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TROGDON, ERNEST WAYNE

THE EFFECT OF THE CIVIL RIGHTS LAW OF 1871 ON TEACHER
DISMISSAL

The University of North Carolina at Greensboro

ED.D.

1980

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THE EFFECT OF THE CIVIL RIGHTS LAW
OF 1871 ON TEACHER DISMISSAL

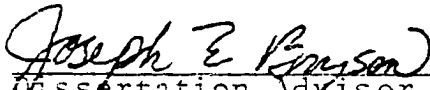
by

E. Wayne Trogdon

A dissertation Submitted to
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Doctor of Education

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APPROVAL PAGE

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Administrators and school boards are charged with the responsibility of renewing or dismissing teachers. When the school board elects to dismiss a teacher, considerable care must be taken to insure that the constitutional rights of the teacher are not violated in the dismissal process. If an individual's protected rights are violated, school officials can be held liable for their actions under the Civil Rights Law of 1871 (42 U.S.C. Section 1983). Relief under this act may take the form of equity or damages.

The Civil Rights Law of 1871 was an obscure, forgotten piece of legislation that was originally passed by the Forty-second Congress in response to the illegal activities of the Ku Klux Klan in Southern states. In 1961 the Supreme Court rediscovered the law and opened the federal judiciary to suits against public officials. Board members, administrators, and the like could be sued under Section 1983. During the late sixties and throughout the seventies teachers have extensively used Section 1983 as a tool for challenging alleged unconstitutional acts in their dismissals. This potential liability has forced school board members and administrators to stay abreast of the constitutional rights of teachers.

This study: (1) reviews court decisions that provide an in-depth analysis of Section 1983 litigation and the impact this litigation has on teacher dismissal process; and (2) examines the use of Section 1983 by the federal courts specifically in the Fourth Circuit.

Judicial review indicates that in regard to Section 1983: (1) qualified immunity (acting without malice and without violating a constitutional right) provides a great deal of protection for school officials; (2) if a prima facie case is established, the defendant must prove his entitlement to the qualified immunity defense; (3) First Amendment Rights are closely guarded by courts and deserve special caution from school officials; (4) if just cause for dismissal exists, procedural difficulties that do not produce provable injury cannot result in back pay or damages other than nominal damages set at one dollar; (5) any constitutional violation will normally entitle a plaintiff to attorneys' fees; (6) initially, a lawsuit does not have to mention Section 1983 specifically but must include the general allegation that a federally protected right was violated; (7) section 1983 lawsuit may be instituted in federal or state court; (8) generally, plaintiffs are not required to exhaust state judicial or administrative remedies before bringing suit for damages; (9) courts have recognized customs in the absence of written policies and procedures and have rejected respondeat superior; (10) statute of limitations is borrowed from state law, normally three years; (11) school boards are

viewed as municipal corporations and, therefore, do not enjoy Eleventh Amendment immunity.

Judicial review indicates that board members and administrators must continually examine the constitutional validity of board policies, rules, and customs. Legal counsel should be sought whenever litigation might develop. The study establishes the need for school boards to protect themselves with personal liability insurance and also insurance that will protect the liability of the board as an entity. The study further establishes that board members who act in good faith and base teacher dismissals on just cause, should have little difficulty defending their official acts if challenged under Section 1983.

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TABLE OF CONTENTS

	Page
APPROVAL PAGE	ii
ACKNOWLEDGMENTS	iii
CHAPTER	
I. INTRODUCTION	1
Statement of the Problem	3
Questions to be Answered	3
Scope of Study	5
Methods, Procedures, and Sources of Information	6
Significance of Study	7
Design of the Study	9
II. HISTORICAL ANALYSIS OF CIVIL RIGHTS LAW OF 1871	11
Adoption of the Civil Rights Law of 1871	19
From 1871 to <u>Monroe v. Pape</u>	25
Reemergence of <u>42 U.S.C. Section 1983</u>	28
III. LEGAL ANALYSIS OF NATIONAL CASES CLARIFYING 42 U.S.C. SECTION 1983 AND TEACHER DISMISSAL	32
Civil Rights Litigation	33
Liability and Immunity Under Section 1983	35
First Amendment Rights	47
Fourteenth Amendment Procedural Due Process	52
Eleventh Amendment Immunity	56
Statute of Limitations	59
Exhaustion of Remedies	60
Attorneys' Fees	62
Liability of School Officials in Their Official Capacities or as Entities	64
IV. SECTION 1983 LITIGATION IN NORTH CAROLINA AND THE FOURTH CIRCUIT	75

	Page
V. SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS . . .	90
Summary	90
Conclusions	95
Recommendations for Educational Officials	98
Recommendations for Future Research	102
Concluding Statement	103
BIBLIOGRAPHY	104

CHAPTER I
INTRODUCTION

School board members and school administrators who take actions or enforce regulations that result in statutory or constitutional violations may be liable for monetary damages, primarily as the result of the rediscovery of the Civil Rights Law of 1871 under Section 1983.

This rediscovery has caused board members and administrators to carefully examine their actions to insure that they do not violate an individual's constitutional rights.

The Civil Rights Act of 1871, 42 United States Code Section 1983, provides:

Every person who, under color of a statute, ordinance, regulation, custom or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceedings for redress.¹

Personal awards of money damages against school board members and administrators are a relatively recent phenomenon. Traditionally, the courts have awarded only equitable relief as opposed to money damages.

Teachers facing dismissal were often at the mercy of incompetent or irresponsible administrators and board members

¹42 U.S.C. sec. 1983 (1871).

who violated the constitutional rights of teachers without fear of personal monetary damages. Legal redress for violation of an individual's basic rights was limited. Recently through the use of 42 U.S.C. Section 1983, teachers have had a tool to protect their constitutional rights. Recent court rulings have defined and broadened the use of 42 U.S.C. Section 1983.

The overall purpose of this study is to provide teachers, school board members, and administrators with an appraisal of the use of the Civil Rights Law of 1871 regarding teacher dismissal. This study could be used as a guide in determining the teacher's use of 42 U.S.C. Section 1983 in a suit in which the teacher believes that his civil rights have been violated.

Also, the study is designed to assist school administrators and school board members in avoiding liability for violating teachers' constitutional rights. The immunity of administrators and school board members is examined to provide an understanding that will assist both parties in acting in a professionally competent manner in regard to teacher dismissal.

Selected court cases are examined to provide national overview of the use of 42 U.S.C. Section 1983 and also cases from the Fourth Circuit and specifically North Carolina will be examined as to the application of Section 1983.

Statement of the Problem

Administrators and boards of education are charged with the responsibility of renewing or dismissing teachers. Along with this responsibility is the realization that the general public has little faith in the school systems and exerts considerable pressure to dismiss ineffective teachers. While the need for effective teachers certainly exists, administrators and school board members must be cognizant of the constitutional rights of teachers or face liability for their actions under Section 1983.

Knowledge of constitutional law and proof that actions were taken without malice or ill will are essential ingredients needed to avoid liability suits. An active, on-going effort is necessary to expose areas that might result in liability and equally important is the stance of good faith in all official acts. Teacher dismissal can only occur as a fair, unbiased act which does not violate the individual's constitutional rights.

Questions to be Answered

The measures that school board administrators and school board members should adopt in order to avoid money damages due to violation of teachers' civil rights under 42 U.S.C. Section 1983 are an important area of this study. To inform teachers of the constitutional protection that 42 U.S.C. Section 1983 offers is also an integral feature. Listed on the following page are several key questions

concerning the relationships of school administrators, school board members and teachers to the Civil Rights Law of 1871 which are to be answered in this research.

1. What is the historical significance of the Civil Rights Law of 1871? What was it originally intended to do? How did it develop? How and why did it re-emerge?
2. What is the present legal status of the Civil Rights Law of 1871? What trends have developed concerning its use?
3. What are the implications of the evolution of constitutional law which permits judgments against school districts as entities as opposed to the traditional interpretation of Section 1983 which forced plaintiffs to sue only the individuals involved?
4. What is the nature of the defense that a school official must make in order to avoid liability under Section 1983? Must defendants in a Section 1983 action prove their immunity? How is immunity affected by such terms as . . . good faith, misfeasance, Eleventh Amendment?
5. Are school board members and administrators liable for emerging or evolving constitutional rights?
6. What is the statute of limitations for a 1983 lawsuit?
7. Can a Section 1983 lawsuit be instituted in federal or state court, and does the initial complaint have to mention specifically Section 1983?

8. What are the status and effect of awarding attorneys' fees in Section 1983 actions?
9. What has been the general interpretation of the Fourth District and more specifically North Carolina regarding teacher dismissal cases and Section 1983 of the Civil Rights Law of 1871?
10. What measures should school boards consider to avoid monetary damages from actions instituted under 42 U.S.C. Section 1983?

Scope of Study

This study examines the origin and development of 42 U.S.C. Section 1983 and its significance in regard to teacher dismissal. National and local cases relating to Section 1983 are examined concerning school teacher dismissals. Examination of higher education cases is limited. Some attention is devoted to student rights cases which influenced litigation under Section 1983.

Considerable attention is given to emerging trends since the United States Supreme Court's decision in Wood v. Strickland.² The cases selected will be dissected to expose the complexities confronting lawyers, courts, professional personnel, and school board members in relation to Section 1983 and its protection of constitutional rights.

²420 U.S. 308 (1975).

Methods, Procedures, and Sources of Information

The basic research technique of this legal historical study is to examine and analyze the available references concerning the Civil Rights Law of 1871, 42 U.S.C. Section 1983 and teacher dismissal.

The Civil Rights Law of 1871 became a forgotten law almost upon its passage. Analyses of various historical documentaries was made in order to determine the circumstances that precipitated the emergence and disappearance of the law. The writer (who is a white public school administrator) attempted to examine both traditional white and black historical documentaries³ in order to synthesize an objective determination of the factors that influenced the evolution of the Civil Rights Law of 1871.

A search of Dissertation Abstracts for related topics was made. Journal articles related to the topic have been located through the use of such sources as Reader's Guide to Periodical Literature, Education Index and Index to Legal Periodicals.

³Richard Bardolph, The Civil Rights Record (New York: Thomas U. Crowell Co., 1970), pp. 1-163; Laurent B. Frantz, "Congressional Power to Enforce the Fourteenth Amendment Against Private Acts," in The Supreme Court and Constitutional Acts. Edited by Martin M. Shapiro (Atlanta: Scott Foresman and Co., 1967), pp. 142-160; Eugene Gressman, "Post-war Revolution in Civil Rights--and Judicial Counter Revolution," in Black Americans and The Supreme Court Since Emancipation. Edited by Arnold M. Paul (New York: Holt Rinehart and Winston, 1972), pp. 1-9; Howard Meyer, The Amendment That Refused to Die (Radnor, Penn.: The Chilton Book Co., 1973), pp. 1-89; Charles W. Quick and Donald B. King, "An Overall View" in Legal Aspects of the Civil Rights Movement. Edited by Donald B. King (Detroit: Wayne State University Press, 1965), pp. 7-34.

A computer search from Educational Resources Information Center (ERIC) was made in order to review related literature, General research summaries were examined in the Encyclopedia of Education Research and in various books on school law.

Federal and state court cases related to 42 U.S.C. Section 1983 were located through the use of the Corpus Juris Secundum, American Jurisprudence, The National Reporter System, and the American Digest System.

Significance of Study

Traditionally, tort cases represented the majority of legal actions involving schools. These actions under the common law of torts for harm provided the school official with considerable immunity which freed him from liability for harm caused others through governmental acts. He needed to be free "to exercise his discretion and to perform his official duties without fear that his conduct will be called into question at an evidentiary hearing or subject him to personal liability."⁴ As W. Prosser, a leading academic authority on tort law states: "A public officer cannot be held liable for doing in a proper manner an act which is commanded or authorized by a valid law."⁵ Under this test an official is immune from suit if the act from which the harm resulted was within the scope of his duty and was undertaken

⁴Hampton v. City of Chicago, 484 F. 2d 602, 607 (7th Cir. 1973).

⁵Prosser, W., Law of Torts 127 (4th ed. 1971).

without malice, corruption, or ill will. The burden of proof is on the plaintiff to prove bad faith.

More recently, actions against school administrators and school board members have become more common under Section 1983 of the Civil Rights Law of 1871. The advantages of Section 1983 instead of tort action are obvious. The Wood v. Strickland decision clarified the immunity of school officials and school board members. It stated that in suits brought under civil rights statutes like Section 1983, a plaintiff need not allege malice. Once the plaintiff demonstrates that his constitutional rights have been violated and brings himself within the statute, the board member must prove at the trial that he acted in sincere belief in the correctness of his behavior and in compliance with the requirements of the Constitution. Under tort law the board member could answer that his acts are those of a governmental officer, and the plaintiff's action will be defeated unless the plaintiff can prove malice or absence of good faith on the board member's part. Under the qualified immunity of the Wood decision, the defendant must raise and prove good faith as a defense or be subject to personal monetary damages. Recently, the courts have determined that school boards can be sued directly under Section 1983. This willingness to allow school boards to be sued directly without necessarily demanding damages from an individual opens the door to suits against the financial resources of school boards. Also, judges and juries may take a different view

of the amount of damages that may be awarded in a Section 1983 suit, if the financial resources of a school district are at stake rather than the personal resources of a school board member or school administrator.

All of these considerations point toward a continued resurgence of the use of Section 1983 of the Civil Rights Law of 1871. Today constitutional protections exist at a time when school administrators and school board members are under tremendous public pressure to improve our nation's schools. One method that school officials have to upgrade schools is to dismiss teachers whose employment is detrimental to the profession. A clear understanding of teacher dismissal and 42 U.S.C. Section 1983 will enable school administrators and school board members to fulfill their charged responsibility of teacher dismissal without violating constitutional rights. This understanding will also help to avoid liability suits against individual board members as persons and against school boards as entities.

Design of the Study

The remainder of the study is divided into three major parts. Chapter two discusses the initial reason for the adoption of the Civil Rights Law of 1871. Consideration is given to the use of 42 U.S.C. Section 1983 from 1871 until the advent of the United States Supreme Court case Monroe v. Pape in 1961.

Chapter three is a legal analysis of national cases that help to clarify 42 U.S.C. Section 1983 and teacher

dismissal. The cases pertain to the following areas: (1) civil rights, (2) liability under Section 1983, (3) First Amendment Rights, (4) Fourteenth Amendment procedural due process, (5) Eleventh Amendment immunity, (6) statute of limitations, (7) exhaustion of remedies, (8) when to file, (9) attorneys' fees, (10) liability of school officials in their official capacities or as entities.

The fourth chapter examines the United States Fourth Circuit decisions concerning Section 1983 and teacher dismissal. The Fourth Circuit interpretation of Section 1983 will also be analyzed.

Chapter five, the concluding chapter of the study, contains a review and summary of the information obtained from the historical analysis and an examination of related cases.

Conclusions concerning the status of Section 1983 and teacher dismissal and related areas are drawn in a form that will, it is hoped, enlighten educators. Finally, suggestions are made to school administrators and school board members to assist them in protecting themselves from Section 1983 liability.

CHAPTER II
HISTORICAL ANALYSIS OF CIVIL RIGHTS LAW OF 1871

On January 1, 1863, President Abraham Lincoln issued the Emancipation Proclamation. This document declared that the slaves in states which were still in arms against the federal government were "forever free."¹ In December, 1863, the House of Representatives received a resolution for a Thirteenth Amendment to the Constitution prohibiting slavery within the United States or any place subject to its jurisdiction. By January, 1865, the Thirteenth Amendment had been ratified and the abolition of slavery became legal.² The Thirteenth Amendment also empowered Congress to maintain this freedom by "appropriate legislation."³

Slavery in the Southern states may have ended legally with the ratification of the Thirteenth Amendment, but slavery did not cease in reality for Negroes. President Andrew Johnson's reconstruction plan enabled Southern states to re-enter the federal government with little difficulty. Johnson pardoned all Southerners who took an oath of allegiance (except for a few important ex-Confederates who had to request special pardons), recognized the loyal governments

¹Emancipation Proclamation, 12 Stat. 1268 (1863).

²U. S. Const. amendment XIII, sec. 1.

³Ibid., sec. 2.

already established by Lincoln in four of the states, and appointed temporary governors in the other seven states, empowering them to hold elections and form state governments. By the end of 1865 all of these states had set up state governments, ratified the Thirteenth Amendment, and according to President Johnson were restored to the Union. In 1865 and 1866 these newly "reconstructed states" enacted laws referred to as the "Black Codes." These laws prohibited Negroes from moving from one place to another and bound them to their former masters as "apprentices." Negroes remained slaves in all but a constitutional sense. By virtue of these codes, Negroes were an oppressed people bound to the land.

When the Thirty-ninth Congress convened in December, 1865, the reconstruction politicians rejected President Johnson's reconstruction plan. Congress refused to seat the newly elected Southern congressmen and declared invalid the recently formed state governments in the South. (Under Article I of the United States Constitution, each house of Congress was empowered to judge the election and qualifications of its members.)

From this Congress, the first civil rights act in our history was drawn up by Senator Lyman Trumbull of Illinois. The senator proposed that equality and freedom could not be thought of separately and that unequal treatment was a kind of slavery which Congress had a right to stop. Trumbull also believed that Congress had the obligation and power to protect the civil rights of individuals

whose respective states allowed mob violence and local lawlessness to exist.

Very basic rights were covered in this initial civil rights legislation: federal citizenship for Negroes; the right to enter into contracts; the right to sue; the right to give evidence; the right to acquire, hold, and convey real property.⁴ In addition the act provided that Negroes and whites were to be given equal benefit of all laws covering the security of a person and property, and that deprivation of civil rights would be a federal offense.⁵

The civil rights bill became the Act of April 9, 1866, being enacted over the veto of President Johnson. Many proponents of the act concluded that the civil rights secured by this act should be placed beyond the possibility of repeal by any later Congress. Among those who believed in the need for the constitutional guarantee of these rights was Representative John Bingham of Ohio who at the onset of the Thirty-ninth Congress proposed a constitutional amendment on the subject.

Bingham became a member of the newly created Joint Committee on Reconstruction which was authorized to examine the whole question of political reconstruction and to make new proposals for congressional action. The Joint Committee conducted hearings about the conditions that freed men faced in the South. Evidence was presented that demonstrated how

⁴ 14 Stat. 27 (1866).

⁵ Ibid.

the "Black Codes" kept former slaves "in their place" and forced them to work on terms and in conditions similar to slavery. Evidence was also given depicting the individual and group abuse of blacks and whites who were loyal to the Union.

Following the investigation, the Joint Committee decided that an amendment was definitely needed to strengthen the permanency of the civil rights legislation of 1866 and to insure the permanency of such rights against any attempts to repeal by a later Congress. In April, 1866, the Fourteenth Amendment was proposed by the committee, and Congress immediately referred the amendment to the states for ratification. John Bingham was the author of Section 1 of the Amendment.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, property, without due process of law; nor deny to any person within its jurisdiction, the equal protection of laws.⁶

With the eventual ratification of the amendment in 1868, equal protection of the law became a constitutional mandate. This mandate would prove to be a prominent force in the future struggle for equality.

Tennessee was the only Southern state to immediately ratify the Fourteenth Amendment and be readmitted to the Union. The other ten Confederate states rejected the amendment.

⁶U. S. Const. amendment XIV, sec. 1.

To force the South to accept its terms, Congress in 1867 passed a series of Reconstruction Acts over President Johnson's veto. The legislation provided that: (1) the ten states still unreconstructed were to be divided into five military districts with a major general in control of each; (2) constitutional conventions, elected by Negroes and loyal whites, were to frame constitutions providing for black suffrage; (3) these constitutions were to be acceptable to Congress; (4) qualified voters were to elect state legislatures pledged to ratify the Fourteenth Amendment; (5) with the ratification of the Fourteenth Amendment, the states could apply for representation in Congress.⁷

The political power in Southern states now shifted from the upper classes, which had been dominant before the Civil War, to a completely new political force. After the registration of Southern voters under the terms of the Reconstruction Acts of 1867, there were 703,000 Negroes registered and only 627,000 whites on the lists. The large Negro vote came under the control of two unprincipled white elements. One element included the Northerners (carpetbaggers) who had moved South with the expectation of achieving power and fortune, and the other element consisted of a few Southern whites (scalawags) who sought political and financial gain by supporting the reconstruction policy of Congress.

Controlled by these elements, seven Southern states met the requirements of the Reconstruction Acts of 1867 and

⁷14 Stat. 428 (1867).

were readmitted to the Union in 1868. The Southern legislatures (1868-1869) were often characterized by extravagance and corruption. Exorbitant public debts and excessively burdensome taxes became common in Southern states. In North Carolina the public debt more than doubled in two years.

Virginia, Georgia, Mississippi and Texas were not readmitted into the Union until 1870 when their legislatures were required to satisfy the conditions of the Reconstruction Acts of 1867 and to ratify the Fifteenth Amendment. This constitutional addition stated that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."⁸

The reaction of Southern whites to the political condition of the late 1860's became violent and was characterized by a policy of terrorism. Secret societies--the Ku Klux Klan, the Knights of the White Camellia, the Boys of '76--committed acts of terrorism in an effort to frighten the Negroes and compel them to stay away from the polls.

Congress attempted to enforce the Fourteenth Amendment with the passage of a new Civil Rights Act on May 31, 1870. The law re-enacted the 1866 Civil Rights Act in order to make it clear that the constitutionality of its provisions rested on federal power granted by the Thirteenth and Fourteenth Amendments. The act also provided criminal penalties

⁸U. S. Const. amendment XV, sec. 1.

for depriving anyone of the rights enumerated in the 1866 Civil Rights Act.⁹

In an attempt to protect the suffrage rights of Negroes, Congress legislated that supervision of elections was to be undertaken by persons appointed by federal courts and any interference with the work of an election supervisor was a federal offense.¹⁰

In spite of these measures, fear, intimidation, and physical violence increased in the Southern states. Gradually, Southern whites began to regain control of their local and state governments. The recently gained constitutionally guaranteed rights of Negroes began to fade without the protection of local or state governments.

It became increasingly obvious that the constitutional guarantees of the Fourteenth and Fifteenth Amendments were not being enforced in the South. On March 23, 1871, President Ulysees Grant sent a message to Congress describing the situation:

A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually

⁹16 Stat. 140 (1870).

¹⁰16 Stat. 433 (1871).

secure life, liberty, and property, and the enforcement of law in all parts of the United States . . .¹¹

The ensuing debate in Congress was filled with references to the lawless conditions that existed in the South in 1871. A 600-page report was presented to the Forty-second Congress describing the activities of the Ku Klux Klan and the inability of state governments to cope with the Klan. The extent of non-compliance by Southern states to enforce constitutional law was reflected in the speeches of Congressmen. Congressman David P. Lowe of Kansas said:

While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night and hides them conspiracies, wicked as the worse felons could devise, have gone unwhipped of justice. Immunity is given to crime and the records of the public tribunals are searched in vain for any evidence of effective redress.¹²

Congressman John Beatty of Ohio summarized in the House of Representatives the unwillingness or inability of states to enforce state law when he said:

. . . certain states have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and unquestionable . . . [M]en were murdered, houses were burned, women were outraged, men were scourged, and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.¹³

¹¹Cong. Globe, 42d Cong., 1st Sess., p. 244.

¹²Ibid., p. 374.

¹³Ibid., p. 428.

Senator Daniel D. Pratt of Indiana emphasized the discrimination against Union sympathizers and Negroes in the actual enforcement of the laws:

Plausibly and sophistically it is said the laws of North Carolina do not discriminate against them; that the provisions in favor of rights and liberties are general; that the courts are open to all; that juries, grand and petit, are commanded to hear and redress without distinction as to color, race, or political sentiment.

But it is a fact, asserted in the report, that of the hundreds of outrages committed upon loyal people through the agency of this Ku Klux organization not one has been punished. This defect in the administration of the laws does not extend to other cases. Vigorously enough are the laws enforced against Union people. They only fail in efficiency when a man of known union sentiments, white or black, invokes their aid. Then Justice closes the door of her temples.¹⁴

These statements indicated that the lawmakers believed that some Southern states were not enforcing the provisions of the recently ratified Fourteenth Amendment and consequently, the rights, privileges, and immunities of many citizens were being denied.

Adoption of the Civil Rights Law of 1871

On March 28, 1871, Representative Samuel Shellabarger of Ohio, acting for a House select committee, reported H. R. 320, a bill "to enforce the provisions of the Fourteenth Amendment to the Constitution and for other purposes."¹⁵

Section 1, now codified as 42 U.S.C. Section 1893, spoke directly to these violations of constitutional rights, was subject to limited debate, and passed without

¹⁴Ibid., p. 505.

¹⁵Ibid., p. 522.

amendment.¹⁶ Representative Shellabarger explained the function of Section 1:

[Section 1] not only provides a civil remedy for persons whose former conditions may have been that of slaves, but also to all people where, under color of state law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship.¹⁷

Senator George F. Edmunds of Vermont, the manager of H. R. 320 in the Senate, reiterated the sentiments of Representative Shellabarger:

The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill [of 1866], which have since become a part of the Constitution.

[Section 1 is] so very simple and really re-enacting the Constitution.¹⁸

These statements corroborated Congress' intention that the enactment of Section 1 would provide a broad remedy for violations of federally protected civil rights. Sections 2 through 4 dealt primarily with the suppression of Ku Klux Klan violence in Southern states. Section 2 described certain federal crimes in addition to those defined in Section 2 of the 1866 Civil Rights Acts, 14 Statute 27, each aimed primarily at the Ku Klux Klan. Section 3 empowered the President to send the militia into any state wreaked with Klan violence. Section 4 provided for suspension of the writ of

¹⁶Ibid.

¹⁷Ibid., App. p. 68.

¹⁸Ibid., p. 568.

habeas corpus in enumerated circumstances, again primarily concerning Klan violence. Sections 2 through 4 invoked considerable debate and each section was amended. Debate on Section 1 was limited in both Houses and passed as introduced.

The House finished the initial debate on H. R. 320 on April 7, 1871, and one week later the Senate voted out a bill. Prior to the vote taken in the Senate, Senator John Sherman of Ohio introduced an amendment that could not be debated at that time according to Senate rules. The amendment was added as Section 7 at the end of the bill. The amendment placed liability not on municipal corporations but made any inhabitant of a municipality liable for damages inflicted by persons "riotously or tumultously assembled."¹⁹

The House did not accept the Sherman Amendment and other amendments made by the Senate; therefore, H. R. 320 went to a conference committee. On April 18, 1871, the conference committee draft was completed. The committee's draft of the Sherman Amendment gave a cause of action to persons injured by:

Any persons riotously and tumultously assembled together; . . . with intent to deprive any person of any right conferred upon him by the Constitution and the laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition of servitude . . .²⁰

This action would be against the county, city, or parish in which the riot had occurred and it could be

¹⁹Ibid., App. pp. 41-42.

²⁰Ibid., App. pp. 42-43.

maintained by either the person injured or his legal representative. Liability for damages was changed from the property of the well-to-do, as in the original Sherman Amendment, and was placed on the local government.

Senator Sherman presumably assumed that taxes would be levied against the property of inhabitants to pay for the liability of local governments. Sherman stated:

Let the people of property in the Southern States understand that if they will not make hue and cry and take the necessary steps to put down lawless violence in those states their property will be holden responsible, and the effect will be most wholesome.²¹

The first conference substitute passed the Senate but was rejected by the House. The House opposition rejected the obligation of municipal corporations to keep the peace if those corporations were not obligated or authorized by their state charters. Congress was seen as not having the constitutional right to impose liability damage for nonperformance of a duty for obligations that Congress had no right to require municipalities to perform. The Sherman Amendment would have made a municipality liable for damages that may be incurred in a riot even if the municipality knew nothing of the impending or ensuing riot, or did not have the organization to do anything about it. The statute even held the municipality liable if it had done everything possible in its power to curb the riot.

The second conference committee abandoned the municipal liability and, instead, made "any person or persons

²¹Ibid., p. 761.

having knowledge [that a conspiracy to violate civil rights was afoot], and having power to prevent or aid in preventing the same," who did not attempt to stop the same, liable to any person injured by the conspiracy.²² Both Houses of Congresses adopted the amendment in this form and coded it 42 U.S.C. Section 1986.

During all of the congressional debate surrounding the Sherman Amendment, very little controversy centered upon Section 1 of the Civil Rights Act. A clear distinction existed between a municipality's liability for failing to keep the peace and a municipality's liability for failing to uphold the Fourteenth Amendment. Representative Luke P. Poland of Vermont, drawing from Contract Clause precedents, indicated that Congress could constitutionally confer jurisdiction on federal courts to entertain suits seeking to hold municipalities liable for using their authorized powers in violation of the Constitution.²³

The Contract Clause precedents included enforcement efforts that took various forms of "positive" relief, such as ordering taxes to be levied and collected, for the purpose of discharging federal court judgments, once a constitutional infraction was found.²⁴ Following the court's action in the

²²Ibid., p. 804.

²³Ibid., p. 794.

²⁴Monell v. New York City Department of Social Services, 98 S. Ct. 2013 (1978).

Contracts Clause, Justice William Brennan reasoned in the landmark Monell case:

Since Section 1 of the Civil Rights Act simply conferred jurisdiction on the federal courts to enforce Section 1 of the Fourteenth Amendment - a situation precisely analogous to the grant of diversity jurisdiction under which the Contract Clause was enforced against municipalities - there is no reason to suppose that opponents of the Sherman Amendment would have found any constitutional barrier to Section 1 suits against municipalities.²⁵

Also an important concept that was well understood in 1871 was that corporations should be treated as a natural person for virtually all purposes of constitutional and statutory analysis. In 1844 this doctrine was succinctly stated:

A corporation created by and doing business in a particular state, is to be deemed to all intents and purposes as a person, although an artificial person . . . capable of being trusted as a citizen of that state as much as a natural person.²⁶

The Letson principle was extended to municipal corporations only two years before the 1871 Civil Rights Act.

Following the Cowles v. Mercer County decision of 1869, municipal corporations were routinely sued in federal courts,²⁷ and just months before the Civil Rights of 1871, Congress passed the Dictionary Act that provided:

in all acts hereafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context show such words were intended to be used in a more limited sense [].²⁸

²⁵Ibid., p. 4576.

²⁶Louisville R. Co. v. Letson, 2 How. 497, 558 (1844).

²⁷7 Wall. 118, 121 (1869).

²⁸Dictionary Act, sec. 2, 16 Stat. 431 (1871).

From 1871 to Monroe v. Pape

The first reported case under Section 1983 was Northwestern Fertilizing Co. v. Hyde Park²⁹ in 1873. The Circuit Judge in a case involving a corporate plaintiff and a municipal defendant interpreted Section 1 as including local government bodies within the realm of "persons" who could be sued. Until 1961 this was the general interpretation of Section 1 of the Civil Rights Law of 1871. The following are Section 1983 cases involving a municipality as a defendant: City of Manchester v. Leiby,³⁰ Hannan v. City of Haverhill,³¹ Douglas v. City of Jeannetta,³² and Holmes v. City of Atlanta.³³

Following the passage of the Civil Rights Law of 1871, Congress added a piece of legislation which was regarded as the capstone for the congressional civil rights program between the years 1866 and 1875. During these years Congress attempted to make secure the constitutional ideals of freedom and equality for all Americans. The Civil Rights Act of 1875 prohibited racial discrimination in inns, public conveyances, and places of amusement. Federal courts were given exclusive jurisdiction over cases arising under this statute.³⁴ This act was designed to completely erase the brand of slavery by

²⁹18 F. Cas. 393, 394 (1873).

³⁰117 F. 2d 661 (1941).

³¹120 F. 2d 87 (1941).

³²319 U.S. 157 (1943).

³³350 U.S. 879 (1955).

³⁴18 Stat. 336 (1875).

giving Negroes freedom to exercise their civil rights without discrimination. The Civil Rights Act of 1875 granted all the fundamental rights which national citizenship was thought to include.

The comprehensive civil rights program enacted from 1866 to 1875 was not a solution for the black man, however. The loose, imprecise language of the constitutional amendments, particularly the Fourteenth Amendment, permitted the enemies of the civil rights movement to persuade the judiciary to follow a strict interpretation of the amendments.

First evidence of this strict interpretation was given by the United States Supreme Court in 1873 in the Slaughterhouse Cases.³⁵ The court stated that only national citizenship received any protection from the privileges and immunities section of the Fourteenth Amendment and that such national citizenship did not encompass any of the fundamental rights of the individual. Those rights were bound only to state citizenship.

National citizenship was seen as including only certain rights that went beyond the reach of state citizenship. These included the right to travel to the national capitol, the right to free access to subtreasuries, the right to protection abroad and on high seas, and the right to sue in federal courts.³⁶ The restrictive interpretation of the Fourteenth Amendment furnished a means to weaken the previous civil rights legislation.

³⁵83 U.S. 36 (1873).

³⁶Ibid., p. 74.

In 1875 in United States v. Cruikshank,³⁷ the United States Supreme Court again determined that the rights and privileges of the Fourteenth Amendment dealt only with those rights incidental to national citizenship. The case grew out of a bloody incident known as the "Colfax massacre." In Louisiana two groups, one Democrat and the other Republican, claimed to have won the 1872 election with the federal government recognizing the Republican faction. In the small town of Colfax, the Republican sheriff summoned a Negro posse which occupied the building used as a courthouse. On April 13, 1873, a white mob surrounded the courthouse, set it afire and shot the Negroes to death as they emerged from the burning building.

The white men were acquitted of murder and conspiracy charges when the United States Supreme Court decided that intimidation of Negroes by private individuals to prevent them from peacefully assembling for lawful purposes was a local matter stemming from state citizenship and was not affected by the Fourteenth Amendment.³⁸

Two 1883 cases illustrate the judicial negation of the civil rights legislation from 1866 to 1875. In the Civil Rights Cases,³⁹ the United States Supreme Court declared the Civil Rights Act of 1875 unconstitutional on the ground that the Thirteenth and Fourteenth Amendments did not prohibit acts of individual discrimination.

³⁷92 U.S. 542 (1875).

³⁸Ibid., p. 551.

³⁹109 U.S. 3 (1883).

Also in 1883 in United States v. Harris,⁴⁰ the United States Supreme Court declared void the criminal conspiracy section of the Civil Rights Act of 1871. This section made it an offense to conspire to deprive any person of the equal protection of the laws or equal privileges and immunities under the laws. The reasoning was that since the Fourteenth Amendment was construed to concern only state action, it could not be used to sustain an action of a private nature.

The result of these decisions was the resumption of prime responsibility for the protection of basic civil rights by Southern states. Following the Reconstruction Period, most Southern Negroes were prevented from exercising their right to vote by such devices as poll taxes, literacy tests, and intimidation. Jim Crow laws were adopted by all Southern states and several Northern states. These laws provided for segregation in the facilities of railroads, in waiting rooms, inns, barber shops, places of amusement, libraries, parks and schools. Nearly a century would pass before the United States Supreme Court in 1954 would rule that segregation in the public schools was unconstitutional.

Reemergence of 42 U.S.C. Section 1983

The Civil Rights Law of 1871 would remain an all but forgotten piece of legislation. Not until the volatile 1960's did civil rights become a major issue again.

⁴⁰106 U.S. 629 (1883).

In 1961 a Chicago case, Monroe v. Pape,⁴¹ provided the opportunity for the resurgence of the Civil Rights Law of 1871 which would be used as a major tool in seeking damages for violation of individual constitutional rights. The complaint alleged that thirteen Chicago police officers broke into James Monroe's home in the early morning, routed him from bed, made him stand naked in the living room, and ransacked every room. Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours while he was interrogated about a murder committed two days previously. He was taken before a magistrate and not permitted to call his attorney or family before being released. The complaint alleged that Mr. Monroe's "rights, privileges, and immunities" guaranteed by the United States Constitution had been violated since the officers had no search or arrest warrant, and Mr. Monroe was detained without a warrant or an arraignment.⁴²

The District Court dismissed the complaint as stating no cause for action under the statute. The Court of Appeals affirmed. On certiorari, the United States Supreme Court reversed the judgment, insofar as it held that the complaint did not state a cause of action against the defendant police officers, but affirmed the dismissal of the complaint against the City of Chicago.⁴³

⁴¹365 U.S: 169 (1961).

⁴²Ibid., pp. 495-496.

⁴³Ibid., p. 493.

In making this decision, the Warren Court examined the legislative history of 42 U.S.C. Section 1983. The Court's determination was that the Forty-second Congress doubted its constitutional authority to impose civil liability on municipalities. This Reconstruction Congress did not intend the word "person" to encompass municipalities or municipal agencies. The Court based this reasoning on the rejection of the Sherman Amendment by the Forty-second Congress.⁴⁴

Monroe v. Pape placed an important limitation on whom suits could be imposed upon under Section 1983. In school cases, suits could not be filed directly against the school district itself, but against the school officers--school board members, administrators and the like. School districts could not be sued even though the school officials who were sued had been acting fully within the authority conferred upon them by the school district.

One lasting effect of Monroe v. Pape was the resurrection of 42 U.S.C. Section 1983 which proved to be legislation appropriate for the needs of a changing, modern society.

The sixties and seventies witnessed a tremendous expansion in federal power to protect rights. These years saw increased federal protections involving public school students, freedom of speech, press and assembly, right to petition the government for redress of grievances, equal protection of the laws, procedural and substantial due process

⁴⁴Ibid., p. 507.

and entitlement to privileges and immunities.⁴⁵ 42 U.S.C. Section 1983 served as a convenient vehicle to enforce these expanding rights as reflected in the following statement by the California Supreme Court:

Section 1983 was enacted over a century ago in a response to the patent inadequacy of state enforcement of constitutional guarantees for the newly enfranchised black citizenry. While the civil disorders of the Ku Klux Klan in the 19th Century, which included passage of the Civil Rights Act, are no longer significant, society has not reached the idyllic state in which all vestiges of racism, oppression, and malicious deprivation of constitutional rights have been eliminated. Accordingly, the purpose underlying Section 1983--i.e., to serve as an antidote to discriminatory state laws, to protect federal rights where state law is inadequate, and to protect federal rights where state processes are available in theory but not in practice, must still be served.⁴⁶

The following chapter will examine the evolution of Section 1983 in the sixties and seventies. Selected judicial decisions will be used to demonstrate the effectiveness of 42 U.S.C. Section 1983 in safeguarding the constitutional rights of citizens.

⁴⁵Thomas A. Shannon, "The U. S. Civil Rights Act: A New Dimension in the Liability of Public School People," Current Legal Issues in Education, 1 (1977): 105-106.

⁴⁶*Williams v. Horvath*, 129 Cal. Rptr. 2d 453 (1976).

CHAPTER III
LEGAL ANALYSIS OF NATIONAL CASES CLARIFYING 42 U.S.C.
SECTION 1983 AND TEACHER DISMISSAL

Thomas Shannon, Executive Director of the National School Board Association, described Section 1983 as ". . . an expanding funnel through which a whole variety of litigation may be brought against school people."¹ Section 1983 litigation has become increasingly heavy since Monroe v. Pape in 1961. American School Board Journal in 1976 reported more than 400 personal liability actions involving more than 1,500 school officials in less than three years.²

Federal jurisdiction in civil rights actions brought under Section 1983 was granted by 28 U.S.C. Section 1343. However, in suits in which the damage claim exceeds \$10,000, jurisdiction under 28 U.S.C. 1331 has been invoked on direct challenges of constitutional violations by federal officials.³ State jurisdiction is also available.

¹Thomas A. Shannon, "The U. S. Civil Rights Act: A New Dimension in the Liability of Public School People," Current Legal Issues in Education 1 (1977): 105.

²Wayne R. Fitter and Don C. Patton, "Liability Protection for Professional School Personnel," Phi Delta Kappan 60 (March 1979): 525.

³Floyd G. Delon, "Update on School Personnel and School District Immunity and Liability Under Section 1983, Civil Rights Act of 1871," Journal of Law and Education 8 (April, 1979).

Civil Rights Litigation

The first educational litigation involving Section 1983 occurred in a North Carolina case⁴ in 1966. The Hendersonville Board of Education reemployed every white teacher who indicated a desire to be reemployed and also employed fourteen inexperienced white teachers. But sixteen out of twenty-four black teachers, who had been employed the previous year in an all-black school, were not offered reemployment. The Fourth Circuit Court of Appeals ruled that the school board had to set up objective standards for the employment and retention of teachers - black and white to be treated in like manner. The Hendersonville Board of Education's efforts to desegregate in accordance to the 1954 United States Supreme Court's mandate was typical of civil rights violations that resulted in Section 1983 action.

In another Fourth Circuit Court of Appeals' decision it was held that black teachers, who were not needed in their former posts because of a reduction of black enrollment in their respective buildings, were entitled to preference for reemployment in the system over new candidates. The court mandated that black teachers and white teachers should be governed by the same policy concerning staff reduction.⁵

⁴Chambers v. Hendersonville City Board of Education, 364 F. 2d 189 (1966).

⁵North Carolina Teachers Association v. Asheboro City Board of Education, 393 F. 2d 736 (1968).

Another North Carolina case⁶ provided guidance for nonretention of individual black teachers. A black teacher with thirteen years in the school system was not recommended for renewal by the school board. The teacher held a bachelor's and master's degree and had been recommended for re-employment by her former black principal at an all-black school. Shortly after submitting the recommendation, the principal was notified by his superintendent that the allocation of teachers for the school had been reduced for the following year because, under a newly instituted freedom-of-choice plan, some black pupils had transferred to formerly all-white schools. The principal having received no instructions on how to reduce his staff notified the teacher of her nonrenewal. Acting on the advice of the superintendent, the teacher in question interviewed with all the principals in the school system, but was not hired. Her former principal would later remark that he considered her a "trouble maker" with whom he had had some difficulties. The superintendent made no independent evaluation of her fitness, nor did he or the board compare her qualifications, or the gravity of her alleged faults, with those of other teachers in the system.

The district court upheld the board's decision not to have a hearing for nonrenewal of the teacher's contract. The court stated that because of the absence of a tenure law, the

⁶Wall v. Stanley County Board of Education, 259 F. Supp. 238 (1966).

lack of a hearing would not be a denial of due process. The Fourth Circuit Court of Appeals rejected the district court's decision and proclaimed the teacher was entitled to receive damages as well as to have the opportunity of being objectively considered for reemployment, with the burden of justifying a failure to rehire being placed on the school board.

School boards became responsible for justifying teacher dismissals on the basis of clear and convincing evidence when the plaintiffs established an initial case of a violation of constitutional rights. As the Fourth Circuit Court of Appeals noted in Wall:

It is now firmly established in this circuit that a teacher wrongfully discharged or denied employment . . . is in addition to equitable remedies, entitled to an award of actual damages.

Liability and Immunity under Section 1983

Prior to 1969, in cases affecting school board members, courts had awarded only equitable relief (forcing the defendant to take or refrain from taking action) as opposed to money damages. After 1969, federal district courts began to award personal damages against school board members for violating teachers' constitutional rights in cases challenging teacher dismissals and nonrenewals of teaching contracts. Lucia v. Duggan⁸ and Chase v. Fall Mountain School District⁹

⁷Wall v. Stanley County Board of Education, 378 F. 2d 275 (1967).

⁸303 F. Supp. 112 (1969).

⁹330 F. Supp. 388 (1971).

are two cases that resulted in personal damages against school board members in 1969 and 1971.

In Lucia,, a 1969 Massachusetts case, a teacher was discharged for refusing to shave a beard he had grown over a vacation period. No prior policy relating to beards had been established by the board, nor was the plaintiff ever actually informed of the consequences of his failure to shave the beard. The federal court found that (1) the conduct of the school authorities had resulted in a denial of due process of law, (2) the school board did not dismiss in good faith, and (3) the members of the school board were individually liable for the plaintiff's lost wages and for compensatory damages of \$1,000.

In the 1971 Chase case, the federal court found the basis for the teacher's dismissal to be uninvestigated and evidenced by totally unsubstantiated charges of impropriety. Evidence in the case indicated that the teacher was actually discharged for criticizing certain board members. The court termed the nonrenewal to be a classic case of a violation of due process. Each board member who voted for nonrenewal was held personally liable for \$2,240, the amount of salary lost by the teacher as a result of the board's action.

Decisions of the late 1960's and early 1970's clearly established that board members and administrators, as individuals, are subject to the provisions of Section 1983. Board members and administrators were considered "persons" under Section 1983, and common law and statutory immunity did

not prevent actions against them. This principle was illustrated in a Kansas case¹⁰ in which a teacher claimed that his due process rights were violated because the board acted arbitrarily and capriciously by ignoring its own board policies which called for notice and hearing. The defendants' motion for dismissal of the complaint was refused on the grounds that the defendants were "persons" under Section 1983 and suit actions were unaffected by sovereign immunity. The plaintiff maintained that the actual reason for dismissal was his spanking of the superintendent's son. The case was settled out of court prior to trial with payment being made to the teacher.

Prior to the landmark Wood case¹¹ which set forth a standard of liability for school officials under Section 1983, a board member's defense generally held up if he could show that he acted in "good faith" without malice or "ill will." This was articulated in a 1969 Seventh Circuit case, McLaughlin v. Tilendis.¹² The court ruled that officials who are defendants retain only qualified immunity dependent on good faith actions.

Lower federal court decisions prior to 1975 did, however, reflect the lack of a clear standard concerning the immunity of school officials. The applications concerning immunity were often sporadic and inconsistent. There

¹⁰Endicott v. Van Petten, 330 F. Supp. 378 (1971).

¹¹Wood v. Strickland, 420 U.S. 308 (1975).

¹²McLaughlin v. Tilendis, 398 F. 2d 287 (1969).

appeared to be holdings on either side of every immunity issue under the Civil Rights Act of 1871.

The immunity issue was examined in the student rights Supreme Court case, Wood v. Strickland.¹³ In Wood the court addressed crucial Section 1983 questions: (1) how to define the liability of school board members and administrators under Section 1983; and (2) would school board members and administrators have the same immunity as they had under state law (that is, immunity except for acts shown by the plaintiff to have been out of malice or ill will)?¹⁴

The Wood decision granted school officials the same qualified immunity as state executive officials as determined earlier in Scheurer v. Rhodes.¹⁵ Scheurer was a Section 1983 action against the governor and several Ohio national guardsmen involved in the 1970 Kent State University shooting. The 1974 ruling held that the chief executive officer of the state, the senior and subordinate officers of the state's national guard, and the president of the state-controlled university only held entitlement to qualified, good faith immunity under Section 1983. The Supreme Court had earlier ruled that the immunity of judges¹⁶ and legislators¹⁷ had not been effected by Section 1983.

¹³Wood v. Strickland, 420 U.S. 308 (1975).

¹⁴L. Lynn Hogue, "Board Member and Administrator Liability Since Wood v. Strickland," School Law Bulletin 7 (October 1976): 3.

¹⁵Scheurer v. Rhodes, 416 U.S. 232 (1974).

¹⁶Pierson v. Ray, U.S. 547 (1967).

¹⁷Tenny v. Brandlove, 341 U.S. 367 (1951).

The Supreme Court in Wood held that immunity from liability did depend on a board member's or administrator's good faith but that good faith consisted of both subjective factors (lack of malice or ill will) and objective factors (not violating settled constitutional rights). The Court explained:

The official must himself be acting sincerely and with the belief that he is doing right, but an act violating a student's constitutional rights can no more be justified by ignorance or disregard of settled undisputed law . . . than the presence of actual malice. To be entitled to a special exemption from the categorical remedial language of Section 1983 . . . a school board member must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic unquestioned constitutional rights of his charges.¹⁸

The Supreme Court rejected the notion that a school official could be liable for every action later found to have caused compensatory injury. Such action would have wreaked havoc in school administration by forcing school officials to guess the nature of emerging constitutional rights. The Supreme Court said:

A compensatory award will be appropriate only if the school board has acted with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.¹⁹

As individuals, both board members and administrators are immune from liability if they can show that their official acts were taken without malice or ill will (subjective element) and in accordance with settled, indisputable

¹⁸Wood v. Strickland, 420 U.S. 308 (1975).

¹⁹Ibid., pp. 320-321.

constitutional law. To prove actual malice under the subjective test has proven difficult. An example of what constitutes actual malice was provided by a Delaware case.²⁰ A federal district court held that a superintendent's deliberate infliction of injury on a nontenured school teacher by falsely accusing her of persistent insubordination precluded a finding of good faith. The court found that the superintendent knew that the school board would rely on his evaluation and would refuse to renew the teacher, thereby damaging her career.

Plaintiffs did not need to allege hard-to-prove malice. If the plaintiff established that his rights had been violated and brought himself under the statute, the school official had to prove at trial that he acted in sincere belief of the rightness of his action and in compliance with the requirements of the United States Constitution. The defense of a school official being sued under state tort law would be that his acts were those of a government officer, and that the plaintiff would have to prove malice or the absence of good faith on the school official's part. Qualified immunity differs from tort immunity in that the defendant must raise and prove his good faith as a defense. The defense must be an affirmative defense and include a written answer to the complaint.

²⁰Morris v. Bd. of Education, 401 F. Supp. 188 (1975).

Thomas A. Shannon, executive director of the National School Board Association, speaks eloquently to a Section 1983 defense:

The chilling aspect of defending against a Section 1983 action is sorting out the burden of proof and the burden of "going forward" with proof. That is, if the base elements of Section 1983 are alleged in the complaint, the defendant should respond in his or her answer by pleading the defenses sufficient to exonerate him or her under Wood v. Strickland and to serve as the basis for carrying the burden of proof at trial if the plaintiff can make a prima facie showing and thus shift the burden of "going forward" with the proof to the defendant.²¹

The standards in Wood by which the individual liability of public officials came to be measured, resulted in Section 1983 cases becoming more difficult to dispose of than under prior law. Subsequent decisions of the federal courts spoke to the questions of what are "settled, indisputed" constitutional rights as addressed in Wood.

In Chaupoin v. Atkinson, the court said that Wood required that "action [be] taken . . . within the bounds of reason under all circumstances."²² Board members and school officials must be aware of legal requirements and follow them:

[T]here can be no immunity, even where the official has acted without intending to deprive the plaintiff of his constitutional rights, if a reasonable man in the defendant's position would have realized that his action would have that effect.²³

²¹Thomas A. Shannon, "The U. S. Civil Rights Act: A New Dimension in the Liability of Public School People," Current Legal Issues in Education, 1 (1977) 111.

²²406 F. Supp. 32 (1975).

²³Ibid., p. 35.

In a Nebraska teacher dismissal case,²⁴ the district court ruled that school officials were immune from liability for not giving a teacher a hearing because the established legal requirements were not clear. The court decided that the school officials could not be liable because they could not be required to know that informing a teacher of a right to a hearing did not entitle them to assume that an absence of a request by the teacher for a hearing relieved them of the duty of giving the teacher a hearing. The district court ruled that future boards would be required to use this new knowledge of constitutional law in granting hearings to teachers. What the court was expressing was that one board's immunity may be the next board's liability.

This notion of one free constitutional violation was rebuked in a search-and-seizure case.²⁵ Acting on a telephone tip that led a school principal to suspect that three junior high students possessed drugs, the principal requested the police to be present when the students were searched. After the arrival of the police, the principal ordered a school nurse and a school psychologist to search the students for illegal drugs. No drugs were found, and one student brought Section 1983 action charging violation of the student's Fourth Amendment rights. At the time of this opinion, there were no prior cases involving a civil rights action for damages against a school principal arising from search of a

²⁴Brown v. Bathke, 416 F. Supp. 1194 (1976).

²⁵Picha v. Wieglos, 410 F. Supp. 1214 (1976).

student. Despite this lack of precedent, the court ruled that there was still a legal basis for putting the issue of liability to a jury. The court said:

Under Wood v. Strickland, school officials are immune from acts which do not violate settled, undisputed constitutional law, as long as actions are not taken maliciously. (I)n terms of the policies set forth in Wood, it appears that law can be settled without there having been a specific case with identical facts which was decided adversely to school officials. There is a limitation to the notion that school officials can have one "free" constitutional violation before they are liable for ignoring constitutional rights that arise in each unique factual setting.²⁶

The court, in denying the school officials' motion for a directed verdict, held that freedom from unreasonable search was a settled, undisputed right.

The Fifth Circuit Court of Appeals read the "settled, undisputed law" more literally in Sapp v. Renfroe.²⁷ The court ruled that the Decatur City Board of Education had not violated the constitutional rights of the plaintiff due to the absence of an authoritative decision from the United States Supreme Court or from the Court of Appeals in the Fifth or other circuits. The case resulted from the denial of the plaintiff's admission to Decatur High School due to the plaintiff's refusal to participate in R.O.T.C. military training.

Despite the Picha ruling, it is the writer's opinion that there is no "settled, undisputed law" if there are differing opinions among appellate courts on a subject. If

²⁶Ibid., p. 35.

²⁷511 F. 2d 172 (1925).

courts below the United States Supreme Court have differing views on a particular issue, that issue is not settled.

The Wood standard necessitating "settled, undisputed law" applied to teacher dismissal in Bertot v. School District No. 1.²⁸ The Tenth Circuit Court of Appeals observed:

The recent decision in Wood . . . has defined the immunity defense in the specific context of school discipline. Due to the similarity of the discretionary authority exercised by local school officials in student discipline and teacher employment matters, we feel the immunity test there stated should apply in a case [of teacher nonrenewal].²⁹

Mrs. Bertot, a Wyoming public school teacher, claimed that the nonrenewal of her contract was in retaliation for the exercise of her First Amendment rights. Mrs. Bertot had participated in establishing an underground newspaper. In looking at the subjective element of Wood first, the jury decided that the school officials had acted in good faith and had not acted maliciously. The court then looked to the constitutional law on the First Amendment. This examination addressed the objective element of the Wood standard. The court concluded:

At the time of the 1971 nonrenewal of Mrs. Bertot's contract, Roth and Sinderman had not been decided and our controlling decision was Jones v. Hopper . . . There a similar constitutional claim of unlawful termination of an untenured instructor's employment because [of his role, among other things, is the founding of] an independent faculty-student publication was rejected for failure to state a claim . . . Hence, we cannot say the defendants knew or reasonably should have known that their actions would violate constitutional rights.³⁰

²⁸ 522 F. 2d 1171 (1975).

²⁹ Ibid., p. 1183.

³⁰ Ibid., p. 1185.

With the objective element of the case settled, the personal liability of the individual school board members was resolved. The court, however, now raised the question concerning the liability of the school board members in their official capacities or the board's liability as an entity which will be examined later in this study.

Another conservative application of the Wood formula for assessing liability occurred in a maternity case.³¹ The issue was the Chagrin Falls school board's requirement that a teacher must resign and her contract would become null and void at the end of the fifth month of pregnancy or at the end of the first semester whichever occurred first. The teacher's request to resign at the end of her fifth month of pregnancy (March 1) rather than at the end of the first semester was rejected by the board. The teacher then resigned at the end of the first semester but brought suit under 42 U.S.C. Section 1983, alleging that the pregnancy policy discriminated against her as a female employee in violation of the United States Constitution.

The issue at the trial was whether the school board should have known that their pregnancy policy was unconstitutional in light of the Supreme Court ruling in Cleveland Board of Education v. LaFleur.³² The district court awarded Mrs. Shirley back pay (from the end of first semester,

³¹ Shirley v. Chagrin Falls Exempted Village School Board of Education, 521 F. 2d 1329 (1975).

³² 414 U.S. 632 (1974).

January 28, until the end of fifth month of pregnancy, March 1) plus interest. The basis of the decision was that the end of the semester provision was adopted by the board for its own convenience and that the policy was arbitrary. This decision was reversed even though the district court had upheld a similar policy in LaFleur minus the end of the semester clause.

The court of appeals reversed on the basis that there were no binding judicial decisions in conflict with the Chagrín Falls policy. The Sixth Circuit found good faith immunity noting that the only case holding that such a requirement was unconstitutional at that time³³ was in the Eastern District of Virginia, and was not constitutionally binding as creating a clear constitutional right. The court stated:

[A]t the time the Board decision was made, there had in fact been no adjudication binding on the Board that its existing pregnant policy was unconstitutional, let alone unquestionably so. To compel the Board members to respond personally in damages in such circumstances would be to hold that they were charged with predicting the future course of constitutional law.³⁴

One note of interest at this point is that the more liberal Cohen ruling³⁵ of the Virginia district court was upheld by the Fourth Circuit³⁶ and the reasoning was later

³³Cohen v. Chesterfield County School Board, 326 F. Supp. 1159 (1971).

³⁴Shirley v. Chagrín Falls Exempted Village School Board of Education, 521 F. 2d 1329 (1975).

³⁵Cohen v. Chesterfield County School Board, 326 F. Supp. 1159 (1971).

³⁶Cohen v. Chesterfield County School Board, 474 F. 2d 395 (1973).

upheld by the United States Supreme Court in Cleveland Board of Education v. LaFleur.³⁷ In LaFleur the United States Supreme Court held that a mandatory maternity policy violated the due process clause of the Constitution.

Another Fourth Circuit interpretation of Section 1983 was a ruling concerning a class action brought on behalf of all pregnant teachers against school boards with allegedly discriminatory maternity leave policies.³⁸ The court ruled that good faith immunity was not a defense in a suit for back pay, which was a vital part of the equitable remedy for reinstatement and not merely a suit for damages.³⁹

First Amendment Rights

A North Dakota case⁴⁰ has provided a judicial guide for proper procedural due process based on the Wood guidelines. An unmarried teacher was discharged for living with her boyfriend in a mobile home furnished by the school district.

After protests from parents, the principal tried to solve the problem informally. Ms. Sullivan told the principal that she believed her living arrangement was a private concern. The principal then told Ms. Sullivan that she would

³⁷ Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

³⁸ Paxman v. Wilkerson, 390 F. Supp. 442 (1975).

³⁹ Ibid., p. 447.

⁴⁰ Sullivan v. Meade Independent School District No. 101, 530 F. 2d 799 (1976).

be fired if the living arrangement continued. The board informed Ms. Sullivan that a hearing would be held based on the superintendent's recommendation that she be dismissed for gross immorality and incompetency. The incompetency charge was added because the board reasoned that the tainted reputation resulting from the immoral acts destroyed the teacher's effectiveness in the classroom. At the hearing, at which Ms. Sullivan was represented by counsel, the board members offered to transfer her to another school if she would alter her living arrangements. Ms. Sullivan refused and was dismissed.

Ms. Sullivan brought suit claiming that her First Amendment rights to privacy and freedom of association and her Fourteenth Amendment rights to due process and protection had been violated. District Court dismissed the action and on appeal, the appeals court held that the board members had acted in good faith by weighing the competing and conflicting constitutional rights, none of which were absolute. The court in applying the guidelines of Wood held that good faith immunity standards had been met by (1) acting without malice, (2) balancing the constitutional rights of the teacher against the welfare of the school community, and (3) not depriving the teacher of established, or unquestioned constitutional rights. The right for unmarried persons to live together was found not to be a "settled, undisputed constitutional right."

Although an individual's right to privacy was not clearly defined, a Wyoming teacher succeeded in a Section 1983 action against board members and the superintendent on this ground.⁴¹ Lack of discipline, untidiness in the classroom and inadequate teaching performance were cited as the reasons for dismissal. Instead the court determined that the teacher's physical size, lack of church attendance, the location of her trailer, and the conduct of her personal life were the reasons for dismissal. The constitutional right of an individual's privacy to be free from unwarranted governmental intrusion was cited.⁴²

Thirty-three thousand dollars compensatory damages were awarded the teacher since the court determined that the school officials had not acted in good faith. No punitive damages were awarded since it was not shown that the defendants acted with malice.⁴³ The Wood guidelines for good faith were not met by the school officials; therefore, the liability was clearly defined.

In another teacher dismissal case⁴⁴ concerning First Amendment rights, the evidence established that three probationary teachers were not renewed because the teachers spoke out at public meetings in opposition to board policies and

⁴¹Stoddard v. School District No. 1, 429 F. Supp. 890 (1977).

⁴²Stanley v. Georgia, 394 U.S. 557 (1969).

⁴³Ibid.

⁴⁴Greminger v. Seaborne, 584 F. 2d 275 (1978).

practices. The Eighth Circuit affirmed the teachers' reinstatements and remanded for redetermination of compensatory damages and attorneys' fees.

The United States Supreme Court established a new standard for adjudicating cases with alleged First Amendment violations in Mt. Healthy School District v. Doyle.⁴⁵ Fred Doyle, the plaintiff, was an untenured teacher who had served as president and as a member of the executive committee of the local teachers' organization. Doyle and another teacher were suspended for an altercation during a heated argument. Doyle's suspension resulted in a walk-out by several union members. Doyle also clashed with cafeteria workers over the amount of spaghetti served him. On another occasion Doyle referred to students as "sons of bitches" and made obscene gestures to two girls who would not follow his commands. The last incident concerned Doyle's phoning a radio station to convey the substance of a memorandum relating teachers' dress to public support of a bond issue. The radio announced the adoption of the dress code as a news item.

The federal district and the Sixth Court of Appeals ruled that the telephone call was an exercise of Doyle's First Amendment right of expression. The Supreme Court vacated and remanded the case with directions. Justice William Rehnquist's opinion states the standard for adjudicating First Amendment cases:

⁴⁵429 U.S. 274, 279 (1977).

Initially . . . the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of evidence that it would have reached the same decision as to respondent's employment even in the absence of the protected conduct.⁴⁶

This ruling prevents employees and pupils from using the exercise of a constitutional right to block school officials when legitimate reasons exist for dismissal or expulsion.

This standard was applied by the Supreme Court in Wagle v. Murray.⁴⁷ At the district court level the jury had awarded a teacher \$50,000 for free speech violations; the judge held for the board notwithstanding the verdict. On appeal, the court of appeals reversed and the board then successfully petitioned for certiorari. The Supreme Court vacated and remanded for reconsideration in light of Mt. Healthy.⁴⁸ On remand, the court of appeals gave instructions to the jury:

Required the appellant to show by a preponderance of evidence that his contract would have been renewed except for the exercise of constitutionally protected rights . . .⁴⁹

⁴⁶Ibid., p. 577.

⁴⁷F. 2d 1329 (1976).

⁴⁸Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 279 (1977).

⁴⁹Wagle v. Murray, F. 2d 401, 403 (1977).

The court concluded that sufficient evidence supported the jury's finding that the teachers would not have been dismissed in the absence of the protected First Amendment conduct.

Fourteenth Amendment

Procedural Due Process

The issue of whether teachers have protected Fourteenth Amendment, property or liberty interests⁵⁰ that entitle them to full due process hearings before dismissal continued to be a heavily litigated issue. School officials have been held liable for damages in situations where failure to provide due process was the source of injury to the individual.

An illustration of this situation is the 1977 case, Bogart v. Unified School District.⁵¹ Bogart, the plaintiff, was a Kansas teacher and the father of a teenage son. The son called home and told his father that he had been apprehended by the sheriff who had a warrant to search the house. The father asked the son if there was anything illegal in the house and the son indicated there was some marijuana in a dresser in his room. The father removed the marijuana from the son's dresser in an attempt to protect the son but decided to turn it over to the sheriff when he arrived. The sheriff then arrested Bogart for illegal possession.

⁵⁰U. S. Const. amendment XIV, sec. 1.

⁵¹432 F. Supp. 895 (1977).

The school immediately suspended Bogart and scheduled a hearing but gave no reasons. At the hearing Bogart was informed that dismissal was being considered due to the criminal charges against him. Bogart argued that he did not smoke marijuana or advocate its use; furthermore, his students understood his stand on drug abuse. Therefore, his teaching effectiveness could not be impaired. The board voted to continue the suspension pending the outcome of the trial, but later granted reinstatement after a three-month court delay. Bogart was found guilty as charged by the jury when his trial was held.

Despite the notification of a pending appeal, the school board voted to dismiss Bogart without further notice or appeal. The following months the judge ordered acquittal notwithstanding the verdict. The school board refused to reconsider the dismissal. The courts found that both Bogart's "property" and "liberty" interests had been violated. Bogart had a "property" interest in employment by virtue of a state law and a "liberty" interest that had been violated because the publicity given the nonrenewal stigmatized him and foreclosed Bogart's freedom to take advantage of other employment opportunities within a reasonable driving distance. The court awarded \$4,695 back pay on his teaching contract, and \$500 back pay of bus driver's salary for the year of discharge and \$31,284 for the next three years, and eight per cent interest in these amounts.

A 1978 student rights case, Carey v. Piphus⁵² struck directly at the procedural due process question in teacher dismissal. The action arose from the suspension, without due process hearings, of two male Chicago students for 20 days each, one for smoking marijuana and the other for wearing a gold earring. The students filed Section 1983 suits alleging that even though they could not prove that they suffered any actual harm from the suspension, they were entitled to monetary damages for mental and emotional distress. The trial court disagreed and dismissed the complaint although it ruled that the suspensions should be removed from the students' records.

On appeal, the Seventh Circuit Court of Appeals ruled that even if the suspension were fully justified and even if no actual harm was suffered by the students, they were still entitled to collect substantial monetary damages because their constitutional due process rights were denied. This holding was in line with a previous ruling, Hostrap v. Board of Junior College District No. 515.⁵³ Hostrap was a case in which the dismissal of a junior college president, Hostrap, was justifiable; however, damages were awarded for infringement on Hostrap's constitutional right to two elements of procedural due process - notice and a hearing. Determination of damages was ordered to be based on the nature of the

⁵²Carey v. Piphus, 98 S. Ct. 1042 (1978).

⁵³Hostrap v. Board of Junior College District No. 515, 523 F. 2d 569 (1975) cert denied 425 U.S. 963, 1976.

deprivation, the magnitude of Hostrap's mental distress and humiliation, and any other injury resulting from his deprivation of rights protected by the Constitution.

The reasoning of appellate court and the reasoning of Hostrap were rejected by the United States Supreme Court.

Justice Lewis Powell in writing the unanimous decision stated:

In sum, then, although mental and emotional distress caused by the denial of procedural due process itself is compensable under Section 1983, we hold that neither the likelihood of such injury nor the difficulty of proving it is so great as to justify awarding compensatory damages⁵⁴ without proof that such injury actually was caused.

If the individual seeking to collect monetary damages for emotional and mental distress caused by constitutional deprivation, can prove actual damage by the constitutional deprivation act, then the individual is entitled to be compensated for the injury. In absence of such proof, the individual is entitled to collect nominal damages, which the Supreme Court set at one dollar. The justification of this principle was stated:

By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed: but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivation of rights.⁵⁵

The Supreme Court saw the purpose of Section 1983 as a means to compensate the victim of a constitutional deprivation, not

⁵⁴Carey v. Piphus, 98 S. Ct. 1042 (1978).

⁵⁵Ibid., p. 1054.

as a means to punish the wrongdoer beyond the amount of the victim's compensation.⁵⁶

The Carey decision has had a definite effect on teacher dismissal because the legal principles are the same for teachers and students. When procedural due process rights were not followed, teachers have been awarded back pay from the time of the termination as damages. Back pay has even been awarded when there was just cause for dismissal but due process was not followed. In applying the Carey principle, it seems reasonable to assume that teachers are entitled to only nominal damages when denied adequate procedural due process in the dismissal process when just cause is evident. Back pay and damages are not awarded under such circumstances. The damages that the teacher can receive are based solely on mental and emotional distress that resulted directly from the denial of adequate due process. This ruling has the potential to substantially reduce the financial liability risk of school officials.

Eleventh Amendment Immunity

School districts have often attempted to invoke the immunity protection of the Eleventh Amendment in Section 1983 actions. This constitutional provision precludes suit by a citizen of one state against another state without its

⁵⁶Thomas J. Flygare, "Section 1983 Suits Against School Districts: The Supreme Court Speaks," Phi Delta Kappan 60 (October 1978): 128.

consent. An 1890 decision⁵⁷ also precluded suits against a state by a resident of that state without consent. Suit by private parties against the states and their agencies without their consent was prohibited by the Supreme Court in the 1974 case Edelman v. Jordan⁵⁸ and reaffirmed more recently in the 1978 ruling Alabama v. Pugh.⁵⁹

Courts have looked at a number of factors in determining whether a school district is entitled to Eleventh Amendment immunity. Courts have examined whether the state is the "real party in interest," using such factors as whether the judgment will have to be paid from the state treasury, whether the school board performs a governmental or proprietary function, whether it has been separately incorporated, whether it has autonomy over its operations, whether it has the power to sue and be sued and to enter into contracts, whether its property is immune from state taxation, and whether the state immunized itself from responsibility for the operation of the school district.

In a 1975 Delaware case,⁶⁰ teachers were awarded reinstatement and back pay due to the court's finding that the district was not entitled to Eleventh Amendment immunity. In determining the status of the school district, the court

⁵⁷Hans v. Louisiana, 134 U.S. 1 (1890).

⁵⁸Edelman v. Jordan, 414 U.S. 651 (1974).

⁵⁹Alabama v. Pugh, 98 S. Ct. 3057 (1978).

⁶⁰King v. Caesar Rodney School District, 396 F. Supp. 423 (D. Del. 1975).

observed the following: (1) The school district is clearly defined by Delaware state law to be a geographical unit organized for administering public education. (2) The school board has the power to contract and control property and funds for the school district. (3) It has the power to collect and levy taxes, although it does receive money from the state. (4) Teachers are hired and dismissed by the school board and not by the state board of education, and appeal is to the Superior Court, not to a state administrative agency.⁶¹ The factors were the basis for the suit for reinstatement being brought against the school district and not the state.

Back pay was determined to come from the school district. The court found that the school district has the power to tax for school purposes and since it has the power to be sued on its contracts, "it logically follows that satisfaction of a contract suit judgment constitutes a school purpose."⁶²

In a Fourth District case,⁶³ a teacher alleged that her discharge was racially motivated and sought reinstatement and back pay. The decision included the finding that the school district was not entitled to Eleventh Amendment immunity. The court ruled that the school board's action may have been described as a "state action" but the school district was not a state defendant.

⁶¹Ibid., 205.

⁶²Ibid.

⁶³Burt v. Board of Trustees of Edgefield City School District, 521 F. 2d 1201 (1975).

In Mt. Healthy School District v. Doyle,⁶⁴ the United States Supreme Court clearly established the status of school districts in most states. In reference to Eleventh Amendment immunity, the opinion is as follows:

The issue here turns on whether the Mt. Healthy Board of Education is to be treated as an arm of the state . . . , or is to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not apply. (A) local school board such as the petitioner is more like a county or city than it is like an arm of the state . . . (I)t was not entitled to assert any Eleventh Amendment immunity from suits in the federal courts.⁶⁵

Also Eleventh Amendment immunity was found not to bar assessment of attorneys' fees against state officials. The Supreme Court approved the award of attorneys' fees against a state official under Title VII of the Civil Rights Act of 1964 in Fitzpatrick v. Bitzer.⁶⁶ There remains some doubt as to the applicability of the Eleventh Amendment immunity in a few states where school districts do not have corporate status. The question is, however, again before the Supreme Court in Skehan v. Board of Trustees of Bloomsburg State College.⁶⁷ This case will be discussed later in the study.

Statute of Limitations

The United States Civil Rights Act did not set a limitation period for the liability of improper actions. In

⁶⁴Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274, 279 (1977).

⁶⁵Ibid., 573.

⁶⁶96 S. Ct. 2666 (1976).

⁶⁷431 F. Supp. 1379 (1977).

a 1914 case, O'Sullivan v. Felix⁶⁸ the United States Supreme Court held that relevant state statutes of limitations were applicable. Generally, these state statutes hold administrators and board members liable for three years. In North Carolina this is the case.⁶⁹

The limitation may run longer, however, since it is measured from the time the plaintiff learns of the injury.

In a 1975 North Carolina case,⁷⁰ the Fourth Circuit Court of Appeals ruled that a claim must be filed within three years of the discovery of the injury. An action for damages was filed by a lady as a result of a sterilization operation. The operation had been performed ten years earlier in compliance with a North Carolina statute that was no longer in effect at the time suit was filed. She contended the original statute was unconstitutional. The claim was held not to be time-barred since the claim was filed within three years of the initial discovery of the sterilization and its permanency.

Exhaustion of Remedies

Generally, plaintiffs are not required to exhaust state judicial or administrative remedies before bringing federal suit for damages under Section 1983. In Monroe v. Pape,⁷¹ the United States Supreme Court said that "the

⁶⁸233 U.S. 318 (1914).

⁶⁹N. C. General Statute 1-15(2) (1975).

⁷⁰Cox v. Stanton, 529 F. 2d 47 (1975).

⁷¹365 U.S. 169 (1961).

federal remedy is supplementary to the state remedy and the latter need not be first sought and refused before the federal one is invoked."⁷²

In certain cases, however, plaintiffs have been required to pursue available means of correcting or redressing wrongs either through proper administrative channels or state courts before bringing federal action. An example of this occurred in a 1975 New York case⁷³ involving a superintendent who brought Section 1983 in federal district court seeking preliminary and injunctive relief against his suspension without pay. The school board brought forty-one charges against him. The board granted the superintendent a hearing before a trial examiner appointed by the board, with full notice and right to counsel. The superintendent agreed that he preferred a federal answer to the litigation based on previous language in Monroe. The court disagreed and ordered the plaintiff to exhaust speedy and effective administrative remedies first. The court felt the hearing would be fair and the plaintiff would still have the right to appeal to the city board or the chancellor.

Section 1983 lawsuits can be filed in either federal or state court of general jurisdiction. Since the United States Civil Rights Act does not contain any exclusive grant of jurisdiction to federal courts, both court systems can adjudicate federal causes of action.

⁷²Ibid., p. 169.

⁷³Fuentes v. Rohr, 395 F. Supp. 1225 (S.D.N.Y.), aff'd. 519 F. 2d 379 (1975).

Attorneys' Fees

Another element in considering damages in Section 1983 is whether the prevailing party should be awarded attorneys' fees. While there is no provision in the United States Civil Rights Act to provide an award of attorneys' fees for successful litigation of Section 1983 action, federal courts have granted such awards on three bases;

- (a) The "unreasonable and obdurately obstinate" behavior standard, under which attorney fees are awarded to a successful party when his opponent had acted "in bad faith, voraciously, wantonly, or for oppressive reasons";
- (b) The "benefit standard, which involves litigation in which the successful plaintiff confers a benefit upon a known class of persons and the awarding court has sufficiently broad jurisdiction to spread the costs of litigation among the class"; and,
- (c) "Private attorney general" standard, under which private parties are awarded attorneys' fees because their successful litigation has aided "in effectuating important congressional and public policies."⁷⁴

In 1975 the United States Supreme Court eliminated the "private attorney" standard in Alyeska Pipeline Service v. Wilderness Society.⁷⁵ In response to the Supreme Court's limitation on attorney fees, Congress adopted the Civil Rights' Attorneys' Fees and Award Act of 1976. This Act was an amendment of 42 U.S.C. Section 1988 and as amended provides:

In any action or proceeding to enforce a provision of Section 1981, 1983, 1985 and 1986 of this Title, Title

⁷⁴Tom Shannon, "The U. S. Civil Rights Act: A New Dimension in the Liability of Public School People, 1976 Current Issues in Education: 113.

⁷⁵Alyeska Pipeline Service v. Wilderness Society, 421 U.S. 240 (1975).

IX of Public Law 92-318, or in any civil action or proceeding by or on behalf of the United States of America, to enforce, or charging the violations of, . . . Title VI of the Civil Rights Act of 1964, . . . the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.⁷⁶

Earlier, in the 1968 Newman v. Piggie Park Enterprises, Inc.,⁷⁷ the United States Supreme Court rejected the bad faith requirement for awarding attorneys' fees. Consequently, any finding of a constitutional violation entitles the plaintiff to attorneys' fees. Apparently, the attorneys' fees award is independent of the compensation for proven injury. For example, the students in Carey v. Piphus,⁷⁸ who were denied proper procedural due process but were awarded only one dollar in nominal damages, were entitled to substantially more in attorneys' fees.

In contrast to this, if a defendant prevails in a civil rights action, he is not entitled to attorneys' fees unless he can establish that the plaintiff's suit was "unreasonable, frivolous, meritless or vexatious or that the plaintiff continued to litigate after it clearly became so."⁷⁹ This ruling made it almost impossible for defendants to obtain attorneys' fees.

⁷⁶42 U.S.C. Section 1988 as amended.

⁷⁷390 U.S. 400, 402, 88 S. Ct. 964 (1968).

⁷⁸98 S. Ct. 1042 (1978).

⁷⁹Christianburg Garment Co. v. EEOC, 98 S. Ct. 694, 701 (1978).

The possibility of attorneys' fees being awarded must be considered by school officials in deciding whether cases should be pursued or settled. The possibility of paying both the prevailing plaintiff's attorneys' fees and their own may cause boards of education to hesitate to dismiss that incompetent teacher who needs to be dismissed. The possibility of being awarded attorneys' fees if the plaintiff prevails is certainly a factor in a teacher's decision to litigate or not litigate his dismissal.

Liability of School Officials in Their
Official Capacities or as Entities

As discussed earlier, the 1961 case, Monroe v. Pape, opened the federal judiciary to suits against public officials based on U.S.C. Section 1983. The Monroe ruling did, however, create a state of confusion with the determination that no monetary recovery was possible under Section 1983 against any local government agency or its officers in their official capacities. Section 1983 states that "any person" who deprives another of his federal constitutional rights shall be liable to the injured party. The Monroe decision held that municipalities were not "persons" under Section 1983 and therefore, immune from suit. This concept was later upheld in two Supreme Court cases. In City of Kenosha v. Bruno,⁸¹ a municipality was ruled not a

⁸⁰365 U.S. 169 (1961).

⁸¹412 U.S. 507 (1973).

"person" under Section 1983 even for injunctive relief. In Moor v. County of Alameda,⁸² a county government was ruled not a "person" under Section 1983.

A 1975 Fifth Circuit case, Adkins v. Duval County School Board⁸³ dealt with the issue that a school district cannot be sued under Section 1983 because of the "not a person" clause. The Adkins court cited Monroe, Kenosha and Moor and denied jurisdiction on the ground that under Florida law there was no distinction between a Florida school board as a governmental entity and a Florida county or municipality. The court saw all three being created by the state constitution and allowed to tax and exercise governmental powers for their respective purposes. Florida state statutes also designated school boards, counties and cities as a "body corporate" for purposes of initiating and defending suits. Suits against a school board, therefore, could only be litigated as would suits against a city or county entity.

Most often plaintiffs alleging constitutional wrongdoings sued individuals in an attempt to obtain injunctive relief and damages directly from the individuals and indirectly from the school district. This was not always the case. Two actions in the Fourth Circuit illustrated that different answers can be given to the same question under different circumstances. In the 1975 case of Burt v. Board of Trustees of Edgefield City School District,⁸⁴ the Fourth

⁸²411 U.S. 693 (1973).

⁸³511 F. 2d 690 (1975).

⁸⁴521 F. 2d 1201 (1975).

Circuit ruled that the school district was not a "person" and hence not subject to suit under Section 1983. In this case a discharged teacher sought reinstatement and back pay alleging that her dismissal was racially motivated.

In a 1975 maternity case⁸⁵ in the Fourth Circuit, the court held that school board members, when sued in their official capacities, are persons under Section 1983, whether the suits are for monetary or injunctive relief. The court stated that a contrary finding would "emasculate" the Civil Rights Act of 1871.⁸⁶

Another 1975 case, Bertot v. School District No. 1,⁸⁷ also imposed liability on board members in their official capacities. As discussed earlier, Bertot was a First Amendment teacher dismissal case. In examining the Wood objective and subjective elements, the court found the school board entitled to the defense of good faith immunity as individual board members. The Tenth Circuit Court of Appeals determined that Mrs. Bertot's First Amendment rights had been violated and for this constitutional violation the trial court should impose liability on the board members in their official capacities or on the board as an entity.

In Hostrap v. Board of Junior College District No. 515,⁸⁸ discussed earlier, the court ruled that even though

⁸⁵Paxman v. Wilkerson, 390 F. Supp. 442 (1975).

⁸⁶Ibid., p. 447.

⁸⁷522 F. 2d 1171 (1971).

⁸⁸Hostrap v. Board of Junior College District No. 515, 523 F. 2d 569 (1975).

the board members had the defense of good faith immunity, the board as a corporate body was not entitled to immunity and was subject to suit as an entity. Hostrap's constitutional right to due process had been violated and even though the board members' actions were taken in good faith, the board itself was liable. The case was remanded for damages by the Seventh Circuit Court of Appeals. This ruling indicated that board members who are sued in their official capacities or as a public entity are not entitled to prove their immunity with a good faith defense. Consequently, a plaintiff could sue regardless of whether or not the constitutional violation was a matter of "settled, indisputed law" when the injury occurred. Suits against boards of education as entities would not have to be based on a violation of "settled, indisputable law" or violations of "clearly established constitutional rights."⁸⁹

The Bertot and Hostrap rulings were not the norm but more the exception. Most cases held that school boards and districts are not "persons" within the meaning of Section 1983. A 1971 United States Supreme Court decision in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics⁹⁰ did provide a legal theory with which plaintiffs could sue school boards directly. Bivens determined that when constitutional rights were violated, the injured person could sue on the basis of the Constitution itself. Lawsuits

⁸⁹Wood v. Strickland, 420 U.S. 308 (1975).

⁹⁰403 U.S. 388 (1971).

based on the Constitution must exceed \$10,000 and have jurisdiction applied under 28 U.S.C. Section 1331. At the time of the ruling, this was the only method that plaintiffs could use to sue school boards as defendants. Section 1983 suits could be for less than \$10,000 but plaintiffs could only sue individual board members and officials.

Even litigation under Section 1331 has been unclear. A nontenured teacher in Oklahoma alleged the nonrenewal of her contract was based on her communications with a teachers' organization.⁹¹ The district court rejected jurisdiction over the school board under either Section 1983 or Section 1331. The court identified the school board not to be a "person" under Section 1983 and thus damages and injunctive relief were not available. Jurisdiction could not be based on Section 1331 since the question of nonrenewal arose under state, not federal law.

The United States Supreme Court made some progress toward answering the question of municipal liability under Section 1983 with the June 6, 1978 ruling Monell v. Department of Social Services of City of New York.⁹² The suit involved litigation for back pay by employees who were required to take maternity leave at an arbitrary point during pregnancy. Suit was brought against the governmental agencies directly and the agency heads in their official capacities rather than suing the agency heads as private individuals.

⁹¹Fanning v. School Board of Indep. School Dist. No. 23 of Jefferson City, 395 F. Supp. 18 (1975).

⁹²98 S. Ct. 2018 (1978).

In response to Cleveland v. LaFleur,⁹³ which held such forced-leave policies unconstitutional, the New York policy was changed, but this was after the suit was filed and the employee-plaintiffs continued to press the back pay portion of the claim. At issue was whether damages could be assessed against the New York Department of Social Services as well as against the individual officials in their official capacities. The district court and the Second Court of Appeals followed the precedent of Monroe v. Pape⁹⁴ and held that no monetary recovery was possible under Section 1983 against any local government agency or its officers in their official capacities. This reasoning was based on the holding in Monroe that a municipality was not a "person" within the meaning of Section 1983. The Monell court found the Monroe ruling in error according to legislative history and overruled in a 7-2 decision. The ruling spoke directly to the immunity question:

Local governmental bodies, therefore, can be sued directly under Section 1983 for monetary declaratory or injunctive relief where, as here, the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers . . . [and] . . . may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels.⁹⁵

Justice William Brennan wrote the majority opinion in Monell and justified overruling Monroe on three grounds.

⁹³Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

⁹⁴Monroe v. Pape, 365 U.S. 169 (1961).

⁹⁵Monell v. New York City Department of Social Services, 98 S. Ct. 2018 (1978).

First, re-examination of the congressional debate on Section 1983 indicates that the Monroe decision misread the legislative history. The Monell ruling determined that the Forty-second Congress did intend municipalities to be encompassed within the term "person" used in Section 1983. Secondly, the Monroe decision has never been a clear precedent. An illustration of this has been the willingness of the Supreme Court to permit Section 1983 litigation against school boards in a number of desegregation suits. Also Congress has condoned Section 1983 liability of school boards by passing laws that provided the school districts financial aid to carry out court orders. Thirdly, Congress through the Civil Rights Attorneys' Fees Act has recently established a degree of liability for local school boards. If the plaintiff prevails in Section 1983 action, the school board is liable for attorneys' fees.⁹⁶

Stated simply, the Monell decision defines governmental bodies as "persons" under Section 1983 and liable for acts committed in the enforcement of unconstitutional policies. The court rejected the respondeat superior theory, a common-law doctrine holding the employer responsible for the mistakes of an employee if the employee believed he was pursuing the employer's business. The majority opinion stated:

In particular, we conclude that a municipality cannot be held liable solely because it employs a tortfeasor - or,

⁹⁶Anne M. Dellinger, "School Boards May Be Sued and Found Liable in Section 1983 Suits," School Law Bulletin 4 (October 1978): 17.

in other words, a municipality cannot be held liable⁹⁷ under Section 1983 on a respondeat superior theory.

Section 1983 liability on a local government occurs only when an official policy or custom followed by an employee violates another's constitutional rights. Governmental liability occurs if a school board adopts an unconstitutional policy or allows the practice of an unconstitutional custom. School boards retained the immunity of Monroe for acts of an employee which go beyond official policy or custom. Custom is defined as "deeply imbedded traditional ways of carrying out state policies" or practices of state officials which are permanent and settled.⁹⁸

The court left unanswered the question of whether governments retain some kind of immunity that will protect them from Section 1983 litigation even though they are considered "persons" who may be sued. The court skirted the issue of affording some form of official immunity by stating: "We have no occasion to address, and do not address what the full contours of municipal liability under Section 1983 may be."⁹⁹

Justice Lewis Powell did suggest, however, that some qualified immunity for governments might exist:

In any event, the possibility of a qualified immunity, as to which the court reserves decision, may remove some of the harshness of liability for good faith failure to

⁹⁷Monell v. New York City Department of Social Services, 98 S. Ct. 2018 (1978).

⁹⁸Ibid., p. 2036.

⁹⁹Ibid., p. 2038.

predict the often uncertain course of constitutional adjudication.¹⁰⁰

The Monell ruling opens the door for suits against the financial resources of municipalities and school boards. Possibly a lesser degree of wrongful action is necessary to be proven against a governmental body than an individual. Judges and juries may view the financial resources of a school district or municipality differently than the personal financial resources of a school official. Certainly there will be more suits filed against governmental agencies and fewer against individual defendants.

The liability for customs should provide governmental bodies the initiative to enact legally acceptable policies, whereby employees can function with a lesser probability of violating the constitutional rights of the public.

The full impact of Monell will await further litigation. Monell left unclear the question of who on the governmental hierarchy has the authority to create policy for which the body may be held liable. The Supreme Court will soon address the question of the status and responsibility of employees in making official policies.

The case, Skehan v. Board of Trustees of Bloomsburg State College,¹⁰¹ arose with the dismissal without due process of a nontenured teacher, who was on suspension. The professor sued the college, the president and various officials. The district court ruled that the professor should

¹⁰⁰ Ibid., p. 2047.

¹⁰¹ 431 F. Supp. 1379 (1977).

be reinstated to the suspended status he held prior to the termination. The federal court of appeals determined that the doctrine of de facto tenure had not been clearly established as a constitutional right at the time of the termination. Consequently, the college president was acting in good faith and immune from personal liability. The appeals court attempted to formulate criteria for determining the reasonableness of school officials' lack of knowledge of due process requirements and suggested weighing such issues as the status and responsibility of each individual defendant, and the relative certainty of the constitutional issue. The appellate court awarded nominal damages of one dollar and refused to remand the case for a hearing since a hearing would not affect the decision to discharge the plaintiff. Back pay was refused in view of the teacher's two-year delay in bringing his suit.

The case is currently awaiting action by the Supreme Court. At issue also is the Eleventh Amendment question. In damage suits against state bodies under 42 U.S.C. Section 1983, should federal courts decide independently whether such bodies are "persons" able to be sued or should they accept holdings of state courts that such bodies are agencies of the state and are entitled to claims of sovereign immunity?

Obviously the effect of holding in Monell that government bodies are not absolutely immune from liability must await further litigation. In Skehan the Eleventh Amendment immunity issue must be addressed. Lower courts may choose to

apply the standard of immunity to governmental bodies found in Wood v. Strickland¹⁰² or may develop another standard.

The ruling in Carey v. Piphus¹⁰³ also has a tremendously important effect. Even though a court is permitted to award monetary damages for emotional and mental distress caused by constitutional deprivation, the plaintiff must prove that he has actually suffered some harm. In absence of this proof the plaintiff would receive only nominal damages that the United States Supreme Court has determined to be one dollar. Carey could nullify the financial risk caused by removal of municipal immunity under Section 1983. Time will tell. Presently it is impossible to predict how frequently and under what circumstances school boards will be liable for denying constitutional rights.

¹⁰²Wood v. Strickland, 420 U.S. 308 (1975).

¹⁰³98 S. Ct. 1042 (1978).

CHAPTER IV
SECTION 1983 LITIGATION IN NORTH CAROLINA
AND THE FOURTH CIRCUIT

In 1966 Section 1983 was used for the first time in the education arena. The case¹ involved the manner used by the Hendersonville Board of Education in desegregating its teaching staff. The board failed to reemploy sixteen out of twenty-four black teachers. At the same time the board reemployed all white teachers and added fourteen new, inexperienced white teachers to the teaching staff. In this case the Fourth Circuit Court of Appeals first stated the principle that would guide future desegregation of teaching staffs. The principle was that school boards were required to set up objective standards for the employment and retention of teachers and to apply the standards without racial consideration. Failure to comply with this principle would result in individual liability for damages.

The liability was evident in the 1967 Wall v. Stanley County Board of Education decision.² In this ruling a black teacher, who was dismissed without due process, was awarded monetary damages and was ordered to be objectively considered for reemployment, with the burden of justifying a failure to

¹Chambers v. Hendersonville Board of Education, 364 F. 2d 189 (1966).

²259 F. Supp. 238 (1966).

rehire placed on the board. The equal treatment principle of Chambers was reiterated when back pay and reinstatement were awarded a black teacher in a case involving nonrenewal due to a reduction of black enrollment in the teacher's school.³

These holdings became the guidelines for other circuits to follow in desegregating teaching staffs where de jure segregation had existed. Boards of education were forced to justify their conduct by clear and convincing evidence if a plaintiff alleged that his constitutional rights had been violated. Lack of justification could result in the teacher's receiving damages and having the opportunity to be considered for re-employment. These principles became firmly established and served as bases for other federal courts seeking precedent.

The judicial foresight of the Fourth Circuit federal courts was evidenced in the 1971 Virginia district court decision⁴ that a mandatory maternity leave policy violated individual constitutional rights. Subsequently, the United States Supreme Court held that a mandatory maternity leave policy created an irrebuttable presumption in violation of the due process clause.⁵

Another precedent-setting decision of the Fourth Circuit Court of Appeals was the 1973 student rights case,

³North Carolina Teachers Association v. Asheboro City Board of Education, 393 F. 2d 736 (1968).

⁴Cohen v. Chesterfield County School Board, 326 F. Supp. 1159 (1971) Rev'd. 474 F. 2d 395 (1973).

⁵Cleveland v. Board of Education v. LaFleur, 414 U.S. 632 (1974).

Herman v. South Carolina.⁶ The court refused to order the University of South Carolina to compensate a student expelled for demonstrating against the Vietnam War, but the court did urge the University to reinstate the student in order to avoid equal protection problems (the school had previously reinstated other demonstrators) and thus make any further judicial action necessary. The court was instructing the University to take voluntary actions redressing student grievances or be held liable for damages.

An example of this liability for violating the constitutional rights of students was found in Thonen.⁷ This case involved the disciplining of students for use of vulgarity in the campus newspaper. The disciplining allegedly violated the students' First Amendment Rights.

The case was filed against the chancellor of East Carolina University and the chairman of the university's board of trustees in both their official and individual capacities. The case arose when a student wrote an open letter to the East Carolina University student newspaper objecting to rules prohibiting visitation of persons of the opposite sex in dormitory rooms. The letter used a vulgar expression in reference to the university's chancellor. When the letter was published, the author of the letter and the editor of the newspaper were expelled from the university.

⁶457 F. 2d 902 (1973).

⁷Thonen v. Jenkins, 455 F. 2d 977 (1972).

Suit was filed in federal district court asking for reinstatement, that their records be expunged of disciplinary action, and that money damages and attorneys' fees be awarded. The district court ordered the students readmitted and records expunged.⁸ The Fourth Circuit Court of Appeals affirmed that order.⁹ The district court also awarded nominal damages (\$100) against the defendants to both plaintiffs because the expulsion violated the students' First Amendment rights. The district court also awarded attorneys' fees and expenses of \$3,429.60 plus costs against the defendants. The court stated:

Since the complaint was filed three years ago the defendants have blocked all avenues of compromise and fully litigated every detail much to the delay and detriment of the plaintiffs. By insisting upon litigation . . . , by totally disregarding the constitutional rights of plaintiffs . . . , and by interposing a variety of administrative obstacles to thwart plaintiffs . . . , defendants have been stubborn to the point of obdurate obstinacy.¹⁰

This award was upheld by Fourth Circuit Court of Appeals but the case was remanded to determine if the \$3,429.60 should be assessed against the defendants officially or individually.¹¹ Also on remand the court was instructed to examine whether the defendants acted in good faith under the Wood decision standard. When the case was remanded, the district court dismissed the damages against the defendants in

⁸Ibid.

⁹Thonen v. Jenkins, 491 F. 2d 722 (1973).

¹⁰Thonen v. Jenkins, 374 F. Supp. 134, 139 (1974).

¹¹Thonen v. Jenkins, 517 F. 2d 3, 6 (1975).

their individual capacities and awarded attorneys' fees against them in their official capacities.¹²

The defendants certainly did not heed the judicial advice given in Herman to take the necessary judicial steps to avoid unnecessary litigation and liability. This case demonstrates the tenacity of the Fourth Circuit Court of Appeals in protecting the constitutional rights of individuals.

A case outside of education illustrates the willingness of the Fourth Circuit to establish precedents in insuring constitutional protection.¹³ In 1972, courts generally would not hold plaintiffs liable for negligence under 1983. The Fourth Circuit Court of Appeals, however, asserted that a state court clerk whose negligence impeded the filing of a postconviction petition was not immune from suit under Section 1983. The court said that "the act of filing papers with the court is ministerial and inflexibly mandatory as any of the clerk's responsibilities."¹⁴ The court ruled that ordinarily negligence does not create cause of action under civil rights law, but negligence that results in depriving someone of constitutional rights does create a federal cause of action.

In another Fourth Circuit ruling,¹⁵ the court decided that North Carolina common law made a sheriff liable for the

¹²Ibid.

¹³McCray v. Maryland, 456 F. 2d 1 (1972).

¹⁴Ibid.

¹⁵Scott v. Vandiver, 476 F. 2d 238, 242 (1973).

misconduct of temporary law enforcement officers. This decision constituted a liberal interpretation of vicarious liability, or the legal responsibilities of board members for the actions of a subordinate or agent of the board. Vicarious liability was addressed in the recent Monell case. Section 1983 imposes liability on a local government only when an official policy or custom "causes" an employee to violate another's constitutional right.¹⁶

The precedent-setting role of the Fourth Circuit Court of Appeals in providing constitutional protection was evidenced in a 1975 desegregation case.¹⁷ The plaintiff, a black teacher, alleged that her dismissal was racially motivated and that she was entitled to reinstatement plus back pay. The court held that the school district was not a "person," and hence not subject to suit under Section 1983, but that board members sued in their official capacities were "persons" and liable for the equitable relief sought. At the time of this ruling, the Supreme Court had not yet established whether school boards could be sued in their official capacity as "persons." Again this demonstrates the more liberal Fourth Circuit Court of Appeals interpretation of the Civil Rights Law of 1871.

The court also determined that the school district was not entitled to Eleventh Amendment immunity because while the

¹⁶ Monell v. New York City Department of Social Services, 98 S. Ct. 2018 (1978).

¹⁷ Burt v. Board of Trustees of Edgefield City School District, 521 F. 2d 1201 (1975).

school board actions may have constituted "state action," the school district was not a defendant.

A district court in Virginia again held that school board members are "persons" under Section 1983 when they are sued in their official capacities. The court stated that a contrary ruling would "emasculate" the Civil Rights Act of 1871.¹⁸ This ruling followed the landmark Wood decision¹⁹ that established the guidelines concerning immunity from liability. Most cases following Wood have found officials to be immune from liability in an action for damages. The court acknowledged that the good faith immunity was incorporated in Section 1983 but good faith was not a defense in a suit for back pay, which was an integral part of the equitable remedy for reinstatement and not merely a suit for damages.²⁰

Another post-Wood case involved the dismissal of a nontenured community college teacher at Guilford Technical Institute (GTI) in North Carolina.²¹ Litigation arose when the teacher was required to teach a remedial mathematics course that the teacher contended was contrary to his contract. When the teacher protested, he was discharged without compliance with the GTI discharge procedure. The teacher brought suit in federal district court for breach of his

¹⁸Paxman v. Wilkerson, 390 F. Supp. 442 (1975).

¹⁹Wood v. Strickland, 420 U.S. 308 (1975).

²⁰Paxman v. Wilkerson, 390 F. Supp. 442 (1975).

²¹Jeffus v. Burman, C-37-6-73 (1975).

employment contract and violations of his constitutional right to free speech and due process.

A five-person jury returned a verdict of \$86,655 for the teacher. The award was as follows: \$15,000 personally against four GTI administrators; \$60,000 against GTI as punitive or exemplary damages for violation of the teacher's constitutional rights to free speech and due process and \$11,655 against GTI for breach of the teacher's employment contract. After the trial judge indicated that he intended to set aside the verdict as excessive, the parties reached a settlement of \$18,000 - the teacher's annual salary of \$15,540 and attorneys' fees of \$2,460.

A very different judgment was rendered in another 1975 North Carolina case.²² A nontenured professor at Western Carolina University brought suit when tenure was denied. He alleged that the denial was based on his involvement in union organizing activities and therefore violated his First Amendment Rights. When the case was tried in district court, the members of the board of trustees were not held liable for damages.

A 1976 North Carolina district court decision²³ provided a formula for determining damages to be awarded a teacher for unlawful nonrenewal. Two teachers sued the school board alleging that the board's decision not to renew their

²²Grant v. Abbott, BA 74-120, -121, and -125 (1975).

²³Head v. Haywood County Board of Education, Civil No. A-C-75-69 (1976).

contracts was unconstitutional, arbitrary, capricious, or based upon personal or political reasons. The jury awarded the teachers \$2,500 in damages. The school board then called for the verdict to be set aside or a new trial held on the basis that the evidence did not support the findings.

The federal district court affirmed the verdict of the jury but denied the teachers' request for reinstatement and back wages. The court determined that \$2,500 in damages the jury had awarded had been computed properly. The formula for determining damages for wrongful termination was the difference between the amount that the plaintiff would have earned under the contract less whatever the plaintiff earned under other employment. The damages should also include the present cash value of losses that may arise from the damaging effect of the nonrenewal on future employment.

In this case the court decided that little, if any, back wages should be awarded because the plaintiffs had not fulfilled their duty to seek other employment. Also very little was awarded for injury to future employment because the "taint" of the nonrenewal was found not to be as pervasive as the teachers had contended. The district court stated that the damages requested by the teachers in addition to what was already awarded (back wages and reinstatement) would constitute "double recovery" and thereby unjustly enrich the teachers.²⁴

²⁴ Ibid.

A nine-year case²⁵ involving the dismissal of a teacher for having someone take the National Teacher Examination for her demonstrates the Fourth Circuit Court of Appeals' strict adherence to constitutional safeguards. The teacher first sued in district court alleging that her due process rights had been violated when (1) the notice to her that she could appear before the State Board of Education to show cause why the board should reinstate the certificate was defective because the decision to revoke was made in private session by the state superintendent; and (2) the hearing wrongly placed the burden on the teacher to prove that the invalidation was unwarranted. The district court denied but the Fourth Circuit Court of Appeals reversed because procedural due process had been violated as Huntley alleged. The court ordered a full de novo hearing to be held. The State Board held the hearing as instructed and found the teacher guilty of fraud and revoked her teacher's certificate. Huntley filed suit again alleging that the new hearing violated her due process rights. Both the district and appellate court rejected. Finally, Huntley filed suit again asking for back pay from the period beginning with the original certificate revocation (Dec. 1967), which did not satisfy due process standards, and ending with the date of the later revocation (October, 1974), which did not satisfy due process.

²⁵Huntley v. North Carolina State Board of Education, No. 75-2096 (1976).

The court denied, citing two of its earlier opinions that had granted back pay until the procedural requirements of a proper hearing had been given.²⁶ The court said that the two teachers, Horton and Burt, had been employed under valid contracts while Huntley had procured her contract by fraud. Consequently, she had never had a valid, pre-existing contractual relationship that must be honored until the date due process requirements were met. The court determined that Huntley had no property right and, therefore, no claim to back pay.

The strict adherence to procedural due process had also been evidence earlier in the 1974 nonrenewal of a non-tenured teacher in Charlotte, North Carolina.²⁷ Once the court determined that procedural due process had been violated, the school system was ordered to reinstate the plaintiff immediately, with full salary and other compensation as if her contract had been renewed. Also, the defendants were enjoined from dismissing the plaintiff unless a full hearing was conducted to determine whether the board's decision not to renew the contract was "arbitrary and capricious." Full procedural due process had to be given the plaintiff at this hearing.

The rediscovery of Section 1983 of the Civil Rights Law of 1871 has provided a much easier path to follow in

²⁶Horton v. Board of Education, 464 F. 2d 536 (1972); Burt v. Board of Trustees of Edgefield City School District, 521 F. 2d 1201 (1975).

²⁷Sigmon v. Poe, 381 F. Supp. 387 (1974).

actions seeking damages from school boards. Traditionally, board members have enjoyed a far greater degree of immunity than allowed in actions brought under Section 1983. Professor W. Prosser, a leading academic authority on tort law, expresses: "A public officer . . . cannot be held liable for doing in a proper manner an act which is commanded or authorized by a valid law."²⁸

North Carolina, as other states, has consented to suit by adopting tort claims act.²⁹ Under state law of torts, to maintain a suit against a board member or officer, a plaintiff must show malice, ill will, or corruption. Board members are liable under traditional tort law for acts done in bad faith (misfeasance). However, they are not liable under traditional tort law for negligence (malfeasance) or inaction misfeasance. This burden of proof imposed on plaintiffs has been so difficult that no reported North Carolina case of recovery against a board member can be found.

When a board member is sued under state tort law, he can reply that his acts are those of a government officer, and the plaintiff's action will be defeated unless the plaintiff can prove malice or absence of good faith on the board member's part. Under Section 1983 the board member enjoys only qualified immunity.³⁰ Under the subjective aspect of the defense, the defendant must show that he acted sincerely

²⁸ W. Prosser, Law of Torts, 127 (4th ed. 1971).

²⁹ N. C. General Statute Section 143-291 et seq.

³⁰ Wood v. Strickland, 420 U.S. 308 (1975).

and with the belief that he was doing right, and had no malicious intention to cause a deprivation of constitutional rights. Under the subjective test, the defendant must show that he neither knew, nor reasonably should have known, that his act would violate the clearly established rights of the plaintiff, as such rights existed at the incident. Once the plaintiff has established a prima facie case, the defendant must factually prove that he is entitled to the qualified immunity defense just described. Also, federal law dictates that a Section 1983 lawsuit may be instituted in either federal district or state court because both courts share concurrent jurisdiction.

Section 1983 has proven to be an excellent tool for teachers to use to protect their constitutional rights from being violated under the color of state or local laws, including public school board rules and regulations, and administrative and teacher directives. Whenever "settled, undisputed" federal rights are violated in the dismissal process, teachers have Section 1983 as a vehicle to insure their constitutional protection. This constitutional protection has been especially guarded by federal courts in the Fourth Circuit.

An example of the closely guarded constitutional protection is evident in the language of a 1974 teacher dismissal case, Janetta v. Cole.³¹

No preview of an uncertain future was needed to determine that firing one for his participating 'in circulating a

³¹493 F. 2d 1334, 1338 (1974).

letter of complaint' was constitutionally impermissible.³²

Janetta illustrates the tenacious protection afforded First Amendment rights by the Fourth Circuit.

The previously described civil rights cases³³ demonstrate the leadership role of the Fourth Circuit federal courts in setting fair, objective standards for the employment and retention of all teachers, regardless of race. The liability of school boards and school administration for unconstitutional teacher dismissals was clearly established. Scott,³⁴ McCray³⁵ and Cohen³⁶ demonstrate the willingness of the courts to go beyond the current legal interpretations to insure constitutional protection. In Burt³⁷ and Paxman,³⁸ the courts' determination that school boards were "persons" in their official capacities and subject to suit illustrates the courts' liberal interpretation of Section 1983 of the Civil Rights Law of 1871. This progressive nature was also evidenced when the Fourth Circuit Court of Appeals

³²Ibid.

³³Chambers v. Hendersonville Board of Education, 364 F. 2d 189 (1966); Wall v. Stanley County Board of Education, North Carolina Teachers Association v. Asheboro City Board of Education, 393 F. 2d 736 (1968).

³⁴Scott v. Vandiver, 476 F. 2d 238, 242 (1973).

³⁵McCray v. Maryland, 345 F. 2d 1 (1972).

³⁶Cohen v. Chesterfield County School Board, 326 F. Supp. 1159 (1971) Rev'd 474 F. 2d 395 (1973).

³⁷Burt v. Board of Trustees of Edgefield City School District, 521 F. 2d 1201 (1975).

³⁸Paxman v. Wilkerson, 390 F. Supp. 442 (1975).

acknowledged that a suit based on the Constitution was appropriate against a North Carolina county.³⁹ All of these decisions occurred prior to the Supreme Court's Monell ruling which spoke to the immunity of municipal agencies.

In conclusion, it may be said that if the constitutional rights of teachers are violated in the Fourth Circuit, the teachers have a judiciary watchdog to protect their rights even if the constitution violation lacks precedent.

³⁹Cox v. Stanton, 529 F. 2d 47 (1975).

CHAPTER V
SUMMARY, CONCLUSIONS, AND RECOMMENDATIONS

Summary

On March 23, 1871, President Ulysees S. Grant addressed the Forty-second Congress concerning the failure of certain states to enforce the constitutional guarantees of the newly enfranchised black citizenry. Grant called on Congress for legislation that would effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States. Also presented to Congress was a 600-page report which described the activities of the Ku Klux Klan and the inability of state governments to cope with the Klan's illegal activities.

The Forty-second Congress responded with the Civil Rights Act of 1871. The purpose of the legislation was, and continues to be, to serve as an antidote to discriminatory state laws, to protect federal rights that are available but are not being enforced. Relief under 42 U.S.C. Section 1983 may take the form of equity or damages.

Following the fervor surrounding the passage, the Civil Rights Law of 1871 became a neglected piece of legislation used only slightly. Judicial decisions of the United States Supreme Court in the 1870's and 1880's seriously weakened the impact of the civil rights legislation that the Reconstruction Congresses had enacted between 1866 and 1875.

Equality and freedom did not begin to become realities for the nation's blacks until nearly a century later. The Civil Rights Law of 1871 was rediscovered with the 1961 Monroe case. This decision, holding that municipalities were not "persons" under 42 U.S.C. Section 1983 and, therefore, immune from suit, left many unanswered questions. At the same time it opened the federal judiciary to suits against public officials, based on Section 1983. Monroe was interpreting the Forty-second Congress as not intending the word "person" to include municipalities or municipal agencies. Because of Monroe, suits alleging wrongdoings by a school district were generally filed directly against school officials and not against the district itself.

The late sixties witnessed the first use of 42 U.S.C. Section 1983 in the educational arena. Cases involving teachers whose contracts were not renewed (usually as the result of school integration) were brought on the basis of a violation of Section 1983. The courts established a standard that placed the burden on the school board to justify its conduct by clear and convincing evidence when the plaintiffs made out an initial case of constitutional deprivation. Failure to comply with this standard could result in individual liability for damages. Before 1969, in cases affecting school board members, courts had awarded only equitable relief (forcing the defendant to take or refrain from taking action) as opposed to money damages. Since 1969, courts have awarded money damages against school board members for

violations of teachers' constitutional rights in dismissal and nonrenewal cases.

Liability under Section 1983 has often been referred to as sporadic and inconsistent. Generally, until 1975, if the administrator or board member could show that he acted in "good faith," he had a good chance of avoiding liability. For example, if an administrator could show that he acted under the apparently valid orders of his superior or if the school board member could show his action was sanctioned or required by State Board of Education regulation or state statute, then each would probably be held immune from liability. Proven "good faith" was not always a sure win, however.

Other decisions recognized good faith as a defense only when school board members or school officials at the time of their acts (1) could reasonably believe they were acting legally, and (2) in fact acted in reliance on this belief. Monroe v. Pape failed to define the circumstances under which officials could be held liable. Unanswered was the question of whether officials would be held responsible for any act that deprived someone of "rights and privileges or immunities" regardless of whether it were done maliciously and deliberately or inadvertently. The Wood v. Strickland case answered this question and formulated a national rule concerning good faith immunity in Section 1983. Wood established that board members could be sued personally for damages for the violation of constitutional rights. A good

faith defense was defined as a combination of both subjective and objective elements: A board member must "be acting sincerely and with a belief that he is doing right" (without malice or ill will) and he must act in accordance with "settled, indisputable law." Lower federal district courts further identified four objective measures of good faith: (1) Knowledge of prior law but without the responsibility to predict future constitutional law; (2) a reasonable factual basis for board action as judged from the perspective of the board member making a decision; (3) prior approval by a superior government agency of a given course of action; and (4) adherence to prior, established practices.

Most cases decided after Wood have found officials to be immune from liability in an action for damages. These suits have been most often directed against board members and school officials in their individual capacities. This has occurred because of general unavailability of Section 1983 action against the school board as an entity (due to the Monroe ruling that municipalities are not "persons").

Not every lower federal court ruling held that school board members, when sued in their official capacities, were not "persons" under Section 1983. For example, a 1975 district court in Virginia found that school board members were "persons" when sued in their official capacities and that a contrary ruling would "emasculate" the Civil Rights Law of 1971.

This issue was finally addressed in the 1978 case, Monell v. New York City Department of Social Services. The ruling established that municipal agencies could be sued directly under Section 1983 and that this was the original intention of the Forty-second Congress. (The Monroe Court had misunderstood the meaning of the act.) From this premise, the Supreme Court reasoned that plaintiffs could gain financial, declaratory, or injunctive relief from local governments when the plaintiffs' constitutional rights have been violated by persons who are carrying out an official policy or custom of the governmental body. The Court noted, however, that it did not have the occasion to address and did not intend to address at that time what the full contours of municipal liability under Section 1983 might be. The Court emphasized that in order for Section 1983 to keep its original meaning, municipal bodies sued under Section 1983 could not be entitled to an absolute immunity.

Another important decision, Carey v. Phipus, rendered just prior to Monell, determined that monetary damages for emotional and mental distress caused by constitutional deprivation was permissible but that the individuals seeking to collect such damages would have the burden of proving that they actually suffered some harm. In absence of such proof the individual would be entitled to collect nominal damages that the Supreme Court set at one dollar.

An examination of the Section 1983 federal decisions in the Fourth Circuit indicates that courts have closely

protected the constitutional rights of its constituents. The early civil rights cases provided guidelines that school boards throughout the nation have been forced to follow in teacher dismissals and nonrenewal of contracts. Many Fourth Circuit decisions have demonstrated a willingness to set precedents if it is believed a new interpretation is necessary to protect individual constitutional rights. The constitutional guarantees of due process for dismissed teachers in the Fourth Circuit have been tenaciously protected by the federal judiciary.

Conclusions

The stated purpose of this legal historical study was to clarify the status of 42 U.S.C. 1983 in the dismissal and nonrenewal process for teachers, school board members, and school administrators. The conclusions listed below are drawn from the literature and legal proceedings reviewed in this study.

1. The courts' interpretation and application of qualified immunity defense against damages provide a degree of protection for school officials. To have this protection, school officials must act without malice and show that they neither knew nor should have known that their acts would violate the settled constitutional rights of teachers.
2. Once a plaintiff has established a prima facie case, the defendant must factually prove that he is entitled to the qualified immunity defense.

3. The impact of the ruling that school districts are "persons" subject to suit under Section 1983 remains unclear. Access to the financial resources of a school district rather than the more meager resources of individuals may spur more suits. Also, judges and juries may be more willing to tap the more impersonal public financial resources than private individual financial resources.
4. Due to the recent determination that municipal agencies are "persons" and are without total immunity, lower courts may apply the standard of immunity to governmental bodies found in Wood or may develop a different standard.
5. First Amendment rights are closely guarded by courts and deserve special cautions from school officials.
6. Procedural deficiencies that do not produce provable injury cannot result in back pay or other damages resulting from termination if just cause exists for dismissal. The United States Supreme Court has set one dollar as a nominal award in such instances.
7. The "absence of protected conduct" standard established in Mt. Healthy means that teachers cannot use deprivation of constitutional rights to tie the hands of school officials when legitimate reasons exist for dismissal.
8. Initially, a lawsuit does not have to mention Section 1983 specifically, but must include the general

allegation that the defendant violated a federally protected right under the color of state or local law.

9. Section 1983 lawsuit may be instituted in either the local federal or state court. If the action is filed in state court, any procedures set forth in state law dealing with claims and time deadlines that constrict the right of a plaintiff to assert his claim under Section 1983 are void under the United States Supremacy Clause.
10. Generally, plaintiffs are not required to exhaust state judicial or administrative remedies before bringing suit for damages under the Civil Rights Law of 1871.
11. Any constitutional violation will normally entitle a plaintiff to attorneys' fees. This factor may make school boards and officials hesitant to litigate disputes despite their individual qualified immunity.
12. The courts' recognition of customs in the absence of written policies and procedures and the courts' rejection of respondeat superior should stimulate school boards to enact legally acceptable policies which set standards for its employees.
13. The statute of limitations for civil rights actions under 42 U.S.C. Section 1983 is borrowed from state law. In North Carolina and most states it is three years.

14. The school board as an entity is most vulnerable when a claim is based on the Constitution, since a school board cannot defend itself on basis of its good faith.
15. Federal law does not prohibit a defendant from being insured by the state or obtaining liability insurance to protect his personal finances from depletion due to a compensatory award of damages against him under Section 1983. State insurance law may prevent protection for an award of punitive damages.
16. School boards have not been granted the luxury of Eleventh Amendment immunity from suits in federal court. School boards are to be treated as a municipal corporation or as any other political subdivision which does not enjoy Eleventh Amendment immunity.

Recommendations for Educational Officials

The legal developments with regard to the liability of school board members and school administrators under the Civil Rights Law of 1871 (42 U.S.C. Section 1983) have been rapid and dramatic. These legal developments, however, have not constrained boards of education to the point that they cannot dismiss incompetent teachers. Section 1983 litigation has defined what the constitutional rights of teachers are regarding dismissal and to a large degree Section 1983 litigation has defined what immunity a school official can expect.

1. School officials must be aware that they are responsible for board policies, rules, and customs being

constitutionally valid. With the help of legal counsel, board members should periodically review current legal requirements, changes in the law, and activities of their board that might affect the constitutional rights of others. Whenever board members are in doubt about possible legal requirements in a particular situation, they should consult legal counsel. Due to the courts' tendency to find school boards liable for customs, it should be a high priority of school boards to transform customs into legally acceptable policies which will set standards for its employees and its agents.

2. School boards should seek the counsel and approval, if appropriate, of state and federal agencies if it is believed that a particular action might result in litigation. Federal and state officials can aid school officials in defining limits of authority and providing information.
3. School officials must always maintain a good faith in regard to teacher dismissals. Statements that could be construed as showing prejudice, malice, or animosity should be avoided. If board members act without malice and avoid violating settled constitutional rights, they can feel comfortable in possessing qualified immunity in their individual capacities.
4. School board members should be aware that Section 1983 has not tied their hands in dismissing teachers if

legitimate reasons exist. If dismissal would have incurred "absence of protected conduct" guaranteed by the Constitution, then courts would uphold the dismissal.

5. School boards should be aware that if a constitutional violation does exist, the board will be liable for attorneys' fees. Attorneys' fees have to be a consideration of school boards in deciding whether to settle or pursue litigation. Boards need to be cognizant that attorneys' fees can result in a considerable sum to a school system if it is proven that an individual's constitutional rights have been violated under Section 1983.
6. Recent interpretation that school boards are "persons" subject to Section 1983 may cause teachers to contest their dismissals more readily. Plaintiffs will have access to the greater financial resources of school boards; moreover a lesser degree of wrongful action will be necessary to gain damages from a governmental body than from an individual who possesses a qualified immunity granted under Wood.
7. School boards then must protect themselves by insurance policies that will protect their personal liability and also protect the liability of the school board as an entity. These liability insurance policies should be reviewed annually to make sure coverage remains adequate to protect the interest of the district, board members, administrators, and other staff

members. Members from every level of the hierarchy should be aware of the type and amount of liability insurance coverage that they possess. Board liability insurance coverage should include coverage for the possible costs of defense suits against the board and also pay for possible judgments and settlements.

8. Although procedural deficiencies usually cannot result in sizable damage awards unless provable injury is shown, school boards should adopt written due process procedures for teacher dismissal. Legal counsel should review these procedures to make sure they accord with current statutes and case law.
9. Care should be taken with board minutes in teacher dismissal proceedings. The minutes should reflect that a reasonable basis is present if a dismissal does occur. The records and minutes of the dismissal process must be retained to demonstrate the proper conduct of the board. The board needs to be very careful in following its own established practices and standard procedures. Officials who have followed established or traditional ways have not been held liable when those practices were later ruled invalid.
10. Informed board members and administrators acting in good faith should have little difficulty defending their official acts if challenged under Section 1983. Board members and administrators can demonstrate this good faith by: following carefully any legal

requirements; basing action on a reasonable view of facts; if possible, relying on prior government approval; following established practices; and avoiding any action that can be interpreted as malicious.

Recommendations for Future Research

The writer believes that a continuing study of the Civil Rights Law of 1871 is needed because of the evolving status of the law. Several key areas concerning the use of Section 1983 await further litigation. For example, the Monell case did not settle the issue of whether governments still retain some degree of immunity even though they are now considered to be "persons" subject to suit. Further litigation could result in either the Wood v. Strickland standard of immunity being applied to governmental bodies or a different standard being developed.

In Skehan, a case presently awaiting a Supreme Court decision, another key issue must be decided. In damage suits against state bodies under Section 1983, should federal courts decide independently whether such bodies are "persons" able to be sued or should they accept holdings of state courts that such bodies are agencies of the state for which it claims sovereign immunity.

Future study is also needed to study the judicial unfolding of Section 1983 with special attention being paid to the philosophies of newly-appointed members of the Supreme Court.

Concluding Statement

Since the late sixties, the Civil Rights Act of 1871 (42 U.S.C. Section 1983) has become the most frequently used basis for challenging alleged unconstitutional acts of school board members and administrators. Section 1983 has proven to be a convenient vehicle for teachers to use in protecting their constitutional rights in the dismissal process. Litigation of Section 1983 has proven to do just that--protect constitutional rights. Section 1983 liability has not made it impossible for school boards and school administrators to dismiss teachers if just cause exists. Section 1983 has forced school board members and administrators to continually review board policies, rules, and customs to make sure that they are and remain constitutionally valid. Section 1983 litigation has struck a reasonable balance between the need to dismiss teachers for just cause and the need to protect individual rights.

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