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Suability of School Boards and School Board Members

*Anne S. McFarland**

IN THE PAST THREE YEARS, suits under 42 United States Code §1983 against school boards and school board members have burgeoned. Suits have been brought by teachers involved in union activity,¹ by teachers who allege nonrenewal of contracts due to racial discrimination,² by pupils who challenge hair and dress regulations,³ by unwed mothers who seek readmission to school,⁴ and by militant students who claim the right to practice-teach.⁵

That such suits are of concern to board members is evident from a recent quote from the *American School Board Journal*:

Teachers are suing school boards these days at the drop of a civil right. And that is no mere figure of speech. This is the kind of lawsuit that can be brought against school board members as *individuals* and can force payment of damages out of a boardsman's own pocket.⁶

These suits are definitely different from the contract or tort actions that have been familiar to boards. Actually, the courts have not agreed as to whether §1983 suits against individual board members are proper or even as to whether suits against boards are allowed. The root of the problem is the word "person" in §1983. Whereas in the majority of such suits the interpretation of the word "person" is not in issue, in a sizeable minority of the suits it becomes central.

It appears, however, that a solution for the difficulties is already apparent if one of the common rationales for permitting suit, the

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¹ *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Hanover Township Fed'n. of Teachers v. Hanover Community School Corp.*, 318 F.Supp. 757 (N.D. Ind. 1970); *Roberts v. Lake Central School Corp.*, 317 F.Supp. 63 (N.D. Ind. 1970); *Local 858 of the Am. Fed'n. of Teachers v. School Dist. No. 1 in the County of Denver and State of Colo.*, 314 F.Supp. 1069 (D. Colo. 1970).

² *Harkless v. Sweeny Independent School Dist.*, 427 F.2d 319 (5th Cir. 1970); *cert. denied*, 400 U.S. 991 (1970) *Freeman v. Gould Special School Dist. of Lincoln County, Ark.*, 405 F.2d 1153 (8th Cir. 1969); *Rolfe v. County Bd. of Educ. of Lincoln County, Tenn.*, 391 F.2d 77 (6th Cir. 1968); *Glover v. Daniel*, 318 F.Supp. 1070 (N.D. Ga. 1969); *McDonald v. Marlin Independent School Dist.*, 313 F.Supp. 1162, (W.D. Tex. 1969); *Porcelli v. Titus*, 302 F.Supp. 726 (D.N.J. 1969) *cert. denied*, 402 U.S. 944 (1971); *McBeth v. Bd. of Educ. of the DeVall's Bluff School Dist. No. 1*, 300 F.Supp. 1270 (E.D. Ark. 1969).

³ *Ferrell v. Dallas Independent School Dist.*, 392 F.2d 697 (5th Cir. 1968); *Martin v. Davison*, 322 F.Supp. 318 (W.D. Pa. 1971); *Bannister v. Paradis*, 316 F.Supp. 185 (D.N.H. 1970); *Cordova v. Chonko*, 315 F.Supp. 951 (N.D. Ohio 1970); *Schwartz v. Galveston Independent School Dist.*, 309 F. Supp. 1034 (S.D. Tex. 1970); *Westley v. Rossi*, 305 F.Supp. 706 (D. Minn. 1969).

⁴ *Perry v. Grenada Municipal Separate School Dist.*, 300 F.Supp. 748 (N.D. Miss. 1969).

⁵ *James v. West Virginia Bd. of Regents*, 322 F.Supp. 217 (S.D. W. Va. 1971).

⁶ *Nolte, Those Ugly Lawsuits and Why More Teachers Are Using Them*, 158 AM. SCHOOL BD. J. 34 (1970).

doctrine of *Ex parte Young*, is combined with a consideration of the meaning that was intended for §1983 by the Congress that drafted it. A clear solution is desperately needed not only for school board members who find themselves being sued but also for those teachers, pupils, and parents who feel that their civil rights are being abridged by school boards; the "drop of a civil right" may be a serious matter. The same problems face boards of trustees, regents, etc., of universities and colleges and an occasional state board of education.

Title 42 U.S.C. §1983 reads as follows:

Every person who, under color of any 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 proceeding for redress.⁷

This statute was enacted in 1871 during the Reconstruction Era and has been referred to as the Ku Klux Act because at that time a great deal of Congress' attention was focused on the lawless conditions in the South, largely due to the activities of the Klan.⁸ However, the remedy provided by §1983 was not against the Klan but against those officials who represented the state but were unwilling or unable to enforce the law.⁹ A modern writer, Chester J. Antieau, asserts that the act's purpose was:

. . . to provide a civil action to protect persons against misuse of power possessed by virtue of state law and made possible because the defendant was clothed with the authority of the state.¹⁰

Indeed, the title of the legislation was "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other purposes."¹¹

A leading case upon which much of the modern interpretation of §1983 is based is *Monroe v. Pape*.¹² This was a suit brought by a citizen against police officers and against the City of Chicago for damages for unlawful invasion of plaintiff's home and illegal search, seizure, and detention. Suit was dismissed against the City of Chicago but allowed as to the individual police officers. In its opinion, the Supreme Court traced the legislative history of §1983, and its interpretation of the word "person" was governed by its finding that the response in Congress during the debates on the bill was totally hostile to making municipalities liable for injuries done to individuals.¹³

⁷ Civil Action for Deprivation of Rights 42 U.S.C. §1983 (1970).

⁸ *Monroe v. Pape*, 365 U.S. 167, 174 (1961).

⁹ *Id.* at 176.

¹⁰ C. ANTIEAU, FEDERAL CIVIL RIGHTS ACTS; CIVIL PRACTICE 49 (1971).

¹¹ *Monroe v. Pape*, 365 U.S. 167, 171 (1961).

¹² *Id.*

¹³ *Id.* at 191.

Thus, the Court determined that a municipality was not a "person" within the meaning of §1983.

This interpretation by the Supreme Court has been questioned in a law review note which argues that the legislature was opposed to making a municipality liable for the acts of the general populace rather than the acts of its governmental officials.¹⁴ The note discusses the "Dictionary Act" passed two months prior to §1983. This act defined a number of terms in use in the legislation of that period, and the word "person" was clearly to extend to both political and corporate bodies.¹⁵ Thus, the conclusion is that in passing §1983, Congress clearly intended municipalities to be liable for injuries inflicted by the action or inaction of municipal officials. Nevertheless, the holding in *Monroe* has been extremely influential in interpreting §1983. Footnote 50 of the opinion states:

. . . Since we hold that a municipal corporation is not a "person" within the meaning of §1983, no inference to the contrary can any longer be drawn from these cases.¹⁶

This holding is commonly mentioned in the §1983 cases involving school boards or school board members brought in the federal courts. That the Supreme Court has, since *Monroe*, entertained suits against school boards without raising the "person" issue, has apparently not been influential with the lower courts, although it is evident from case records that a good number of them have not raised the question. It is not clear whether the Supreme Court, in not facing the issue, is ignoring it or whether it has decided that there is *no* issue regarding school boards and "person".

An examination of the cases in which the "person" issue has been raised shows no consistency in the approach to and treatment of the issue. It is submitted that this situation mirrors the state of the law as it now exists. The crux of the problem is the tension between the eleventh amendment and the fourteenth amendment to the Constitution. The eleventh amendment reads:

The Judicial power of the United States shall not be construed to extend to any suit in law or in equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The relevant portion of the fourteenth amendment reads:

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, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

¹⁴ Note, *Developing Governmental Liability Under 42 U.S.C. §1983*, 55 MINN. L. REV. 1201, 1206 (1970).

¹⁵ *Id.* The full title of the act is "An Act Prescribing the Form of the enacting and resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof."

¹⁶ *Monroe v. Pape*, 365 U.S. 167, 191 (1961).

A conflict arises in that the eleventh amendment limits suits against the states, while the fourteenth amendment prohibits certain actions on the part of the states. If the state cannot be sued, there is no remedy for state actions prohibited in the fourteenth amendment. On its face §1983 is directed against those who act "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory." One acting under such "color of law" would almost certainly be a public official.

As noted earlier, at note 11, the very title of the legislation that produced §1983 indicates that its purpose was to enforce the provisions of the fourteenth amendment. If §1983 conflicts with the eleventh amendment in its provision of an avenue for suit against the state, is §1983 unconstitutional? Authority for the passage of §1983 can be seen in the "necessary and proper" clause of the Constitution which reads as follows:

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.¹⁷

As a means of resolving the conflicts evident here, one student of constitutional law has suggested that, by adoption of the fourteenth amendment, any portion of the eleventh amendment which conflicts has been repealed.¹⁸

The leading interpretation of the eleventh amendment is the Supreme Court's decision in *Ex parte Young*¹⁹ in which it was held that a state official who exceeded his authority was no longer acting with the authority of the state and was therefore not protected from suit against him as an individual. Some courts have applied the same rationale to governmental boards which exceed their authority. These boards are treated as corporate "persons" and are suable as such. This point is illustrated by a school board case, *Louisiana State Board of Education v. Baker*, in which the court stated:

The vital principle, however, is not the difference between an individual and a board, it is the difference between the State (the principal granted immunity) and its agents (public officials or public boards) when the act in question exceeds the agent's constitutional authority.²⁰

The conclusion here is that the "agent" of the state may be either an individual or a "board", and in either case, where the authority of the agent has been exceeded, the agent will be personally liable for his acts.

It will be seen that all of the views mentioned—the doctrine of *Monroe*, the doctrine of *Ex parte Young*, references to the eleventh and

¹⁷ U.S. Const. art. I, §8.

¹⁸ Interview with David E. Engdahl, Associate Prof. of Law, Univ. of Colorado, Feb. 16, 1972.

¹⁹ *Ex parte Young*, 209 U.S. 123 (1908).

²⁰ *Louisiana State Bd. of Educ. v. Baker*, 339 F.2d 911, 912 (5th Cir. 1964).

fourteenth amendments—as well as certain other views, are included in the opinions written in §1983 suits against school boards and school board members. These case records are often difficult to understand purely from the standpoint of the pleadings alone. Often suit is brought against both the board in its representative capacity and also against the members as individuals. In other cases, either the board is sued in its representative capacity or only the individual members are sued. Sometimes it is very difficult to ascertain from the case report exactly who all of the defendants are.²¹ In *Miller v. Parsons* the case report contains the statement that the “court construes the loosely drawn complaint as an effort to sue Parsons both individually and in his official capacity.”²² The case report in *Pavlak v. Duffy*²³ contains the puzzling reference to the fact that while the board of trustees are individually named, they are specifically sued only in their official capacities. In *Bradley v. School Board of the City of Richmond, Virginia*²⁴ it is also very difficult to tell *who* the individual defendants are.

As indicated earlier, there are two questions facing the courts that entertain the “person” argument: whether suit can be brought against a school board and whether suit can be brought against the individual board members. Each question has been answered both positively and negatively. In the discussion which follows, each response to these questions will be treated separately.

Suits Dismissed Against the Board in its Representative Capacity

The holding in *Monroe* that a municipal corporation is not a “person” is by far the predominant single reason for dismissing suits against school boards in their representative capacities. In three of these cases, it was specifically held that the suits would be dismissed only insofar as damages were sought but would be allowed as far as the relief sought was injunctive in nature.²⁵ These three Wisconsin courts read *Monroe* as narrowly as possible, and since *Monroe* was a suit for damages, these courts held that it would not control a suit for injunctive relief. In six other cases the decision in *Monroe* is directly or indirectly controlling as precluding suit against a school board in its representative capacity.²⁶ In two of these cases, the suit was for damages only, but in the other four both damages and in-

²¹ *Derby v. The Univ. of Wis.*, 325 F.Supp. 163 (E.D. Wis. 1971).

²² *Miller v. Parsons*, 313 F.Supp. 1150, 1151 (M.D. Pa. 1970).

²³ *Pavlak v. Duffy*, 48 F.R.D. 396 (D. Conn. 1969).

²⁴ *Bradley v. School Bd. of the City of Richmond, Va.*, 324 F.Supp. 401 (E.D. Va. 1971).

²⁵ *Henson v. City of St. Francis*, 322 F.Supp. 1034 (E.D. Wis. 1970); *Abel v. Gousha*, 313 F.Supp. 1030 (E.D. Wis. 1970); *Gouge v. Joint School Dist. No. 1*, 310 F.Supp. 984 (W.D. Wis. 1970).

²⁶ *Harvey v. Sadler*, 331 F.2d 387 (9th Cir. 1964); *Martin v. Davison*, 322 F.Supp. 318 (W.D. Pa. 1971); *Blount v. LaDue School Dist.*, 321 F.Supp. 1245 (E.D. Mo. 1970); *Pavlak v. Duffy*, 48 F.R.D. 396 (D. Conn. 1969); *Morey v. Independent School Dist. No. 492*, 312 F.Supp. 1257 (D. Minn. 1969); *Patton v. Bennett*, 304 F.Supp. 297 (E.D. Tenn. 1969).

injunctive relief were sought. Unlike the Wisconsin courts, these courts made no distinction between *Monroe's* application to actions for damages and its application to actions for injunctive relief.

In the remaining cases *Monroe* is not mentioned. In the case of *Sellers v. Regents of the University of California*,²⁷ plaintiffs asked for an injunction, declaratory judgment and damages when they were denied the use of university buildings for a "Vietnam Commencement". Although the case was subsequent to *Monroe*, three other ninth circuit cases are cited as authority for the statement that:

We draw attention to the fact that the action is being prosecuted against *The Regents of the University of California, a corporation*. The appellee is a corporation created by the Constitution of the State of California. As such it is not a proper party since it is not a "person" within the meaning of 42 U.S.C. §1983.²⁸

None of the cases relied upon mentions *Monroe*. In *Schwartz v. Galveston Independent School District*²⁹ the court held that defendant board in its representative capacity could be dismissed without affecting the issues. The court stated:

In a suit against individual school officials in their individual capacity only, an injunction may issue binding all defendants and those acting in concert with them . . . Such an injunction provides relief as effective as an injunction operating against a school district directly.³⁰

This is one of the few cases in which the question of proper parties was raised by the court sua sponte. In the remaining two cases there is *no* clear rationale for dismissal; it should be noted that one of these cases was prior to *Monroe*.³¹

There exists, then, a situation in which *Monroe* is pre-eminent but is interpreted differently, sometimes to bar all suits against boards and sometimes to bar only suits for damages. It is interesting to note that the cases that do not rely on *Monroe* vary from having no clear rationale for dismissal to relying on cases other than *Monroe* to get the same result that reliance upon *Monroe* would give.

Suits Allowed Against the Board in its Representative Capacity

It has been seen that many courts have been willing to read *Monroe* as controlling only in cases where damages are sought. There

²⁷ *Sellers v. Regents of the Univ. of Calif.*, 432 F.2d 493 (9th Cir. 1970), *cert. denied*, 401 U.S. 981 (1971).

²⁸ *Id.* at 500.

²⁹ *Schwartz v. Galveston Independent School Dist.*, 309 F.Supp. 1034 (S.D. Tex. 1970).

³⁰ *Id.* at 1038.

³¹ *Miller v. Parsons*, 313 F.Supp. 1150 (M.D. Pa. 1970); *Miller v. Bd. of Educ. of Dist. of Columbia*, 106 F.Supp. 988 (D.D.C. 1952).

are, then, many cases in which suit is permitted against school boards for equitable relief.³²

There are other cases that rely on the *Ex parte Young* doctrine rather than *Monroe* although these cases are post-*Monroe*. Two Louisiana cases bear this out. In *Louisiana State Board of Education v. Baker*,³³ an action was brought by Negro students seeking admission to a state college. The attorney general's defense for the Board was that the eleventh amendment shields the state and its agencies from suit without their consent. The court remarked that the attorney general misunderstood the doctrine of *Ex parte Young*, and that any state agency, individual or board would be liable to suit when exceeding its authority.^{33a} In the case of *McCoy v. Louisiana State Board of Education*,³⁴ a year later, the same court merely handed down a per curiam opinion, noting that for the seventh time in recent years, it was holding that a state agency is not immune from suit to enjoin it from enforcing an unconstitutional statute. In *Lee v. Board of Regents of State Colleges*,³⁵ a seventh circuit court ruled similarly. Plaintiffs had brought suit because a school newspaper refused to print their editorial statement, and the court held that it has been settled law since *Ex parte Young* that suits to enjoin state and county officials from invading constitutional rights are not forbidden by the eleventh amendment. The court also made the same observation that the Louisiana court made by indicating that the fact that the board is a "body corporate" rather than a natural person did not excuse the board under §1983. A pre-*Monroe* case also relied on *Ex parte Young* in permitting suit.³⁶

The only other pre-*Monroe* case is the 1947 case of *Bomar v. Keyes*³⁷ where plaintiff teacher was dismissed following service on a federal jury. At one particular stage of the suit, the principal was the only defendant, but in this opinion, Learned Hand referred to the fact that the board was a corporate body which may be sued but that it had no part in the wrong alleged. The post-*Monroe* case of *Porcelli v. Titus*³⁸ used the same rationale when it was stated that the board of education is a corporate body which may sue and be sued.

³² *Butts v. Dallas Independent School Dist.*, 436 F.2d 728 (5th Cir. 1971); *Orr v. Thorpe*, 427 F.2d 1129 (5th Cir. 1970); *Harkless v. Sweeny Independent School Dist.*, 427 F.2d 319 (5th Cir. 1970); *Henson v. City of St. Francis*, 322 F.Supp. 1034 (E.D. Wis. 1970); *Local 858 of the Am. Fed'n. of Teachers v. School Dist. No. 1 in the County of Denver and State of Colo.*, 314 F.Supp. 1069 (D. Colo. 1970); *Abel v. Gousha*, 313 F.Supp. 1030 (E.D. Wis. 1970); *Gouge v. Joint School Dist. No. 1*, 310 F. Supp. 984 (W.D. Wis. 1970); *Roth v. Bd. of Regents of State Colleges*, 310 F. Supp. 972 (W.D. Wis. 1970).

³³ *Louisiana State Bd. of Educ. v. Baker*, 339 F.2d 911 (5th Cir. 1964).

^{33a} *Id.* at 912.

³⁴ *McCoy v. Louisiana State Bd. of Educ.*, 345 F.2d 720 (5th Cir. 1965).

³⁵ *Lee v. Bd. of Regents of State Colleges*, 441 F.2d 1257 (7th Cir. 1971).

³⁶ *Orleans Parish School Bd. v. Bush*, 242 F.2d 156 (5th Cir. 1957).

³⁷ *Bomar v. Keyes*, 162 F.2d 136 (2d Cir. 1947), *cert. denied*, 332 U.S. 825 (1947).

³⁸ *Porcelli v. Titus*, 302 F.Supp. 726 (D. N.J. 1969), *cert. denied*, 402 U.S. 944 (1971).

There may be the implication here that a board, in becoming a corporate entity, has waived the eleventh amendment and may be sued. In the only remaining post- *Monroe* cases, the rationales are simply not clear as to why the board was allowed.³⁹

Again, the bases for allowing suits against the boards are varied. *Monroe* is used to argue that suits for injunctive relief may be allowed; at other times the doctrine of *Ex parte Young* is used, and at still other times the theory that a corporate body may sue and be sued is relied upon.

Suits Dismissed Against Individual Board Members

In only four cases were suits against individual board members dismissed, and in two of these cases, suits against the board in its representative capacity were also brought and were allowed. In *Abel v. Gousha*,⁴⁰ the court stated that the gravamen of the complaint was improper actions by the board in its corporate capacity, and that since there was no complaint about individual action by any board member, the individual members were entitled to dismissal. This case involved suit by a teacher who complained that she was discharged after she was a party to certain demonstrations. She sought reinstatement to employment and damages. In *Henson v. City of St. Francis*,⁴¹ the same court ruled that the action must fail because there was no individual activity. Here plaintiff teachers were seeking damages, reinstatement and a declaratory judgment. Their contention was that the board had denied them their fourteenth amendment rights in discharging them without a public hearing. Obviously, in both cases, the court felt that there were valid causes of action against the boards as entities and desired to permit redress for the alleged actions of those entities. The conclusion to be reached is that the court was loathe to assess damages against individuals and so dismissed the suit as to them. This is in direct contradiction to the holding in *Monroe* that damages could be collected from the individual defendants but not from the municipality. An argument can be made that these cases are distinguished from *Monroe* in that the individual defendants in *Monroe* were separable from the City of Chicago while the individual defendants in *Abel* and *Henson* were, in turn, the members of the corporate board being sued.

In a third Wisconsin case, *Lessard v. Van Dale*,⁴² suit was brought only against the individual board members. Plaintiff teacher asked for money damages when she was discharged without cause and was not given the public hearing provided by state statute. The *Lessard* court mentioned the *Abel* case and stated that the issue in

³⁹ *Scher v. Bd. of Educ. of the Town of W. Orange*, 424 F.2d 741 (3d Cir. 1970); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 300 F.Supp. 1381 (W.D. N.C. 1969).

⁴⁰ *Abel v. Gousha*, 313 F.Supp. 1030 (E.D. Wis. 1970).

⁴¹ *Henson v. City of St. Francis*, 322 F.Supp. 1034 (E.D. Wis. 1970).

⁴² *Lessard v. Van Dale*, 318 F.Supp. 74 (E.D. Wis. 1970).

both *Lessard* and *Abel* was not whether a cause of action *could* be stated against the individual board members but whether it *was* stated. The court ruled that the plaintiff was alleging misconduct by the defendant as a board and that there was no action against them as individuals.

The remaining case in which suit was dismissed as to the individual defendants is *Morey v. Independent School District No. 492*⁴³ in which suit was also brought against the district. Plaintiff was a teacher claiming increases in back pay and both actual and exemplary damages. The suit was dismissed against the district under *Monroe* because the claim was not for equitable relief and was dismissed against the individuals for failure to allege deprivation of any rights, privileges or immunities secured by the Constitution. Again, a court found no cause of action against individual defendants when damages were being sought. However, lest this result of not allowing damages against individuals be thought to occur without deviation, it should be noted that there are three other school board cases in which suits for damages were allowed against individuals.⁴⁴ In none of these cases does the record indicate conclusively what was the final disposition of the damage question.

Suits Permitted Against Individual Board Members

An appropriate division to use here is that between cases in which the "person" issue was treated as dicta and cases in which it was germane to the case at hand. In two of the latter, the doctrine of *Ex parte Young* was applied to allow suit against the individual members. In *Board of Trustees of Arkansas A & M College v. Davis*, a faculty member brought suit for damages and equitable relief when his position was terminated, and the court stated "Without the cloak of valid state authority to immunize defendant's actions plaintiff is allowed a remedy against them individually."⁴⁵ In *Whitner v. Davis*, the court made the similar statement that "Individuals, sued in their capacity as trustees of a state agency, are not protected by the Eleventh Amendment any more than the agency itself is protected by that Amendment."⁴⁶

In three other cases there is the common thread that good faith action will protect defendants in suits that are allowed against them as individuals. In *McLaughlin v. Tilendis*,⁴⁷ the plaintiffs were probationary teachers suing for damages and contending that their dismissal arose because of their association with the American Federa-

⁴³ *Morey v. Independent School Dist. No. 492*, 312 F.Supp. 1257 (D. Minn. 1969).

⁴⁴ *Whitner v. Davis*, 410 F.2d 24 (9th Cir. 1969); *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968); *Board of Trustees of Ark. A. & M. College v. Davis*, 396 F.2d 730 (8th Cir. 1968) cert. denied, 393 U.S. 962 (1968).

⁴⁵ *Bd. of Trustees of Ark. A. & M. College v. Davis*, 396 F.2d 730, 733 (8th Cir. 1968) cert. denied, 393 U.S. 962 (1968).

⁴⁶ *Whitner v. Davis*, 410 F.2d 24, 30 (9th Cir. 1969).

⁴⁷ *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968).

tion of Teachers local union. The court ruled that defendants would have a qualified immunity dependent upon good faith action. A Wisconsin case, *Gouge v. Joint School District No. 1*,⁴⁸ relied on *McLaughlin* in holding that defendants have a qualified immunity. *Gouge* is simply not clear on its face as to why suit was allowed against the individual members. The same problem arises in *Patton v. Bennett*,⁴⁹ where suit was permitted against individuals with no clear rationale, though again the qualified privilege based on good faith action was recognized.

The four remaining cases have no common rationale for permitting suit. In *Miller v. Board of Education of District of Columbia*,⁵⁰ the court simply says that while the board is not an entity and is not subject to suit, the respective members are properly sued. In *Swann v. Charlotte-Mecklenburg Board of Education*, the court stated:

The motion of the individual defendants, members of the school board, to dismiss was and is denied. This is a suit under the Civil Rights Act involving questions of equal protection of laws and racial discrimination and segregation in the public schools. The individual defendants are proper parties and their presence is appropriate and desirable.⁵¹

The reasons for this statement are not explained. In a case involving suit for injunction by long-haired students, *Schwartz v. Galveston Independent School District*,⁵² the court felt that the complaint failed to state a claim on which relief could be granted against any but the individual defendants. In this case, quoted at note 30, supra, the court held that suit against the defendants as a school board could be dismissed because injunctive relief against the individual members would be as effective as injunctive relief against the board. *Bradley v. School Board of the City of Richmond, Virginia*⁵³ again simply indicated that suit can be brought against the individuals; there is no reference to *Ex parte Young* or to the *Monroe* decision. There is some confusion as to whether the case report, in referring to individuals, is talking about school board members or other officials, such as the superintendent or principal.

There are also five cases in which the question of suability of individual board members was treated as dicta. Two have no clear rationale for allowing suit,⁵⁴ two seem to rely on *Ex parte Young*,⁵⁵ and

⁴⁸ *Gouge v. Joint School Dist. No. 1*, 310 F.Supp. 984 (W.D. Wis. 1970).

⁴⁹ *Patton v. Bennett*, 304 F.Supp. 297 (E.D. Tenn. 1969).

⁵⁰ *Miller v. Bd. of Educ. of Dist. of Columbia*, 106 F.Supp. 988 (D. D.C. 1952).

⁵¹ *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 300 F.Supp. 1381, 1382 (W.D. N.C. 1969).

⁵² *Schwartz v. Galveston Independent School Dist.*, 309 F.Supp. 1034 (S.D. Tex. 1970).

⁵³ *Bradley v. School Bd. of the City of Richmond, Va.*, 324 F.Supp. 401 (E.D. Va. 1971).

⁵⁴ *Martin v. Davison*, 322 F.Supp. 318 (W.D. Pa. 1971); *Blount v. Ladue School Dist.*, 321 F.Supp. 1245 (E.D. Mo. 1970).

⁵⁵ *Miller v. Parsons*, 313 F.Supp. 1150 (M.D. Pa. 1970); *Pavlak v. Duffy*, 48 F.R.D. 396 (D. Conn. 1969).

in the case of *Harkless v. Sweeney Independent School District*⁵⁶ plaintiffs voluntarily dismissed the suit against individuals when two jurors expressed reluctance to grant damages against individual board members. However, the court indicated that §1983 clearly intended that persons would be suable since many Supreme Court cases since *Monroe* had ignored the issues of "person" in suits against state officials. The *Harkless* decision is the subject of a law review note.⁵⁷

Again, then, there is confusion as to why suits against individuals are allowed. *Ex parte Young* has been used to uphold these suits, but in the majority of cases there is simply no clear rationale.

Conclusions

The discussion above has encompassed thirty-one cases in which courts have clearly faced the problem of whether boards of education or their individual members may be proper parties defendant in §1983 lawsuits. There is no easy way to summarize all of these cases because of the great disparities in holdings, but a brief overview of certain aspects of these cases may be helpful. In eight cases, suit against board members as individuals was allowed. In an additional five cases, dicta indicated that individuals would have been proper parties defendant. In four cases, suit against individuals was definitely not permitted, and in all four cases, damages were sought. Even though three other cases did permit suits for damages against individuals, it seems fair to say that causes of action or individual activity may be more difficult to find when it appears that damages may be assessed against individual members than when it appears that damages are being sought from the board as a representative body.

In twenty-five cases where the board was sued in its representative capacity, fifteen suits were allowed and ten were prohibited. In seven of these prohibited cases, however, suits had also been brought and were allowed against individuals. Out of the total of thirty-one cases, seven were absolutely dismissed; in four of these, only the board was sued and dicta indicates that suits against individuals would have been permitted. It appears, then, that there is generally a right of action against school boards and school board members. The problem is to develop consistent rationales and doctrines upon which such suits can proceed.

It was stated earlier that, in a majority of the cases, the courts have not raised the "person" issue. For the purposes of comparison, a number of cases equal to the number discussed above have been examined to ascertain whether there is any factor common to those cases where the issue is not raised which is absent in those cases where the issue is raised. The cases chosen for examination are almost equally divided into cases in which the board was sued in its repre-

⁵⁶ *Harkless v. Sweeney Independent School Dist.*, 427 F.2d 319 (5th Cir. 1970).

⁵⁷ 35 Albany L. Rev. 332 (1971).

sentative capacity.⁵⁸ and those in which individual members were sued.⁵⁹ There seems to be no factor common to those cases where the issue is not raised which is absent in those cases where the issue is raised. Thus, there is the dilemma that in the majority of the cases the issue is not even raised, and when it is, there is no consistency in its resolution.

How must this appear to those individuals who are serving on the school boards of this nation? It has been written that:

There must be effective protection of individuals who serve unselfishly in the capacity of school board members, but who through no apparent fault of their own have run afoul of the law on an allegation that they have invaded someone's constitutional rights.⁶⁰

No one would argue that many school board members do not often serve unselfishly and without pay. On the other hand, running afoul of someone's constitutional rights is no trivial problem. Board members are in positions of great sensitivity and power; the policy decisions of a school board often involve civil rights and affect a great number of people in a given community.

It is partially the realization of both sides of this problem that has brought the courts to their present posture of allowing suits

⁵⁸ *Freeman v. Gould Special School Dist. of Lincoln County Ark.*, 405 F.2d 1153 (8th Cir. 1969), *cert. denied*, 396 U.S. 843 (1969); *Rolfe v. County Bd. of Educ. of Lincoln County, Tenn.*, 391 F.2d 77 (6th Cir. 1968); *Glover v. Daniel*, 318 F.Supp. 1070 (N.D. Ga. 1969), *aff'd.*, 434 F.2d 617 (5th Cir. 1970); *McBeth v. Bd. of Educ. of the DeVall's Bluff School Dist. No. 1*, 300 F.Supp. 1270 (E.D. Ark. 1969) (teachers allege racial discrimination in discharge); *Johnson v. Branch*, 364 F.2d 177 (4th Cir. 1966), *cert denied*, 385 U.S. 1003 (1967); *Hetrick v. Martin*, 322 F.Supp. 545 (E.D. Ken. 1971); *Orr v. Trinter*, 318 F.Supp. 1041 (S.D. Ohio 1970), *rev'd.*, 444 F.2d 123 (1971); *Robbins v. Bd. of Ed. of Argo Community High School Dist. 217, Cook County, Ill.*, 313 F.Supp. 642 (N.D. Ill. 1970); *Canty v. Bd. of Educ., City of New York*, 312 F.Supp. 254 (S.D. N.Y. 1970) (teachers allege wrongful non-renewal of contract); *James v. W. Va. Bd. of Regents*, 322 F. Supp. 217 (S.D. W. Va. 1971) (student teacher alleges right to practice teach); *West v. Bd. of Educ. of Prince George's County*, 165 F.Supp. 382 (D. Md. 1958) (teacher claims back pay); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) (students wearing black armbands); *Ferrell v. Dallas Independent School Dist.*, 392 F.2d 697 (5th Cir. 1968), *cert denied*, 393 U.S. 856 (1968) (students with long hair); *Sullivan v. Houston Independent School Dist.*, 307 F.Supp. 1328 (S.D. Tex. 1969) (students publishing underground newspaper); *Perry v. Grenada Municipal Separate School Dist.*, 300 F.Supp. 748 (N.D. Miss. 1969) (unwed mothers wish to return to school).

⁵⁹ *Smith v. Bd. of Educ. of Morrilton School Dist. No. 32*, 365 F.2d 770 (8th Cir. 1966); *McDonald v. Marlin Independent School Dist.*, 313 F.Supp. 1162 (W.D. Tex. 1969) (teachers allege racial discrimination in discharge); *Jones v. Hopper*, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970); *Bradford v. School Dist. No. 20, Charlestown, S.C.*, 364 F.2d 185 (4th Cir. 1966); *Hanover Township Fed'n of Teachers v. Hanover Community School Corp.*, 318 F.Supp. 757 (N.D. Ind. 1970); *Roberts v. Lake Central School Corp.*, 317 F.Supp. 63 (N.D. Ind. 1970); *Montgomery v. White*, 320 F.Supp. 303 (E.D. Tex. 1969); *Shirck v. Thomas*, 315 F.Supp. 1124 (S.D. Ill. 1970); *Lucia v. Duggan*, 303 F.Supp. 112 (D. Mass. 1969); *Rackley v. School Dist. No. 5, Orangeburg County, S.C.*, 258 F.Supp. 676 (D.S.C. 1966) (teachers allege wrongful nonrenewal of contract); *Connell v. Higginbotham*, 403 U.S. 207 (1971) (teacher objected to loyalty oath); *Bannister v. Paradis*, 316 F.Supp. 185 (D.N.H. 1970) (student complains about dress code); *Cordova v. Chonko*, 315 F. Supp. 953 (N.D. Ohio 1970); *Westley v. Rossi*, 305 F.Supp. 706 (D. Minn. 1969) (students with long hair).

⁶⁰ *Noite, Suddenly Boardmen Can Be Sued as Individuals*, 158 AM. SCHOOL Bd. J., Oct., 30, 32 (1970).

against school boards and members more often than not, but being very conservative when it comes to permitting suits for damages against individual members. However, the plethora of rationales that have been advanced for permitting or denying suits desperately needs to be put into some kind of order so that the law will be predictable, not only with regard for the position of the school board member, but also for the teacher, pupil or parent who seeks to enforce rights abridged by school boards.

It seems as though the beginning of a solution is apparent if certain rationales already in use are combined. First there is the holding of *Ex parte Young* that those officials who overstep their authority are stripped of immunity from suit. Next, there is the holding already advanced by at least two courts that a school board can also be stripped of its immunity as a board. Finally, §1983 may be considered in the light of its contemporaneous "Dictionary Act," supra at note 15, in which "person" was distinctly understood to include a corporate person. Thus, suits could proceed against boards in their representative capacities with no question. It seems clear that not only is the Supreme Court's interpretation of the legislative history of the term "person" in §1983 questionable, but also that the court's own position of not raising the issue with regard to school boards is a matter of record. Thus, the courts that are currently citing *Monroe* as authority to dismiss actions against school boards are on doubly dangerous grounds.

At present the most prudent tactic is to sue both the corporate body and the individual members, but there is still the danger that under the prevailing interpretation of "person" in §1983, suit may be dismissed against the board, and if damages are sought, it is very likely that the suit will be dismissed against the individuals for "no individual activity". In such cases there is no remedy left. By its very nature, the school board acts as a body, and in most cases there is no real necessity to seek remedies against individual members if such remedies can be sought against the board. (This is, of course, the converse of *Schwartz v. Galveston Independent School District*, discussed at note 30 supra.) Permitting suits against boards is consistent with established legal principles and would end much of the unpredictability currently surrounding such suits.