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Case Comments

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CASE COMMENT

CONSTITUTIONAL LAW - *JETT V. DALLAS INDEPENDENT SCHOOL DISTRICT*: THE APPLICABILITY OF MUNICIPAL VICARIOUS LIABILITY UNDER 42 U.S.C. SECTION 1981

As a result of dicta in *Monell v. Department of Social Services*[1] stating that 42 U.S.C. Section 1983[2] precludes application of the common-law doctrine of respondeat superior,[3] plaintiffs have focused upon 42 U.S.C. section 1981[4] as a means to hold a municipality vicariously liable for racial discrimination. Whereas section 1983 provides a remedy for any deprivation of a constitutional right under color of law, section 1981 has a narrower focus; the thirteenth amendment's guarantee against racial discrimination.[5] The United States Supreme Court has not addressed the issue of whether section 1981 permits recovery through use of respondeat superior.[6] In *Jett v. Dallas Independent School District*,[7] the United States Court of Appeals for the Fifth Circuit interpreted *Monell* as also

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1 436 U.S. 658 (1978).

2 42 U.S.C. § 1983 (1982) 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 citizen of the United States or any 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. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

For a discussion of the legislative history of § 1983, see *infra* note 39.

3 The court in *Monell* held that municipal liability under 42 U.S.C. § 1983 must involve a violation which occurs pursuant to an official policy or custom. 436 U.S. at 694. Justice Brennan noted that § 1983 requires causation before a defendant could face liability. *Id.* at 691. Since *Monell* involved an official municipal policy, the Court's discussion of municipal respondeat superior was "merely advisory and not necessary to explain the Court's decision." *Id.* at 714 (Stevens, J., concurring in part). For the Court's reasoning for rejecting municipal vicarious liability under § 1983, see *Id.* at 691-95.

For a definition of what constitutes an official policy, see, e.g., Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir. 1984) (en banc) (per curium) (modifying 728 F.2d 762 (en banc)), *cert. denied*, 472 U.S. 1016 (1985).

4 42 U.S.C. § 1981 (1982) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to enjoy the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

For a discussion of the legislative history and purpose of § 1981, see *infra* note 38.

5 For a discussion of the available causes of actions under §§ 1981 and 1983, see generally Comment, *Developments in the Law - Section 1981*, 15 HARV. C.R.-C.L. L. REV. 29 (1980) (discusses the legislative histories of §§ 1981 and 1983 and details causes of actions employed in the modern civil rights movement).

6 In General Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982), the Court reversed a finding of private vicarious liability under § 1981 due to insufficient facts to demonstrate an agency relationship. Justice O'Connor, however, stated in dissent that "nothing in the Court's opinion prevents the respondents from litigating the question of the employers' liability under § 1981 by attempting to prove the traditional elements of *respondeat superior*." *Id.* at 404 (emphasis in original).

7 798 F.2d 748 (5th Cir. 1986).

prohibiting municipal vicarious liability under section 1981. This holding runs contrary to the reasoning adopted by the majority of the circuits and by district courts which allow such recovery.[8]

Part I of this comment discusses the facts and holdings in *Jett*. Part II argues that an independent analysis of the language, legislative history, and purpose of section 1981 shows that municipal vicarious liability is not precluded in section 1981 actions. Part III suggests that courts should interpret section 1981 in the context of the modern civil rights movement, focusing on the necessity to assure the plaintiff adequate compensation and to deter future violations. Part IV concludes that, in *Jett*, the Fifth Circuit adopted an unduly restrictive view of municipal liability under section 1981.

I. *Jett v. Dallas Independent School District*

Norman Jett, a caucasian, alleged that Frederick Todd, a black principal at South Oak Cliff High School who was employed by the Dallas Independent School District (DISD), removed him from his position as South Oak's head football coach based upon his race.[9] In May 1983, Jett initiated a suit against Todd in his individual and official capacities, and the DISD, seeking damages under 42 U.S.C. sections 1981 and 1983.[10]

In 1962, after working for the DISD for five years, Jett received an appointment to the faculty and football coaching staff at South Oak Cliff.[11] When Jett became the athletic director/head football coach in 1970, the school's racial composition had shifted from predominantly

8 Springer v. Seamen, 821 F.2d 871, 880-81 (1st Cir. 1987) (Since *Monell* is peculiar to § 1983 causes of action, its limitations, jurisdictional limitations and causation requirements will not be imposed on § 1981 causes of action.); Leonard v. City of Frankfort Elec. and Water Plant Board, 752 F.2d 189, 194 n.9 (6th Cir. 1985) (In rejecting § 1981 liability for the city, "[t]he district court's reasoning was clearly deficient in relying solely on *Monell*, since post-*Monell* § 1981 decisions clearly reject this approach."); Abasiekong v. City of Shelby, 744 F.2d 1055 (4th Cir. 1984) (reinstates jury verdict imposing § 1981 municipal liability); Mahone v. Waddle, 564 F.2d 1018 (3d Cir.), *cert. denied*, 438 U.S. 904 (1977) (city may be liable under § 1981 for misconduct by its police officers); Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1160-61 (9th Cir. 1976) (en banc) (§ 1981 does not provide the municipal immunity found by the Supreme Court in *Monroe* for § 1983 racial discrimination claims); Bouquette v. Clemmer, 626 F. Supp. 46, 48 (S.D. Ohio 1985) (a municipality may be vicariously liable under § 1981); Lawrence v. Board of Police Commissioners, 604 F. Supp. 1229, 1232 (Mo. 1985) (respondeat superior may be invoked to hold a municipality liable under § 1981); Caine v. Chicago, 619 F. Supp. 1228, 1232-33 (N.D. Ill. 1985) (respondeat superior claim against the city is affirmed); Haugabrook v. Chicago, 545 F. Supp. 276, 280-81 (N.D. Ill. 1982) (§ 1981 respondeat superior liability found against municipality); Bell v. Milwaukee, 536 F. Supp. 462, 474 (E.D. Wis. 1982) (a municipality's § 1981 liability is not limited to an agent's acts done pursuant to his authority); Jones v. Int'l. Union of Operating Engineers, 524 F. Supp. 487, 491-92 (S.D. Ill. 1981) (respondeat superior is applicable to § 1981 causes of action); Croswell v. O'Hara, 443 F. Supp. 895, 898 (E.D. Pa. 1978) (city has respondeat superior liability under § 1981 for police misconduct); Stewart v. Wappingers Cent. School Dist., 437 F. Supp. 250, 253 (S.D.N.Y. 1977); *Contra*, Lee v. Wyandotte County, 586 F. Supp. 236, 240 (Kan. 1984) (the county may be liable if a direct link can be established; otherwise there is no respondeat superior liability for municipal defendants under § 1981).

9 *Jett*, 798 F.2d at 752.

10 *Id.* The United States Supreme Court held in McDonald v. Santa Fe Trail Transport. Co., 427 U.S. 273 (1976), that white persons may bring a § 1981 claim. Writing for the majority, Justice Marshall noted that the statute's protection explicitly applies to "all persons." The Court held that the statute's language, "as is enjoyed by white persons," did not eliminate the prohibition of racial discrimination against whites. *Id.* at 285-96.

11 *Jett*, 798 F.2d at 751.

white to predominantly black.[12] In 1975, the DISD named Todd principal of South Oak Cliff.[13] A strained working relationship ensued between Todd and Jett over the next seven years.[14]

The tension prompted Todd to present DISD Director of Athletics John Kincaide with a written request for Jett's removal in March, 1983.[15] Shortly thereafter, Jett met with DISD Superintendent Linus Wright and suggested that Todd's accusations stemmed from his desire to have a black football coach.[16] Wright, however, supported Todd and asked Jett to relocate voluntarily, while assuring him that "the DISD would take care of him and find him another position."[17] At a March 1983 meeting between DISD officials and Todd, Wright officially approved Todd's request.[18]

The DISD then reassigned Jett to teach, without any coaching responsibilities, at another high school.[19] On May 5, 1983, the DISD informed Jett of his placement in the "unassigned personnel budget" and of their intention not to rehire him for the next school year.[20] At that point, Jett initiated his suit and subsequently resigned from the DISD on August 19, 1983.[21]

The United States District Court for the Northern District of Texas found, *inter alia*, racial discrimination by both Todd and the DISD.[22] The Fifth Circuit, while affirming Todd's personal liability,[23] refused to find

12 *Id.*

13 *Id.*

14 *Id.* The two men argued over Jett's faculty meeting attendance record, his methods of purchasing equipment and his teaching abilities. Much of the antagonism developed out of events surrounding South Oak Cliff's game against Plano High. Prior to the contest, Jett angered Todd by making exaggerated statements about his team's ability in a local newspaper. After losing the game, Jett violated league rules by entering the referees' locker rooms and criticizing two black officials. Rumors later circulated that the South Oak Cliff coaching staff may have accepted bribes prior to the game and failed to follow their initial game plan. In a subsequent incident, a newspaper quoted Jett as claiming that only two of his players would meet college football academic eligibility requirements. *Id.*

15 *Id.* at 752.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* The DISD transferred Jett to the Security Department and claimed that he could apply for any available positions. If DISD could not find him an administrative position, it promised Jett a teaching assignment. *Id.*

21 *Id.* On August 4, 1983, the DISD did offer Jett a position at Jefferson High School as a history teacher, freshman football coach, and freshman track coach. *Id.*

22 *Id.* The jury also found that Jett suffered violations of his rights to free speech and procedural due process. It noted that constructive termination from DISD occurred in August, 1983. Damages were set at $850,000, including $50,000 punitive damages against Todd. Barefoot Saunders, District Judge for the Northern District of Texas, held that the evidence did not support the punitive damages award. Jett accepted a remittitur ordering $450,000 actual damages and $112,870.45 for attorney's fees against the DISD. Todd was jointly and severally liable for $50,000 actual damages and wholly liable for the attorney's fees. *Id.*

23 In affirming Todd's liability for racial discrimination, the Fifth Circuit relied on McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). The court stated that Jett, as a member of a racial minority at South Oak Cliff, had established a prima facie case of racial discrimination and created a rebuttable presumption that discrimination led to his discharge. DISD had supplied legitimate, alternative reasons for its action, including poor work performance. The jury decided that Todd intentionally discriminated against Jett. The court found that the continuing conflicts between the two men provided an adequate basis

the DISD vicariously liable under sections 1981 and 1983.[24] The court did acknowledge the applicability of respondeat superior in section 1981 claims against a private employer.[25] The Fifth Circuit, however, interpreted *Monell* as providing "compelling reasons for distinguishing between private and municipal liability under section 1981."[26] Namely, the court interpreted *Monell* as allowing municipal vicarious liability for both sections 1981 and 1983 only on proof that the violation was pursuant to an "official policy or custom;"[27] because the court found no such official policy or custom of racial discrimination, the DISD was not vicariously liable for Todd's actions.[28]

II. Statutory Construction of 42 U.S.C. Section 1981

By analogizing the school district's section 1981 liability to that available under section 1983, the Fifth Circuit used a method of statutory construction similar to that unanimously rejected by the United States Supreme Court in *District of Columbia v. Carter*.[29] In *Carter*, the district court first held that the District of Columbia is a "state or territory" as used in section 1983;[30] it applied as binding precedent a case in which the Supreme Court had decided the same issue for section 1982.[31] In reversing the district court's decision, the Supreme Court held that a court interpreting related statutes must take into account the effects of variations in historical context, subject matter, and scope of legislative power exercised in each enactment.[32] The Court then found different

for the jury's decision. 798 F.2d at 756-57. Additionally, Todd's liability for violating Jett's exercise of free speech was upheld. *Id.* at 757-58. The Fifth Circuit reversed and remanded Todd's damages on these counts for a new trial. *Id.* at 763.

24 *Id.* at 753-54. The court also held that the DISD did not violate Jett's right to substantive due process since his contract did not constitute a property interest. In addition, it overturned the jury's finding of constructive termination because Todd's diminished responsibilities did not make his remaining with DISD intolerable. *Id.*

25 *Id.* at 762.

26 *Id.* at 763.

27 The *Jett* court stated:

> We believe that the Supreme Court's focus in *Monell* in this connection was not on particular types of "federal" wrongs, but rather was on a particular type of liability for all such wrongs. The Supreme Court's interpretation of section 1983 and its legislative history indicates that Congress did not impose different types of liability on a municipality based on the particular "federal" wrong asserted .... To impose such vicarious liability for only certain wrongs based on section 1981 apparently would contravene the congressional intent behind section 1983.

Id. at 762 (footnote omitted).

The Fifth Circuit did acknowledge that a municipality may face vicarious liability under Title VIII. However, the court found that Title VIII covers different constitutional violations than do sections 1981 and 1983. *Id.* at 762-63 nn. 13-14.

28 *Id.* at 760-61.

29 409 U.S. 418 (1972).

30 Carter v. Carlson, 447 F.2d 358, 361 n.3 (1971).

31 Hurd v. Hodge, 334 U.S. 24, 31 (1948). The Fourth Circuit, in Sewell v. Pegelow, 291 F.2d 196 (4th Cir. 1961), had also relied on *Hurd* to establish the status of the District of Columbia in section 1983 causes of action. *Carter* notes the different congressional enactments behind each statute. Section 1982 is based on the Civil Rights Act of 1866. 409 U.S. at 421. Section 1981, which the *Jett* court interpreted in light of *Monell*'s section 1983 analysis, is also based on the Civil Rights Act of 1866.

32 At first glance, it might seem logical simply to assume, as did the court of appeals, that identical words used in two related statutes were intended to have the same effect. Never-

interpretations for identical language used in both the Civil Rights Act of 1866 and 1871.[33]

Although the *Jett* court did not base its holding on the existence of identical statutory language, it found identical breadth of liability based on statutory omission.[34] Despite the *Carter* requirement of discrete inquiries into the meaning behind each enactment as a threshold determination in statutory analysis, the *Jett* court posited a uniform municipal liability for constitutional violations.[35] It did not consider the differences in context, constitutional sources, and congressional intent between sections 1981 and 1983. An analysis of these factors produces a different result.

Although *Jett* examined section 1981 in light of *Monell's* section 1983 analysis,[36] *Monell* itself does not require uniform construction of sections 1981 and 1983. The statutes were enacted by different Congresses and have separate and distinct legislative histories.[37] Further, the two statutes derive from different constitutional authority. Section 1981 was enacted pursuant to the thirteenth amendment[38] while section 1983 was

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theless, "[w]here the subject matter to which the words refer is not the same in several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another, the meaning well may vary to meet the purposes of the law . . . ."

409 U.S. at 418 (quoting Atlantic Cleaners and Dyers v. United States, 286 U.S. 427, 433 (1932)).

33 409 U.S. at 419.

34 Sections 1981 and 1982 are the modern codifications of § 1 of the Civil Rights Act of 1866. Section 1983 is the modern codification of the Civil Rights Act of 1871. Neither § 1981 as interpreted in *Jett*, nor § 1983 as interpreted in *Monell*, address the issue of vicarious municipal liability. The *Jett* court interpreted these omissions so as to preclude vicarious liability.

35 798 F.2d at 760-61.

36 *Supra* note 27.

37 *See, e.g., Carter*, 409 U.S. at 423 ("The situation is wholly different, however, with respect to § 1983. Unlike § 1982, which derives from the Civil Rights Act of 1866, § 1983 has its roots in the Ku Klux Klan Act of 1871."); Mahone v. Waddle, 564 F.2d 1018, 1030 (3d Cir. 1977) ("Although their modern codification in Title 42 may make it appear that section 1981 and section 1983 are sister provisions of a single act of Congress which ought to be construed together, such is not the case."); *see also* Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1160 (9th Cir. 1976) (en banc).

38 The legislative history of § 1981 indicates that it was enacted pursuant to the thirteenth amendment. It was initially codified in section 1 of the Civil Rights Act of 1866.

> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

(Act of Apr. 9, 1866, ch. 31, 14 Stat. 27. Reenacted as Act of May 31, 1870, ch. 114, 16 Stat. 140).

This Act was a response to the circumvention of the thirteenth amendment by Southern legislatures. The Reconstruction Congress found that racist legislation was rendering the guarantees of the amendment ineffective. For example, Senator Trumbull, the floor manager of the bill, noted that "[i]n some communities in the South, a custom prevails by which different punishment is inflicted upon the blacks from that meted out to whites for the same offense." CONG. GLOBE, 39th Cong., 1st Sess. 1758 (1866). *See infra* note 60.

The intent to enforce the thirteenth amendment was emphasized by Senator Trumbull in his introductory remarks, who called the measure:

enacted pursuant to the fourteenth amendment.[39] Federal courts have consistently recognized the different constitutional derivations of the two sections.[40] Since "[d]ifferent problems of statutory meaning are presented by two enactments deriving from different constitutional sources,"[41] an independent analysis of the language, history, and purpose of section 1981 is required to determine the proper scope of any municipal liability.

A. *Language and Structure of Section 1981*

Section 1981 does not indicate any congressional intent to exempt municipalities from vicarious liability. The language refers only to those "persons" protected as potential plaintiffs under the statute.[42] It contains no language concerning the class of potential tortfeasors.[43] The absence of such limitation is conspicuous, for if Congress intended any special delineation of municipal liability, it would have explicitly mentioned it on the face of the enactment. In section 1983, for example, "person" defines the class that can violate the statute.[44] The *Jett* court took *Monell's* analysis of jurisdictional limitations to recovery in civil

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> The most important . . . that has been under consideration since the adoption of the constitutional amendment abolishing slavery. That amendment declared that all persons in the United States should be free. This measure is intended to give effect to that declaration and secure to all persons in the United States practical freedom.

CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

Congressman Thayer, another proponent of the bill, called it the "just sequel" and "proper conclusion" to the thirteenth amendment. "Without this, in my judgment," Thayer said, "that great act of justice will be paralyzed and made useless. With this it will have practical effect, life, vigor and enforcement." CONG. GLOBE, 39th Cong., 1st Sess. 1161 (1866). For section 1981's grounding in the thirteenth amendment *see e.g.*, Jones v. Alfred Mayer Co., 392 U.S. 409, 422-24 (1972); The Civil Rights Cases, 109 U.S. 3, 22 (1883); Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1160 (9th Cir. 1976).

39 Section 1983 finds its roots in the Ku Klux Klan Act of 1871. Congress enacted this legislation to limit the terrorism of the Klan and other racist groups which had "rendered the courts powerless to punish the crimes they [had] committed." President Grant requested that Congress enact legislation that would "effectively secure life, liberty, and property and the enforcement of law in all parts of the United States." The subsequent legislation was presented by Congressman Shellabarger as a bill "to enforce the provisions of the fourteenth amendment of the United States." CONG. GLOBE, 42nd Cong., 1st Sess. 236 (1871) (statement of Sen. Sherman).

The focus of the 1871 Act was not so much on the Klan as on those state officials who refused to control it. As Justice Douglas wrote in Monroe v. Pape, 365 U.S. 167, 176 (1961), the Act was not a remedy *against the Klan*, but against "those who representing a State in some capacity were unable or *unwilling* to enforce a state law." Thus, while the Civil Rights Act of 1866 was intended to ensure the broad viability of the thirteenth amendment, the Act of 1871 was enacted to enforce the fourteenth amendment within the limited factual setting of the denial of rights under color of law. For further analysis of the constitutional background of § 1983, see *Carter*, 409 U.S. at 423-29. Section 1983's roots in the fourteenth amendment have been detailed in Mitchum v. Foster, 407 U.S. 225, 238 (1972); Monroe v. Pape, 365 U.S. 167, 171 (1961); Mahone v. Waddle, 564 F.2d 1018, 1020 (3d Cir. 1977).

40 *See supra* notes 38-39 (citing cases).

41 *Carter*, 409 U.S. at 423.

42 *Sethy*, 545 F.2d at 1160. "The provisions of § 1981 [regarding liability] however, are not limited to 'persons'; on the contrary, that term refers to those benefited by the enactment. There is no indication that Congress intended to restrict the class of those liable for § 1981 violations to those within the § 1983 definition of 'persons.'" *Id.* at n.5.

43 *See supra* note 4.

44 *Mahone*, 564 F.2d at 1030. ("Whereas the word 'person' in section 1983 defines those on whom liability may be visited, the word 'persons' in section 1981 describes those who are protected by the statute.")

rights violations in section 1983 actions and applied that analysis to section 1981 actions, thereby limiting the recovery for victims of that class of civil rights violations.

The language of section 1981 is sweeping and inclusive, providing for the right of "all persons" to engage in the statute's protected activities.[45] Courts have consistently interpreted this language to apply to a wide range of factual settings.[46] When a statute is drafted to provide broad protection and courts have applied it in many different situations, it is ill-founded to imply a limited remedy when no limitation is contained in the language.[47] Had Congress intended limited liability it would have drafted the statute more narrowly and expressly limited potential defendants.

B. *Congressional Intent for Section 1981*

The rationale supporting vicarious liability under section 1981 rests in the purpose of the Civil Rights Act of 1866. Congress intended to make that original legislation as broad and sweeping as possible.[48] During the congressional debates, proponents repeatedly derided a narrow application of the rights guaranteed in the thirteenth amendment. Senator Trumbull argued that because of such a crabbed interpretation, "the promised freedom [of the thirteenth amendment] is a delusion. Such was not the intention of the Congress."[49] Senator Howard exemplified the support in Congress for wide legislative power to make the amendment effective. "It was in contemplation of [the amendment's] friends and advocates to give to Congress precisely the power over the subject of slavery and freedom which is proposed to be exercised by the [Civil Rights Act of 1866] now under our consideration."[50]

The repeated hopes that the Act would "give practical effect" to the thirteenth amendment[51] and wipe out all vestiges of slavery clearly indicate Congress' purpose to enact far reaching, forceful legislation. The existence of a statutory right implies the existence of all necessary and appropriate remedies.[52] Congress did not intend to enforce a sweeping

45 *See supra* note 4.

46 *See, e.g.*, McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 295-96 (1976) (Section 1981 protects both whites and non-whites from racial discrimination); Runyon v. McCrary, 427 U.S. 160, 174-75 (1976) (Section 1981 prevents exclusion of students from private schools due to race); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 421 (1968) (1866 Act protects against public and private discrimination); Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1161 (9th Cir. 1976) (en banc) (Section 1981 precludes racially motivated hiring by municipalities and their employees); Hernandez v. Erlenbusch, 368 F. Supp. 752, 755 (D. Or. 1973) (restaurant's refusal to serve Spanish speaking persons is precluded by section 1981); Sims v. Order of United Commercial Travelers, 343 F. Supp. 112, 114-15 (D. Mass. 1972) (a refusal to sell insurance to a black customer is actionable under section 1981); Grier v. Specialized Skills Inc., 326 F. Supp. 856, 861-62 (W.D.N.C. 1971) (barber school is precluded from discriminating against applicants by section 1981).

47 *See* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1969) (a narrow construction of section 1982, another modern codification of the Civil Rights Act of 1866, is inconsistent with the "broad and sweeping" protection intended by that act).

48 *See* Comment, *supra* note 5 at 37-56.

49 CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

50 *Id.*

51 *See* CONG. GLOBE, 39th Cong., 1st Sess. 1151 (1866) (remarks of Rep. Thayer).

52 *See* Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 239 (1969).

policy goal with severely limited remedies, especially in light of potential municipal liability for tort actions in the 19th century.[53]

Most state political subdivisions in the 19th century were organized as municipal corporations;[54] as such, they could be sued both in contract and in tort like any other corporation.[55] Generally, prior to 1866, courts were not willing to impose vicarious liability for purely discretionary acts by public officials,[56] but if the municipality through its representative official failed to fulfill an absolute duty to the plaintiff it would be liable.[57] Some courts also allowed recovery against municipalities for acts of city employees that violated federal or state statutes.[58] Thus, vicarious municipal liability was not an uncommon remedy in the 19th Century; Congress could have explicitly excluded it from the act.

The political climate in the Reconstruction Congress also gives guidelines as to the legislative intent. Such historical context is necessary when examining statutory purpose.[59] The Thirty-Ninth Congress suspected Southern intransigence in the face of reconstruction[60] and was willing to use broad measures to prevent a return to the old regime of slavery.[61] By citing *Monell*, the *Jett* court implied that the Thirty-Ninth Congress desired a limited remedy; despite the fact that that body was expressly concerned with rooting out the institutionalized slavery of the South.

C. *Implied Repeal*

The questionable extension of section 1983 liability to section 1981 results from conflicting interpretations of the failure of the Sherman

53 *See* Owen v. City of Independence, 445 U.S. 622, 637-644 (1980) (a discussion of municipal liability available in the mid 19th century).

54 *See* DILLON, THE LAW OF MUNICIPAL CORPORATIONS, § 9-10 (2nd ed. 1877).

55 *See* Barnett, *The Foundations of the Distinction Between Public and Private Functions in Respect to the Common-Tort Liability of Municipal Corporations*, 16 OR. L. REV. 250 (1936); DILLON, *supra* note 54 at §§ 749-802.

56 *See* BLACK, COMMENTARIES ON THE LAW OF PUBLIC CORPORATIONS (1893); DILLON, *supra* note 54 at §§ 774-777.

57 Dillon *supra* note 54 at § 778, n. 1 (citing cases). In Owen v. City of Independence, the Court held that a municipality has no discretion to violate duties imposed on it by the Federal Constitution. 445 U.S. at 649. Therefore, although the DISD could have removed Jett from his position under its discretionary powers, it had an absolute duty not to discriminate against him on the basis of his race.

58 *See, e.g.*, Havemeyer v. Iowa County, 70 U.S. (3 Wall.) 294, 303 (1865) (state subdivision enacted provision violating the Contract Clause of the United States Constitution); New York v. Ramson, 64 U.S. (23 How.) 487 (1859) (patent violation). *See also* Barnett, *supra* note 55 at 251-52 n.7 (1936) (citing cases); Note, *Streets, Change of Grade, Liability of Cities*, 30 AM. ST. REP. 835, 837 (1893) (citing cases).

59 District of Columbia v. Carter, 409 U.S. 418, 420 (1973).

60 As Senator Trumbull noted:

> Since the abolition of slavery, the legislatures which have assembled in the insurrectionary States have passed laws relating to the freedmen, and in nearly all the states they have discriminated against them. They cling to their customary rights, subject them to severe penalties and still impose upon them the very restrictions which were imposed upon them in consequence of the existence of slavery, and before it was abolished.

CONG. GLOBE 39th Cong. 1st Sess. 474 (1866).

61 *See* F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 64 (1928); C. WARREN, THE SUPREME COURT IN THE UNITED STATES HISTORY 177-219 (1928); *See also*, the Feedmens Bureau Bill U.S., Mar. 3, 1865, c. 90, 13 Stat. 1353 (subsequently vetoed by President Andrew Johnson) which extended federal military involvement in particularly discriminatory communities.

Amendment to become part of the Civil Rights Act of 1871. The Sherman Amendment would have imposed liability on a municipality for damage done by private persons "riotously or tumultuously assembled."[62] Proponents of a limited section 1981 remedy have argued that even if municipal liability had existed from the time of the enactment of the Civil Rights Act of 1866, the failure of the Sherman Amendment in 1871 represented an "implied repeal" of municipal liability under section 1981.[63]

Implied repeal, as a canon of statutory construction, is not favored by the courts; it should be sparingly used.[64] When no express repeal is contained in a statute, no implied repeal occurs unless the two acts in question are in irreconcilable conflict or "unless the later statute covers the whole ground occupied by the earlier and is clearly intended as a substitute for it, and the intention of the legislation to repeal [it is] clear and manifest."[65] A court must find a "positive repugnancy between the

62 The Sherman Amendment provided:

> That if any house, tenement, cabin, ship, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together, with intent to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising such right, or by reason of his race, color, or previous condition or servitude, in every such case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his widow or legal representative if dead; and such compensation may be recovered in an action on the case by such person or his representative in any court of the United States of competent jurisdiction in the district in which the offense was committed, such action to be in the name of the person injured, or his legal representative, and against said county, city, or parish, and in which action any of the parties committing such acts may be joined as defendants. And any payment of any judgment, or part thereof unsatisfied, recovered by the plaintiff in such action, may, if not satisfied by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof. And the court in any such action may on motion cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, by it paid, with costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be subjugated to all the plaintiff's rights under such judgment.

CONG. GLOBE, 42d Cong., 1st Sess. 745, 755 (1871).

63 *See* Sethy v. Alameda County Water District, 545 F.2d at 1157, 1161 (9th Cir. 1976) (en banc). The court recognizes yet rejects this line of argument. *See also* Mahone v. Waddle, 564 F.2d 1018, 1031 (3rd Cir. 1977).

64 United States v. Borden, 308 U.S. 188, 198 (1939) ("It is a cardinal principle of construction that repeals by implication are not favored. Where there are two acts upon the same subject the rule is to give effect to both if possible."). *See also* United States v. Constantine, 296 U.S. 287, 299 (1935) (Cardozo, J., dissenting, quoting Sinking Fund Cases, 99 U.S. 700, 718 (1878) ("Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt."))

65 Red Rock v. Henry, 106 U.S. 596, 601-12 (1882).

provisions of the new law and those of the old."[66] It cannot merely establish that a subsequent law covers "some or even all" of the cases provided for by the old law.[67]

The Civil Rights Act of 1871 does not expressly repeal the Civil Rights Act of 1866.[68] The two statutes differ in constitutional origin,[69] legislative history, and purpose.[70] Clearly, the subject matter of the statutes do not overlap. Under the tests for implied repeal laid out by the Supreme Court, the Civil Rights Act of 1871 fails to represent an implied repeal of the Civil Rights Act of 1866.

The Sherman Amendment involved vicarious liability for the acts of third parties in the course of riots and disturbances.[71] Section 1981 municipal respondeat superior, however, is founded on the actions of municipal employees,[72] whose acts can be directly influenced and sanctioned by the municipal employer.[73] Commentators have argued that the Sherman Amendment failed mainly because most municipalities in 1871 could not prevent prohibited activities by its employees.[74] Although the Supreme Court has not addressed the issue of implied repeal,[75] several lower courts have rejected this argument.[76]

Clearly, the legislative debates on section 1983 did not impliedly repeal section 1981. *Carter* explicitly rejected such impression of the legislative history of one statute onto another.[77] Yet *Jett* did not apply this holding when it implied the existence of uniform types of municipal liability under sections 1981 and 1983. The *Jett* court instead stated that "to impose such vicarious liability for only certain wrongs based on section 1981 apparently would contravene the congressional intent behind section 1983."[78]

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66 Wood v. United States, 41 U.S. (16 Pet.) 342, 362-63 (1842).

67 *Id.*

68 *See* Sethy v. Alameda County Water Dist., 545 F.2d at 1157, 1161 (9th Cir. 1976) (en banc).

69 *See supra* notes 38-39.

70 *Id.* As has been noted, the Civil Rights Act of 1866 was intended to be sweeping legislation of great effect, applying to private and public acts of discrimination. *See also supra* note 40. It does not contain the "conduct under color of law" limitations of the Civil Rights Act of 1871. *See* Runyon v. McCrary, 427 U.S. 160 (1976); Jones v. Mayer Co., 392 U.S. 409 (1968).

71 *See* text of Sherman Amendment, *supra* note 62.

72 Justice Brennan himself admits in *Monell* that "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 acts of a municipality's employees." 436 U.S. at 694 n.57.

73 *See infra* note 96 and accompanying text.

74 *See* Blum, *From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts*, 51 TEMP. L. Q. 409, 413 n.15 (1978) (Discussing in part the lack of municipal police power in 19th century America).

75 *See supra* note 6.

76 "Nothing in the legislative history of section 1983 indicates that Congress' concern with municipal liability under that section extended to municipal liability under every prior federal civil rights act." *Mahone*, 564 F.2d at 1031. "[T]here is . . . no 'positive repugnancy' between the Act of 1866 and the Act of 1871 that would force a conclusion that passage of the latter impliedly repealed the former." *Sethy*, 545 F.2d at 1161. *See also* Garner v. Giarusso, 571 F.2d 1330, 1338-41 (5th Cir. 1978); Campbell v. Gadsen County Dist. School Bd., 534 F.2d 650, 654 n.8 (5th Cir. 1974).

77 If *Monell* is read to apply § 1983 analysis to § 1981, as the *Jett* court did, Justice Brennan, author of the *Monell* opinion, would be overruling *sub silentio* his own *Carter* opinion.

78 798 F.2d at 762.

III. Policy Considerations

A. *Interpreting Section 1981 in a Modern Context*

Section 1981 provides no explicit language concerning the scope of municipal liability.[79] The Reconstruction Congress, however, clearly intended a broad statutory protection for racial discrimination victims.[80] In any section 1981 claim, courts should adhere to this intent. As Justice Stevens remarked in *Runyon v. McCrary*,[81] courts must interpret section 1981 in terms of "the prevailing sense of justice today."[82]

Courts have consistently applied vicarious liability in section 1981 suits against private employers.[83] The legislative history of section 1981 does not differentiate between municipalities and private citizens with respect to potential liability.[84] Given the increased importance of section 1981 in the modern civil rights era,[85] courts should focus upon the underlying policies behind respondeat superior, including compensation, deterrence, and allocation of loss.[86] Rather than undertaking such an analysis, the Fifth Circuit in *Jett* relied solely upon *Monell's* considerably criticized[87] rejection of section 1983 respondeat superior.

B. *Compensation and Loss Spreading*

The denial of recovery via municipal respondeat superior under section 1981, as espoused in *Jett*, substantially hinders the plaintiff's ability to sue a solvent defendant. To hold a municipality liable, the plaintiff

79 *See* Comment, *supra* note 5, at 206.

80 *See supra* note 38.

81 427 U.S. 160 (1976).

82 *Id.* at 191 (Stevens, J., concurring).

83 *See, e.g.*, Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979). In that case, the Ninth Circuit held:

> Title VII and § 1981 define wrongs that are a type of tort, for which an employer may be liable. There is nothing in either act which even hints at a Congressional intention that the employer is not to be liable if one of its employees, acting in the course of his employment, commits a tort. Such a rule would create an enormous loophole in statutes.

Id. at 213.

84 *See* Comment, *supra* note 5, at 206.

85 *Id.* at 64-100 (In the modern civil rights era, plaintiffs suing under § 1981 have included Blacks, Whites, Chicanos, Puerto Ricans, Slavs, aliens and Jews.)

86 *See* R. PROSSER & W.P. KEETON, THE LAW OF TORTS, § 69 (5th ed. 1984) (The modern justification for vicarious liability involves a deliberate allocation of the risk, requiring employers to carefully monitor employee activity.)

87 *See* Blum, *supra* note 74 at 413 n.15 (suggesting that reliance on the Sherman amendment is improper); Katz, *Municipal Liability under Section 1983 and the Doctrine of Respondeat Superior . . . A System of More Certain Justice*, 16 J. COLLECTIVE NEGOTIATION IN PUBLIC SECTOR 15, 17 (1987) (claiming that respondeat superior under § 1983 ensues full compensation and furthers deterrence); Schnapper, *Civil Rights Litigation After* Monell, 79 COLUM. L. REV. 213, 215 n. 15 (1979) (criticizing the Court's analysis in *Monell* of the Sherman amendment); Note, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, 46 U. CHI. L. REV. 935 (1979) (criticizing the reliance on the Sherman amendment and suggesting policy reasons for § 1983 respondeat superior); Note, Monell v. Department of Social Services: *One Step Forward and a Half Step Back for Municipal Liability Under Section 1983*, 7 HOFSTRA L. REV. 893, 921 (1979) (suggesting that the Court's analysis in *Monell* of vicarious liability is "poorly reasoned").

Many of the policy considerations, such as deterrence and compensation, raised against *Monell* are also applicable to the denial of § 1981 respondeat superior.

faces the arduous task of proving that the violation involved an "official policy or custom."[88]

In a suit against the offending employee, the jury may sympathize with the economic burden which a damage award imposes on one person.[89] A defendant may also lack adequate insurance coverage against such judgments.[90] Statutes indemnifying municipal employees have often failed to alleviate this burden.[91] Even when indemnification is present, the jurors often lack notice of the indemnification and base their award calculations on the defendant's limited assets.[92] A cause of action, furthermore, has minimal value when the municipal employee is judgment proof.[93]

Municipal respondeat superior under section 1981 allows the damage award to reflect more accurately the harm inflicted on the plaintiff.[94] A municipality possesses the ability to allocate its losses among the citizenry and diminish the potential monetary impact of adverse judgments.[95] Simple fairness dictates that the municipality, not the victim of

88 *See* Comment, *supra* note 5, at 208.

89 *See* Katz, *supra* note 87 at 17 ("[T]he jury will surmise that the officer's pocketbook will be limited by a small salary and they are reluctant to impose liability on the employee for this reason").

90 *See, e.g.*, F. HARPER AND F. JAMES, THE LAW OF TORTS § 26.1 (1956) ("the public employee . . . must bear alone the full weight of the losses he causes unless some provision is made to protect him by insurance."); Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175, 1190 (1977).

A state may enact a provision dealing with the insurance coverage for municipal employees. *See, e.g.*, Ind. Code Ann. § 34-4-16.5-18(a) (West 1987 Supp.) ("A political subdivision may purchase insurance to cover the liability of itself or its employees.")

91 *See* Bermann, *supra* note 90, at 1191 ("Virtually every existing right of indemnity enjoyed by public officials is subject to exclusions not only for action beyond the outer perimeters of their authority, but also for egregious actions within those perimeters." [sic])

92 *See* Newman, *Suing the Lawbreakers: Proposals to Strengthen the 1983 Damage Remedy for Law Enforcers Misconduct*, 87 YALE L.J. 447, 456-57 (1978) ("The jurors, not informed of indemnification, think the officer will personally have to pay any damages . . . .")

93 *See* Comment, *supra* note 5, at 206.

94 The Supreme Court in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969), held that any violation of a federally protected right incurs all necessary remedies to the victim. However, the Court stated in Newport v. Facts Concerts, Inc., 453 U.S. 247 (1981), that a municipality may not face punitive damages under 42 U.S.C. § 1983. Justice Blackmun distinguished between remedies aiming to compensate and those intended to punish saying, "Compensation was an obligation properly shared by a municipality itself, whereas punishment properly applied to actual wrongdoers." *Id.* at 263.

Boyd v. Shawnee, 522 F. Supp. 1115 (D.Kan. 1981) held that *Facts Concerts* does not preclude the levying of punitive damages in a § 1981 claim against a municipality. *Boyd* relied on dicta in Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 460 (1975), which stated that "[a]n individual who establishes a cause of action under section 1981 is entitled to both equitable and legal relief, including compensatory and, under certain circumstances, punitive damages." Also, *Boyd* emphasized the differing histories of sections 1983 and 1981. 522 F. Supp. at 1115. *See supra* notes 38-39.

The First Circuit, in Heritage Homes of Attleboro, Inc. v. Seekonk Water Dist., 670 F.2d 1 (1st Cir.), *cert. denied*, 457 U.S. 1120 (1982), rejected *Boyd's* analysis and held that *Facts Concerts* also applies to § 1981. The court reiterated the concern expressed in *Facts Concerts* that punitive damages would impose unbearable financial constraints on a municipality and severely hinder decision making. 670 F.2d at 3. The majority of courts have also adopted the *Heritage Homes* reasoning. *See, e.g.*, Walters v. Atlanta, 803 F.2d 1135 (11th Cir. 1986); Poolaw v. Adanarko, 738 F.2d 364 (10th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985); Molly v. Naperville, 571 F. Supp. 668 (N.D. Ill. 1983); Perry v. County Club Hill, 607 F. Supp. 771 (E.D. Mo. 1983); Bell v. Milwaukee, 536 F. Supp. 462 (E.D. Wis. 1982).

95 Given a municipality's deep pocket, the use of vicarious liability has been advocated by commentators:

racial discrimination, bear the financial burden of discrimination occasioned by the municipality's employee.[96]

C. *Deterrence*

Given that a municipality depends upon agents to implement its operations, allowing section 1981 respondeat superior liability would deter future violations.[97] The municipality would then undertake more diligent administrative supervision, threatening employees who practiced discrimination with sanctions such as termination, suspension, wage reduction or reassignment.[98] Even if the offending official remained unidentified, respondeat superior would deter future violations by guaranteeing an aggrieved party access to federal court.[99]

IV. Conclusion

The *Jett* court's merger of the congressional intent and remedies of sections 1981 and 1983 fails to recognize several important factors. First, the different constitutional origins and legislative intent of the statutes make merger unreasonable. Furthermore, *Carter* precludes such an analysis. Likewise, the lack of clear repugnance between the statutes leaves no grounds for implied repeal. Thus the *Jett* court's application of *Monell*'s section 1983 analysis rejecting vicarious liability under section 1981 is unsupportable. Only when section 1981 is allowed to stand on its own language, history, and purpose, can its true scope of liability be found.

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The absence of the government's vicarious liability also means little assurance on recovery to the victim of injurious official action. Since neither his master nor his supervisor shares the officer's liability, any recovery must come from the financially weakest link in the chain. Such a principle of liability may be likened to an inverted pyramid; from a viewpoint which stresses the importance of compensation and wide distribution of losses among the beneficiaries of the enterprise that causes them, the present system is well nigh the worst that can be imagined.

F. HARPER AND F. JAMES, THE LAW OF TORTS, § 29.9 (1956).

See also G. CALABRESI, THE COSTS OF ACCIDENTS (1970) (deep pocket allows the risk to belong to the party most capable to pay). *But see* Young, *Tort Judgments Against Cities: The Sky's the Limit*, 1983 DET. C.L. REV. 1509. ("As Mayor, I see, almost on a daily basis, taxpayer dollars wasted, in ever increasing amounts of litigation, settlements and judgments arising out of tort claims against municipalities.")

96 *See* Comment, *supra* note 5, at 210. (Restrictive municipality liability under § 1981 fails to deal with racial discrimination, "an area of preeminent national concern.")

97 *See* Note, *Section 1983 Municipal Liability and the Doctrine of Respondeat Superior*, *supra* note 87, at 954.

98 *See* Bermann, *supra* note 90, at 1198. ("[P]ublic officials respond at least as favorably to the direct and immediate service related sanctions as they do to the threat of litigation and eventual liability in damages.")

99 *See* Comment, *supra* note 5, at 208 (without § 1981 vicarious liability, numerous claims would not be brought to court).

Addendum

In Jett v. Dallas Independent School District, 837 F.2d 1244 (5th Cir. 1988), the 5th Circuit denied Norman Jett's motion for a rehearing en banc. In its opinion the court explained its rationale for precluding municipal respondeat superior under 42 U.S.C. § 1981.

The court first dismissed Jett's argument that Garner v. Giarusso, 571 F.2d 1330 (5th Cir. 1978), was controlling precedent in the 5th circuit. 837 F.2d at 1245. The issues in Garner *concerned whether municipalities were wholly exempted from section 1981 liability.*

Next, the court rejected section 1981 vicarious municipal liability based on its understanding of Owen v. City of Independence, 445 U.S. 622 (1982), which rejected qualified municipal respondeat superior liability under 42 U.S.C. § 1983, as unable to "co-exist with municipal respondent superior *liability . . . ." 837 F.2d at 1246.*

Finally, the fifth circuit adhered to its understanding that Monell v. Department of Social Services, 436 U.S. 658 (1978), controlled vicarious municipal liability in section 1981 causes of action. 837 F.2d at 1246-48.