Nos. 87-2084, 88-214

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NORMAN JETT,
Petitioner and Cross-Respondent,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT,
Respondent and Cross-Petitioner.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF THE INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT AND CROSS-PETITIONER

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QUESTIONS PRESENTED

1. Whether a municipal employer may be held liable under 42 U.S.C. § 1981 based solely on racially discriminatory actions of a supervisor that are not attributable to an official policy or custom.

2. Whether an official policy or custom sufficient to impose liability on a municipal employer under 42 U.S.C. § 1981 and 42 U.S.C. § 1983 exists where state law vests final policymaking authority in persons other than the individuals who are alleged to have committed or approved the racially discriminatory acts in question.

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INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States. They must bear the finan-

cial and management burdens that arise from legal rules holding public employers responsible for the actions of their employees. For this reason, the *amici* have filed a number of briefs with this Court in cases raising issues of municipal liability. *See, e.g., City of Canton v. Harris*, No. 86-1088; *DeShaney v. Winnebago County Dep't of Social Services*, No. 87-154; *City of St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988); *City of Springfield v. Kibbe*, 107 S. Ct. 1114 (1987).

This case presents important questions concerning potential municipal liability for constitutional violations by non-policymaking municipal employees. *Amici*'s principal concern is with petitioner's argument that the liability of a municipality under 42 U.S.C. § 1981 is not restricted, as it is under 42 U.S.C. § 1983, to actions that are those of the municipality itself, but may be imposed on a theory of *respondeat superior*. Such an extension of "no-fault" liability to municipalities would nullify, in substantial part, this Court's careful crafting of the standards for municipal liability under Section 1983.

Amici also have a continuing concern about the evolving standards for municipal liability under Section 1983. In *amici*'s view, the only appropriate standard for municipal liability under Section 1983 as well as under Section 1981 is the existence of an unconstitutional policy or custom on the part of the municipality itself. Because this Court's resolution of these questions will have a direct effect on matters of prime importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.*

STATEMENT

1. Petitioner and cross-respondent, Norman Jett, who is white, is a former teacher, head football coach, and athletic director of South Oak Cliff High School, a pre-

* The parties' letters of consent, pursuant to Rule 36 of the Rules of the Court, have been filed with the Clerk.

dominantly black high school in Dallas, Texas (Pet. App. in No. 87-2084, at 2A). In March 1983, his former principal, Frederick Todd, who is black, recommended that Jett be relieved of his responsibilities as head football coach and athletic director at South Oak Cliff (*id.* at 2A-3A). Jett subsequently met with supervisory officials of respondent and cross-petitioner, the Dallas Independent School District (DISD), including Linus Wright, Superintendent of the DISD, to discuss Todd's recommendation (Pet. App. in No. 87-2084, at 3A). Jett informed Wright that he believed Todd's recommendation was unfounded and that Todd wanted a black coach (*id.* at 3A-4A). Wright, however, determined that he should "go with the principal" and that Jett should be removed from his position at South Oak Cliff (*id.* at 4A).

Jett was then assigned to teach at the DISD's Business Magnet School, without any coaching responsibilities (Pet. App. in No. 87-2084, at 4A). A few months later, he was reassigned to Jefferson High School as a history teacher and freshman football and track coach (*id.* at 4A-5A). Shortly thereafter, he resigned from the DISD (*id.* at 5A).

2. Prior to being reassigned to Jefferson High School and resigning his employment, Jett filed this action under 42 U.S.C. §§ 1981 and 1983 against the DISD, Todd, and the DISD Board of Trustees (Pet. App. in No. 87-2084, at 5A). A jury determined that Jett had been deprived of his position as athletic director and head football coach at South Oak Cliff because of his race and his exercise of protected speech, and in violation of his right to procedural due process (*id.*). The district court entered a judgment for $450,000 in damages and $112,870.45 in attorney's fees for Jett (as to which Todd was held jointly and severally liable for all of the attorney's fees and $50,000 in damages) (*id.*). In doing so, the court found that, by delegating unreviewable authority to Wright to "reassign" personnel as he saw fit, the DISD's Board

of Trustees had given official sanction to the employment decisions that Jett was challenging, and that a municipality may be liable for race discrimination under Section 1981 on a theory of *respondeat superior* (*id.* at 46A-47A).

3. The Fifth Circuit reversed and remanded (Pet. App. in No. 87-2084, at 1A-32A). It determined that Jett had no claim against either Todd or the DISD for a violation of due process (*id.* at 6A-10A). Moreover, although the court sustained the jury's finding that Todd had discriminated against Jett on the basis of race and his exercise of protected speech, it determined that a new trial was necessary on the damages award against Todd (*id.* at 13A-20A, 31A). Finally, it reversed the findings of liability and damages against the DISD, and remanded these matters for another trial (*id.* at 20A-31A).

As to the claim against the DISD under 42 U.S.C. § 1983, the court noted that "liability may be imposed [under Section 1983] if the constitutional violation is due to official action, policy, or custom" (Pet. App. in No. 87-2084, at 20A). It found the district court's instruction to the jury in this regard deficient "because it did not state that the city could be bound by the principal or superintendent only if he was delegated policy-making authority" (*id.* at 21A). In so concluding, the court questioned, but did not reject, the district court's judgment that Wright had the requisite policy-making authority because the DISD's Board of Trustees had delegated to him unreviewable authority to reassign members of the coaching staff (*id.* at 21A-23A). Rather, it rejected only the district court's judgment that the DISD could be held liable without any "finding that Wright's decision was in fact improperly motivated or that Wright knew or believed that (or was consciously indifferent to whether) Todd's recommendation was so motivated" (*id.* at 25A).

As to the claim against the DISD under 42 U.S.C. § 1981, the court concluded "that to impose municipal liability on a *respondeat superior* theory . . . would be inconsistent with" *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986) (Pet. App. in No. 87-2084, at 28A). The court concluded that "[t]o impose such vicarious liability for only certain wrongs based on section 1981 apparently would contravene the congressional intent behind section 1983," as articulated by this Court (*id.* at 29A). On rehearing, the court further explained, but did not change, its decision on the Section 1981 issue (Pet. App. in No. 87-2084, at 34A-44A).

SUMMARY OF ARGUMENT

I. A municipal employer should not be held liable under 42 U.S.C. § 1981 upon a theory of *respondeat superior*. The language of Section 1981 does not purport to create a civil cause of action, much less to impose this sort of vicarious liability on a municipal employer. Moreover, the legislative history shows that, when Congress enacted the forerunner to Section 1981 in Section 1 of the Civil Rights Act of 1866, it expressly declined to adopt a federal civil remedy. Rather, consistent with a century of tradition and practice, it left the task of civil enforcement to the state courts, and directed the federal government to enforce Section 1 through criminal sanctions and the use of the military.

Five years later, in the Ku Klux Klan Act of 1871, Congress enacted the forerunners of 42 U.S.C. § 1983 and 28 U.S.C. § 1343(a)(3), which created a civil cause of action for the enforcement of Section 1981 and original jurisdiction in the federal courts over such actions. But, in doing so, Congress rejected, on constitutional grounds, the imposition of *respondeat superior* liability on municipalities. Interpreting Section 1981 as impliedly

allowing *respondeat superior* suits against municipalities would conflict with this express congressional judgment.

Honoring the judgment of the 1871 Congress does not constitute a repeal of a pre-existing civil remedy. An express civil cause of action for the enforcement of rights protected by Section 1981 did not exist until Section 1983 was enacted in 1871. Moreover, an implied civil cause of action for the enforcement of Section 1981 was not recognized until the early 1970s, subsequent to, and as a consequence of, this Court's holding that Section 1981 applies to the actions of private persons. Even then, the Court based this implied cause of action on congressional acts and jurisdictional statutes that post-date the 1866 Act. Thus, rejection of *respondeat superior* liability in Section 1981 cases involving municipalities—based on the intent of the 1871 Congress—does not constitute a repeal or narrowing of a pre-existing remedy.

Contemporaneous common law rules of *respondeat superior* cannot be interposed to frustrate congressional intent to limit municipal liability. Section 1983 constitutes an express congressional mandate against imposition of *respondeat superior* liability on municipalities. Moreover, the suggestion that the common law imposed such liability on municipalities is by no means representative of all the contemporary authorities. Furthermore, contemporaneous common law doctrine did not permit imposition of vicarious liability for intentional torts, the closest analogue to Section 1981 violations. Finally, Congress's constitutional concerns about vicarious liability for violation of federally imposed duties renders unpersuasive any analogy to municipal *respondeat superior* liability at common law.

Nor is municipal *respondeat superior* liability necessary to promote the policies underlying Section 1981. Section 1981 prohibits only intentional race discrimination, and a custom or policy limitation is thus implicitly

a necessary (albeit not sufficient) condition for imposition of Section 1981 liability. Moreover, ample remedies are available to enforce Section 1981 without *respondeat superior* liability—including civil damages, injunctive relief, punitive damages, and criminal penalties against all actors who can fairly be said intentionally to discriminate.

II. To implement congressional intent that liability be imposed only for a municipality's own acts, the Court should assess municipal liability under both Sections 1981 and 1983 by the definition of municipal policy or custom set forth in the plurality opinion in *City of St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988). Thus, a municipality should be liable only when it "officially sanctioned or ordered" the statutory violation complained of, that is, when a municipal employee has acted pursuant to a policy promulgated by those with "final policymaking authority," as determined by state law (*id.* at 924).

Applying the *Praprotnik* test here, the case against the DISD must be dismissed. All policymaking authority is vested by state law in the DISD's Board of Trustees; the Superintendent of Schools has no such authority. Thus, even if Superintendent Wright knew or approved of Principal Todd's actions, liability could not be imposed on the DISD. There is no suggestion that the DISD's Board of Trustees knew of and approved Principal Todd's actions, and it was entitled to presume that Superintendent Wright exercised the discretion delegated to him in a lawful manner.

ARGUMENT

In *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), this Court held that a municipal employer may not be held liable under 42 U.S.C. § 1983 on a theory of *respondeat superior*—that is "for an injury inflicted solely by its employees or agents." The Court reasoned that Section 1983, as originally enacted, imposed liability only if a person "subject[ed], or caused to be subjected," another person to the deprivation of a federally protected right. The Court understood that language to mean that, in the case of one who did not directly inflict the injury, liability was appropriate only where one could be said to have "caused" it to be committed (436 U.S. at 692).

The Court found substantial support for this conclusion in the legislative history of Section 1983. It reasoned (a) that Congress in 1871 rejected the "Sherman Amendment," which would have imposed vicarious liability on municipalities for injuries caused by "any persons riotously and tumultuously assembled" within their borders (436 U.S. at 666), on the ground that the amendment was of questionable constitutional validity as an invasion of state and local governmental prerogatives; and (b) that the same constitutional difficulties would have applied to liability based on a theory of *respondeat superior* (*id.* at 692-694). The Court held that only the "execution of [the] government's policy or custom" may subject a municipality to liability under Section 1983 (*id.* at 694). That limitation subjects a municipality to liability only where the act in question is committed by those with "final policymaking authority" in the relevant area of the municipality's business.

The same "policy or custom" limitation on municipal liability which the *Monell* Court found embodied in Section 1983 should be applied as well in actions initiated under 42 U.S.C. § 1981. In this case, it is clear that no

final policymaker under state law committed or approved the discriminatory acts in question.

I. A MUNICIPALITY SHOULD NOT BE HELD LIABLE UNDER 42 U.S.C. § 1981 FOR RACIALLY DISCRIMINATORY ACTIONS OF EMPLOYEES THAT ARE NOT ATTRIBUTABLE TO AN OFFICIAL POLICY OR CUSTOM.

Whether a municipality may be deemed to have violated 42 U.S.C. § 1981 solely because certain discriminatory actions were taken by its employees is, of course, a question of congressional intent. The language and legislative history of Section 1981 suggest that Congress did not intend to impose liability on municipalities based on such a theory of *respondeat superior*. Indeed, the 1866 Congress, which enacted the statute from which Section 1981 derives, provided for no federal cause of action at all. When Congress, in the 1871 statute from which Section 1983 derives, expressly provided a damages cause of action against governments for violation of Section 1981 rights, it did not provide for *respondeat superior* liability, but rather limited liability to cases involving a governmental policy or custom. In fashioning the judicially created liability rules under Section 1981, this Court should follow the judgments made by Congress when it addressed the questions in Section 1983 and should therefore adopt Section 1983's limits on governmental liability in the Section 1981 context.[1]

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[1] The situation with respect to private employers is different, as Congress did not speak to that situation in Section 1983. Judicial fashioning of liability rules under Section 1981 for private employers is therefore not necessarily constrained by Congress's specific judgment on the issue in Section 1983. Contrary to the assertion of *amicus* NAACP/ACLU (at 15-18), however, this Court has not decided whether *respondeat superior* liability exists under Section 1981 against private employers. *See General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 392-395 (1982) (assuming without deciding question). Given the controversy surrounding whether Section 1981 was intended to apply to the actions of pri-

A. The Language Of Section 1981 Evinces No Intent To Create *Respondeat Superior* Liability For Municipalities.

Section 1981 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 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.

This language is declarative of a "right" of all persons to be free of racial discrimination in the making and enforcement of contracts and in "laws and proceedings for the security of persons and property." *See McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 285-296 (1976). The language does not itself speak in terms of liability for impairing such rights, nor of a civil cause of action—or indeed of any other mechanism—for enforcement of those rights. And it certainly makes no mention of a theory of *respondeat superior* liability applicable in any such civil action. This omission is significant because, as Title VII of the Civil Rights Act of 1964 illustrates (42 U.S.C. § 2000e(b) ("Employer" defined to include "any agent")), Congress is capable of creating a civil cause of action in which an employer—including a municipal employer—may be held vicariously liable for the racially discriminatory actions of its employees. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 69-73 (1986). Thus, although the language of the statute is not conclusive, the absence of any language that can easily be construed to create *respondeat superior* liability does suggest an absence of intention to

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vate persons at all (*see Patterson v. McLean Credit Union*, No. 87-107) (reargued Oct. 12, 1988), we suggest that the private employer inquiry be left for another day.

impose such liability. *See Monell v. Department of Social Services*, 436 U.S. at 692-693 n.57.

B. The Legislative History Confirms That Congress Did Not Intend To Impose Liability On Municipal Employers Based On The Theory Of *Respondeat Superior*.

This Court has recognized that the post-Civil War civil rights acts "were all products of the same milieu and were directed against the same evils." *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391 (1982). Thus, in defining the contours of the implied cause of action under Section 1981 (*Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459-460 (1975); *cf. Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 238-240 (1969) (recognizing existence of implied private right of action under 42 U.S.C. § 1982)), the Court has repeatedly looked not only to the language and legislative history of Section 1981 as originally enacted in 1866, but also to the language and legislative history of the subsequent statutes that have amended, modified, and reinforced Section 1981 and the civil rights enforcement scheme of which it is an integral part. *See, e.g., General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. at 382-391; *Saint Francis College v. Al-Khazraji*, 107 S. Ct. 2022, 2026-2028 (1987); *Goodman v. Lukens Steel Co.*, 107 S. Ct. 2617, 2621 (1987). When Section 1981 is considered in this context, it is clear that municipal liability resting on a theory of *respondeat superior* is contrary to the intent of Congress.

1. This Court has held that Section 1981 originated in Section 1 of the Civil Rights Act of 1866, 14 Stat. 27.[2]

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[2] That Section provided:

> Be it enacted . . . 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

Runyon v. McCrary, 427 U.S. 160, 167-171 & n.8 (1976).[3] Significantly, proponents of this section described it as a declaration of rights to be enforced by machinery set up in the remaining sections of the statute. For example, Senator Trumbull, the principal sponsor of the bill, said (Cong. Globe, 39th Cong., 1st Sess. 474 (1866)): "This section is the basis of the whole bill. The other provisions of the bill contain the necessary machinery to give effect to what are declared to be the rights of all persons in the first section . . . ." *See also id.* at 475 (remarks of Sen. Trumbull) ("A law is good for nothing without a penalty, without a sanction to it, and that is to be found in the other sections of the bill.").

Section 2 of the Act made it a crime for anyone acting under color of law to "subject, or cause to be subjected," another person to a deprivation of the rights established in Section 1 of the Act.[4] Section 3 of the Act conferred jurisdiction upon the federal courts to entertain criminal actions initiated under Section 2; and provided that persons claiming rights under Section 1 of the Act could

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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 persons 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.

[3] Justice White has concluded that Section 1981 is more properly traced to the Enforcement Act of 1870 than to the Civil Rights Act of 1866. *See Runyon v. McCrary*, 427 U.S. at 195-211 (White, J., dissenting). Nothing about the language or history of the 1870 legislation suggests a purpose at that time to create a remedy against municipalities based on a theory of *respondeat superior*.

[4] The criminal remedy created in Section 2 of the Act is the forerunner of 18 U.S.C. § 242. *See Screws v. United States*, 325 U.S. 91 (1945); *United States v. Classic*, 313 U.S. 299 (1941).

remove to federal court certain civil and criminal proceedings brought against them in state courts.[5] Sections 4 through 8 set the ground rules for the apprehension and prosecution of persons violating Section 1 of the Act. Section 9 empowered the President "to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and to enforce the due execution of this act." And Section 10, the final section, authorized an appeal to this Court in "any cause under the provisions of this act."

Noticeably absent from this enforcement machinery was any civil cause of action or original federal civil jurisdiction for the private enforcement of Section 1 of the Act.[6] This omission was not an oversight by Con-

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[5] Section 3 of the Act also contained the forerunner of the present 42 U.S.C. § 1988. *See Moor v. County of Alameda*, 411 U.S. 693, 704-705 (1973).

[6] Some opinions have erroneously suggested that Section 3 of the 1866 Act created a civil cause of action and original federal civil jurisdiction for the enforcement of Section 1 of the Act. *See, e.g., Mahone v. Waddle*, 564 F.2d 1018, 1032-1033 (3d Cir. 1977). While the language of Section 3 did purport to confer jurisdiction on the federal courts over *some* civil causes of action (*cf. Moor v. County of Alameda*, 411 U.S. at 704-705), it did not itself purport to create any civil causes of action or to authorize assumption of original jurisdiction over any such civil actions. Rather, it conferred jurisdiction—*i.e.*, removal jurisdiction—only over civil causes which had already been initiated in state court. The brief legislative history of Section 3 directly supports this view. *See* Cong. Globe, 39th Cong., 1st Sess. 479, 1680, 1759. Moreover, any broader grant of jurisdiction would surely have provoked an intense debate, yet there was none—in sharp contrast to the lengthy debate in 1871 when Congress enacted the forerunners of 42 U.S.C. § 1983 and 28 U.S.C. § 1343(a)(3). *See Mitchum v. Foster*, 407 U.S. 225, 238-241 (1972). That no such debate occurred is a telling indication that Congress was not conferring original civil jurisdiction or creating a civil cause of action. *See Mahone v. Waddle*, 564 F.2d at 1039, 1044-1048 (Garth, J., dissenting); *Allen v. McCurry*, 449 U.S. 90, 99 n.14 (1980) (Section 3 embodies remedy of "postjudgment removal for state court defendants whose civil rights were threatened").

gress. Representative Bingham of Ohio in fact proposed that a civil remedy be placed in the statute in lieu of the criminal provision in Section 2. *See* Cong. Globe, 39th Cong., 1st Sess. 1271-1272, 1290-1291. But Bingham's proposal was defeated by a vote of 53 to 45 (*id.* at 1272), on the grounds that it was the obligation of the Government to enforce the rights created in Section 1 and that private citizens should not have to seek their own remedies at their own cost. *Id.* at 1295. No one suggested that this debate was moot because a federal civil remedy and original federal civil jurisdiction had already been created elsewhere in the Act. Rather, the debate appears to have contemplated either a criminal *or* civil remedy, but not both.

Congress decided upon the former.[7] Thus, the language of the statute, its structure, and the legislative history all indicate that, as originally enacted, Section 1981 did not include a private cause of action at all, much less a cause of action against municipal employers based on *respondeat superior* liability.

2. Five years later, in the Ku Klux Klan Act of 1871, Congress revisited the civil cause of action question. At that time, after extensive debate, Congress provided the basis for, and the limitations on, an original civil cause of action in federal court for violations of, among other things, Section 1981. It enacted the civil cause of action

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[7] The criminal provision in Section 2 seems explicitly to have rejected the concept of *respondeat superior* liability. This Court has repeatedly held that the "subject[ed], or cause[d] to be subjected," language in Section 1983—which was at issue in *Monell*—derives from Section 2 of the 1866 Act. *See, e.g., Lynch v. Household Fin. Corp.*, 405 U.S. 538, 543-544 n.7 (1972); *Mitchum v. Foster*, 407 U.S. at 238. In *Monell*, the Court ruled that the use of the "subject[ed], or cause[d] to be subjected," language indicates a rejection of the theory of *respondeat superior* liability. *See Monell v. Department of Social Servs.*, 436 U.S. at 691-692.

now embodied in 42 U.S.C. § 1983,[8] and the grant of federal civil jurisdiction now embodied in 28 U.S.C. § 1343(a)(3).[9]

a. "During most of the Nation's first century, Congress relied on the state courts to vindicate essential rights arising under the Constitution and federal laws." *Zwickler v. Koota*, 389 U.S. 241, 245 (1967). In 1871, however, Congress determined that "this reliance had been misplaced." *District of Columbia v. Carter*, 409 U.S. 418, 428 (1973). It found that the state courts had not been effectively exercising their common law powers to redress violations of federally secured constitutional and statutory rights. *See Mitchum v. Foster*, 407 U.S. 225, 240-242 (1972). It therefore enacted Section 1983,

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[8] Section 1983 provides, in pertinent part, that "[e]very 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 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."

[9] Section 1343(a)(3) provides that "[t]he district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person . . . [t]o 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 citizens or of all persons within the jurisdiction of the United States . . . ."

It has been suggested that this grant of federal civil jurisdiction originated in Section 3 of the 1866 Act, rather than in the 1871 Act. *See Mahone v. Waddle*, 564 F.2d at 1033; *see also Hague v. CIO*, 307 U.S. 476, 508 n.10 (1939) (opinion of Roberts, J.). But this suggestion collapses under the weight of contrary authority from this Court. *See Examining Board of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 581, 583-584 (1976); *Lynch v. Household Fin. Corp.*, 405 U.S. at 543-544 n.7; *see also Zwickler v. Koota*, 389 U.S. 241, 247 (1967); *District of Columbia v. Carter*, 409 U.S. 418, 428 n.22 (1973); note 6, *supra*.

to "open[] the federal courts to private citizens, offering a uniquely federal remedy" (*id.* at 239), and 28 U.S.C. § 1343(a)(3), to create "original federal court jurisdiction as a means to provide at least indirect federal control over the unconstitutional actions of state officials" (*District of Columbia v. Carter*, 409 U.S. at 428).[10]

b. In creating this federal civil cause of action and jurisdiction, Congress recognized that, among other things, it was adding to the arsenal of weapons available to enforce the rights created by Section 1 of the 1866 Act. Thus, in proposing Section 1 of the 1871 Act, Representative Shellabarger stated (Cong. Globe, 42d Cong., 1st Sess., App. 68 (1871)) that "[t]he model for [this section] will be found in the second section of the act of April 9, 1866, known as the 'civil rights act.' That section provides a criminal proceeding in identically the same case as this one provides a civil remedy . . . ." Similarly, Senator Edmunds stated (Cong. Globe, 42d Cong., 1st Sess. 568 (1871)) that, in his view, there could be no valid objection to the remedial and jurisdictional provisions set forth in Section 1 of the 1871 Act because "it is merely carrying out the principles of the civil rights bill [of 1866], which have since become part of the Constitution."

c. As the Court held in *Monell*, however, and has reiterated on several occasions, Congress did not, in creating this federal civil cause of action and jurisdiction, intend to impose *respondeat superior* liability on municipalities. *See Monell v. Department of Social Services*, 436 U.S. at 691-694; *see also City of Oklahoma City v. Tuttle*, 471 U.S. 808, 817-820 (1985); *Pembaur v. City*

[10] In 1875, Congress enacted the forerunner of the general federal question jurisdiction provision in 28 U.S.C. § 1331 and thereby expanded even further the authority of federal courts to enforce federal rights. *See Lynch v. Household Fin. Corp.*, 405 U.S. at 548 & n.14.

of Cincinnati, 475 U.S. 469, 478-481 (1986). Rather, the Court has said that, "while Congress never questioned its power to impose civil liability on municipalities for their *own* illegal acts, Congress did doubt its constitutional power to impose such liability in order to oblige municipalities to control the conduct of *others*." *Pembaur v. City of Cincinnati*, 475 U.S. at 479 (emphasis in original). Thus, the Court has concluded that, because "creation of a federal law of *respondeat superior* would have raised all of the[se] constitutional problems" as well,[11] Congress chose not to incorporate such a doctrine into Section 1983. *Monell*, 436 U.S. at 693.

3. The historical context thus makes clear that municipalities cannot be found liable under Section 1981 on a *respondeat superior* theory. When Congress enacted the forerunner to Section 1981 in Section 1 of the 1866 Act, it expressly declined to adopt a federal civil remedy for violations of the rights secured therein. Rather, consistent with a century of tradition and practice, it left the task of civil enforcement to the state courts and directed the federal government to enforce Section 1 through criminal sanctions and the use of the military. In 1871, Congress vested the federal courts with authority to entertain private civil actions to enforce rights secured by Section 1981, among other provisions. But, in doing so, Congress

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[11] These constitutional concerns arose from the then-reigning "dual sovereignty" doctrine. *See Monell v. Department of Social Servs.*, 436 U.S. at 671-674. Under that doctrine, it was unconstitutional for the federal government to impose federal duties—such as a duty to enforce the fugitive slave clause, or a duty to pay a federal tax—on the States or their instrumentalities. *See Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871); *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861) (overruled in *Puerto Rico v. Branstad*, 107 S. Ct. 2802, 2809-2810 (1987)); *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842). The "dual sovereignty" doctrine has since been recast by this Court. *See Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 (1939) (overruling *Collector v. Day*); *Ex parte Virginia*, 100 U.S. 339 (1880).

rejected, on constitutional grounds, the imposition of *respondeat superior* liability on municipalities. Thus, Section 1981 cannot properly be read as impliedly allowing *respondeat superior* suits against municipalities. To do so would conflict with the contrary judgment that Congress made in 1871 in enacting the forerunners to Section 1983 and 28 U.S.C. § 1343(a)(3), which are the express civil enforcement provisions for Section 1981.

C. Jett And His *Amici* Offer No Sound Reason For Allowing Municipal Liability Under Section 1981 On A *Respondeat Superior* Theory.

Jett and his *amici* offer a series of arguments concerning why municipalities must be held liable under Section 1981 based on a theory of *respondeat superior*. None of these arguments is convincing.

1. Jett first argues (Br. 15-21) that there is no evidence in the language or legislative history of the 1871 Act that Congress intended thereby to narrow the civil cause of action included in the 1866 Act.[12] As ex-

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[12] In part, Jett relies (Br. 18-21) on the contention that no such intent is possible, since Congress intended Sections 1981 and 1983 to deal with entirely distinct classes of rights. This argument is based on a discredited legal theory—distinguishing between "natural rights" and "political rights"—that Jett admits (Br. 19) has "not . . . survived," and that, as Senator Edmunds' above-quoted statement demonstrates, was not intended by the 1871 Congress. See *supra* page 16. Jett fails to cite any legislative history to support his claim that Congress did not intend Section 1 of the 1871 Act to subsume the rights articulated in Section 1 of the 1866 Act.

As this Court stated in *Lynch v. Household Finance Corp.*, 405 U.S. at 545, "[t]he broad concept of civil rights embodied in the 1866 Act and in the Fourteenth Amendment is unmistakably evident in the legislative history of § 1 of the Civil Rights Act of 1871." More recent decisions of this Court have given effect to this intent. *See, e.g., Wilson v. Garcia*, 471 U.S. 261, 273 (1985) (Section 1983 actions may be brought based on "discrimination in public employment on the basis of race"); *Burnett v. Grattan*, 468 U.S. 42, 43-47 (1984) (claim of race discrimination in public employment brought under Sections 1981 and 1983).

plained above, however, no express civil cause of action for enforcement of the rights protected by Section 1981 (and Section 1982) was created until 1871, when the forerunners of the present Section 1983 and 28 U.S.C. § 1343(a)(3) were enacted. And no implied civil cause of action for the enforcement of the rights protected by Section 1981 (and Section 1982) was recognized until this Court and some lower federal courts held, in the late 1960s and early 1970s, that these statutes applied to the discriminatory actions of private persons. *Compare Runyon v. McCrary*, 427 U.S. 160 (1976); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968); *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir.) (cause of action), *cert. denied*, 401 U.S. 948 (1970); *Mizell v. North Broward Hospital District*, 427 F.2d 468 (5th Cir. 1970) (cause of action), *with Hanna v. Home Insurance Co.*, 281 F.2d 298, 303 (5th Cir.) (no cause of action), *cert. denied*, 365 U.S. 838 (1960); *Watson v. Devlin*, 167 F. Supp. 638 (D. Mich. 1958) (no cause of action), *aff'd*, 268 F.2d 211 (6th Cir. 1959); *Hirych v. State*, 136 N.W.2d 910, 912 n.1 (Mich. 1965) (no cause of action). In recognizing an implied cause of action at that time, the courts rested in part on congressional actions that post-date the creation in 1871 of an explicit civil cause of action for violations of Section 1981. *See, e.g., Goodman v. Lukens Steel Co.*, 107 S. Ct. at 2621; *Sullivan v. Little Hunting Park*, 396 U.S. at 238; *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 412 n.1, 414-415 nn.13 & 14. Thus, reliance on the intent of the 1871 Congress in concluding that municipal liability under Section 1981 cannot be predicated on a theory of *respondeat superior* does not in any way constitute a narrowing of a pre-existing cause of action, express or implied.

2. For similar reasons, Jett errs in suggesting (Br. 21-26) that the exclusion of the "subjects, or causes to be subjected," language from all but Section 2 of the 1866 Act indicates an intention to allow *respondeat su-*

perior liability of municipalities under Section 1 of that Act.[13] Such language limiting the class of potentially liable parties had no place, however, in a statute that, when enacted, created no civil liability of anyone. Its absence therefore cannot support an inference that the right of action implied later—based in part on subsequent congressional enactments—is one of unprecedented breadth. Rather, the limits of the action to be implied must be drawn from the intent of the various congressional actions—many of which post-dated 1866—that ultimately led the Court to recognize the implied right of action.[14]

3. Jett (Br. 26-27) and his *amici* (NAACP/ACLU Br. 10-46) next suggest that an intention to impose *respondeat superior* liability on municipalities should be inferred on the basis of contemporaneous common law rules of the 1860s that allegedly subjected municipalities to liability on that basis. This argument is fallacious for numerous reasons.

First, any such inference is, of course, reasonable only insofar as it is consistent with what is otherwise known

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[13] Jett also suggests (Br. 13-14, 21-26) that the "color of law" language in the 1871 Act supports the "policy or custom" test and that the absence of this language in Section 1981 proves Congress did not intend a "policy or custom" limitation under that Section. As Jett concedes, however, the "color of law" language has been "given other meanings" by the Court (Br. 13). Moreover, the Court has never suggested that the "color of law" language is a source of the "policy or custom" limitation; indeed, *Monell* suggests just the contrary. *See Monell v. Department of Social Servs.*, 436 U.S. at 690-695.

[14] In any event, the "subjects, or causes to be subjected," language was not the sole basis of the *Monell* Court's rejection of the theory of *respondeat superior*. The Court was substantially motivated as well by the statute's legislative history, together with "the absence of any language in § 1983 which can easily be construed to create *respondeat superior* liability." *Monell v. Department of Social Servs.*, 436 U.S. at 693 n.57. *See also Pembaur v. City of Cincinnati*, 475 U.S. at 478-479.

of Congress's intentions from the relevant statutory language and legislative history. In this instance, the alleged common law rules are inconsistent with statutory language and legislative history. In enacting Section 1983 in 1871, Congress created an express civil enforcement provision for rights protected by what is now Section 1981. As this Court held in *Monell*, Congress intended the "subjects, or causes to be subjected," language of Section 1983 to bar imposition of liability on municipalities pursuant to a theory of *respondeat superior*. *Monell v. Department of Social Services*, 436 U.S. at 691-694. Thus, whatever the common law rules were in the 1860s concerning municipal *respondeat superior* liability, Congress plainly intended no such liability with regard to the rights guaranteed by Section 1981.

Second, the premise that, in 1866, municipal employers were generally liable at common law on a theory of *respondeat superior* "is by no means representative of all the contemporary authorities" (*City of Oklahoma City v. Tuttle*, 471 U.S. at 818-819 n.5 (opinion of Rehnquist, J.)).[15] While some courts at that time appear to have found municipalities liable based on the negligent acts of their agents, even that liability was confined by "certain rather complicated municipal tort immunities" (*id.* at 818-819 n.5). In particular, municipalities were considered immune from liability for "governmental" acts (such as providing education) as opposed to "proprietary" acts (including building and maintaining utilities, bridges, etc.). *See* W. Williams, *Municipal Liability for Tort* §§ 11, 17 (1901); 2 F.

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[15] Indeed, there is authority suggesting that municipalities could never be held liable based on *respondeat superior*. *See* L. David, *Municipal Liability for Tortious Acts and Omissions* 101 (1936) ("The absence of the principle of respondeat superior is the most conspicuous factor in the entire law of tort liability of municipalities and their officers.") (quoted in Fuller & Casner, *Municipal Tort Liability In Operation*, 54 Harv. L. Rev. 437, 439 n.7 (1941)).

Harper & F. James, *The Law of Torts* §§ 29.6-29.10 (1956). Thus, Justice Story stated:

> [W]here persons are acting as public agents, they are responsible only for their own misfeasances and negligences, and . . . not for the misfeasances and negligence of those who are employed under them, if they have employed persons of suitable skill and ability, and have not co-operated in or authorized the wrong . . . .

J. Story, *Agency* § 321 (Boston, 6th ed. 1863); *see also id.* §§ 320-22, 457.[16]

Moreover, any general recognition of *respondeat superior* liability in the mid-nineteenth century was qualified in other respects as well. In particular, there is much authority indicating that, at the time Section 1981 was enacted, the theory of *respondeat superior* did not extend to intentional torts.[17] *See Fox v. The Northern Liberties*, 3 Watts & Serg. 103, 106 (Pa. 1841); *Prather v. City of Lexington*, 52 Ky. (13 B. Mon.) 559, 563 (1852); *Mali v. Lord*, 39 N.Y. 381, 383 (1868); W. Seavey, *Agency* § 89 at 155 (1964) (*respondeat superior* liability limited to negligence "until the second half of the nineteenth century"); W. Paley, *Law of Principal*

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[16] In *Tuttle*, no other Justice joined, and four Justices expressly disagreed with, the dissenting opinion, which argued that *Monell*'s rejection of *respondeat superior* liability for municipalities should be abandoned. Justice Stevens alone believed that such liability could have been imposed under contemporaneous common law principles. *See* 471 U.S. at 834-842 (Stevens, J., dissenting).

[17] Also, under the "fellow servant" rule applied during these times, the *respondeat superior* liability of any employer did not extend to the tortious acts of one employee against a fellow employee. *Farwell v. Boston & Worcester R.R.*, 4 Metc. 49 (Mass. 1842). *See also* 2 F. Hilliard, *The Law of Torts* 463 (4th ed. 1874); *see generally* J. Story, *supra*, §§ 453d, 453e. Because the allegedly discriminatory action here was taken by a fellow employee, albeit a supervisor, it is at least arguable that the employer's liability would have been denied at common law on that ground as well.

and Agent *295, *299 (4th American ed. 1884); 2 F. Hilliard, *The Law of Torts* 407-408 (4th ed. 1874). This Court has held that a violation of Section 1981 is most properly characterized as an intentional tort. *See Goodman v. Lukens Steel Co.*, 107 S. Ct. at 2621; *see also General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. at 383-391 (Section 1981 applies only to intentional race discrimination). Thus, the present case of alleged intentional discrimination would seemingly not have given rise to *respondeat superior* liability, even against an employer who was not a municipality.[18]

Finally, even assuming *arguendo* that contemporary tort rules would have imposed *respondeat superior* liability on a municipal employer for the intentionally tortious acts of its employees, it would still be unreasonable to suppose that Congress intended to impose *respondeat superior* liability on a municipality for its employees' violations of Section 1981. Congress must be presumed to know the state of constitutional law and to expect that its statutes will be interpreted to avoid constitutional objections. *See NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979). At the time Congress enacted Section 1981, substantial questions existed concerning its authority to impose federal liability on municipalities for the acts of others. *See Monell v. Department of Social Services*, 436 U.S. at 669-683, 691-695. In fact, in 1866, just after the ratification of the Thirteenth Amendment, concerns about the issue of "dual sovereignty" were perhaps even more intense than in 1871, when the recently adopted Fourteenth Amendment provided an additional constitutional predicate for the imposition of obligations on state and municipal governments. *See* Cong. Globe, 39th Cong., 1st Sess. 1292-1293. In such circumstances, it cannot be pre-

[18] The contract cases that the NAACP/ACLU's brief cites (at 44-47) are irrelevant in light of this Court's holdings that Section 1981 is grounded in principles of tort, and not contract. *See Goodman v. Lukens Steel Co.*, 107 S. Ct. at 2621.

sumed that Congress—without so much as debating the issue—followed a course producing a form of liability believed to raise serious constitutional concerns.[19]

4. Jett finally suggests (Br. 29-31) that the civil rights policies underlying Section 1981 favor adoption of *respondeat superior* liability. This suggestion is also without merit.[20]

The policies underlying Section 1981 do not favor adoption of *respondeat superior* liability. This Court has held that those policies allow liability to be imposed only upon actors who have engaged in intentional race discrimination. *See General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. at 383-391. To hold an employer liable for all acts committed within the scope of

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[19] None of the cases cited by the NAACP/ACLU (at 10-46) involved the imposition of federal duties on state officials; rather, they involved enforcement of state-created duties (or duties imposed by Congress on federally created entities). Thus, none of those cases implicated the "dual sovereignty" concerns that troubled Congress in the immediate post-Civil War period. Reliance on them is therefore misplaced.

[20] Jett's suggestion (at 27-29) that 42 U.S.C. § 1988 compels adoption of a *respondeat superior* standard—either by incorporation of state law or as an independent matter of federal law—ignores the contemporary constitutional concerns and, in all events, is totally unfounded. Section 1988 merely "instructs federal courts as to what law to apply in causes of action arising under federal civil rights acts." *Moor v. County of Alameda*, 411 U.S. 693, 703 (1973). It does not "authorize the wholesale importation into federal law of state causes of action—not even one purportedly designed for the protection of federal civil rights" (*id.* at 703-704) (footnote omitted). Nor does it "independently create[] a federal cause of action for the violation of federal civil rights" (*id.* at 704 n.17). This Court has therefore held that Section 1988 may not be used to create *respondeat superior* liability for municipalities in cases where, as here, Section 1983 applies, on the ground that "Congress did not intend, *as a matter of federal law*, to impose vicarious liability on municipalities for violations of federal civil rights by their employees" (*id.* at 710 n.27) (emphasis in original)). *See also Monell v. Department of Social Servs.*, 436 U.S. at 663-664 n.7 (reaffirming holding of *Moor*).

its employees' employment would be inconsistent with this intent requirement. If an employee is not carrying out a policy or custom of the employer, it cannot fairly be said that the employer actually intended the consequences of that employee's acts, whether or not the acts are within the scope of employment.[21]

Furthermore, *respondeat superior* liability is not necessary in order to vindicate the rights protected by Section 1981. Ample remedies exist. Both damages and injunctive relief may be obtained (as they were obtained here) against individuals who are responsible for discrimination. Similarly, damages and injunctive relief may be obtained against municipal employers where discrimination is pursuant to a policy or custom. And, for egregious incidents of discrimination committed under color of state law, criminal sanctions are available. In addition, there are the remedies for discrimination in employment set forth in Title VII. Thus, although *respondeat superior* liability against municipalities would provide an additional weapon to be used in the enforcement of Section 1981, it is not necessary in order to ensure that a remedy is available against every actor who can fairly be said to be responsible for unlawful discrimination. Congress's judgment that countervailing constitutional concerns outweighed the need for such an additional remedy should be respected.

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[21] Of course, even if a "policy or custom" exists, liability does not necessarily follow. The trier of fact must also find that the "policy or custom" was motivated by racial animus. *See General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. at 383-391.

II. A POLICY OR CUSTOM SUFFICIENT TO IMPOSE LIABILITY ON A MUNICIPALITY UNDER SECTIONS 1981 AND 1983 DOES NOT EXIST WHERE, AS HERE, STATE LAW VESTS FINAL POLICY-MAKING AUTHORITY IN PERSONS OTHER THAN THOSE WHO COMMITTED OR APPROVED THE DISCRIMINATORY ACTS IN QUESTION.

Although the court below properly held that the "policy or custom" limitation applied to both Jett's Section 1981 and Section 1983 claims, it apparently accepted the district court's judgment that Superintendent Wright had the requisite authority to establish a "policy or custom" (Pet. App. in No. 87-2084, at 21A-23A). Moreover, it remanded the case for trial, apparently on the issue whether Wright's decision was improperly motivated or made on the understanding that Principal Todd was so motivated (*id.* at 25A). These rulings were in error.

The Court has worked toward a clear standard concerning whether a "policy or custom" sufficient to justify imposition of municipal liability exists. Thus, in *City of St. Louis v. Praprotnik*, 108 S. Ct. 915 (1988), Justice O'Connor, writing for a plurality of the Court, offered a comprehensive approach to the problem. Under that opinion (*id.* at 924) (emphasis in original), (1) "municipalities may be held liable under § 1983 only for acts for which the municipality is actually responsible, 'that is, acts which the municipality has officially sanctioned or ordered' "; (2) "only those municipal officials who have final policymaking authority may by their actions subject the government to § 1983 liability"; (3) "whether a particular official has 'final policymaking authority' is a question of *state law*"; and (4) the "challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in *that area* of the city's business."

We urge the Court to follow the approach taken by Justice O'Connor in *Praprotnik*. That approach inquires whether the actions challenged have been undertaken pursuant to a grant of express or, in the case of "custom," *de facto* authority. The *Praprotnik* standard declines to impose liability on the basis of any theory of the employer's inherent authority to control (which, of course, is one theory underlying imposition of *respondeat superior* liability). And, critically, it leaves to state and local governments the identification of who shall be empowered to create—or to delegate the power to create—such authority. It thus ensures that municipalities will be held liable only for acts that may be deemed their own—and, accordingly, that the intent of the enacting Congress is respected.[22]

Applied to the facts of this case, the *Praprotnik* approach requires dismissal of the claims against the DISD under 42 U.S.C. §§ 1981 and 1983. Texas law specifies that policymaking authority for school districts is vested exclusively in the district's board of trustees. *See* Tex.

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[22] By contrast, the proposal of the National Education Association ("NEA") in its *amicus* brief would ignore outright the congressional rejection of *respondeat superior* liability. NEA suggests (Br. 3-5, 10-12) that municipal liability should attach wherever the alleged wrongdoing is inherently an act of the municipality because it has been implicitly adopted or effectuated by the municipality. But all actions taken within the scope of an individual's employment are in this sense inherently acts of the municipality, because, by definition, the employee is the municipality's agent, and the law generally presumes that principals have control of their agents' actions. Therefore, the suggestion of the NEA equates to *respondeat superior* liability, which is precisely what the Court has found that Congress rejected. Thus, as NEA admits, its suggestion conflicts with this Court's interpretation of congressional intent in *Praprotnik*.

Also, the fact that only the DISD could restore Jett to his position as coach and athletic director simply does not mean that it has authorized the discrimination of which he complains. *See General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. at 397-401.

Code Ann., Education § 23.26(b) (Vernon 1987) ("the trustees shall have the exclusive power to manage and govern the public free schools of the [independent school] district."); *see generally* 51 Tex. Jur. 2d, *Schools* §§ 4, 10, 73 (1970) ("Local school trustees may adopt whatever reasonable rules and regulations are necessary for the control and management of the schools.") (citing, *e.g.*, *Wilson v. Abilene Independent School District*, 190 S.W.2d 406, 412 (Tex. Civ. App. 1945)). Moreover, the Texas courts have found that school superintendents lack any independent policymaking authority. *See Hinojosa v. State*, 648 S.W.2d 380, 386 (Tex. Ct. App. 1983) ("[T]he Education Code . . . gives the trustees the *exclusive* power to *manage* and *govern* the school district. The superintendent and his subordinates were but employees or agents of the trustees.") (emphasis in original); *Pena v. Rio Grande City Consolidated Independent School District*, 616 S.W.2d 658, 660 (Tex. Civ. App. 1981). Thus, neither Superintendent Wright's nor Principal Todd's actions are acts of a policymaker. Accordingly, those actions may not be deemed acts of the DISD.

It may be, as Jett asserts (Br. 31-32), that the DISD Board has delegated to Superintendent Wright the discretion to make transfer decisions for coaches and has not provided him with any policy guidance. That still would not subject the DISD to liability for any discriminatory actions by Wright. The DISD is entitled to assume that Wright will exercise his discretion consistent with the requirements of the law; and any failure by him to do so would not create a policy of discrimination on the DISD's part. *City of St. Louis v. Praprotnik*, 108 S. Ct. at 927. Because there is no suggestion that the DISD instructed Wright to make the transfer decision in a racially discriminatory manner, that the DISD knowingly concurred in or encouraged Todd's racially discriminatory recommendation, or that the DISD had a

custom or policy of racially discriminatory transfer decisions, the DISD cannot be held responsible for the decision challenged here. The remand ordered by the court below was thus in error (and, in any event, was not directed toward any legitimate inquiry under the *Praprotnik* approach).

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court below with respect to the issue raised in No. 87-2084, and reverse the judgment of the court below with respect to the issue raised in No. 88-214.

Respectfully submitted,

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