

Section 1983, Senate Bill 217, and the Future of Civil Rights Practice in Colorado

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For most people 1983 is only a year. A year in which Michael Jackson was still #1 on the charts, David Copperfield made the Statue of Liberty disappear, John Elway forced his way to Denver, and Ronald Reagan was battling low approval ratings in his first term of office. But for civil rights attorneys, 1983 has a different meaning: it is the lifeblood of our work. We speak of 42 U.S.C. § 1983 in reverential tones, and for good reason. Section 1983 creates a cause of action for individuals to sue governmental actors for violating their constitutional rights.[1] As such, Section 1983 breathes life into the U.S. Constitution. Through Section 1983, "We the People of the United States,"[2] are able to hold the government to account.

This article is intended to provide an overview of constitutional litigation. We will trace the evolution of Section 1983 to provide historical context, discuss the current state of the law, and then look forward to how civil rights practice in Colorado will change as a result of recently-passed Senate Bill 217. Although we expect that Senate Bill 217 will largely replace Section 1983 when it comes to claims against "peace officers," Section 1983 will remain relevant as it constrains a broader swath of governmental actors.

History of Section 1983

The story of Section 1983 runs parallel to the story of our nation's endless struggle to give truth to the Declaration of Independence's (US 1776) recognition that "all men are created equal." Section 1983 has its origin in Reconstruction, a brief period following the Civil War that saw a leap towards equality not seen again until the Civil Rights movement of the mid-20th century. During Reconstruction, Congress passed and the states ratified[3] the Thirteenth, Fourteenth, and Fifteenth Amendments (collectively, the "Reconstruction Amendments").[4] As a remarkable district court order recently observed, "If the Civil War was the only war in our nation's history dedicated to the proposition that Black lives matter, Reconstruction was dedicated to the proposition that Black futures matter, too."[5]

Reconstruction—and its progress towards racial equality—was short-lived. The threat towards white supremacy caused immediate backlash. The Ku Klux Klan was formed in 1866 and racial violence reigned supreme in the South.[6] In 1871, to combat this growing terror, Congress passed the Ku Klux Klan Act of 1871. Section 1 of the Act, now codified as 42 U.S.C. § 1983, reads in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . 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 any action at law, suit in equity, or other proper proceeding for redress . . . .[7]

The plain language of the statute creates a personal Fourteenth Amendment action for damages and injunctive relief against any "person" who, acting "under color of" state or local law, deprives a person of their Fourteenth Amendment rights.

But, despite Congress's intent to provide a remedy to those deprived of their constitutional rights, racial violence continued to flourish—often perpetrated or otherwise sanctioned by law enforcement and other government officials. And the federal courts acquiesced.[8] In the *Civil Rights Cases* of 1883, the Supreme Court narrowly interpreted the state action requirement of the Fourteenth Amendment so as to effectively make Section 1983 a dead letter.[9] Thus, persons who were denied due process and equal protection of the law no longer had any recourse in the federal courts.

For almost a century, Section 1983 lay dormant as Jim Crow spread and became the de facto law of the land.[10] Eventually, a burgeoning civil rights movement began to make inroads, as embodied in the Supreme Court's unanimous decision in *Brown v. Board of Education* in 1954 that state laws establishing racial segregation in public schools were

unconstitutional.[11] Thus, by the time *Monroe v. Pape*[12] reached the Supreme Court, it found an audience much more receptive to the expansion of civil rights than previous iterations.

Monroe v. Pape and the Resuscitation of § 1983

In *Monroe v. Pape*, the plaintiffs were a Black family who alleged that "13 Chicago police officers broke into petitioners' home in the early morning, routed them from bed, made them stand naked in the living room, and ransacked every room, emptying drawers and ripping mattress covers."[13] The plaintiffs further alleged that the father was taken to the police station, detained on "open" charges for ten hours, interrogated, not taken before a magistrate, and was not permitted to call his family or an attorney.[14] The officers had no search warrant or arrest warrant.[15] The plaintiffs brought a cause of action under Section 1983 for the violation of his Fourth and Fourteenth Amendment rights.[16]

In a two-page decision,[17] the Seventh Circuit held that the plaintiffs had no federal cause of action because they "are not without their remedy in the state court."[18] At the Supreme Court, the defendants advanced the same argument that the plaintiffs had an adequate remedy at state law. Additionally, the defendants argued that "under color of" excludes acts of an official who can show no authority under state law, custom, or usage.[19]

Monroe began its analysis with a lengthy examination of the legislative history of Section 1983.[20] The Court observed that one purpose of Section 1983 was "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."[21] Thus, "[i]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy . . . ."[22] Just as importantly, the *Monroe* court held that "under color of" state law included the "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law . . . ."[23] Thus, a governmental actor who violated state law by abusing his state-given power could be held liable under Section 1983. With *Monroe*, the Court opened the long-closed doors of federal courthouses to litigants seeking a remedy for the deprivation of civil rights.

Elements of a 1983 Claim

As mentioned above, Section 1983 creates a private right of action to enforce federal rights. Thus, to state a claim under Section 1983, a plaintiff must allege (1) that a person acting under color of state law (2) deprived the plaintiff of their federally protected rights.[24] Broken down to its subparts, a plaintiff must establish

> (1) a violation of rights protected by the federal Constitution or created by federal statute or regulation, (2) proximately caused (3) by the conduct of a 'person' (4) who acted under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia.[25]

What this means, in practice, is that virtually all violations of federal constitutional or statutory rights by state or local officials may give rise to a Section 1983 claim. For example, whenever law enforcement conducts an unlawful search or seizure, makes an illegal arrest, or uses excessive force in violation of the Fourth Amendment, Section 1983 would be implicated. Or whenever a school official disciplines a student for speech in violation of the First Amendment, or a prison official imposes "cruel and unusual punishment" on inmates in violation of the Eighth Amendment, or a public employer discriminates against an employee based on his or her sex or race in violation of the Fourteenth Amendment, Section 1983 will provide a cause of action.[26]

(1) *Did the defendant violate your client's rights?*

To determine whether a person has a cause of action under Section 1983, the first step is to determine what constitutional or federal right was violated. This can be complicated as it is often dependent on context. For example, the contours of a First Amendment claim will vary widely based on whether you are a student in a public school,[27] an inmate in a detention facility,[28] or a private citizen wearing a jacket displaying "Fuck the Draft."[29] Or, for an excessive force claim, such a claim may fall under the Fourth, Fifth, Eighth, or Fourteenth Amendment, depending on "where the plaintiff finds himself in the criminal justice system."[30] Complicating matters, each type of excessive force carries with it a different legal test.

Accordingly, it is imperative for any attorneys considering a Section 1983 claim to identify the precise constitutional or statutory right that has been violated. Recognize that seemingly small distinctions, such as whether the excessive force occurred before a probable cause determination or after, can have an enormous effect on the applicable legal standard.

(2) *Was the defendant the proximate cause of the violation of rights?*

"Personal involvement is an essential allegation in a § 1983 action."[31] It is the plaintiff's burden to identify specific actions taken by particular defendants showing that they personally were responsible for the violation of rights. Obviously, if a law enforcement officer uses excessive force against the person, this element would be met for that particular officer. But what about

his partner who is on the scene but takes no action to intervene? What about the supervisor who failed to properly supervise the officer? And what about the municipality that employed the officer? The answers to these questions are "possibly," "sometimes," and "maybe."

For all three of these questions, the focus must remain on the actions (or inaction) by the particular putative defendant. So, a law enforcement officer can be held liable under Section 1983 if he or she personally fails to take reasonable steps to prevent or interrupt a colleague's use of excessive force.[32] A supervisor can only be held liable whether there is "an 'affirmative link' between the supervisor and the constitutional violation."[33] Similarly, a municipal entity cannot be liable merely because it employed the offending officer. The injury must be traceable to action or inaction by the municipality itself.[34]

(3) *Is the defendant a "person?"*

Succinctly, a "person" is an individual, a municipality, and its entities, but not states and their agencies.[35]

(4) *Is the defendant acting under color of state law?*

Finally, a plaintiff must show that the defendant was acting "under color of any statute, ordinance, regulation, custom, or usage, of any State . . ." The definition of acting under state law is when a person exercises power that he or she possesses "by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[36] The authority with which the defendant is clothed may be "either actual or apparent."[37]

What does this mean in practice? Take the case of a police officer who assaults an individual. You might assume that this fact pattern would fall under color of state law. Well, it depends. For example, an on-duty police officer who uses excessive force in effectuating an arrest will almost certainly be acting under color of law because he or she is acting pursuant to the authority given to law enforcement by the government. But consider that same police officer who decides to grab a drink after work, gets in a bar fight, and assaults another patron. That patron could sue for assault and battery but would likely not have a Section 1983 claim because the officer was not acting in his or her capacity as a law enforcement officer. But what if the officer instigates the bar fight because the other patron made a disparaging comment about law enforcement and the officer flashed his or her badge? Or what if the officer uses police-issued handcuffs to subdue the patron and then calls an on-duty officer to arrest the other patron?

Two examples illustrate the fact-intensive nature of the "color of state law" inquiry. In *Haines v. Fisher*, the Tenth Circuit found that officers were not acting under color of state law where they staged an armed robbery of a store clerk as a practical joke, even though they were on-duty and used police equipment to carry out the prank.[38] The court reasoned that the officers were not using their positions as policemen to accomplish the prank and were acting only in the interest of "their personal pursuits."[39] In *Lusby v. T.G. & Y Stores*, by contrast, the Tenth Circuit found that an off-duty police officer who was employed as a private security guard acted under color of state law where the officer flashed his police badge at a shoplifting suspect, used police documents to complete arrest forms, and secured uniformed officers to pick up and detain the suspect.[40]

The "under color of state law" analysis can be even more complex in situations where a non-governmental actor or entity is the source of the harm.[41] In most cases, private individuals or businesses cannot be held liable under Section 1983.[42] However, just as governmental officials are not automatically subject to Section 1983 liability when engaging in purely personal pursuits, private individuals or businesses can be subject to Section 1983 liability when there is such a close nexus between the challenged conduct and the State such that the behavior of private parties "may be fairly treated as that of the State itself."[43] The Court has emphasized that this is a fact-bound inquiry. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."[44] So, for example, a private security firm acting under government contract may be considered a state actor because it was performing the governmental function of providing security services in a government laboratory.[45]

Damages

Although it is difficult to prevail on a Section 1983 claim (as discussed more infra), successful Section 1983 plaintiffs are entitled to all the damages normally available for personal injury (such as medical expenses, lost income, pain and suffering, emotional distress, etc.). Additionally, a Section 1983 plaintiff may receive punitive damages against individuals (but not municipalities) for "reckless or callous disregard of the plaintiff's rights, as well as intentional violations of federal law."[46] A prevailing plaintiff may also receive an award of attorney fees and costs under 42 U.S.C. § 1988.

Qualified Immunity

As discussed above, the enactment of Section 1983 coincided with Reconstruction. It became a dead letter when white southerners reclaimed political power at the expense of

Blacks. Section 1983 found new life during the Civil Rights movement. Now, as the mass demonstrations this summer revealed, we are once again at a pivotal moment in our nation's civil rights history. Given this historical backdrop, it should be no surprise that the current unrest comes as federal courts (and particularly the Supreme Court) have grown increasingly hostile towards civil rights litigation.

While we cannot fairly attribute this summer of protest solely to legal doctrine, the Court's ever-deferential treatment of law enforcement, at the expense of justice, has been a major contributor to the frayed relationship between law enforcement and the communities they serve.

You have likely heard of qualified immunity by now. For those unaware, it is a judicially-created legal doctrine that "shields public officials . . . from damages actions unless their conduct was unreasonable in light of clearly established law."[47] To be clear, this "clearly established" requirement is not found in the text of Section 1983, nor is it in the Constitution. Rather, qualified immunity was created by the Supreme Court. Originating with the Court's decision in *Pierson v. Ray*,[48] qualified immunity has evolved into a doctrine that "protects all officers, no matter how egregious their conduct, if the law they broke was not 'clearly established.'"[49]

How do you prove that something is clearly established? Not with a district court case. Not even an unpublished circuit court case will do. Only published circuit court cases (typically from your circuit) or Supreme Court cases will count.[50] Given how comparatively few cases reach these levels, it is often the case that egregious conduct will go unpunished due to the lack of a sufficiently on-point appellate case.

Given that the Supreme Court has constantly evolved qualified immunity to be even more favorable to defendants, it is no surprise that the Court's decisions are almost always on the side of granting qualified immunity.[51] This precedent has sent an unmistakable warning to lower courts that they are on much safer grounds when they grant qualified immunity than when they deny it.

Outrageous and unfathomable decisions based on qualified immunity abound in the federal courts.[52] Conservative judge Don Willett of the Fifth Circuit has eloquently explained:

> Section 1983 meets Catch-22. Plaintiffs must produce precedent even as fewer courts are producing precedent. Important constitutional questions go unanswered precisely because no one's answered them before. Courts then rely on that judicial silence to conclude there's no equivalent case on the books. No precedent = no clearly established law = no liability. An Escherian Stairwell. Heads government wins, tails plaintiff loses.[53]

Judge Willett's observation is apt. And it is shared by an increasing number of judges, academics, and practitioners. But until the Supreme Court discards this ill-considered doctrine, injustice will continue to be the law of the land and many who have been deprived of their federal rights will continue to be without remedy. And when the scales of justice tip too far in favor of the government, as is presently the case, civil unrest inevitably follows (as we currently see).

The Promise of Senate Bill 217

In response to weeks of protest following the killing of George Floyd, Colorado enacted SB-217 on June 19, 2020—or Juneteenth, a holiday celebrating the emancipation of American slaves. The new law includes many different provisions aimed at redressing police misconduct, such as a requirement that all law enforcement agencies use body-worn cameras. But at least in our view, the most significant provision is a state-law analog to Section 1983, which creates a cause of action for the deprivation of state constitutional rights.[54] While inspired by Section 1983, Colorado's SB-217 differs from federal civil rights law in several important ways.

SB-217 only applies to local "peace officers"

The first significant difference is the scope of government officials whose actions are covered by the law. Whereas Section 1983 applies broadly to any "person" acting under color of law, and thus encompasses a wide swath of government actors and their conduct, SB-217 applies only to local law enforcement. In particular, SB-217 applies only to the actions of "[a] peace officer," which, generally speaking, means a police officer, sheriff's deputy, or similar law enforcement officer.[55]

In addition, the peace officer must have been "employed by a local government." While "local government" is not explicitly defined in the statute, it presumably encompasses city police departments, as well as county sheriff's offices, and excludes Colorado state patrol officers and state corrections officers. It remains to be seen whether SB-217 applies to peace officers employed by political subdivisions that aren't obviously "local" or "state" in character, such as the Regional Transportation District.

SB-217 rejects qualified immunity

While SB-217 does not cover as broad a range of government action as Section 1983, it provides a much more straightforward path to liability where it does apply. First, SB-217 explicitly specifies that "qualified immunity is

not a defense to liability."[56] Thus, plaintiffs suing under SB-217 should have their claims decided on the merits, regardless of whether there was already an on-point appellate decision holding that the conduct was against the law. This is especially significant because it is not clear to what extent Colorado Court of Appeals and Colorado Supreme Court decisions "clearly establish" the individual rights afforded by the Colorado constitution.

Not only does SB-217 unequivocally reject qualified immunity, its structure and other provisions shut the door on attempts to fashion qualified immunity by another name. In particular, SB-217 provides that "if the peace officer's employer determines that the officer did not act upon a good faith and reasonable belief that the action was lawful," then the peace officer is personally liable for five per cent of any judgment."[57] Conversely, if the officer **did** have a good faith, reasonable belief that their actions were lawful, then the municipality must fully indemnify the officer. As such, the fact that an officer may have had a "good faith and reasonable belief" in the lawfulness of their actions is plainly not a defense to liability under the statute; it is relevant only insofar as it affects the officer's obligation to pay part of the judgment.

SB-217 makes municipal liability less important

Civil rights plaintiffs often bring Section 1983 claims against municipalities or other government entities for two practical reasons. First, only individuals are entitled to qualified immunity, so government entities cannot avoid liability on qualified immunity grounds. Second, a judgment against the government is generally easier to collect than a judgment against an individual. However, this approach also has major disadvantages. As described above, municipal liability claims under Section 1983 face steep hurdles stemming from the lack of respondeat superior liability.[58]

SB-217 eliminates these tradeoffs. Because municipalities and government agencies are not "peace officers," they are beyond the scope of the law and cannot be sued directly. However, SB-217 also provides that the "employer" of the peace officer—*i.e.*, the municipal government—"shall indemnify" the officer for the entire judgment.[59] Because state law previously required municipalities to indemnify their officers only up to a limit of $100,000, this eliminates the risk that a large judgment against an individual officer remains uncollectable.[60] Thus, plaintiffs proceeding under SB-217 may receive all the benefit of a claim against the government entity itself, without needing to clear the high bar set by the Supreme Court for municipal liability.

SB-217 includes a robust fee-shifting provision

SB-217 also provides for more robust fee-shifting than Section 1983. Federal law provides that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee."[61] While federal courts routinely award attorneys' fees to successful Section 1983 plaintiffs, SB-217 removes any doubt and provides that "a court **shall** award reasonable attorney fees and costs to a prevailing plaintiff."[62]

And in a more substantial departure from current federal law, SB-217 explicitly endorses fee shifting in injunctive relief cases under the so-called 'catalyst theory,' where "the plaintiff's suit was a substantial factor or significant catalyst in obtaining the results sought by the litigation."[63] For example, if a lawsuit is brought challenging a particular police department or jail policy, the governmental defendants cannot simply avoid a fee shift by changing the challenged policy and mooting the lawsuit, so long as the plaintiff can show that the lawsuit was a "substantial factor" in bringing about the change.

By contrast, the Supreme Court has rejected such an approach under federal law, holding that plaintiffs may only be awarded their attorneys' fees if they obtained a judgment on the merits or other court order.[64] Needless to say, this approach creates a substantial barrier to bringing certain kinds of civil rights claims, particularly cases challenging unlawful laws and policies where there is no concrete injury to person or property. Thankfully, the Colorado legislature recognized that actions for injunctive relief should be rewarded where they cause the government to change an unconstitutional law or policy without a court order.

What rights are protected?

Like its federal counterpart, SB-217 is not itself a source of any substantive rights, and only creates a cause of action to vindicate rights established elsewhere. Whereas Section 1983 broadly permits claims based on "any rights" found in the U.S. Constitution and federal statutes, the language of SB-217 refers specifically to "individual rights that create binding obligations on government actors secured by the bill of rights, article II of the state constitution."[65]

But these textual differences may not have much of an impact. The question of which constitutional provisions provide actionable rights is not a new one. Indeed, the text of SB-217 tracks the Supreme Court's test for determining whether a particular provision of law is cognizable as a 'right' under Section 1983. That test, articulated in *Golden State Transit Corp. v. Los Angeles*, considers three factors: (1) "whether the provision in question

creates obligations binding on the governmental unit"; (2) whether the right is "too vague and amorphous" and thus "beyond the competence of the judiciary to enforce"; and (3) "whether the provision in question was intended to benefit the putative plaintiff."[66] Although it is possible Colorado courts will fashion their own test, it is likely that the analysis in *Golden State* will guide which of Article II's provisions can be enforced through SB-217.

With this backdrop in mind, Article II provides a number of rights that are likely redressable under SB-217, just as their more familiar federal counterparts are under Section 1983. For example, Article II protects freedom of speech,[67] the right to assemble and petition the government,[68] religious freedom,[69] and the right to bear arms.[70] It protects against unreasonable searches and seizures,[71] takings of property,[72] and cruel and unusual punishments.[73] And it provides for due process under law.[74]

The Colorado Constitution's Bill of Rights also contains various other provisions, such as a guarantee of free and open elections,[75] the right to trial by jury,[76] a prohibition on slavery.[77] However, it is difficult to see how these provisions could be implicated by the actions of a peace officer, and they are unlikely to give rise to claims under SB-217.

Colorado Courts are likely to borrow heavily from federal constitutional law

The Colorado Supreme Court has made clear that, "[w]hen interpreting our own constitution, we do not stand on the federal floor; we are in our own house."[78] But SB-217 creates—for the first time—a mechanism for individuals to enforce civil rights provided by the Colorado Constitution. Because there was previously no such cause of action, there is little precedent for which rights are enforceable, or the precise contours of such rights.

Nonetheless, many provisions in Colorado's Bill of Rights share similar—if not identical—language with their federal counterparts. And given federal courts' long history with Section 1983, federal constitutional law is well-developed, often much more so than state constitutional law. As a practical matter, federal constitutional law is likely to serve as a persuasive model in many areas of state constitutional law. For example, with respect to religious freedom protections of Article II, Section 4, the Colorado Supreme Court has said that "the federal and state constitutional provisions embody similar values," and thus courts will "look to the body of law that has been developed in the federal courts with respect to the meaning and application of the First Amendment for useful guidance."[79] Many of the substantive protections under state constitutional provisions available under SB-217 are likely to mirror federal constitutional protections afforded through Section 1983.

However, even substantially similar provisions may be interpreted differently. Given their focus on law enforcement officers, excessive force cases are likely to make up the bulk of litigation under SB-217. The Fourth Amendment, which provides the basis for excessive force claims under Section 1983, is largely similar to Article II, Section 7. Yet despite the fact that "Article II, Section 7 . . . is substantially similar to its federal counterpart," the Colorado Supreme Court has held that it is "not bound by the United States Supreme Court's interpretation of the Fourth Amendment when determining the scope of state constitutional protections."[80] Although it is too soon to tell if Colorado courts will follow the excessive force standard set by *Graham v. Connor,*[81] they have occasionally departed from Fourth Amendment precedent in certain contexts, in ways that are more protective of individual rights.[82]

The Colorado Constitution may provide greater rights than the U.S. Constitution in some areas

Some Colorado constitutional provisions provide the same category of right as their federal counterparts but contain substantially different language. These differences can result in stronger protections under the state constitution than under the federal constitution. For example, Article II, Section 13, like the Second Amendment, provides for the right to bear arms. But the Colorado Supreme Court has held that the state provision has "a text and constitutional tradition distinct from the Second Amendment's."[83] As a result, gun regulations are subject to a different legal analysis under the state constitution; the "reasonable exercise test," which "unlike ordinary rational basis review [under the Second Amendment] demands not just a conceivable legitimate purpose but an actual one."[84]

Another area where the Colorado Constitution differs from its federal counterpart is free speech protections. The Colorado Supreme Court has long held that the Colorado Constitution "provides greater protection of free speech than does t[h]e First Amendment."[85] This is because Article II, Section 10 affirmatively provides that "every person shall be free to speak, write or publish whatever he will on any subject."[86] Thus, it requires "more stringent scrutiny of free speech issues" than does the U.S. Constitution.[87]

A New Era for Civil Rights in Colorado

Although many unanswered questions remain, SB-217 promises Colorado plaintiffs a significant new tool for vindicating their civil rights. Though it applies only to law enforcement officers, it addresses many of the most

criticized shortcomings of Section 1983 and is certain to move a significant volume of civil rights litigation from federal to state court. ▲▲▲

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Endnotes:

[1] Notably, Section 1983 does not create any substantive rights; rather, substantive rights must come from the Constitution or federal statute. *See Spielman v. Hildebrand*, 873 F.2d 1377, 1386 (10th Cir. 1989) ("Section 1983 does not provide a remedy if federal law does not create enforceable rights.").

[2] U.S. CONST. pmbl.

[3] Notably, the southern states were required to ratify the Fourteenth Amendments as a precondition to rejoining the Union. *See* Thomas B. Colby, *Originalism and the Ratification of the Fourteenth Amendment*, 107 NW. U. L. REV. 1627 (2013).

[4] The Thirteenth Amendment sought to abolish slavery, the Fourteenth Amendment made all persons born in the United States citizens of the country and guaranteed them due process and equal protection of law, and the Fifteenth Amendment provided that the right to vote could not be denied on account of race, color, or previous condition of servitude. *See* U.S. CONST. amend. XIII, XIV, XV.

[5] *Jamison v. McClendon*, 16-CV-595-CWR-LRA, 2020 WL 4497723 (S.D. Miss. Aug. 4, 2020) at *7. The *Jamison* order is a must-read for anyone interested in how the promise of Reconstruction went unrealized. *See id.* at *21-22.

[6] *See id.* at *8-9.

[7] 42 U.S.C. § 1983.

[8] *See Jamison*, at *10 n.91.

[9] 109 U.S. 3 (1883). The Supreme Court consolidated five cases that each implicated the Thirteenth and Fourteenth Amendments' application to private conduct and decided, "Mere discriminations on account of race or color were not regarded as badges of slavery. If, since that time, the enjoyment of equal rights in all these respects has become established by constitutional enactment, it is not by force of the Thirteenth Amendment, (which merely abolishes slavery,) but by force of the Thirteenth and Fifteenth Amendments." *Id.* at 25.

[10] Through this period, the Supreme Court remained hostile to equal rights, most notably in the infamous *Plessy v. Ferguson* decision, which held that racially segregated public facilities did not violate the Equal Protection clause of the Fourteenth Amendment. 163 U.S. 537, 538 (1896) (*overruled by Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954)).

[11] *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954).

[12] 365 U.S. 167 (1961).

[13] *Id.* at 169.

[14] *Id*.

[15] *Id*.

[16] Previously, the guarantee against unreasonable searches and seizures expressed in the Fourth Amendment was made applicable to the States through the Due Process Clause of the Fourteenth Amendment. *See Wolf v. Colorado*, 338 U.S. 25 (1949).

[17] We must confess to being envious of the brevity of judicial decisions from prior generations.

[18] *Monroe v. Pape*, 272 F.2d 365, 366 (7th Cir. 1959).

[19] *Id*. at 172.

[20] *Id*. at 172-183.

[21] *Id*. at 174; *see also id.* at 180 ("It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because . . . state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.").

[22] *Id*. at 183.

[23] *Id*. at 184 (quoting *United States v. Classic*, 313 U.S. 299, 325-26 (1941)).

[24] *See West v. Atkins*, 487 U.S. 42, 48 (1998).

[25] *Schaefer v. Las Cruces Pub. Sch. Dist.*, 716 F. Supp. 2d 1052 (D.N.M. 2010) (internal quotation and citation omitted).

[26] While illustrative, these examples are far from an exhaustive list of potential Section 1983 claims.

[27] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

[28] *Turner v. Safley*, 482 U.S. 78 (1987).

[29] *Cohen v. California*, 403 U.S. 15 (1971).

[30] *Porro v. Barnes*¸624 F.3d 1322, 1325-26 (10th Cir. 2010).

[31] *Mitchell v. Maynard*, 80 F.3d 988, 994 (10th Cir. 1996).

[32] *Mick v. Brewer*, 76 F.3d 1127, 1136 (10th Cir. 1996).

[33] *Estate of Booker v. Gomez*, 745 F.3d 405 (10th Cir. 2014) (quoting *Dodds v. Richardson*, 614 F.3d 1185, 1195 (10th Cir. 2010)).

[34] The contours of municipal liability are well beyond the scope of this article. Indeed, to shamelessly plug our own work, it is a topic worthy of its own law review article. *See* Matthew J. Cron et al., *Municipal Liability: Strategies, Critiques, and a Pathway Toward Effective Enforcement of Civil Rights*, 91 DENV. U. L. REV. 583, 602-03 (2014).

[35] *See Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978) ("Our analysis of the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress did intend municipalities and other local government units to be included among those persons to whom § 1983 applies."); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) ("neither a State nor its officials acting in their official capacities are "persons" under § 1983").

[36] *Monroe* 365 U.S. at 184 (quoting *Classic*, 313 U.S. at 325-26).

[37] *Jojola v. Chavez*, 55 F.3d 488, 492 (10th Cir. 1995).

[38] 82 F.3d 1503 (10th Cir. 1996).

[39] *Id*. at 1508.

[40] 749 F.2d 1423 (10th Cir. 1984), *vacated on other grounds*, 474 U.S. 805 (1985).

[41] Courts have often "applied various analyses and referred to them as the 'nexus test,' the 'public function test,' the 'joint action test,' and the 'symbiotic relationship test.'" *Wittner v. Banner Health*, 720 F. 3d 770 (10th Cir. 2013) (quoting *Johnson v. Rodrigues*, 293 F.3d 1196, 1202-03 (10th Cir. 2002)). However, in *Brentwood*, the Supreme Court stressed that "**[T]here is no single test** to identify state actions and state actors." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Assn.*, 531 US 288, 295 (2001) (emphasis added).

[42] *See, e.g.*, *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924 (1982) ("Because the [Fourteenth] Amendment is directed at the States, it can be violated only by conduct that may be fairly characterized as 'state action.'").

[43] *Brentwood*, 531 U.S. at 295 (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974)).

[44] *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

[45] *DeVargas v. Mason & Hanger-Silas Mason Co., Inc.*, 844 F.2d 714, 722 (10th Cir. 1988); *see also West v. Atkins*, 487 U.S. 42 (1988) (finding private doctor under contract with the State to provide services to prison inmates had acted under color of state law); *Milonas v. Williams*, 691 F.2d 931 (10th Cir. 1982) (finding private school that contracted with the State to educate minors with behavioral problems was a state actor).

[46] *Smith v. Wade*, 461 U.S. 30, 51 (1983) (citing *Adickes v. Kress & Co.,* 398 U.S. 144, 233 (1970)).

[47] *Booker*, 745 F.3d at 411 (internal citation omitted).

[48] 386 U.S. 547, 555 (1967). In *Pierson*, the Court held that "good faith" was a defense under Section 1983 where police officers had arrested persons who used segregated facilities under a statute that was later held unconstitutional. While a good faith defense may make some logical sense in that context, the current version of qualified immunity is far more deferential to governmental actors.

[49] *Jamison*, 2020 WL 4497723, at *13.

[50] *See Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011); *Wilson v. Layne*, 526 U.S. 603, 617 (1999) ("Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.").

[51] *See Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting) ("[T]his Court routinely displays an unflinching willingness to summarily reverse courts for wrongly denying officers the protection of qualified immunity but rarely intervenes where courts wrongly afford officers the benefit of qualified immunity in these cases.") (internal quotation omitted).

[52] *See Jamison* at *15-16 (listing cases).

[53] *Id.* at *16 (quoting *Zadeh v. Robinson*, 928 F.3d 457, 479-80 (5th Cir. 2019) (Willett, J., concurring in part and dissenting in part)).

[54] This new provision has been codified at C.R.S. § 13-21-131.

[55] C.R.S. § 16-2.5-101, *et seq*.

[56] C.R.S. § 13-21-131(2)(b).

[57] C.R.S. § 13-21-131(4).

[58] *See supra* note 34.

[59] While individual officers are liable for a portion of the judgment if they act in bad faith, SB-217 nonetheless guarantees that the entire judgment is collectable from the employer.

[60] C.R.S. § 29-5-111.

[61] 42 U.S.C. 1988.

[62] C.R.S. § 13-21-131 (emphasis added).

[63] C.R.S. § 13-21-131(3).

[64] *Buckhannon Bd. & Home Care, Inc. v. West Virginia Dep't of Health and Human Res.*, 532 U.S. 598 (2001).

[65] C.R.S. § 13-21-131(1).

[66] 493 U.S. 103, 106 (1989) (internal quotations and alterations omitted).

[67] Colo. Const. art. II, § 10.

[68] Colo. Const. art. II, § 24.

[69] Colo. Const. art. II, § 4.

[70] Colo. Const. art. II, § 13.

[71] Colo. Const. art. II, § 7.

[72] Colo. Const. art. II, §§ 14–15.

[73] Colo. Const. art. II, § 20.

[74] Colo. Const. art. II, § 25.

[75] Colo. Const. art. II, § 5.

[76] Colo. Const. art. II, § 23.

[77] Colo. Const. art. II, § 26.

[78] *Rocky Mountain Gun Owners v. Polis*, 467 P.3d 314, 324 (Colo. 2020).

[79] *Conrad v. City & Cty. of Denver*, 656 P.2d 662, 670–71 (Colo. 1982).

[80] *People v. Sporleder*, 666 P.2d 135, 140 (Colo. 1983).

[81] 490 U.S. 386 (1989).

[82] *See Sporleder*, 666 P.2d 135 (finding privacy interest under state constitution in dialing of phone numbers from home telephone); *People v. McKnight*, 446 P.3d 397, 406, *reh'g denied* (July 1, 2019) (holding that search premised on police dog trained to detect marijuana violated state constitution).

[83] *Rocky Mountain Gun Owners,* 467 P.3d at 323–24.

[84] *Id.* at 328.

[85] *Bock v. Westminster Mall Co.*, 819 P.2d 55, 59 (Colo. 1991).

[86] Colo. Const. art. II, § 10 (emphasis added).

[87] *Bock*, 819 P.2d at 60.