ARTICLES

Reinterpreting "Person" in Section 1983: The Hidden Influence of *Brown v. Board of Education*

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I. INTRODUCTION

Brown v. Board of Education[1] has earned such a large measure of legitimacy that, on its thirtieth anniversary, proponents and critics alike may almost rest assured that the "separate but equal" doctrine is gone forever from the landscape of American constitutional law. But consider the effect if more than twenty years after *Brown's* rejection of racial segregation it had been held that the district courts lacked subject matter jurisdiction in suits against school boards. The precise jurisdictional basis for the district courts' remedy in *Brown* was not expressly acknowledged in the Supreme Court's opinion. Perhaps this was because a private action for injunctive relief was so clearly inferable from the fourteenth amendment.[2] Perhaps it was because such an action was so manifestly a case arising under federal law that compliance with section 1331,[3] the general grant of federal question jurisdiction was never in doubt. Of course, no reference at all was made to the Civil Rights Act of 1871,[4] and therefore no reliance was placed upon its special jurisdictional counterpart, section 1343(3).[5] Whatever the reason, in the absence of explicit

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1. 347 U.S. 483 (1954).

2. Any such remedy would have a genesis analogous to the damages remedy inferred from the fourth amendment in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), and the eighth amendment in Carlson v. Green, 446 U.S. 14 (1980); *see* Hill, *Constitutional Remedies*, 69 COLUM. L. REV. 1109, 1155-58 (1969). *But see infra* note 28.

3. Title 28 U.S.C. § 1331 (1976 & Supp. 1983) states:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arise under the Constitution, laws, or treaties of the States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

This provision has its origin in the Act of March 3, 1875, § 1, 18 Stat. 470, which, as related in P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WESCHLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 846-87 (2d ed. 1973), was passed without much debate and with no fanfare.

4. 17 Stat. 13 (1871).

5. 28 U.S.C. § 1343(3)(1976), amended and recodified as § 1343(a)(3) (Supp. 1984). The construction and interrelationship between § 1343(a)(3) and 42 U.S.C. § 1983 (1976) is instrumental for a full understanding of this topic. Both §§ 1343(a)(3) and 1983 have their foundation in § 1 of the Civil Rights Act of 1871. Section 1 authorized individual suits in federal court to address "the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States" that occurred under color of state law.

Section 1983 which established a private cause of action for civil rights violations provides:

> Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any

language addressing original subject matter jurisdiction, the Court did not decree a binding resolution of that specific issue.[6]

Several years later without referring to *Brown*, the Supreme Court decided three interrelated cases—*Monroe v. Pape*,[7] *Kenosha v. Bruno*,[8] and *Aldinger v. Howard*[9]—which dangerously eroded *Brown's* assumed jurisdictional foundation through miserly interpretations of the Civil Rights Act of 1871.[10] Section 1 of that act, now known as section 1983,[11] established the principal federal statutory remedy for civil rights violations by "persons" acting under color of state law. *Monroe*, *Kenosha*, and *Aldinger* narrowed the range of "persons" liable under section 1983 and at the same time narrowed the scope of its jurisdictional counterpart, section 1343(3), which was originally meant to be coextensive with actions to enforce the statutory remedy. As discussed below, that narrowing process had potentially far-reaching consequences on the availability of original federal jurisdiction in civil rights cases against governmental entities, notably school boards.

Suddenly, in 1978, with an abruptness as remarkable as the relatively unnoticed process of jurisdictional decay, *Monell v. Department of Social Serv-*

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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. . . .

Section 1343(3), the jurisdictional counterpart of § 1983, provides:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person. . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of its citizens or all persons within the jurisdiction of the United States. . . .

Section 1343(3) had served to provide a means to satisfy federal jurisdictional requirements when $10,000 was not in controversy, as was formerly required by § 1331. However, Pub. L. No. 96-468 (1980) amended § 1331 to eliminate the $10,000 amount in controversy requirement for claims arising under the Constitution or federal laws. *See supra* note 3.

There is speculation that from 1874 onward, Congress intended to create a "broad right of action in federal court for deprivations by a State of any federally secured right. . . . [I]t is also clear that the prime focus of Congress in all of the relevant legislation was ensuring a right of action to enforce the protections of the 14th Amendment. . . ." Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 611 (1979).

6. The Supreme Court's silence on the issue of subject matter jurisdiction in *Brown* was not insignificant, despite the fact that relief was given on the merits in that case. The Court in Hagans v. Lavine, 415 U.S. 528, 535 n.5 (1974), explained that precedents addressing the merits of federal claims, but not addressing the subject-matter jurisdiction of the suit, are not binding in subsequent cases of a similar nature where subject-matter jurisdiction is directly challenged:

[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us. . . .

The Court most recently applied § this principle in Pennhurst State School and Hosp. v. Halderman, 451 U.S. 1 (1981), where the Court addressed, as if on a clean slate, whether state sovereign immunity precluded the exercise of pendent jurisdiction over a state law claim against state institutions and officials. This was accomplished in the face of an important earlier case which had actually exercised pendent jurisdiction in similar circumstances but without any sovereign immunity challenge. Siler v. Louisville & Nashville R.R., 213 U.S. 175 (1909).

7. 365 U.S. 167 (1961).

8. 412 U.S. 507 (1973). *See also* Moor v. County of Alameda, 411 U.S. 693, 708-10 (1973) (holding that counties as well as cities were excluded from being persons as defined in § 1983).

9. 427 U.S. 1 (1976).

10. 17 Stat. 13 (1871).

11. 42 U.S.C. § 1983 (1976).

ices[12] partially overruled *Monroe* thus ending the largely hidden challenge to *Brown*.

The present essay seeks to describe the unusual journey from *Monroe* to *Monell* in an attempt to shed some light upon the shadowy background of what was a major reversal in statutory interpretation and to reflect upon the judicial law-making process which produced it.

II. Interpreting Section 1983 on an Inadequate Record of Congressional Intention

Monroe v. Pape on its face had nothing to do with school desegregation. It arose out of an alleged unconstitutional arrest and detention by Chicago city police. However, one issue before the Court was whether the city of Chicago fell within the scope of the word "person" in the Civil Rights Act of 1871. Although section 1 of that act, now section 1983, clearly prohibited "persons acting under color of state law" from violating federal rights, nothing in the statute defined the term "person." Based on the House's rejection of the Sherman amendment, which would have imposed liability directly on any town or city for lawless racial violence which was committed there, the Court determined that the post-Civil War Congress had intended to exclude municipalities from the term "person."[13]

Accordingly, the Court, per Justice Douglas, created what seemed to be a municipal immunity from damages under section 1983. In so doing, however, the Court did not expressly limit its holding to section 1983 cases involving damages, but instead noted inconspicuously that even in cases seeking equitable relief municipal corporations could not be considered "persons" for purposes of section 1983.[14]

The Court's holding in *Monroe* did not appear to be a crushing blow to section 1983 civil rights suits. *Monroe* did expand the interpretation of "under color of state law" to reach beyond actions specifically directed by statute. This in turn expanded the section 1983 remedy. Although the municipal level of government is perhaps the most resistant to civil liberties on a day-to-day basis, it could still be expected even in the aftermath of *Monroe* that cities, towns, and counties would, as a matter of policy, indemnify their police officers and other employees found individually liable for civil rights infractions.[15] Those individuals were, after all, still within the meaning of "person" in section 1983. Limited to its facts, *Monroe* held only that the municipal corporation itself, with the community's deep pocket, could not be held directly liable as a "person" for damages arising from an employee's misconduct. *Monroe* certainly did not appear to address, let alone upset, the principles in *Brown*—which gave rise to equitable relief from *de jure* segregation against a county board of education.

Even the comments in *Monroe* that municipalities were not "persons" for purposes of section 1983 injunctive suits had no dramatic effect in the immedi-

12. 436 U.S. 658 (1978).

13. 365 U.S. at 188-89.

14. *Id.* at 191 n.50.

15. *See* Crosley v. Davis, 426 F. Supp. 389, 392 n.7 (E.D. Pa. 1977). Nonetheless, as the court in *Crosley* pointed out, the risk that the city might not indemnify officers in every case might even have been thought of as a deterrent to aberrant police behavior. *Id.* at 396.

ate aftermath of that decision. In 1971, the Fifth Circuit Court of Appeals in *Hawkins v. Town of Shaw*[16] approved a wide range of section 1983 remedies directly against a defendant municipality. The court in *Hawkins* held the town responsible under section 1983 for its blatant denial of equal protection of the law in failing to provide paved roads, streetlights, and other services to its residentially segregated black population. The court observed that "[t]he Town of Shaw, indeed any town, is not immune to the mandates of the Constitution."[17] So effective an injunctive tool had section 1983 seemed in *Hawkins* for those denied their fourteenth amendment right to equal protection, that, notwithstanding the limitations of *Monroe*, Judge Friendly expressed his fear that *Hawkins* would "be a tremendous litigation breeder."[18] No such fear could have arisen had a section 1983 suit against a municipality not been so convincingly a direct, simple and valuable equitable device for remedying constitutional wrongs.[19]

Despite the *Hawkins* court's certitude on the mandates of the Constitution, the predicate for its decision was the view that the word "person" in section 1983 still included municipalities wherever injunctive relief was concerned. As it developed, because of the changing meaning of "person," the influence of *Hawkins* was short-lived.

Two years later, and more than a decade after *Monroe*, the Supreme Court in 1973 decided *Kenosha*. That case arose from refusals by the cities of Kenosha and Racine in Wisconsin to renew liquor licenses because of alleged nude dancing at the applicants' establishments. The bar owners sued the cities for injunctive relief invoking the section 1983 remedy and alleging, among other things, a violation of the due process clause of the fourteenth amendment. Neither the district court nor the court of appeals noted any problem with subject-matter jurisdiction in the case. Justice Rehnquist, however, pointed out for the Court *sua sponte* that there was

> nothing in the legislative history discussed in *Monroe* or in the language actually used by Congress, to suggest that the generic word "person" in § 1983 was intended to have a bifurcated application to municipal corporations depending on the nature of the relief sought against them. . . . *The District Court was therefore wrong in concluding that it had jurisdiction of appellees' complaints under § 1983.*[20]

Based upon this logic, municipal corporations were afforded protections from equitable as well as monetary remedies under section 1983 and were excluded from jurisdiction under section 1343,[21] the special jurisdictional grant supporting the section 1983 remedy.[22] Furthermore, because every case in

16. 437 F.2d 1286 (5th Cir. 1971).

17. *Id.* at 1292.

18. H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW, 89 (1973).

19. The simplicity of this avenue may be contrasted with the complications posed by being forced to seek injunctive relief only against individual officials. *See infra* text accompanying notes 50-52, 63 & note 64.

20. 412 U.S. at 513 (emphasis added).

21. 28 U.S.C. § 1343 (1976) (originally part of the Civil Rights Act of 1871, together with what is now section 1983).

22. For a current discussion of the relationship between section 1983 and section 1343, see Maine v. Thiboutot, 448 U.S. 1 (1980). Although both sections were recognized as statutory partners, the wording of section 1343 has been found limited to cases presenting claims of violation of constitutional rights or federal statutory rights of equality. Owing to changes during a recodification in 1874, section 1983 extends a remedy more broadly to violations of federal "laws" under color of

federal court must satisfy some statutory grant of jurisdiction,[23] the question was raised whether original subject-matter jursidiction was available for equitable relief against cities and counties through the apparently alternative route of section 1331. This section ostensibly was not encumbered by section 1343(3) restrictions. The Supreme Court therefore remanded *Kenosha* for a determination whether section 1331 could provide a jurisdictional foundation. Whether the remand was meant to address only the amount in controversy requirement then found in section 1331, or a more subtle and serious impediment related to the section 1343(3) restrictions, was not decided.[24]

Both the force of precedent and the logic of Justice Rehnquist's reasoning led Justices Marshall and Brennan at least to concur specially in the *Kenosha* decision on the assumption that section 1331 jurisdiction would be available if the amount in controversy could be alleged. Justice Douglas, the author of *Monroe*, however, signaled the Court's changing direction by dissenting on the merits from any extension of *Monroe* to suits for equitable relief: "To the extent that the Sherman amendment was directed only at liability for damages and the devastating effect those damages might have on municipalities, it seems that the defeat of the amendment did not affect the existence *vel non* of an equitable action."[25]

In 1976, the Supreme Court decided *Aldinger v. Howard*.[26] In *Aldinger* the plaintiff had filed her section 1983 suit in federal district court against individual county officers. She claimed her constitutional rights were violated when she was fired from county employment because she was living with her boyfriend. In addition to suing the county officers who clearly qualified as "persons" under sections 1983 and 1343(3), the plaintiff sought to use the theory of "pendent party" jurisdiction as a means of joining the county on a factually related state law claim. Although *Aldinger* was unrelated to the subject of racial segregation in public schools, the jursidictional limitations were edging closer and closer.

Justice Rehnquist again delivered the majority opinion. In denying the availability of pendent party jurisdiction to the plaintiff, he observed,

> [p]arties such as counties, whom Congress *excluded* from liability in § 1983, and therefore by reference in the grant of jurisdiction under § 1343(3), can argue with a great deal of force that the scope of that "civil action" over which the district courts have been given statutory jurisdiction should not be so broadly read as to bring them back within that power merely because the facts also give rise to an ordinary civil action against them under state law.[27]

The Court, thus established that Congress, in passing the act of 1871 ex-

state law. The difference is no longer very significant in view of the amendment to section 1331 which removed the amount in controversy requirement. For cases alleging a section 1983 remedy due to the violation of some federal law not pertaining specifically to equal rights, section 1331 jurisdiction is now generally available.

23. *See, e.g.*, United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966).

24. 412 U.S. at 514. *See also* Pitrone v. Mercadante, 420 F. Supp. 1384, 1388, n.8 (E.D. Pa. 1976) (pointing out that only the concurring opinion of Justice Brennan assumed jurisdictional remand was limited to the amount in controversy issue).

25. 412 U.S. at 519-20 (Douglas, J., dissenting; appendix).

26. 427 U.S. 1 (1976).

27. 427 U.S. at 17 (emphasis in original); *accord, id.* n.12 ("the *refusal* of Congress to authorize suits against municipal corporations under the cognate provisions of § 1983 is sufficient to defeat the asserted claim of pendent party jurisdiction." (Emphasis added)).

pressed so strong an intention to exclude municipalities from civil rights jurisdiction that even an independent theory of federal jurisdiction could not overcome the obstacle. This was a far cry from *Monroe's* narrow holding, and even a farther cry from Justice Douglas' description of *Monroe* in his *Kenosha* dissent. Although there was still no discussion of *Brown*, the jurisdictional basis for that decision became more doubtful.

At about the same time that *Aldinger* was under consideration, federal district courts in most major cities were experiencing an upsurge in section 1983 suits alleging unconstitutional conduct by state and city employees in various local law enforcement contexts.[28] Despite *Monroe*, *Kenosha*, and *Aldinger*, creative efforts were attempted by plaintiffs to join the municipalities as defendants through the only remaining possible theory—a private right of action implied directly from the fourteenth amendment and supported by general federal question jurisdiction under section 1331.[29] Many of the cases which confronted this perplexing jurisdictional question after *Aldinger* rejected the implied right of action theory based on the Court's pronouncement that Congress had precluded all municipal liability for civil rights infractions.[30] For the first time, the proximity to school desegregation cases forced open discussion.

In *Crosley v. Davis*,[31] one of several district court decisions considering the implied private action claims, the court reasoned that the prerequisites for an implied private right of action in damages had not been met. This was determined largely because, unlike the circumstances in *Bivens v. Six Unknown Named Agents*,[32] there was a preemptive background of substantial congressional legislation fashioned to protect civil rights from infringement under color of state law. To infer from the fourteenth amendment a damages remedy which the Supreme Court repeatedly said was precluded by the very branch of government entrusted with enforcing that amendment, would have been an action inconsistent with the venerable principle of judicial restraint. Nevertheless, being sensitive to the direction in which the Court's precedents were heading, Judge Becker stressed his

> conviction that the problems with the implication of a damages remedy against a municipal entity based on the Fourteenth Amendment and § 1331 jurisdiction do not arise in suits for injunctive or declaratory relief, regardless of the exclusions in § 1983. . . .We do not believe, for instance, that an injunction of the sort issued in *Brown v. Board of Education* can be undermined.[33]

That there was a need to address such a possibility revealed the extent to which *Brown's* foundation had become intermixed with jurisdictional ques-

28. *See* Crosley v. Davis, 426 F. Supp. 389, 391 n.2 (E.D. Pa. 1977)

29. *See* Note, *Damage Remedies Against Municipalities For Constitutional Violations*, 89 HARV. L. REV. 922, 928-29, nn.40-46 (1976); Comment, *Implying a Damage Remedy Against Municipalities Directly Under the Fourteenth Amendment: Congressional Action as an Obstacle to Extension of the Bivens Doctrine*, 36 MD. L. REV. 123, 126-27 (1976). *See also* Bodersteiner, *Federal Court Jurisdiction of Suits Against "Non-Persons" for Deprivation of Constitutional Rights*, 8 VAL. U.L. REV. 215 (1974).

30. Kostka v. Hogg, 560 F.2d 37 (1st Cir. 1977); Milburn v. Girard, 441 F. Supp. 184 (E.D. Pa. 1977); Pitrone v. Mercadante, 420 F. Supp. 1384, 1388-89 n.10 (E.D. Pa. 1976). *See* Fine v. New York, 529 F.2d 70, 76 (2d Cir. 1975) (describing the issue as "difficult and troublesome").

31. 426 F. Supp. 389 (E.D. Pa. 1977).

32. 403 U.S. 388 (1971).

33. 426 F. Supp. at 396.

tions. Those questions stemmed from extensions of *Monroe* producing an impact greatly disproportionate to the narrow and value-neutral issue of statutory construction presented and decided in that case.

Judge Becker's circumspect dictum, and the observations of other district judges,[34] could hardly have stemmed the jurisdictional collapse of *Brown* if *Aldinger* went unchecked. This seems clear from the refusal of the Court in *Kenosha* to differentiate between damages and equitable relief for jurisdictional purposes[35] and from a more subtle premise laid down in *Radzanower v. Touche Ross Co.*[36] *Radzanower* had established a principle of statutory construction favoring the preservation of an earlier specific statute as against a subsequent general one. The Court observed:

> It is a basic principle of statutory construction that *a statute dealing with a narrow, precise and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.*[37]

Analogously, the exclusion in section 1343, a specific grant of civil rights jurisdiction was not "submerged" by Congress' later general grant of federal question jurisdiction in section 1331.

The problem was that the faulty logic from *Monroe* through *Aldinger* was not generally understood. By gradually extending *Monroe's* holding, however, the Court appeared to have eliminated any possibility that municipalities, the most ubiquitous governmental presence in daily life, could ever be sued directly in a section 1983 suit. In addition, it created a jurisdictional vacuum which threatened even to bar suits which might be based, not on section 1983, but directly upon the guarantees of the Constitution itself.

III. Recognizing the Implications of the Extensions of *Monroe*

The growing encroachment upon *Brown* came unmistakably to the Court's attention in *Mount Healthy City School District v. Doyle.*[38] In *Doyle* the plaintiff alleged that he was unlawfully discharged by a school board in derogation of the first amendment. Jurisdiction was asserted under both sections 1331 and 1343.[39] In a supplemental brief the defendant school board raised a jurisdictional argument which, once discovered, must have seemed to be the school board's best chance for a clear cut victory. The Court explained the board's argument:

> The Board contends that even though Doyle may have met the jurisdictional amount requirement of § 1331, it may not be subjected to liability in this case because Doyle's only substantive constitutional claim arises under 42 U.S.C. § 1983. Because it is not a "person" for purposes of § 1983, the Board reasons, liability may no more be imposed on it where federal jurisdiction is grounded on 28 U.S.C. § 1331 than where such jurisdiction is grounded on 28 U.S.C. § 1343.[40]

The logic of the argument was clear and emphatic: school boards, no less

34. *E.g.*, Hupart v. Board of Education, 420 F. Supp. 1087, 1103 n.38 (S.D.N.Y. 1976); Patterson v. Ramsey, 413 F. Supp. 523, 528 (D. Mich. 1976).
35. *See* Pitrone, 420 F. Supp. at 1389, n.14.
36. 426 U.S. 148 (1976).
37. *Id.* at 153 (emphasis added).
38. 429 U.S. 274 (1977).
39. *Id.* at 276.
40. *Id.* at 277.

than cities and counties, were excluded from the federal court's jurisdiction whenever and by whatever route a civil rights claim was raised.[41]

The Court was not immediately prepared to decide this issue. Although the suggestion was clear that section 1331 could not give jurisdiction where section 1343(3) took it away, the Court was satisified to describe the section 1331-based claim as "not patently without merit."[42] The kind of jurisdictional argument raised by the school board, the Court pronounced, was "not of the jurisdictional sort which the Court raises on its own motion,"[43] but went more to the issue whether a school board was a "person" for purposes of a section 1983 remedy. The latter issue, the Court stated, had not been raised and would not be decided. The Court, per Justice Rehnquist, then forged ahead to determine that because school boards were so similar to cities and counties they were not protected by the eleventh amendment.[44] The plaintiff's claim was then remanded for consideration of the merits.

Although there was no discussion of or reference to *Brown*, the Court must have perceived that the ideas suggested in *Monroe* through *Mount Healthy* regarding the meaning of "person" in section 1983 were in contravention to the power exercised in *Brown*. Indeed, the ideas unleashed before the Court in *Mount Healthy* must have been surprising as much for their logical consistency as their former quiescence.

In view of the Court's hesitation in *Mount Healthy*, one must inquire into the likely consequence of a holding that the "exclusion" from section 1343 of counties, cities, and possibly school boards also precluded jurisdiction under section 1331, the only other possible basis for a suit against a local government. In 1976, Justice Rehnquist, writing for the Court in *Rizzo v. Goode*,[45] had intimated the probable answer. There, just one year before *Mount Healthy*, Justice Rehnquist addressed the separate issues of when and to what

41. A separate question also arises whether Congress has the power to pick and choose the types of cases which the federal district courts may hear. While there is no specific authority for hinging such choices on the public status of the defendant, it is clear that Congress may, consistent with article III, impose any number of jurisdictional conditions, including minimum amounts in controversy and complete diversity requirements. Having created the inferior courts, Congress is not obliged to grant jurisdiction to the outer limits of article III. *See* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 21-24 (1980). Nevertheless, it is open to some question whether Congress, having granted general federal question jurisdiction, could discriminate against some constitutional claims. *But see* Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850) (exclusion of non-constitutional claim upheld).

42. *Mount Healthy*, 429 U.S. at 279.

43. *Id.*

44. *Id.* at 280-81. This determination followed the Court's analysis of the political independence of school districts under state law. The Court said "a local school board such as petitioner is more like a county or a city than it is like an arm of the State." *Id.* at 280. Cities and counties do not enjoy the protection of the eleventh amendment bar to suits in federal court because under state law they traditionally function independently of state government. Nonetheless, state agencies—such as state hospitals for the mentally retarded—are regarded as arms of the state and, hence, protected by the eleventh amendment. *Pennhurst*, 451 U.S. at 1. The linkage of school boards to cities and counties was superfically beneficial to civil rights plaintiffs in the sense that such linkage deprived cities and counties of an eleventh amendment defense to any suit against them in federal court. At the same time, the linkage was ironically unfavorable to civil rights plaintiffs because the exclusion of municipalities from section 1983's definition of "person" jeopardized the remedial and jurisdictional base for bringing suit against a local governmental entity. It is small solace to a plaintiff kept out of court by section 1983 that if he had had an action and a statutory grant of jurisdiction to support it, he would not have been barred by the eleventh amendment.

45. 423 U.S. 362 (1976).

extent injunctive relief was available under section 1983 against individual officials alone.

Rizzo involved charges of civil rights violations by the mayor of Philadelphia and other officials in their handling of the police department. The Court held that injunctive relief against a named official must be supported by proof that the particular official violated the plaintiff's civil rights. The Court commented:

> We first of all entertain serious doubts whether on the facts as found, there was made out the requisite Article III case or controversy between the individually named respondents [plaintiffs] and petitioners [defendants].[46]

Brown and *Swann v. Charlotte-Mecklenburg Board of Education*[47] were distinguished by Justice Rehnquist. He observed in those cases:

> [S]egregation imposed by law had been implemented by state authorities for varying periods of time, whereas in the instant case the District Court found that *the responsible authorities had played no affirmative part* in depriving any members of the two respondent cases of any constitutional rights.[48]

Although injunctive relief against the individual officials was denied in *Rizzo* because of insufficient evidence that the named defendants affirmatively inflicted injuries to the named plaintiffs, some effort was thus made to place the desegregation cases on a different *factual*, but not legal, footing. Justice Rehnquist mysteriously failed to highlight the clearest distinction: specifically, that in *Brown* and *Swann* the governmental entity had been the defendant. Instead, he relied on a more subtle distinction and a more limiting view of an action for *de jure* segregation than had been previously expressed. He stated that in *Swann* the "administrators and school board members were found *by their own conduct* in the administration of the school system to have denied those rights."[49] Neither *Brown* or *Swann* spoke of such a limitation.

Justice Rehnquist did not point out in *Rizzo* that the historical focus in dealing with *de jure* segregation rested squarely upon the discriminatory involvement of the defendant governmental unit no matter who was in command. As Professor Owen Fiss has aptly stated: "Civil rights injunctions were typically addressed to the office, rather than the person. . . .Operationally this meant that in determining whether an injunction was needed, the misconduct of the predecessors in the office would automatically be attributed to the incumbent; there was a tacking of misconduct."[50] If, after *Rizzo*, the school boards were excluded from the school desegregation cases, a finding of *de jure*

46. *Id.* at 371-72.

47. 401 U.S. 1 (1971).

48. 423 U.S. at 377 (emphasis added).

49. *Id.* (emphasis added).

50. O. FISS, THE CIVIL RIGHTS INJUNCTION 15-16 (1978). Professor Fiss also observed that one of the effects of addressing an injunction to the office rather than the individual is that Fed. R. Civ. P. 25(D) WOULD AUTOMATICALLY SUBSTITUTE ANY INDIVIDUAL IMCUMBENT. *Id.* However, even before Rule 25, the Supreme Court in Murphy v. Utter, 186 U.S. 95 (1902), pointed out that "if the action be brought against a continuing municipal board it does not abate by change in *personnel*." *Id.* at 101 (emphasis in original). The Court had also noted that if a writ were directed against an individual, albeit regarding an official duty, "he only can be punished for disobedience." *Id.* at 100. *See also infra* text accompanying note 50.

In Dayton Board of Education v. Brinkman, 443 U.S. 526 (1979), the Court looked into the distant past for the proof of *de jure* segregation by the defendant Board. As a defendant, the Board itself was the party responsible even for offenses which may have occurred when it was differently constituted. The custom of seeking equitable relief against a school board was well established. *See,*

segregation would logically be narrowed to those instances in which existing named administrators and officials were proven to have personally violated the equal protection clause of the fourteenth amendment. After *Washington v. Davis*[51] this would require additional proof that the individual defendant *intended* to discriminate on the basis of race. Continuity with the actions and policies of a past board would be broken and the availability of suable officials and individual proof would be unlikely in many cases. As a result, it is reasonable to conclude that charges of *de jure* segregation would be difficult to sustain, particularly in northern school districts where subtle pre-1954 discriminatory policies may have been replaced with facially neutral, but non-remedial practices such as neighborhood attendance or free choice plans.[52] Without the simplicity and historical acceptability of evaluating the conduct of school boards, the task of establishing *de jure* segregation could have been presented with severe obstacles.

Perhaps even more forbidding, however, was a second aspect of the *Rizzo* decision. The Court forecast a narrowing in the scope of injunctive relief whenever it was directed at individual official defendants:

> The principles of federalism which play such an important part in governing the relationship between federal courts and state governments though initially expounded and perhaps entitled to their greatest weight in cases where it was sought to enjoin a criminal prosecution in progress, have not been limited either to that situation or indeed to a criminal proceeding itself. We think these principles likewise have applicability *where injunctive relief is sought*, not against the judicial branch of the state government, but *against those in charge of an executive branch of an agency of state or local governments* such as respondents here.[53]

This call to federalism by the Court was its response to the pervasiveness of the district court's remedial decree in reshaping the structure of certain aspects of the Philadelphia Police Department. The Supreme Court's clear instruction was that only minimally intrusive remedies were appropriate where civil rights violations by state or local executive officials had been proven. That the Court meant business in this pronouncement has been tested most recently in *Los Angeles v. Lyons*[54] where injunctive relief against a police department for its chokehold policy was denied because the likelihood that the

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e.g., Milliken v. Bradley, 443 U.S. 267, 292-93 (1977) (Powell, J., concurring). Indeed, Professor Fiss has elsewhere pointed out:

> the general pattern for school desegregation litigation, including that in Alabama, where there were about 120 districts, was to have a separate suit against the school board for each local district.

FISS at 645-46.

51. 426 U.S. 229 (1976).

52. If federal courts were denied original jurisdiction over school boards, the only possible alternative would be a suit against school boards in state court for an implied right of action under the fourteenth amendment. Even if such a right of action were to be found for only state court actions, the lack of a federal trial forum would subject such suits to hazards which were recognized as far back as Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

Being forced into state court to litigate claims based on federal laws would restrict a plaintiff "to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal, into which he is forced against his will." *Id.* at 822-823. An original federal trial forum is essential for the protection of federal rights because the fact finding process must be institutionally sympathetic to the federal interests at stake.

53. 423 U.S. at 380 (emphasis added).

54. 461 U.S. 95 (1983).

plaintiff would suffer such an experience again was "speculative" and therefore not an adequate basis for equitable relief. The Court observed: "recognition of the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the states' criminal laws in the absence of irreparable injury which is both great and immediate."[55] Unlike *Rizzo*, the injunction ordered by the district court in *Lyons* had narrowly barred the use of deadly force by police officers. It fell far short of restructuring the department.

By contrast, one can hardly imagine more pervasive equitable remedies than those traditionally recognized as appropriate in cases of *de jure* school desegregation. Such remedies have included the reshaping of a school district's plans, practices, policies and rules and have frequently imposed mandatory district-wide busing plans. The principles expounded in *Rizzo*, however, certainly tightened the requirements of proof in section 1983 suits against individual state or local government officials. It is noteworthy that in commenting upon *Rizzo* Professor David L. Shapiro observed in 1976:

> Fortunately I do not think that this [federalism] aspect of the *Rizzo* opinion will be realized—the continuing actions of the courts in desegregation cases are strong evidence that they will not—but I am deeply disturbed that the sensible and limited exception carved out in *Douglas* and *Younger* should be recruited for such dangerous service.[56]

If desegregation suits had been limited to suits against individual local officials still in office, a corresponding contraction of remedies would have been expected. The result could have proven gravely disabling, not only to meeting the threshold requirements of proving *de jure* segregation, but also to obtaining complete and effective injunctive relief in suits against individual officials.

IV. Confronting the Error in Statutory Interpretation in Light of Risks to Fundamental Values

The issue of civil rights jurisdiction over school boards was at last squarely confronted in 1978 in *Monell v. Department of Social Service*.[57] *Monell* presented a constitutional challenge to a school board rule compelling women to take leaves of absence from their employment during pregnancy. The suit was based on section 1983 and thus presented the very question raised but avoided in *Mount Healthy*, namely, whether school boards were excluded from the definition of "person." This time the issues were timely raised and briefed. The plaintiffs in their brief to the Supreme Court asserted that after *Brown* there had been nineteen Supreme Court cases brought pursuant to section 1983 in which a school board was a defendant.[58] In eight of those decisions, section 1983 and its jurisdictional partner, section 1343, were

55. *Id.* at 112. *But see* Hague v. CIO, 307 U.S. 496 (1939); Allee v. Medrano, 416 U.S. 802 (1974); Lankford v. Gelson, 364 F.2d 197 (4th Cir. 1966).

56. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 320 (1976). The *Douglas* and *Younger* cases referred to by Professor Shapiro are Douglas v. City of Jeanette, 319 U.S. 157 (1943),and Younger v. Harris, 401 U.S. 37 (1971). They demonstrate the principle that a federal district court will not ordinarily enjoin a state court criminal action. Constitutional claims in such circumstances must be raised in the state proceeding.

57. 436 U.S. 658 (1980).

58. Brief for Petitioners at 14-15, *Monell*, 436 U.S. 658.

the sole foundation of the suits.[59] Each of those cases was decided after *Monroe*.[60] The thrust of the plaintiff's argument was that the Court could not ignore these eight prior decisions and relegate her suit to the same jurisdictional vacuum as *Kenosha*: Notably, the argument did not contend that the Court was wrong in its interpretation of "person" but, more narrowly, that *Brown* and its progeny were proof positive that "person" must include school boards regardless of whomever else the term excluded.[61] Yet, despite all this careful analysis, the Court in *Mount Healthy* had specifically likened school boards to cities for eleventh amendment purposes.

The oral argument of the *Monell* case demonstrates the Court's developing awareness that there were inconsistencies in *Monroe* and in *Kenosha*. Although counsel for the petitioner was careful not to hinge his argument on the overruling of *Monroe*, his arguments concerning the conflict between the jurisdictional exclusion of cities and the long tradition of desegregation orders against school boards implicitly impunged that decision. To drive home the Court's own past emphasis on the involvement of the school board as an entity in desegregation cases, counsel for the petitioners made the following pertinent comments in answer to the Court's inquiries:

> [T]he Court has focused time and again on "the board," the defendant board, the respondent board. And Mr. Justice Powell, concurring in the second *Milliken* case last term, noted that. . .the principle defendant—I am quoting here—is usually the local board of education or school board. . . .
>
> . . . .
>
> [I]ts the entity that's doing the wrong.[62]

Counsel for the respondent also addressed the typical setting in which a school board is sued. He could not, however, escape the awkwardness of a desegregation suit which could not name a school board as a defendant:

> [I]f you order the chancellor of the Board of Education to integrate schools, to bus, and if he doesn't, your remedy is clear: contempt. . . .[A]nd there's no guarantee that the city is going to pay his contempt judgment; maybe there's an indemnity clause statute, *there's no guarantee*.[63]

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59. Brief for Petitioners, *supra*, note 51 at 15. *E.g.*, East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976); Keyes v. School Dist. No. 1, 413 U.S. 189 (1973); Swann v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 1 (1971); Northcross v. City of Memphis Bd. of Educ., 397 U.S. 232 (1970); Tinker v. Des Moines Indep. School Dist., 393 U.S. 621 (1969); District of Abington Township v. Schempp, 374 U.S. 203 (1963); McNeese v. Bd. of Educ., 373 U.S. 668 (1963).

60. Brief for Petitioners, *supra* note 51, at 16.

61. Transcript of Oral Argument at 5, *Monell*, 436 U.S. 658 [hereinafter cited as Transcript].

62. Transcript, *supra* note 54 at 2-3. The quotation is taken from Milliken v. Bradley, 433 U.S. 267, 292-93 (1977) (Powell, J., concurring). Counsel for petitioner conceded that Justice Powell's remark was meant to distinguish between local and state defendants. Regardless of the precise context, the statement was descriptive of the practice in desegregation cases.

63. Transcript, supra note 54 at 22 (emphasis added). Of course, the decision of the Court in Murphy v. Utter, 186 U.S. 95 (1902), suggested that in such a case only the official could be punished for disobedience. *Id.* at 100.

Most recently, in the aftermath of *Monell*'s application of section 1983 to municipal corporations, the Supreme Court held in Brandon v. Holt, 53 U.S.L.W. 4122 (Jan. 21, 1985), that a damages suit against a named individual in his official capacity as "Director of Police of the Memphis Police Department" could give rise to a money judgment enforceable against the city. This outgrowth of *Monell* has significance because a city, unlike an individual, is entitled to no qualified good faith immunity. Owen v. City of Independence, 445 U.S. 622 (1980).

Justice Rehnquist dissented and observed, consistent with his pre-*Monell* views:

> It has long been the practice, of course, to sue a government official in his "official capacity" when seeking *injunctive* relief against a government entity. But I suspect that process arose

The oral argument clearly reveals that the Court was concerned about the distinction between suing an individual and suing a school board insofar as a desegregation remedy was concerned. The argument does not reveal, however, any further recognition that limiting desegregation cases to suits against individual board members would also portend an effect on the elements of proof needed to make out a constitutional violation.

In *Monell*, the Court addressed the jurisdictional issue directly. *Monell* clearly overruled *Monroe*. Municipalities and school boards were held to be "persons" under section 1983. They were thus brought within the scope of section 1343, and therefore subject to liability for both injunctive and compensatory relief whenever the government "as an entity," through some official policy or custom, is responsible for the civil rights infraction.[64]

The rationale given for the change of interpretation was the new recognition that the 42d Congress meant only to exclude cities from liability for unprevented private acts of violence.[65] The turnabout in statutory interpretation was so decisive that Justice Rehnquist, in his dissent, acknowledged that the *Monell* opinion represented "a more searching and careful analysis" than *Monroe*.[66]

The new analysis of the *Monell* majority hinged on a re-evaluation of the proposed Sherman amendment added to the bill which ultimately became the Civil Rights Act of 1871, now codified in section 1983. In *Monroe* it was thought that the amendment had been defeated in the House ostensibly out of fear that Congress lacked the constitutional power to impose obligations upon municipalities.[67] Upon closer examination, the defeat of the Sherman amendment was shown to have turned on a much more limited congressional fear that making cities, counties, and towns liable for the riotous conduct of private parties, including the Ku Klux Klan, would have imposed a truly novel and extraordinary obligation upon those municipal entities.[68] It was this extraordinary liability which was considered by some to violate the principles of state sovereignty. The existence of and references in the debates to then contemporary Supreme Court decisions enforcing the contract provision of the Due Process Clause against municipalities belied any conclusion that the defeat of the Sherman amendment reflected a congressional intent to protect municipalities from all civil rights liability in an effort to avoid a usurpation of power.[69]

Furthermore, the Dictionary Act, passed shortly before the Civil Rights

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in no small part from the fact that equity courts traditionally acted *in personam*, enforcing their decrees through the contempt power over the individual defendant. See H. Mclintock, Equity 34 (2d ed. 1948); W. Stafford, Handbook of Equity, ch. 6 (1934).

Brandon, 53 U.S.L.W. at 1425. Justice Rehnquist's remarks on the limitations of enforcing an equity decree against an individually named defendant confirms the legitimacy of the Supreme Court's concern during the *Monell* argument about the effect of a jurisdictional bar against naming a governmental entity as a defendant. As pointed out in the argument, a contempt judgment against an individual defendant would not guarantee obedience from a jurisdictionally immune municipality.

64. *Monell*, 436 U.S. at 694.

65. *Id.* at 673-82.

66. *Id.* at 723.

67. *Monroe*, 365 U.S. 167, 188-91; *see Monell*, 436 U.S. at 664-65, 688.

68. *Monell*, 436 U.S. at 658, 673, 690-95.

69. *Id.* at 672, 686-87; *see id.* at 673 (focus of House rejection of the Sherman amendment was the belief that local governments could not be forced by federal law to create police forces to counter private violence).

Act of 1871, directed that "in all acts hereinafter passed . . . the word 'person' may extend and be applied to bodies politic and corporate unless the context shows that such words were intended to be used in a more limited sense."[70]

The record, in short, compelled a conclusion opposite to that reached in *Monroe*: the Congress did include municipalities within the term "person." With this new enlightened interpretation of section 1983, all the jurisdictional impediments established or foreshadowed in *Kenosha* and *Aldinger* were completely destroyed, as were the risks that desegregation suits against school boards might be found jurisdictionally barred from the federal district courts.

Possibly not since *Erie R.R. v. Tompkins*[71] overruled *Swift v. Tyson*[72] had there been such a striking retreat from an established statutory interpretation. Although the statutory interpretation in *Monell* was performed with greater insight and without opposition, it is likely that as in *Erie* the conversion would not have been made but for the influence of recognized constitutional values.[73] It is interesting indeed that in a 1978 publication, which made no reference to *Monroe* or *Monell*, Professor Fiss had described a kind of judicial logic which once flowed not from *Monroe's* statutory construction, but from *Brown's* fundamental legitimacy: "[*Brown*] was the foundation for arguments of the form, '[i]f this use of the injunction is denied, *Brown* is being denied, and therefore, this use cannot be denied.' "[74]Although Professor Fiss believed that such high status was diminishing, perhaps *Monell* marked a resurgence of vitality proving the continuing influence of moral and social policy on the Court's interpretive role.

V. PRESENT LIMITATIONS ON SECTION 1983

Although any jurisdictional doubts about *Brown* were put to rest by *Mo-*

70. Dictionary Act, ch. 71, § 2, 16 Stat. 431 (1871).

71. 304 U.S. 64 (1938) (Holding that the Rules of Decision Act, 28 U.S.C. § 1652, required the application of substantive state decisional law as well as state statutory law. This reversed the interpretation given to the act for nearly 100 years.)

72. 41 U.S. (16 Pet.) 1 (1842).

73. Notably there were two other courses of judicial action which might have preserved the full importance of *Brown* and at the same time avoided the embarrassment of overruling the *Monroe* line of decisions: (1) treating school boards *sui generis* as persons for purposes of § 1983; or (2) implying an injunctive remedy directly from the fourteenth amendment against even cities and school boards.

The first course would have provided momentary relief, but in the long run would have proven transparent. *Mount Healthy* had effectively likened school boards to cities for purposes of the eleventh amendment. That likeness could not easily have been ignored given the complete absence of any consideration by the 42d Congress of "school boards" in rejecting the Sherman amendment. Moreover, a school board could easily disappear by virtue of state law only to reemerge in city or county government departments. The city or county would still be protected from suit had *Monroe* survived.

As to the second possible course, the Court would have had to overcome what the Court itself portrayed to be a deliberate exclusion by Congress of cities and counties from the special grant of statutory jurisdiction embodied in the Civil Rights Act of 1871. In the face of this judicially recognized congressional policy, the court would not only have had to create a *remedy* defying the Congressional intent, it would also have had to create a source of jurisdiction. Perhaps it could have done so by disregarding *Radzanower* and interpreting § 1331 to have "submerged" the exclusion found in the jurisdictional provision of the act of 1871. The Court might even have articulated a wholly novel notion of inherent original jurisdiction for claims of constitutional violations. To have followed any of these approaches, however, would have invited major constitutional controversies. *See supra* note 29.

74. FISS, *supra* note 50 at 5.

nell, the present-day usefulness of the section 1983 remedy for constitutional violations by state or local governmental officials is still circumscribed by several limiting policies and interpretations. *Rizzo* and *Lyons*, for example, both have continuing effects in requiring stringent proof before any injunctive relief will be ordered. In the context of a suit for damages, the Court in *Monell* insulated municipal "persons" from vicarious liability for constitutional wrongs committed by municipal employees.[75] Additionally, despite *Monell's* dramatic expansion of the definition of "person," there remains yet another important limitation on the meaning of the troubled term.

Illustrative of this point is the Supreme Court's statement in *Quern v. Jordan*[76] that, notwithstanding *Monell*, states as political entities are not themselves persons under section 1983. Whether this determination is reminiscent of the problems created by *Monroe* is a matter of conjecture.

In the absence of a federal statute making states subject to suit for violations of fourteenth amendment guarantees, states are immune under the eleventh amendment from any suit brought in federal court by an individual.[77] This is true whether the suit be one for damages or injunctive relief. Without a congressional enactment subjecting states to suit, the only way to enforce constitutional rights against the states is by naming a state official as the defendant.[78] Even then the relief obtainable is limited to an injunction whose terms do not affect the state treasury except for the cost of prospective compliance with a court decree.[79] This allows, for example, a state and its agencies to withhold payments required to be made by federal law in a federal-state entitlement program without fear of reprisal for not compensate the victims for their loss during the period between the denial of payments and the date of a court decree ordering such payments in the future.[80]

If, on the other hand, states could be characterized as persons under section 1983, then Congress, through its special power under section five of the fourteenth amendment to pass legislation enforcing that amendment, would have entirely eliminated the eleventh amendment as a bar to full relief in federal court for a civil rights violation. In such a circumstance, a state could be sued directly for its violations, just as municipalities may be sued for their violations.

The decision in *Quern*, holding that states are not persons, has been disputed by Justice Brennan.[81] As discussed above, the holding in *Monell* that

75. 436 U.S. at 658, 692-93 n.57. Justice Brennan for the Court observed: "Strictly speaking, of course, the fact that Congress refused to impose vicarious liability for the wrongs of a few private citizens does not conclusively establish that it would similarly have refused to impose vicarious liability for the torts of municipal employees." *Id.* at 693. It might as easily have been said that a Congress capable of expressing its dislike for vicarious liability in one circumstance would have been able to express its rejection of vicarious liability in other settings as well if it wished. *See* Andrus v. Gover Constr. Co., 446 U.S. 608, 616-17 (1980); Ash v. Cort, 496 F.2d 416, 427 (3d Cir. 1974) (dissenting opinion), *rev'd*, 422 U.S. 66 (1975).

76. 440 U.S. 332, 338-41 (1979).

77. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

78. This approach, left open in Edelman v. Jordan, 415 U.S. (1974), originated in *Ex parte* Young, 209 U.S. 123 (1908), where the Court engaged in the fiction that a state official's action, in putting into effect some unconstitutional law or policy, could not have been under the aegis of state sovereignty in any event.

79. *Edelman*, 415 U.S. 651.

80. *See id.*

81. *Quern*, 440U.S. at 349-366 (concurring opinion).

cities were meant to be treated as persons hinged in part upon a congressional enactment that preceded section 1983 and included in the definition of the term those "bodies politic and corporate."[82] Justice Brennan adopts the definition of "person" in the *Monell* decision:

> [s]ince there is nothing in the "context" of the Civil Rights Act calling for a restricted interpretation of the word "person," the language of that section should prima facie be construed to include "bodies politic" among the entities that could be sued. . . .Even the Court's opinion today does not dispute the fact that in 1871 the phrase "bodies politic and corporate" would certainly have referred to the States.[83]

Justice Brennan's view is consistent with the established opinion that section 1983 was motivated by a deep distrust of the southern states and passed by a Reconstruction Congress that wanted to protect constitutional rights effectively without being openly expressive of any concern for states which offended those rights.[84] The controversy heralded by Justice Brennan promises to make the meaning of person in section 1983 a subject of important continuing debate.

Since desegregation suits have historically focused upon school boards and counties, the current exclusion of states from the meaning of "person" in section 1983 would not appear to pose a profound threat. As in *Milliken v. Bradley* (*Milliken* II),[85] a state may still be involved in a desegregation suit compatible with the eleventh amendment by naming a state official as a defendant. In such a case prospective injunctive relief is available, even for the costs of remedial programs designed to "dissipate the continuing effects of past misconduct."[86] Although problems of proof and enforcement of a decree against an individual do exist in such a suit, the inability to sue a state directly for *de jure* segregation has not yet proven to present a danger comparable to the very serious danger eliminated by *Monell.*

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82. *See supra* text accompanying note 59e.

83. *Quern*, 440 U.S. at 356.

84. Even the defeated Sherman amendment which would have imposed municipal liability for private lawless actions was passed by the Senate. CONG. GLOBE, 42d Cong., 1st SESS., 704-05 (1871). The predominant congressional mood was distrustful of state government, not protective of it. *See* Mitchum v. Foster, 407 U.S. 225 (1972).

85. 433 U.S. 347 (1977).

86. *Id.* at 290.