & Loan Association v. Novotny*.292 In essence these cases direct the courts to an examination of the legislative history and the structure of the statute to determine whether or not Congress intended it to be exclusive. As with the implied right of action inquiry, the courts are left to struggle with the question of what Congress intended when there is frequently no indication of its intent.293

Applying this to the EAHCA, the court indicated that it, "like the statutes at issue in *Brown* and *Novotny*, contains an elaborate administrative and judicial enforcement system."294 Next, the court indicated

287. 658 F.2d at 1210 n.9.
289. Although not expressly addressed in the opinion, if § 1983 is available to enforce the EAHCA, then presumably a plaintiff could seek damages as well as injunctive relief even if the EAHCA itself does not provide for damages. This is true because § 1983 provides for damages. It could, however, be argued that § 1983 is available but only to the extent it is not inconsistent with the EAHCA. If this is true, then the availability of § 1983 serves only to make attorney fees available. This is obviously an important function.
290. 658 F.2d at 1215, quoting from *Pennhurst*, 451 U.S. at 28.
291. 425 U.S. 820 (1976) (§ 717 of Title VII provides the exclusive judicial remedy for employment discrimination claims of federal employees).
293. While the task is certainly similar, the test should be different. See, e.g. Ryans v. New Jersey Comm’n for the Blind, 542 F. Supp. 841, 846-49 (D. N.J., 1982); Note, Preclusion of Section 1983 Causes of Action by Comprehensive Statutory Remedial Schemes, 82 COLUM. L. REV. 1183 (1982).
that Congress when enacting the EAHCA also believed that the rights it was creating had heretofore been inadequately protected under federal law.\textsuperscript{295} Finally, what the court considered the most compelling reason for its conclusion that the EAHCA provides the exclusive remedy "is that the relief it provides is inconsistent with section 1983 relief."\textsuperscript{296} According to the court, the two are inconsistent because § 1983 provides for damages whereas it had already concluded that the EAHCA does not provide for damages absent exceptional circumstances. In summary the court stated:

the availability of a private right of action under the EAHCA, the detailed statutory administrative and judicial scheme, the fact that Congress intended the EAHCA to create new rights, and the absence of a traditional damage remedy, together compel our conclusion that the judicial remedy provided in the EAHCA was intended to be exclusive.\textsuperscript{297}

Lower courts are divided as to the availability of § 1983 to enforce the EAHCA. A contrary district court decision in \textit{Tatro v. Texas}\textsuperscript{298} was specifically rejected in \textit{Anderson}.\textsuperscript{299} Several courts have held that § 1983 is available and awarded fees under § 1988 in cases enforcing rights under the EAHCA,\textsuperscript{300} while others have relied upon \textit{Anderson} in rejecting the use of § 1983.\textsuperscript{301} One other appellate court, without citing \textit{Anderson}, similarly held that § 1983 is not available to enforce the EAHCA.\textsuperscript{302}

A question not necessarily answered by \textit{Anderson} is whether a

\textsuperscript{295} Clearly the EAHCA was a recognition that the rights of handicapped children were not being adequately protected by the states and the local schools, but Congress was definitely not suggesting that handicapped children did not previously have a right to an equal educational opportunity. In fact, the legislative history of the relevant provisions of the EAHCA makes it quite apparent that Congress was acting to assist the states in complying with decisions establishing the right of handicapped children to an equal educational opportunity under the fourteenth amendment. \textit{See, e.g.}, S. Rep. No. 168, 94th Cong., 1st Sess. 5-7, reprinted in 1975 \textit{U.S. Code Cong. & Ad. News} 1429-31. ("In recent years decisions in more than 36 court cases in the States have recognized the rights of handicapped children to an appropriate education.") \textit{Id.} at 1431. \textit{See also Bodensteiner, supra} note 294.

\textsuperscript{296} 658 F.2d at 1216. This reason is questioned in \textit{Bodensteiner, supra} note 294.

\textsuperscript{297} \textit{Id.} at 1217.

\textsuperscript{298} 516 F. Supp. 968, 984 (N.D. Tex. 1981). This case held that \textit{Thiboutot} controls and § 1983 is available so long as the plaintiff exhausts the administrative remedies under 20 U.S.C. § 1415; however, because § 1983 would add nothing to the EAHCA claim other than to trigger an award of fees under § 1988, the court held that it could not be used.

\textsuperscript{299} 658 F.2d at 1215.


\textsuperscript{302} McGovern v. Sullins, 676 F.2d 98, 99 (4th Cir. 1982).
plaintiff can use § 1983 to enforce rights under the EAHCA when a state refuses to provide an administrative remedy mandated under § 615 of the EAHCA.\textsuperscript{303} In this situation plaintiffs can challenge the state's lack of an administrative process mandated by § 615(e) or its unwillingness to apply the appropriate procedural protections. Because § 615(e)(2) provides jurisdiction in the courts only after exhaustion of administrative remedies, they might be prevented from enforcing the procedural protections mandated by the Act. The question is whether such plaintiffs can proceed in court under § 1983 seeking to require the state to implement the procedures mandated by the EAHCA. In \textit{Hymes v. Harnett County Board of Education}\textsuperscript{304} the court awarded fees under § 1988 because "no judicial relief route is provided in the EAHCA, to prevent an alteration of the educational placement of a child, pending administrative determination (and any appeal therefrom to the courts)."\textsuperscript{305} Depending on how strictly § 615(e)(2) is interpreted, a plaintiff in this situation, in contrast to the situation in \textit{Anderson}, may be without a remedy under the EAHCA and therefore § 1983 should still be available.

\textit{Anderson} demonstrates the complexity of the issues caused by the Supreme Court's retreat from \textit{Thiboutot} in \textit{Pennhurst} and \textit{National Sea Clammers}. The latter part of the inquiry demanded by \textit{Pennhurst} and \textit{National Sea Clammers}, i.e., whether the federal statute at issue creates any rights or privileges for the plaintiffs, is of course unavoidable. Assuming a cause of action is available through § 1983, the courts will always have to decide what, if any, substantive rights are provided by the federal statute. This is really all \textit{Pennhurst} dealt with.\textsuperscript{306} The other aspect of the inquiry, i.e., whether Congress has forclosed private enforcement of the statute in the enactment itself, leads to the inquiry which Judge Swygert stated in \textit{Lieberman} "can best be analogized to the medieval practice of counting angels on the head of a pin."\textsuperscript{307} Of course, if Congress expressly indicates that a remedy provided in the substantive statute itself is intended to be exclusive, that indication would preclude the use of § 1983. On the other hand, where Congress

\textsuperscript{303} 20 U.S.C. § 1415(e). This issue is currently pending before the Seventh Circuit in Doe v. Koger, \textit{appeal docketed}, No. 85-567 (7th Cir. May 19, 1982).

\textsuperscript{304} 664 F.2d 410, 413 (4th Cir. 1981).

\textsuperscript{305} \textit{See also}, \textit{Tatro v. State of Texas}, 658 F.2d at 984, where the court, after concluding that a § 1983 action is available as long as the plaintiff has exhausted administrative remedies under § 615(e), stated: "\textit{w}hatever may be the role of § 1983 where the attack is upon the adequacy of procedures themselves, this court sees no role for § 1983 here."

\textsuperscript{306} \textit{See Judge Swygert's} dissenting opinion in \textit{Lieberman}, 660 F.2d at 1189-90.

\textsuperscript{307} 660 F.2d at 1193.
either does not explicitly deal with the question of remedy, or provides a partial remedy but does not exclude other remedies, why should it not be assumed that Congress is fully aware of § 1983 and intends it to be available absent a clear indication to the contrary? This would be simple and consistent with the principle of Bell v. Hood which, according to Judge Swygert, "alleviates the tensions inherent in this separation of powers problem."308

Most of the court of appeals decisions since Pennhurst and National Sea Clammers have avoided the more difficult question by concluding that the plaintiff either has no rights under the substantive federal statute or did not state a violation of the statute.309 Another court summarily concluded, relying on Thiboutot and Cuyler v. Adams,310 that a plaintiff could use § 1983 to enforce the Interstate Agreement on Detainers.311 Unfortunately, what could be a very simple issue if the teaching of Bell v. Hood were not ignored, seems destined to result in endless litigation just as the Cort v. Ash analysis has resulted in a waste of judicial resources attempting to determine whether or not an implied right of action exists.

Finally, the court considered the question whether a federal employee has an implied right of action for damages under the fifth amendment following what she claimed to be a forced retirement from her position as curator of the Fort Sheridan Museum.312 The lower court dismissed the case primarily on the grounds that there was an alternative remedy before the Civil Service Commission. In reversing and remanding for trial the Seventh Circuit applied the test adopted in Carlson v. Green313 indicating that a remedy exists for such constitutional violations unless one of two exceptions is present: "(1) special factors counseling hesitation in the absence of affirmative action by Congress and (2) an alternative remedy provided by Congress."314 The court found that neither exception applies. Concerning the alternative administrative remedy, the court noted that it does not cover coerced

308. Id.
309. See, e.g., Uniformed Firefighters Ass'n v. City of New York, 676 F.2d 20, 22-23 (2d Cir. 1982); Local Div. 732, Etc. v. Metropolitan Atlanta, Etc., 667 F.2d 1327, 1345-46 (11th Cir. 1982); Perry v. Housing Auth. of City of Charleston, 664 F.2d 1210, 1217-18 (4th Cir. 1981); Brown v. Sibley, 650 F.2d 760, 764-65 (5th Cir. 1981).
312. Sonntag v. Dooley, 650 F.2d 904 (7th Cir. 1981).
313. 446 U.S. at 14, 18-19 (1980).
314. 650 F.2d at 906.
resignations and, even if it did, the only relief available is reinstatement and back pay. The plaintiff here seeks damages rather than reinstatement.\footnote{315}

### B. Attorney Fees

The court decided a number of cases this term raising questions of entitlement to attorney fees under either the Civil Rights Attorney's Fees Awards Act\footnote{316} or Title VII of the Civil Rights Act of 1964.\footnote{317} Several of the cases reflect the amount of discretion given to the trial judge in making the attorney fee determination. Another group of cases confronts the difficult question of whether or not a plaintiff has prevailed. A few decisions uphold lower court awards of attorney fees to prevailing defendants, while recognizing the very strict standard for such awards. Finally, two of the decisions dealt extensively with the factors to be considered in determining the proper amount of fees to award.\footnote{318}

Generally speaking the awarding of attorney fees is subject to the discretion of the trial court and will be reversed only for an abuse of discretion. The Court of Appeals can, of course, still review the "legal correctness,"\footnote{319} of the district court ruling and reverse "[i]f a judge erroneously thought the law required him to do what he did."\footnote{320} Obviously, the more reasons and detail given by the trial judge in making an award, the more meaningful the opportunity for review by the Court of Appeals.\footnote{321} In *Whitley v. Seibel* the plaintiff's attorney sought fees for 277 hours at the rate of $110.00 per hour plus a multiplier. The lower court awarded $10,000, to be divided among the attorneys as they chose. Although the amount awarded was less than one third of that requested, there did not seem to be a detailed statement of the reasons for the lower court decision. Nevertheless, the court identified several factors—a lower rate than requested for trial time and an even lesser rate for office time; some duplication of effort by the two attor-

\begin{itemize}
\item \footnote{315} *Id.* at 907.
\item \footnote{316} 42 U.S.C. § 1988.
\item \footnote{317} 42 U.S.C. § 2000e-5(k).
\item \footnote{318} These two cases, relying on *Bond v. Stanton*, 630 F.2d 1231, 1235 (7th Cir. 1980), confirm a prevailing plaintiff's entitlement to fees for time spent litigating and establishing the right to fees. They are *Balark v. Curtin*, 655 F.2d 798, 802-03 (7th Cir. 1981) (including the right to fees for time spent defending a fee award before the Supreme Court), and *Brown v. Smith*, 662 F.2d 464, 470 n.7 (7th Cir. 1981).
\item \footnote{319} *Syvock v. Milwaukee Boiler Mfg. Co., Inc.*, 665 F.2d 149, 162 (7th Cir. 1981).
\item \footnote{320} *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 765 (7th Cir. 1982).
\item \footnote{321} *Whitley v. Seibel*, 676 F.2d 245, 253-54 (7th Cir. 1982); *Loctite Corp. v. Fel-Pro, Inc.*, 667 F.2d 577, 585 (7th Cir. 1981).
\item \footnote{322} 676 F.2d 245 (7th Cir. 1982).
\end{itemize}
ney with a challenge to 56 hours on this basis; the fact that the case redressed an individual wrong rather than benefiting a class or vindicating the public interest; and the fact that there was a substantial monetary judgment and a contingent fee agreement between the attorneys and client—which represent a reasonable basis for the fees awarded by the lower court. The case suggests that, while a detailed statement of the reasons for an award are obviously useful on review, the appellate court should examine the full record closely in an effort to justify the lower court award.

More detailed findings and conclusions by the lower court on questions of duplication of effort, the factual and legal complexity of the case and the amount of time spent by the attorneys on certain tasks made it relatively easy for the Court of Appeals to uphold the fee award in Patterson v. Youngstown Sheet and Tube Co. Similarly, in upholding an award of fees to the defendants in Reichenberger v. Pritchard the court was able to rely on an explicit finding of the trial court that the case satisfied the Christiansburg Garment Co. v. EEOC criteria for awarding fees to a prevailing defendant. Factual findings are also important in determining whether or not plaintiffs have prevailed in some cases. In Stewart v. Hannon, a case challenging a written examination used in determining promotions from the position of assistant principal to principal in the Chicago public schools, the defendants decided not to use the 1978 examination results once they realized their use had an adverse impact on minorities. The question is whether the plaintiffs prevailed in a “practical sense”, a determination which requires consideration of two criteria: “(1) whether the litigation benefited the plaintiff and the class, and (2) whether the lawsuit acted as a catalyst, or was a material factor in the defendant’s decision to change the disputed practices. . . .” Both of these criteria raise fact questions which are to be determined by the district court and the court found sufficient evidence in the record to support the lower court’s finding that the plaintiffs were not the prevailing parties.

The situation and holding in Stewart should be compared with

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323. Id. at 253-54.
324. See also, Harrington v. DeVito, 656 F.2d 264, 269 (7th Cir. 1981) (the record supports an implicit finding of the lower court and “an abuse of discretion only occurs where no reasonable person could take the view adopted by the trial court”).
325. 659 F.2d 736, 740-41 (7th Cir. 1981).
326. 660 F.2d 280, 288-89 (7th Cir. 1981).
328. 675 F.2d 846 (7th Cir. 1982).
329. Id. at 851, citing Dawson v. Pastrick, 600 F.2d 70, 78 (7th Cir. 1979).
330. Id. at 851-52.
that in Harrington v. DeVito. Here the parties settled the case by consent decree and the court subsequently awarded the plaintiffs $25,000.00 in fees, finding that they prevailed against both the state and county defendant officials. When the defendants were unable to agree to an allocation of the liability for fees, the court ordered the county defendants to pay 80% and the state defendants 20% of the fee award. The state officials, on appeal, claimed that the allocation of fees against the state constituted an abuse of discretion because the plaintiffs had not prevailed against the state. Here the court looked to guidelines for determining prevailing party status, adopted in cases resolved by settlement. Relying on cases decided by the First and Eighth Circuits, the court stated that in order "to prevail in a settled case, the plaintiffs' lawsuit must be causally linked to the achievement of the relief obtained. Secondly, the defendant must not have acted wholly gratuitously, i.e. the plaintiffs' claims, if pressed, cannot have been frivolous, unreasonable, or groundless."333

The court went on to explain that the first step requires that the lawsuit play a "provocative role" in obtaining relief and that this represents a factual determination. The record supports the lower court's implicit conclusion that the state officials took actions in response to the lawsuit. The second inquiry under this test, whether the defendants acted gratuitously, requires a determination of whether the plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Here the court found that the lower court had implicitly rejected the state's contention that its role was purely voluntary by making an award of fees.

While both Stewart and Harrington involve a determination of whether plaintiffs had prevailed even though there had not been a judicial determination on the merits, the tests articulated by the court appear different. Maybe this is because Harrington resulted in a consent decree whereas the plaintiff's argument in Stewart was based, not on a consent decree, but rather on a change in the defendants' position. It is not clear, however, why this difference should dictate a different test. Stewart was decided subsequent to Harrington and it never mentioned Harrington.

331. 656 F.2d 264 (7th Cir. 1981).
333. 656 F.2d at 266-67.
334. Id. at 267.
335. Id. at 268, quoting from Nadeau v. Helgemoe, 581 F.2d at 281.
336. Id.
A very difficult attorney fee issue arises when plaintiffs clearly prevail on one or more claims, but less than all of the claims raised in the litigation. The plaintiff in *Syvock v. Milwaukee Boiler Manufacturing Co.* brought an action under the Age Discrimination in Employment Act claiming the defendant had laid him off and failed to rehire him in violation of the Act. A jury trial was held on the liability phase and it found that the defendant willfully discriminated against the plaintiff, thus entitling him to liquidated damages under the Act. The court subsequently upheld the jury’s finding of discrimination but granted the defendant a judgment notwithstanding the verdict on the jury’s determination of willfulness, thus preventing double damages. The court also found that the plaintiff had failed to mitigate his damages and awarded a lesser amount accordingly. The lower court awarded attorney fees, but only for seventy hours instead of the requested 400 hours. The Court of Appeals upheld the initial reduction to 200 hours and the refusal to apply a 25% multiplier; however, it found that the trial court erred in its interpretation of *Muscare v. Quinn.*

Recognizing some apparent inconsistencies within the Circuit, the court examined three prior decisions in some detail and attempted to reconcile them. The first, *Muscare v. Quinn,* was characterized by the *Syvock* court as a case where the plaintiff presented two independent claims for relief, *i.e.*, a first amendment challenge to a regulation and a due process challenge to the procedures utilized in suspending him, and prevailed on only one of them. In contrast, the court found that *Syvock* presented only one claim, *i.e.*, that the defendant discriminated against him under the ADEA because of his age, and the plaintiff “essentially succeeded” in this claim. He prevailed in his ADEA claim even though he failed to establish willfulness and that he had mitigated damages. However, that failure did not justify diminishing his award of attorney fees.

The court then went on to find that the other two circuit decisions, *Sherkow v. Wisconsin Department of Public Instruction* and *Busche v.*
Burkee, are consistent with Muscare. As noted in Syvock, the Sherkow opinion is not clear as to which part of plaintiff's claim was unsuccessful. The court in Sherkow simply stated: "[s]ince the plaintiff prevailed in part but not as to her entire claim against the defendant, should her recovery of attorneys' fees and expenses be reduced accordingly?" After quoting extensively from a Sixth Circuit decision, Northcross v. Board of Education of Memphis City Schools, the court in Sherkow simply concluded that "[o]nce it is determined a plaintiff has prevailed, then the plaintiff is entitled to recover for all the time reasonably spent on a matter." The apparent adoption of the Northcross test could reasonably lead one to believe that Sherkow is inconsistent with Busche. The Northcross test for §1988 cases is simply whether the plaintiff prevailed "on the case as a whole." A different panel of the Seventh Circuit in Busche had rejected the Northcross test and completely ignored Sherkow. Under the Busche test the plaintiff has to demonstrate the number of hours attributable to the prosecution of successful claims and this calculation "presumably includes time spent on unsuccessful claims to the extent such time would have been spent in connection with the successful claims even if the unsuccessful claims had not been brought."

The plaintiff in Busche alleged that his procedural due process rights were violated in the termination of his employment as a police officer. According to the court in Syvock, Busche asserted three independent claims against the defendants—"that the charges filed against him before the Commission were constitutionally insufficient, that the Commission's written findings and conclusions were constitutionally deficient, and that his termination was unlawful because he was afforded no pretermination hearing"—and he prevailed on only the third. The court in Syvock further characterized the unsuccessful claims in Busche as independent, like those in Muscare, in that they were "not mere aspects of a larger claim that affected the amount of damages he was due for for the claim on which he did succeed."

Thus, the four cases are apparently reconciled as follows: the

343. Id. at 164 n.22.
344. 630 F.2d 498, 504 (7th Cir. 1980).
345. 611 F.2d 624, 635-36 (6th Cir. 1979).
346. 630 F.2d at 504.
347. 611 F.2d at 636.
348. 649 F.2d 509, 522 (7th Cir. 1981). In rejecting Northcross, the court noted that it might have considerable merit but found it "at odds with the formulation" adopted in Muscare. Id.
349. Id. at 521.
350. 665 F.2d at 164.
351. Id. at 165.
plaintiffs in *Busche* and *Muscare* presented independent claims and prevailed on less than all of them; the plaintiff in *Sherkow* claimed unlawful sex discrimination by reason of the defendant’s failure to promote her and the subsequent retaliation against her and she prevailed on both; the plaintiff in *Syvock* presented one claim of age discrimination and essentially succeeded. The critical inquiry seems to relate to the independence of the separate claims. The closer they are related and the more they rely on the actions of the same defendants and the same fact situation, the easier it is to argue that a plaintiff has “essentially succeeded.”

Considerable deference was shown to the trial courts which awarded fees to prevailing defendants under § 1988 and Title VII. In *Reichenberger v. Pritchard* the court identified four factors to be considered in determining whether prevailing defendants are entitled to fees. These are (1) whether the issue is one of first impression; (2) whether the controversy is sufficiently based upon a real threat of injury to the plaintiff; (3) whether the trial court made a finding that the suit was frivolous; and (4) whether the record would support such a finding. The plaintiffs in that case were owners and operators of two nightclubs which sell liquor and present nude dancing entertainment. They claimed that the defendants had conspired to eliminate the nude dancing by interfering in various municipal administrative proceedings involving the operation of the nightclubs. Because of the plaintiffs’ “threshold inability to allege injury or deprivation of constitutional rights,” the court found that it fell within the *Christiansburg* guidelines. In addition, the court noted that the defendants had a clear defense in that they were exercising first amendment rights of speech, assembly, and petition.

A suit against municipal officials to enjoin the collection of property taxes and recover damages was found to be meritless if the plaintiff “should have known that his claim for injunctive relief would be dismissed for lack of subject matter jurisdiction.” As to the claim for

352. *Id.*
353. *Id.*
354. *Id.* at 288.
355. *Id.*
356. *Id.*
357. *Id.*
358. *Id.*
359. *Id.*
damages, the court upheld the district court's determination that it was meritless because the plaintiff "knew that there were no facts or inferences that could reasonably support a finding that defendants acted in bad faith."360 Even though the court recognized that under Gomez v. Toledo361 the plaintiff did not have to plead bad faith, he did plead that the defendants had acted maliciously, intentionally and recklessly but attached exhibits which seemed to contradict these allegations.

In a final case awarding fees to a prevailing defendant, Bugg v. International Union of Allied Industrial Workers of America,362 the court considered the question of whether fees should be awarded to a defendant/appellee who prevails on appeal in a Title VII case. The award of fees to the defendant for the trial work was not contested on appeal. Relying in part in Bond v. Stanton,363 the court found no reason to distinguish between trial and appellate time under Title VII. The question then would be whether the plaintiff's appeal falls within the Christiansburg guidelines and the determination by the district court that the original action was frivolous or meritless is not necessarily determinative, although it is probative.364 In awarding fees to the defendant/appellee on appeal the court noted that the arguments on appeal were essentially the same as those rejected by the lower court, the additional allegations were either collateral or meritless, the plaintiff/appellant had consumed considerable time and energy of both the court and defendant's counsel by repeatedly attempting to modify the record and the appellate court had explicitly rejected the plaintiff's motion for appointment of counsel.365 While recognizing the danger of discouraging valid claims by awarding fees to defendants/appellees, in view of the frivolity, unreasonableness and lack of foundation for the appeal, the court found that this case was appropriate for such an award.

Three cases dealt quite extensively with issues involved in determining the amount of fees to award a prevailing plaintiff. In a Title VII case, Chraliwy v. Uniroyal, Inc.,366 the parties settled the case on the merits with the defendant agreeing to pay attorney fees in an amount to be established by the court. While indicating that the Seventh Circuit had never expressly adopted the "lodestar" method, the

360. Id. at 196.
361. 446 U.S. 635 (1980).
362. 674 F.2d 595 (7th Cir. 1982).
363. 630 F.2d 1231 (7th Cir. 1980).
364. 674 F.2d at 600 n.10.
365. Id. at 600-01.
366. 670 F.2d 760 (7th Cir. 1982).
court did indicate it had approved using "hours times billing rate" as a convenient starting point in determining a fee award and making any necessary adjustments upward or downward based on the factors established in *Waters*.\(^{367}\) In concluding that the 11,000 hours expended by counsel for the plaintiffs was not unreasonable, the court seemed influenced by the fact that counsel for the defendant had spent the same number of hours on the case.\(^{368}\) The court also held that the lower court erred in excluding the hours of plaintiffs' counsel spent in efforts to persuade the federal government to debar the defendant from its federal contracts.\(^{369}\)

Determining a reasonable billing rate was complicated in this case by the fact that some of the plaintiffs' attorneys practice in Washington, D.C. and New York where the billing rates are substantially higher than South Bend, where the case was litigated. The district court, while indicating that the congressional policy of § 706(k) would not be advanced by limiting plaintiffs' counsel to the local rate and noting that the requested rate must be balanced against the local rate, nevertheless awarded only the local rate of $85.00 per hour. The Seventh Circuit reversed holding that, while the rate customarily charged in the locality remains a factor, non-local attorneys should not be precluded from recovering their usual rate where they have specialized skills not readily available in the locality where the case is tried.\(^{370}\) In other words, it is reasonable for a party to look outside of the local area if necessary to find an attorney with specialized skills and it is also reasonable to compensate a specialist at a higher rate.

The final issue in *Chrapilwy* concerns the district court's upward adjustment of the basic fee in the amount of $50,000.00 because of the

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367. *Id.* at 763-64 n.5. *See* *Waters v. Wisconsin Steel Works of Int'l Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976). A "lodesstar" amount is determined by multiplying the allowable hours worked by a reasonable hourly rate.

368. An earlier case, *Mirabal v. General Motors Acceptance Corp.*, 576 F.2d 729, 730-31 (7th Cir. 1978), which might suggest that a comparison between plaintiffs' and defendant's counsel is improper, was distinguished by the court. 670 F.2d at 768 n.18.

369. The Seventh Circuit stated:

> We think [the lower court's] interpretation of Section 706(k) is too narrow. The plaintiffs at all times pursued their Title VII action. Their efforts to have the defendant debarred from its federal contracts on the basis of the same discrimination charged in the Title VII action were designed to move the Title VII case toward ultimate disposition. This desired effect was achieved, because the threat of debarment on account of discrimination caused the defendant to settle the Title VII action. Thus, the plaintiffs' pursuit of debarment was a service which contributed to the ultimate termination of the Title VII action, and in that sense was within the Title VII action.

670 F.2d at 767. This interpretation was found to be consistent with *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980).

370. 670 F.2d at 768-69.
risk involved and $200,000.00 for the quality of representation. As to the risk factor, the Seventh Circuit affirmed stating that "[f]ifty thousand dollars to account for the risks involved in representing the plaintiffs on a contingent basis in a complex class action is a modest, if not meager, award." As to the quality factor, the court indicated that the lower court’s consideration of quality was appropriate; however, it was remanded for further consideration on this issue in light of the holding that the Washington and New York attorneys were entitled to their customary rates. To allow both the higher basic fee and the quality adjustment could result in overlap and the case was therefore remanded on this issue.

The question of the appropriateness of an incentive or multiplier also arose in two other cases. In *Bonner v. Coughlin* the district court allowed a multiplier on reconsideration after originally denying it. On appeal it was decided that the case was not appropriate for use of a multiplier for the following reasons: the contingent nature of the fee does not alone justify use of a multiplier; while plaintiff’s counsel was skilled in prison rights litigation, the result obtained—a $100.00 judgment—was minimal; there was some question about the reasonableness of the number of hours claimed; the significance of the precedential value of the decision is questionable; undesirability is less of a factor when the attorney specializes in such cases; and there was no indication that representation in this case precluded other employment. Finally, the delay between the time some of the legal services were rendered and actual payment, while a factor in determining fee awards, does not justify a multiplier if fees are awarded at current rates prevailing in the locality, rather than the presumably lower rates at the time the services were rendered. Finally, in *Tidwell v. Schweiker* the court concluded that it was an abuse of discretion for the lower court to attach a 1.5 multiplier to the attorney fees awarded to the plaintiff. The multiplier was based on the importance of the results achieved; the Court of Appeals recognized the importance of the results but did not agree that they justified the multiplier.

371. *Id.* at 770.
372. *Id.*
373. 657 F.2d 931 (7th Cir. 1981).
374. *Id.* at 936-37.
375. *Id.* at 937. The court also held that it was not an abuse of discretion to compensate both in court and out of court time at the same rate. This assumes, of course, that the rate does not reflect the normally higher rate for in court time. *Id.*
376. 677 F.2d 560, 570 (7th Cir. 1982).
377. The court did, however, recognize that in some cases the results alone might justify a multiplier. *Id.* at 570 n.14. It is not clear why the results alone did not justify a multiplier in this
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Tidwell also dealt with two other issues: whether there was duplication on the part of plaintiffs' counsel and whether the state defendants could be held responsible for fees relating to issues which they claim involved only federal defendants. As to duplication, the court agreed with the district court that there was no duplication of effort primarily because there were two sets of plaintiffs and, after the cases were consolidated, attorneys for one set of plaintiffs were designated as lead counsel. Most of the hours billed by the other attorneys related to work done prior to consolidation.\textsuperscript{378} Obviously, a clear delineation of the respective duties and responsibilities of counsel helps to avoid a duplication argument. As to the remaining issue, whether the federal officials only were culpable, the lower court found that a conspiracy existed between the two sets of defendants. Therefore, the lower court's finding that both federal and state defendants were liable was well within its discretion.\textsuperscript{379}

C. Other Enforcement Issues

The court faced several other issues which are quite common in civil rights litigation. Three of them—state action, the article III case or controversy requirement and qualified official immunity—will be discussed.\textsuperscript{380}

1. State Action

In \textit{Bloomer Shippers Association v. Illinois Central Gulf Railroad Co.}\textsuperscript{381} the plaintiffs claimed that the Illinois Central, in retaliation for

\begin{quote}
the state statutory and regulatory scheme involving the use of the challenged form was found invalid under the supremacy clause on behalf of a class consisting of all past and present patients in state mental institutions whose disability benefits were wrongfully appropriated by the state. The court did note that the facts are relatively simple and the suit, while novel, was not so different or unique as to warrant a multiplier. \textit{Id.} at 570.
\end{quote}

\textsuperscript{378} 677 F.2d at 570.

\textsuperscript{379} Id. at 569.

\textsuperscript{380} Other cases involving relatively uncontroversial civil rights issues include Richardson v. City of Indianapolis, 658 F.2d 494, 501 n.1 (7th Cir. 1981) (in a § 1983 action seeking damages resulting from a shooting and killing by a police officer, an instruction to the effect that the officer's act resulting in the death "must have been intentional or motivated by maliciousness or by a callous disregard for the consequences" is not erroneous); \textit{Id.} Reichenberger v. Pritchard, 660 F.2d 280 (7th Cir. 1981) (in an action alleging that the defendants conspired to eliminate nude dancing in the plaintiff's nightclubs by interfering in municipal administrative proceedings, the plaintiff did not state a cause of action because the injury complained of was too speculative, tentative and hypothetical); United States of Am. v. 16.92 Acres of Land, Etc., No. 81-1190 (7th Cir. filed Mar. 30, 1982) (an equal protection challenge to a federal statute governing eminent domain proceedings and setting different classifications for property is governed by a "relatively relaxed" rational basis standard which was met because the classification is rationally related to a legitimate legislative goal).

\textsuperscript{381} 655 F.2d 772 (7th Cir. 1981).
their complaint to the Interstate Commerce Commission, had unlawfully discontinued service to a grain company and terminated the plaintiffs' leases and attempted to evict them in state court. The plaintiffs argued that the defendant was subject to a § 1983 action because 1) it is a "heavily regulated utility" with its rates, regulations and practices subject to review by several state agencies, 2) it had eminent domain powers and 3) it was subject to the power of the State Commerce Commission to approve or disapprove leases, sales or exchanges of property. Although conceding that the Illinois Central is a "heavily regulated utility," the court indicated the defendant did not act under color of state law because there was not a sufficient nexus between the state and the challenged action. Monopoly status alone is insufficient; the service provided by the defendant is not a state function and the mere fact that it is a business affected with the public interest does not make its action "state action." Further, the court found that the defendant's use of the state courts for the forcible entry and detainer actions against some of the plaintiffs does not satisfy the state action requirement under § 1983.

To the extent the plaintiffs in Bloomer Shippers Association relied on Illinois Central's forceable entry and detainer actions in the state courts to establish that the defendant acted "under color of state law" for § 1983 purposes, the case raises a question of the applicability of a recent Supreme Court decision, Lugar v. Edmondson Oil Co. In Lugar, the company obtained a pre-judgement writ of attachment issued by a Virginia court clerk based on an ex parte petition alleging Lugar was disposing or might dispose of his property to avoid his creditors. After a hearing, thirty four days after issuance of the writ, the state court dismissed the attachment order because the statutory grounds for such attachment had not been satisfied.

Subsequently, Lugar brought an action under § 1983 against Edmondson Oil Co. and its president claiming they had acted jointly with the state to deprive him of his property without due process of law. The complaint sought both compensatory and punitive damages for losses caused by the improper attachment. Based on Flagg Brothers, Inc. v. Brooks the district court dismissed the case on the grounds

384. 102 S. Ct. 2744 (1982).
that the actions of the defendants did not constitute state action as re-
quired by the fourteenth amendment. The Court of Appeals affirmed
the dismissal, but for a different reason. It indicated that while there
was "state action" as required by the fourteenth amendment, the com-
plaint did not allege conduct "under color of state law" as required by
§ 1983. The case thus raises the question of whether the "state action"
requirement of the fourteenth amendment is identical to the "under
color of state law" requirement of § 1983.

Confusion relating to this issue was unnecessarily caused by the
following statement in Flagg Brothers:

A claim upon which relief may be granted ... under § 1983 must
embody at least two elements. [Plaintiffs] are first bound to show
that they have been deprived of a right "secured by the Constitution
and laws" of the United States. They must secondly show that [the
defendant] deprived them of this right acting "under color of any
statute" of the State of New York. It is clear that these two elements
denote two separate areas of inquiry.386

Of course there are at least two elements of a § 1983 action, i.e., does
the plaintiff meet the requirements of § 1983 and does the plaintiff have
any enforceable rights under the federal constitution or statutes. These
are obviously separate areas of inquiry. Accepting that, however, does
not imply that "state action" and "under color of state law" are differ-
ent requirements since there are additional inquiries necessary with re-
spect to each.387

In Lugar, the Court first noted "it is clear that in a § 1983 action
brought against a state official, the statutory requirement of action
'under color of state law' and the 'state action' requirement of the Four-
teenth Amendment are identical."388 Referring to the confusing state-
ment in Flagg Brothers, quoted above, the Court indicated this does not
mean that state action, if present, might not satisfy § 1983. The Court
attempted to reconcile its "two separate areas of inquiry" language
from Flagg Brothers with its holding in Lugar. It indicated the two are
not inconsistent because: (1) even though satisfying the state action re-
quirement of the fourteenth amendment satisfies the under color of law
requirement of § 1983, the reverse is not necessarily true; and (2) in
§ 1983 cases enforcing constitutional or statutory provisions which do
not require state action, the § 1983 requirement of action under color of

386. Id. at 155-56.
387. For example, to establish a due process claim there must be a protected interest; the
availability of § 1983 to enforce federal statutes depends on whether Congress intended to fore-
close § 1983 as a conduit. See supra notes 289-311 and accompanying text.
388. 102 S. Ct. at 2750.
state law would be a distinct element of the case not automatically satisfied by a finding of a violation of the federal right.\(^{389}\)

The first explanation is not very convincing, particularly in light of the earlier statement to the effect that the two requirements are "identical." Also the Court gives no clue as to why "state action" should require more than "under color of state law."\(^{390}\) The second explanation is the more logical and in essence means that Flagg Brothers never intended to suggest that state action and under color of law were not identical. All this suggests is that a § 1983 plaintiff must satisfy two elements because § 1983 is only a conduit to enforce other rights. Therefore, a plaintiff must not only demonstrate a violation of the substantive federal right involved, but also must meet the requirements of § 1983, including the under color of law requirement.\(^{391}\)

Regarding the state action requirement, it was stated that prior cases "have accordingly insisted that the conduct allegedly causing the deprivation of a federal right be fairly attributable to the state."\(^{392}\) Determining the "fair attribution" question requires a two part approach:

First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state.\(^{393}\)

Application of this two part approach required the Court to review separately the two counts of the complaint relating to due process violations. The second count was interpreted to mean that the defendants were charged with acting contrary to the relevant policy articulated by the state. To the extent the state court plaintiff improperly invoked a statute, this could not be attributed to a state rule or state decision and, therefore, the first part of the test was not met.

As to count one, the complaint challenges the state statute providing for prejudgement attachment as being procedurally defective under the due process clause. Clearly, the scheme created by the statute is the product of state action. Therefore, the question was whether the sec-

\(^{389}\) Id. at 2753 n.18.

\(^{390}\) If this were true it would indeed be surprising since the primary purpose of § 1983 is to enforce the fourteenth amendment.

\(^{391}\) See supra note 387 and accompanying text.

\(^{392}\) 102 S. Ct. at 2754.

\(^{393}\) Id.
ond part of the test was met, *i.e.*, are the defendant company and its 

president state actors?

Whatever may be true in other contexts, [invoking the aid of state 

officials to take advantage of state created attachment procedures] is 
sufficient when the state has created a system whereby state officials 

will attach property on the *ex parte* application of one party to a 

private dispute [to characterize the private party as a "state 

actor"]').

In response to Justice Powell's concern that private individuals who 

innocently use seemingly valid state statutes might be liable in damages 

if the statute is subsequently held to be unconstitutional, the majority 

indicated this "should be dealt with not by changing the character of 

the cause of action but by establishing an affirmative defense." Whether a qualified immunity should be available to such private indi-

viduals is a question the Court did not have to reach.

Because the plaintiff in *Bloomer Shippers Association* was not chal-

lenging Illinois' forcible entry and detainer statutes as violating due 

process, but rather challenged the defendant's claimed retaliatory use 

of the procedures, it would seem that *Lugar* should not change the re-

sult in this case.

2. Case or Controversy

Three decisions raised case or controversy issues under Article III. 

In the first, *Johnson v. Board of Education of the City of Chicago*, the 

primary issue was whether the court should reconsider its holding relat-

ing to the constitutionality of student assignment plans based on racial 

quotas. The plaintiff sought an injunction against the school board's 

continued use of racial quotas which have the effect of requiring only 

black children to be transported from their neighborhood schools. This 

relief was sought after the school board and the Department of Justice, 

in other litigation, had entered into a consent decree to develop a sys-

tem-wide integration plan and the board had voluntarily discontinued 

use of the challenged quotas. The district court denied the injunction 

and the court of appeals upheld this denial on the grounds that the 

board's use of the quotas was constitutional. The Supreme Court 
granted certiorari and then remanded the case for a determination of

394. *Id.* at 2756-57.

395. *Id.* at 2757 n.23.

396. *Id.*

397. 664 F.2d 1069 (7th Cir. 1981).

whether the consent decree or any plan implementing the decree had mooted the controversy.

Applying *County of Los Angeles v. Davis*, the court held that “[a] case or controversy may become moot because there is no reasonable expectation that the alleged violation will recur, and interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.” Because both of these conditions must be satisfied before a case will be deemed moot and the board had satisfied neither, the court concluded that the case was not moot. Despite the consent decree, the court found that the use of racial quotas to exclude blacks from the schools in question was not precluded. Therefore, since mere voluntary cessation of the challenged conduct does not moot a controversy, “there remains a reasonable likelihood that the quotas in question may again be used to exclude only blacks from [the two schools].”

Second, the court found that neither the consent decree nor interim events irrevocably eradicated the effects of the alleged violation. Black students continued to be excluded from their neighborhood schools because of their race and thus the effects of the alleged violation continue.

Having determined the case was not moot, the Seventh Circuit affirmed the denial of the requested injunction, primarily because it felt bound by its prior ruling. After stating the test—“[w]hen a federal court of appeals has decided an issue in a case, the court's ruling establishes law which it itself should apply to the same issues in subsequent proceedings in that case absent 'unusual and compelling circumstances'”—the court concluded that the decision in *Fullilove v. Klutznick*, does not warrant a departure from the law of the case. “[T]he result in *Fullilove* does not conflict with this court's determination [in this case] that the use of racial quotas is constitutional in remedial programs designed to remedy the lingering effects of past discrimination.”

A question of mootness also arose in the context of an action by a former jail inmate for declaratory relief and compensatory damages

400. 664 F.2d at 1071.
401. Id. at 1072.
402. See also, Tidwell v. Schweiker, 677 F.2d 560, 564 (7th Cir. 1982), where the court cited Johnson in holding that a party "does not lose the right to appeal simply because it complies with an order of the court."
404. 448 U.S. 448 (1980).
405. 664 F.2d at 1073.
against a sheriff who died subsequent to a judgment in his favor in the district court. The succeeding sheriff had been substituted as defendant pursuant to Rule 43(c)(1) of the Federal Rules of Appellate Procedure. Obviously the new sheriff could not be held personally responsible for the conduct of the prior sheriff. However, because the plaintiff sought damages from the defendant in his official capacity and because "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent . . .," the court concluded that the suit for damages was not mooted by the sheriff's death. The claim for declaratory relief was viewed as a demand for present or prospective relief and, therefore, found to be moot.

The court went on to hold that the deprivation of certain reading materials—pictorial magazines such as Sports Illustrated, Playboy and Newsweek, newspapers and hardbound books—violated the plaintiff's due process and first amendment rights. Since the suit was in essence one against a local governmental entity, and the plaintiff established a violation of due process and first amendment rights based on the former sheriff's enforcement of an official policy, the defendant was not entitled to invoke a qualified immunity.

The disturbing part of the case is the court's holding that absent any proof of injury compensable under § 1983, the plaintiff was entitled to only nominal damages in the amount of one dollar. Without any discussion, the court seems to be equating first amendment violations and violations of substantive due process with the procedural due process violations in Carey v. Piphus and concluding that such violations too are worth only one dollar.

In a class action in which the standing of the named plaintiffs was at issue, the court very interestingly applied mootness principles to uphold their standing. The plaintiffs, who had never signed a state

406. Kincaid v. Rusk, 670 F.2d 737 (7th Cir. 1982).
408. This aspect of the case is somewhat suspect because a declaratory judgment in this context could be viewed as simply establishing liability from which damages could flow.
412. 670 F.2d at 745-46.
413. Fortunately, Kincaid is not being treated as definitive on this question. Subsequently, in Owen v. Lash, 682 F.2d 648, 657-59 (7th Cir. 1982), the court strongly suggested that Carey should not prohibit presumed damages in cases where substantive constitutional rights have been violated and remanded the case to the district court for a determination of the issue.
414. Tidwell v. Schweiker, 677 F.2d 560 (7th Cir. 1982).
form which allowed Illinois to seize the disability payments of persons confined in state mental institutions and use the proceeds to cover the cost of institutionalization, brought an action challenging the use of the form on statutory and constitutional grounds. The court indicated that it should first determine whether there was standing under Article III and, if yes, then determine whether the named plaintiffs satisfy the requirements of Rule 23. It then concluded that the members of a class can satisfy the personal stake requirement at all stages of the litigation, including the point where standing is determined. This is true because the "personal stake" required to prevent mootness is the same as that required for a grant of standing. Because some members of the class had signed the challenged form and suffered the resulting injury, there was standing. Extension of the Article III principles established in the context of mootness cases to the standing inquiry is rather novel, however, sound analytically because both mootness and standing raise the same question of whether or not there is a case or controversy.

The next question was whether the named plaintiffs, who did not sign the challenged form, are proper class representatives within the meaning of Rule 23(a). Here the court found that the "nexus between the named plaintiffs and those class members actually injured by Form 623 is sufficient in this case to ensure that the concerns underlying Rule 23 are not undermined." The nexus is established by the fact that all patients admitted to the state facility were subjected to an illegal system of which the challenged form was a significant part.

3. Immunity

Several immunity questions arose in the context of three consolidated cases brought under two civil rights acts by former state court

415. Id. at 566-67.
416. 677 F.2d at 566.
417. Most decisions indicate that the court must first determine whether the named plaintiff has standing, and then determine the Rule 23(a) questions. See, e.g., the cases cited in C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1766 n.73.1 (1972, Supp. 1981).
418. Fed. R. Civ. Pro. 23(a). The rule states:
   (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
419. 677 F.2d at 566.
420. Id. at 565.
criminal defendants claiming their rights were violated by the use of perjured testimony.\textsuperscript{422} First, the court held that four witnesses—three police officers and a victim of one of the crimes—enjoyed an absolute immunity from § 1983 liability. While recognizing important considerations weighing against absolute witness immunity,\textsuperscript{423} the court was convinced by comments of the Supreme Court in \textit{Butz v. Economou}\textsuperscript{424} to the effect that “[a]bsolute immunity is thus necessary to assure that judges, advocates, and witnesses can perform their respective functions without harrassment or intimidation.”\textsuperscript{425} In addition, because witnesses are subject to cross examination and the penalties of perjury, there is less need for individual suits to enhance the reliability of testimony.

Several prosecuting attorneys who were alleged to knowingly use perjured testimony and withhold material evidence from the appellate courts, were found to enjoy absolute immunity under \textit{Imbler v. Pachtman}\textsuperscript{426} because the alleged misconduct is “intimately associated with the judicial phase of the criminal process.”\textsuperscript{427} The presiding trial judge in one of the cases was also protected by absolute immunity because he was “acting under color of his judicial authority in presiding over [the] trial and in entering judgment and sentence against [the criminal defendant].”\textsuperscript{428} The judge’s court reporters at the criminal proceedings were extended the protection of absolute judicial immunity because they were discharging their official responsibilities.\textsuperscript{429}

The final case involving immunity, \textit{Colaizzi v. Walker},\textsuperscript{430} was already discussed earlier.\textsuperscript{431} It is mentioned again here because the standards for determining a qualified immunity have been somewhat modified by the recent Supreme Court decision in \textit{Harlow v. Fitzgerald}.\textsuperscript{432} In \textit{Harlow} the Court recognized its decisions have established that the qualified or good faith immunity defense has both an “objec-
"tive" and a "subjective" aspect. The objective element relates to whether the official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff];" the subjective element addresses whether the official "took the action with malicious intention to cause a deprivation of constitutional rights or other injury. . . ." The Court then noted its dissatisfaction with this test because "the subjective element of the good faith defense frequently has proved incompatible with our admonition in Butz that insubstantial claims should not proceed to trial." In other words, the Court was concerned with the fact that lower courts were regarding the subjective element as creating a question of fact requiring resolution by a jury. This, of course, allowed bare allegations of malice to preclude summary judgment and almost automatically subject public officials to the substantial costs which attend full litigation. The Court, therefore, concluded:

that bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

In essence, the Court has eliminated the subjective element and now defines the limits of qualified immunity in objective terms only.

The primary impetus for this change seems to be the Court's interest in making possible the resolution of insubstantial claims on summary judgment. No discovery should be allowed until the threshold immunity question, whether the law was clearly established at the time of the official's challenged conduct, is resolved. If the law was clearly established, then the immunity defense would normally fail because reasonably competent public officials should know the law controlling their conduct. However, where an official pleading the immunity defense claims extraordinary circumstances and can show that he neither knew nor should have known of the relevant clearly established law, then the immunity defense should be sustained. Under this standard, summary judgment in Colaizzi would have been appropriate if

433. Id. at 2737.
435. 102 S. Ct. at 2737.
436. Id. at 2738.
437. Id. at 2739.
438. Id.
the due process law relied upon by the plaintiff was not clearly established when the relevant acts took place. After this article went to press, the Supreme Court handed down two significant decisions regarding issues discussed in the text. Although brief footnote reference was made to these opinions, further elaboration follows:

In Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 103 S. Ct. 948 (1983), the Supreme Court overturned the Seventh Circuit decision, discussed at pages 605-607, supra. It rejected the appellate court's analysis of this case as an equal access problem where a particular viewpoint was being discriminated against. Instead it held, in a 5-4 opinion, that the case did not involve a public forum or even a "limited public forum;" therefore, the policy only had to be reasonable. The Court found no indication that the school board intended to discourage one viewpoint and advance another; instead they found the access policy was based on the status of the unions. The differential access was reasonable because it was consistent with the district's legitimate interest in preserving the property for the use to which it was lawfully intended, i.e., it enabled the recognized union to perform its obligation as the exclusive representative of all Perry Township teachers. Having failed to recognize a viable first amendment argument, the Court summarily rejected the equal protection claim. Since the policy did not burden a fundamental right of the minority union, the school district policy only needed to rationally further a legitimate state interest. Note that the four dissenters agreed with the Seventh Circuit analysis that the exclusive access policy amounted to "viewpoint discrimination" that impermissibly infringed on the union's first amendment rights. *Id.* at 960.

Reaching the same conclusion as the Seventh Circuit, discussed at pages 637-40, the Supreme Court in EEOC v. Wyoming, 103 S. Ct. 1054 (1983), narrowly upheld the extension of ADEA against a tenth amendment claim. Assuming that congress acted under the commerce clause in extending ADEA to cover state and local governments, the five judge majority proceeded to apply the three-prong *Hodel* analysis. The Court concluded that the third prong was not met, i.e., the act did not "directly impair" the state's ability to "structure integral operations in areas of traditional government functions." *Id.* at —. The Court concluded that the degree of federal intrusion was sufficiently less serious than in the *National League of Cities* case so as to justify upholding the provision. The following differences were noted: (1) ADEA simply requires states to achieve its goals in a more individualized and careful
manner than would otherwise be the case; (2) the state may defend ADEA claims by showing that age is a "bona fide occupational qualification," within the meaning of the act; (3) ADEA will not have substantial consequential effects on state decisionmaking, such as the allocation of state financial resources. *Id.* at 1062.