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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-2084
No. 88-214

NORMAN JETT,

Petitioner,

—v.—

DALLAS INDEPENDENT SCHOOL DISTRICT,

Respondent.

DALLAS INDEPENDENT SCHOOL DISTRICT,

Cross-Petitioner,

—v.—

NORMAN JETT,

Cross-Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE RESPONDENT*

Opinions Below

The opinion of the Fifth Circuit is reported at 798 F.2d 748, while the opinion on Suggestion for Rehearing En Banc is

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* Dallas Independent School District is the Petitioner in Cause No. 88-214; however, for ease of identification, and with the agreement of counsel and the consent of the Clerk, it will be styled the "Respondent" throughout these proceedings.

reported at 837 F.2d 1244. The original opinion is set forth in the Appendix to Dallas Independent School District's Petition for Writ of Certiorari (which is attached to the printed petition) at pp. 1A-32A** and the opinion on the Suggestion for Rehearing is reproduced at pp. 33A-44A. The opinion of the District Court is not reported. The Memorandum Opinion and Order is set forth in the Appendix at pp. 45a-63a. The Amended Reformed Judgment appears at pp. 64a-65a.

Jurisdiction

The mandate of the Fifth Circuit Court of Appeals issued on February 5, 1988. Appendix at 66a-67a. Norman Jett filed a petition for writ of certiorari on June 21, 1988, which was granted on November 7, 1988, limited to the first question presented by the petition. Respondent Dallas Independent School District filed its petition for certiorari on July 21, 1988 and it, too, was granted on November 7, 1988. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Fifth Circuit by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

Questions Presented

Whether a school district may be held vicariously liable under Section 1981, 42 U.S.C. § 1981, for the actions of a non-policymaking employee.

Whether the Fifth Circuit erred by not dismissing the section 1983 (and § 1981) claims against Dallas Independent School District since they were predicated solely upon the doctrine of *respondeat superior*.

** References in this brief to the Appendix attached to the petition for certiorari filed by Petitioner Jett will hereafter be cited as "_____pa." References to the Appendix attached to Respondent's petition for certiorari will be cited as "_____a" and references to the separate Joint Appendix will be designated as "_____A." References to the Trial Transcript will be designated as "_____T."

Constitutional Provision Involved

United States Constitution, Amendment 13, Section 1:

Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Statutory Provisions Involved

1. Title 42, United States Code § 1981:

   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 white 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.

2. Title 42, United States Code § 1983:

   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 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 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.

Other statutory provisions, and acts of Congress, which are substantially involved in this case are noted in the brief of the petitioner at p. 2 and are reproduced in the Joint Appendix.

Statement of the Case

Frederick Todd, a black, was assigned as principal of South Oak Cliff High School in 1975. When he arrived at South Oak Cliff, petitioner Norman Jett, plaintiff below,[1] a white male, was already assigned there. In 1983, believing that it was best for his school, Todd requested and received permission from Linus Wright, then General Superintendent of Schools of Dallas Independent School District (hereinafter also called "DISD"), to reassign plaintiff. The assignment was effective April 4, 1983.

Plaintiff was employed by the Dallas Independent School District as a teacher[2] in 1957. In 1962, he was assigned to SOC as a teacher and an assistant coach and later, in 1970, he was assigned to be the head football coach and athletic director. He remained in the position of teacher/head football coach at SOC until April, 1983, when he was reassigned, first to security, then, as a teacher and assistant coach and transferred to another school within the district. Rather than accept his reassignment, Jett resigned from his employment with the school district.[3]

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1 Hereinafter the parties will be referred to according to their designation in the trial court.

2 Although petitioner Jett was ultimately assigned as an athletic director and coach at South Oak Cliff High School (hereinafter called "SOC"), he was originally hired, and remained employed throughout his career at Dallas Independent School District, under a "TEACHER CONTRACT." Plaintiff's Response to Defendants' Request for Admissions, Requests Nos. 1-5, 7. The plaintiff's Teacher Contract is reproduced in the Appendix at 19A-21A. DISD does not use any other employment contract with its non-administrative professionals other than the "teacher contract." Jett was administratively assigned to his position at SOC pursuant to paragraph 3 of his contract. *See* Testimony of Frederick Todd, 53T-54T.

3 Jett claimed that he was constructively discharged from his position with the DISD; however, the Fifth Circuit rejected this allegation "as a matter of law." Appendix at 11a. This finding is now the law of

Suspecting that his school principal's request to have the General Superintendent reassign him was, in part, racially motivated, Jett brought suit against Todd and the Dallas Independent School District[4] claiming reverse discrimination under 42 U.S.C. § 1981[5] and a denial of First Amendment rights pursuant to § 1983.[6] He did not sue Dallas Independent School District's General Superintendent of Schools, Linus Wright, who is white. The reverse racial discrimination claim that is before this Court derives from paragraph VI of the First Amended Complaint and is based upon Section Sixteen of the Enforcement Act of 1870, ch. 114, 16 Stat. 140.

The results of the litigation are detailed in the initial opinion of the Fifth Circuit. Appendix at 5a. On appeal, the United States Court of Appeals for the Fifth Circuit rejected plaintiff's claim that he had been deprived of a property interest in his assignment as a coach and athletic director. It set aside the jury finding that plaintiff had been constructively discharged and left intact a finding that Todd's recommendation that Jett be reassigned was racially motivated and in retaliation for free speech. Feeling that the jury findings were unclear about whether the General Superintendent was a policymaker, the court remanded for a new trial, on a *respondeat superior* the-

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the case. *See United States v. Smelting Co.*, 339 U.S. 186, 198 (1950); *Insurance Group Committee v. D. & R.G.W. R. Co.*, 329 U.S. 607, 612 (1947).

4 The individual members of the Dallas Independent School District Board of Trustees are nominal parties since Jett sued them only in their official capacities.

5 As will be discussed in the body of this brief, plaintiff's § 1981 claim was, like his First Amendment claim, brought into federal court via § 1983.

6 The jury award based upon Jett's free speech contention, brought under 42 U.S.C. § 1983, was, as to DISD, reversed by the appellate court and the holding is not, with one exception, before this Court. Appendix at 25a 27a. Defendant's petition for certiorari was granted on DISD's challenge to the Fifth Circuit's failure to dismiss the free speech allegations against it for failure to state a claim. *See* Cross-Petition for Writ of Certiorari, Question 1.

ory, against DISD. The appellate court ordered that on retrial the jury determine if the General Superintendent knew of the illegal motivations behind the requested transfer, implying that if he did know, DISD could be liable.

Several points must be emphasized. One, although General Superintendent Linus Wright's decision to reassign plaintiff was not subject to review *per se*, any violation by Todd or Wright of law or school board policy was subject, pursuant to law and Board policy, to further examination by the Board of Trustees.[7] Hence, Jett could have claimed before the Board of Trustees that Wright or Todd had violated DISD's anti-discrimination policies or that the General Superintendent had violated DISD's transfer policy.[8] Defendant's policies only prevent appellate type review of a transfer when the decision does not implicate constitutional, statutory or policy violations. As long as the General Superintendent does not violate policy or

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7 Texas Constitution Art. 1, § 27; Tex. Rev. Code Anno. art. 5154c, sec. 6. In *Professional Association of College Educators v. El Paso Community (College) District*, 678 S.W.2d 94 (Tex. App.—El Paso 1984, writ ref'd n.r.e.) ("*PACE*"), the court ruled that Texas Constitution Art. 1, § 27 requires "those trusted with the powers of government [to] . . . surely . . . stop, look and listen" to complaints filed by those being governed. They must consider the petition, address or remonstrance. 678 S.W.2d at 96. Article I, § 27 of the Texas Constitution and Tex. Rev. Civ. Stat. Anno. art. 5154c, § 6 were also authoritatively construed in the case of *Corpus Christi Independent School District v. Padilla*, 709 S.W.2d 700 (Tex. App.—Corpus Christi 1986, no writ). As to the constitutional right to grieve, *Padilla* found that the *PACE* decision was "sound," 709 S.W.2d at 704, and adopted it. The court specifically held that an "open forum" before a school board where persons have the opportunity to freely express their views is the minimum required to satisfy the Texas constitutional requirements. *Id.* The public employer is not required by the Texas Constitution to respond to the presentation.

8 Jett did not file a grievance over the transfer or appear before the Board of Trustees alleging any violation of law or policy.

law, he is free to assign and reassign for any reason, or for no reason.[9]

Second, although the plaintiff and *amicus* National Education Association try to claim that General Superintendent Wright was or could be a policymaker, he has never been, and under state law cannot be, delegated authority to make policy.[10] Tex. Educ. Code §§ 23.01, 23.26(b), 23.26(d). *See, e.g., Hinojosa v. State*, 648 S.W.2d 380, 386 (Tex.App.—Austin 1983).

Dallas Independent School District's Board of Trustees has established several policies regarding transfers and reassignments by which the General Superintendent was bound.[11] More

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9 Board of Trustees Policy DK-R (Local) provides that on review of an involuntary transfer, the General Superintendent shall "issue a decision that shall be final and binding." Paragraph 6, Page 5 of 6, Plaintiff's Exhibit 9. This "finality" regulation applies only to an appeal of an involuntary transfer and not a formal grievance. Policy DK-R (Local) states that the appeal procedure "shall not be deemed a formal grievance." *Id.* It is for this reason that Mr. Wright testified at trial that there is no appeal to his decision "[a]s far as assignment . . . ." 405T; *see also* 423T.

10 Plaintiff alleged in his First Amended Complaint that "Defendant BOARD OF TRUSTEES of the DALLAS INDEPENDENT SCHOOL DISTRICT, by virtue of the statutes of the State of Texas, is given and charged with the responsibility for the possession, care, control, and management of the affairs of defendant DALLAS INDEPENDENT SCHOOL DISTRICT . . . ." Paragraph IID at 7A. We agree with this admission. *See, e.g.*, Defendants' First Amended Answer, paragraph IID at 24A.

11 General Superintendent Wright, in response to questions asked by plaintiff's counsel, testified that the transfer policy applied to all professional employees except "Administrators," and that Jett, although his school's athletic director, was not an Administrator. 67A (395T-396T). Mr. John Santillo, who was at the time the Assistant Superintendent of Personnel, expressed his belief that the Board of Trustees' transfer policy did apply to the Jett reassignment. 488T. Wright was bound by those policies and, assuming, *arguendo*, that he failed to follow them, would have been at fault. However, the fact that he might not have followed the policies which were created by the true policymaking body of the District, the Board of Trustees, does not make him

importantly, the Board of Trustees had established policies forbidding racial discrimination or retaliation for labor or First Amendment activities.[12] *See, e.g.*, Board of Trustees Policy DAA, Plaintiff's Trial Exhibit 3.[13] The General Superintendent's final authority to make discrete individual transfer decisions would not subject the DISD to responsibility for his actions.[14] Quite simply, Wright was not and could not be a policymaker.[15]

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a policymaker. Rather, the opposite is true. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 482-83, 483n.12 (1986) (hereinafter cited as *Pembaur*); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823 (1985) ("At the very least there must be an affirmative link between the policy and the particular constitutional violation alleged").

12 The General Superintendent testified that it is inconsistent with the policy of the DISD to use as a reason for demotion or transfer the public speech or remarks made by one of its employees 449T-450T. This testimony was uncontroverted. Accordingly, as to the First Amendment claim, the appellate court should have rendered judgment in favor of defendant, Dallas Independent School District. *City of St. Louis v. Praprotnik*, _____ U.S. _____, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988). Even if a First Amendment violation occurred when the General Superintendent made the transfer decision, it would have been in violation of defendant's policy, and not in accordance with it.

13 Hereinafter citations to Trial Exhibits will be to the party and exhibit number only. Plaintiff's Exhibits 9-15 are other policies, established by the Board of Trustees, which control the discretion of the General Superintendent.

14 Having concluded that the jury findings were deficient and could not support the award of damages against the DISD under section 1983, the Fifth Circuit remanded the case for retrial, holding that DISD might be liable if General Superintendent Wright acted with discriminatory intent or intent to retaliate for the exercise of free speech activities. In light of *Praprotnik*, the Fifth Circuit's decision is error. The court should have applied state law to the case and dismissed the claims brought pursuant to 42 U.S.C. § 1983. Because this is so straightforward, and since state law is so clear on the subject of who is a school district's policymaker, *see supra* at notes 9, 10, 11 and 12; *infra* at note 36, we will not dwell upon the issue further. Regardless of whether the Court affirms the section 1981 portion of the Fifth Cir-

(*Footnote 15 appears on following page*)

Legislative Background

In mid-December, 1865, the "Schurz Report," Report of Maj. Gen. Carl Schurz on the Condition of the South (December 19, 1865), was presented to Congress. The report cautioned that, in spite of the abolition of slavery, the establishment by the southern states of "black codes," offshoots of the antebellum slave codes, were preventing blacks from taking their rightful place within society. S. Exec. Doc. No. 2, 39th Cong., 1st Sess. (1865).

With the Schurz Report and others like it[16] as an impetus, Congress tried to end the anarchy existing at the end of the Civil War, caused, as the Radical Republicans viewed it, by the Southern States' intransigence, by passing legislation aimed at defining and protecting the rights of the former slaves, and formulating the relationship of the confederate states to the federal government. These early Civil Rights Laws have become the mechanism for today's civil rights litigation. One of the first of the early civil rights laws, passed in the same legislative session, the 39th, that saw the Fourteenth Amendment sent to the states

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cuit's holdings, it should rule that the § 1983 claims must be dismissed. Likewise, if the Court affirms the ruling that *respondeat superior* may not be utilized to impose § 1981 liability upon DISD, as it should, it should apply *Praprotnik* and order the entire case dismissed.

15 While the case was pending before the Fifth Circuit, defendant Todd settled with plaintiff. The settlement papers state that Frederick Todd is to be released from the lawsuit, with prejudice, and "[d]efendant Todd continues to deny all liability." Release Restricted as to Frederick Todd and the Alleged Insurance Carrier Colony Insurance Company, 2. The Fifth Circuit's and the District Court's Orders of Dismissal appear in the Appendix to the petition for certiorari at 82a-85a as "G" and "H," respectively. Consequently, we take issue with the claim that "Todd's liability under all three [above-referenced legal] theories has been established." Brief of the Petitioner at 6.

16 *See, e.g.*, S. Rep. 41, 42nd Cong., 2nd Sess. (1872) (Report on Conditions in the Late Insurrectionary States); S. Rep. 1, 42nd Cong., 1st Sess. (1871) (Report of the Select Committee to Investigate the Alleged Outrages in the South); H.R. Rep. No. 37, 41st Cong., 3rd Sess. (1871) (Report on Protection of Loyal and Peaceable Citizens in the South).

for ratification, was entitled "An Act to protect all persons in the United States in their civil rights and furnish the means of their vindication." S. 61, 39th Cong., 1st Sess. (1866), *reprinted in* Cong. Globe, 39th Cong., 1st Sess. (1866). The bill was introduced in the Senate on January 5, 1866.[17] Cong. Globe, 39th Cong., 1st Sess. 129 (1866) (herein this session will be cited as "Globe"). In the Senate, the legislation was managed by Senator Trumbull, the chairman of the Senate Judiciary Committee, who opened debate on January 12, 1866. *Id.* at 211. It passed the Senate by a vote of 33 to 12 on February 2, 1866, *id.* at 606-07, and was sent to the House. *Id.* at 626-27. House debate began on March 1st, *id.* at 1115, and the Act, as amended in the lower branch, passed, on March 13th, by a vote of 111 to 38. *Id.* at 1367. Three prominent Republicans voted "nay," Henry J. Raymond, publisher of the New York Times; Columbus Delano, a moderate from Ohio; and, most importantly, Ohioan John A. Bingham, a Radical Republican, and one of the most influential men in the 39th Congress. A. Bickel, *The Original Understanding and The Segregation Decision*, 69 Harv. L. Rev. 1, 20-22 (1955) (hereinafter cited as "*The Original Understanding*"). The Senate concurred in the amendments two days later. Globe at 1413-16. President Johnson vetoed the bill on March 27, 1866. *Id.* at 1679-81. The Senate overrode the veto, 33-15, on April 6th. *Id.* at 1809. The House, on April 9, 1866, voted the Act into law by a vote of 122 to 41, generating "an outburst of applause." *Id.* at 1861.

The Fourteenth Amendment was conceived in the Joint Committee to Look into the Condition of the States Which Formed the So-called Confederate States of America (the Joint Committee on Reconstruction) (popularly known as the "Committee of Fifteen"). The Committee was formed under the Joint Resolution of December 13, 1865. Globe at 6, 30, 46-47; *The Original Understanding* at 29-45. On April 30, 1866, Senator Fessenden in the upper chamber and Representative Stevens in the lower chamber introduced the Joint Committee's proposed

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17 The Thirteenth Amendment was officially certified as adopted on December 18, 1865. 13 Stat. 774 (1865).

Constitutional Amendment, H.R. 127.[18] Globe at 2265, 2286. Debate started in the House on May 8th, *id.* at 2433, and in the Senate on May 23, 1866. *Id.* at 2764. On May 10th, the House, by a vote of 123-37, passed the joint resolution. H.R. 127

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18 As originally written by Representative Bingham, the proposed resolution read: "The Congress shall have power to make all laws necessary and proper to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property." *Journal of the Joint Committee on Reconstruction*, 9, *reprinted as* S. Doc. No. 711, 63rd Cong., 3rd Sess. (1915); *see The Original Understanding* at 30; *see generally* H. Flack, *The Adoption of the Fourteenth Amendment* (1908); B. Kendrick, *The Journal of the Joint Committee of Fifteen on Reconstruction, 39th Congress, 1865-1867* (1914); J. James, *The Framing of the Fourteenth Amendment* (1956). For a study of the ratification process in the states, *see generally* J. James, *The Ratification of the Fourteenth Amendment* (1984). This draft was edited in the Committee of Fifteen, which ultimately reported out the Bingham proposal, as H.R. 63, with one significant change. The phrase "to secure to all persons in every state within this Union equal protection in their rights of life, liberty and property" had permutated to "secure to the citizens . . . all privileges and immunities of citizens in the several States, and to all persons in the several States the equal protection in the rights of life, liberty and property." Globe at 1033-34. After debate, however, the measure was postponed to a day certain, Globe at 1095, and never appeared again. Although this language did not prevail by itself, Bingham never gave up and, in a modified version, later saw his concept become a part of our Constitution.

When the Joint Committee began attempting to salvage something from the ignominious disappearance of its previous attempt to draft an acceptable amendment, *see* Report of the Joint Committee on Reconstruction XIV, H.R. Rep. 30, 39th Cong., 1st Sess. (1866), Representative Robert Owen put before it a proposal which, in section 5, stated that "Congress shall have power to enforce by appropriate legislation, [its] provisions. . . ." Representative Bingham, refusing to give up his language entirely, offered an amendment to this section. The substitute language is now a part of the Fourteenth Amendment:

> Sec. 5. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws

The Original Understanding at 42-43. Later the Committee moved this section to its rightful place in the proposal. By a vote of 10-3, it became section 1 of the Resolution introduced.

passed the Senate on June 8, 1866, *id.* at 3042, and was returned to the House for concurrence with Senate amendments. On June 13, 1866, by a vote of 120 to 32, the House concurred in the Senate's amendments and sent the Joint Resolution to the states for ratification. *Id.* at 3149.

The ratification of the Fourteenth Amendment allowed the Congress to take aim at the denial of civil rights in a manner not otherwise constitutionally possible. In reality, many in Congress had felt that Congress had exceeded its authority when it passed the Civil Rights Act of 1866 with only the Thirteenth Amendment as its sanction. Hence, the Enforcement Act of 1870, while pending before the Senate, was amended on motion of Senator Stewart to include language almost identical to the 1866 Act and to incorporate the previous civil rights law into the new legislation by reference. Cong. Globe, 41st Cong., 2d Sess. 3480 (1870). In the House, Representative Bingham reported a substitute bill on behalf of the Committee on the Judiciary on May 16, 1870, and with the rules suspended, obtained passage. Cong. Globe, 41st Cong., 2d Sess. 3503-04 (1870). It was the House bill which ultimately became law; however, the language was the Senate's. *Id.* at 3688-90, 3705, 3726, 3752, 3809, 3884 (1870).

In 1871, the Anti-Ku Klux Klan law was enacted. Ch. 22, 17 Stat. 13 (1871). *See generally* M. Walter, *The Ku Klux Klan Act and the State Action Requirement of the Fourteenth Amendment*, 58 Temp. L. Q. 3 (1985). It is by far the most important of the Reconstruction Period Civil Rights Acts adopted, since it gave birth to present day 42 U.S.C. § 1983. Its development began in the House, five days after President Grant called for legislation to control the turbulant conditions in the South, *see* Cong. Globe, 42nd Cong., 1st Sess. 244 (1871), when Representative Shellabarger, on behalf of the House Judiciary Committee, introduced a bill, H.R. 320, to enforce the new Amendment. H.R. 320, 42nd Cong., 1st Sess. (1871), *reprinted in id.* at app. 138. During debate, he outlined the legal effect of prior decisions upon the proposal. *Id.* at app. 68. Because of opposition even within his own party to the bill as introduced, Shellabarger amended it substantially, including the addition of

a civil remedy. *Id.* at 477. It passed the House April 6th on a vote of 118-91. *Id.* at 522.

In the Senate, debate opened with Senator Edmunds acting as floor manager on behalf of the Senate Judiciary Committee. *Id.* at 567. It passed the Senate on April 14, 1871, with a controversial amendment having been attached to it by Senator Sherman. *Id.* at 633, 704-05. The House voted down the bill with the Sherman amendment, 74-106, on April 19, 1871. *Id.* at 800. The amendment authorized a damage action against a municipality or county for damages incurred during a riot. Jurisdiction was placed in federal courts. The House stood firm in its refusal to adopt the Sherman amendment. Cong. Globe, 42nd Cong., 1st Sess. 801-05 (1871); *see especially*, *id.* at 804 (Remarks of Poland). After detaching the Sherman amendment in conference, the House voted in favor of the bill. *Id.* at 808. That same day, April 19, 1871, the Senate passed the bill, as amended, 36-13. *Id.* at 831.

The United States' statutes were revised and codified in 1874, when section 1981 appeared in its present form.[19] Commissioners were appointed to "bring together all statutes and parts of statutes which from similarity of subject ought to be brought together, omitting redundant or obsolete enactments" pursuant to Act of June 27, 1866, 14 Stat. 74. Due to the length of time it ultimately required to complete the task, the authorization statute was re-enacted. Act of May 4, 1870, ch. 72, 16 Stat. 96.

Introduction to Argument and to Summary of Argument

There are two questions presented by the petitions for certiorari. The first question is the major issue before the Court: Whether section 1981 liability may be imposed on a school district solely upon the doctrine of *respondeat superior*. The second question is whether the Fifth Circuit erred in not resolving

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19 *See Runyon v. McCrary*, 427 U.S. 160, 168 n.8 (1976); *id.* at 195-97 (White, J., dissenting), for a short history of the Revisions as they apply to section 1981.

the question of who under Texas Law has "final policymaking authority," *Praprotnik*, ____ U.S. at ____, 108 S.Ct. at 924, 99 L.Ed. at 118, and dismissing the claims based upon *respondeat superior* as opposed to remanding the issue for determination by a jury.

To the extent that the second question is different from the first one, it is only a more general challenge to the *respondeat superior* problem. Accordingly, other than the law which is discussed in relation to the § 1981 issue, we do not intend to address separately the "question of state law" vis-a-vis section 1983 liability for the alleged denial of the First Amendment rights.

While the plaintiff and *amici* NAACP Legal Defense Fund and American Civil Liberties Union, and, to a lessor extent, the court of appeals, have framed this case in terms of the meaning of section 1981 and whether it requires proof of official policy, another—and more serious—issue is raised by the plaintiff's position that under 42 U.S.C. § 1981 the doctrine of *respondeat superior* applies. That issue is whether section 1981 gives rise to an *independent*, implied right of action against a public entity or finds redress only through section 1983. *See Mahone v. Waddle*, 564 F.2d 1018, 1044 (3rd Cir. 1977), *cert. denied*, 438 U.S. 904 (1978) (Garth, J. dissenting) (hereinafter Judge Garth's dissent will be cited as "*Mahone*"). If an independent right of action against a state agency is not directly implied under § 1981, then *City of St. Louis v. Praprotnik*, ____ U.S. ____, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), is *stare decisis* and the doctrine of *respondeat superior* cannot be used to hold Dallas Independent School District *vicariously* liable. This, then, will be the first issue upon which we will focus.

Summary of Argument

This case presents the question under what circumstances a school district may be held liable under 42 U.S.C § 1981 for unconstitutional conduct allegedly attributable to its non-policymaking employees. *See Monell v. Department of Social Services*, 436 U.S. 658 (1977). Before reaching this issue,

though, the Court must determine if its recent pronouncements in *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1988), and *City of St. Louis v. Praprotnik*, ____ U.S. ____, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), that municipal liability under 42 U.S.C. § 1983 cannot be predicated on the doctrine of *respondeat superior*, are *stare decisis*.

Section 1983 provides adequate support for one to bring an action against a school district and its employees for violations of constitutional and statutory rights. Of course, § 1983 is the means by which one obtains a cause of action against a municipality to protect the rights and privileges protected in § 1981. Likewise, section 1981 does not by its own language grant any cause of action; it only details substantive rights. Unless the Court wishes to create a direct, implied right of action outside the parameters of § 1983 against those acting under color of state law, *Monell* and its offspring prevent the *respondeat superior* doctrine from being used to hold defendant Dallas Independent School District vicariously liable to plaintiff for damages.

Even if there is an implied right of action when the defendant is a state actor, the legislative history of section 1981 prevents the use of *respondeat superior* as a means of obtaining a judgment against defendant. Section 1981 was, originally, a criminal statute and was not meant to include the doctrine of *respondeat superior* within its terms. Each Congress from 1866 through 1874, when the Reconstruction civil rights acts were being adopted or codified, believed that any legislation which attempted to use the doctrine of *respondeat superior* against a municipality would be unwise and unconstitutional. Fearing this, they did not pass any civil liability statute incorporating the theory. The rationale of *Monell* and the Court's other decisions in the area can lead to no other conclusion.

When a school district in good faith has adopted policies which are meant to prevent violations of employee's rights, it is fundamentally wrong to require it to answer in damages. Unless the district through its elected policymakers is a constitutional tortfeasor, its taxpayers should not be required to pay the piper.

ARGUMENT

I.

This Court's decision in *City of St. Louis v. Praprotnik*[20] Governs The Case

A. Scope of Review

The plaintiff attempts to succeed in this Court by the device of toppling over a straw man. He constructs his argument by stating that this cause is an action brought under the provisions of 42 U.S.C. § 1981. He then finds himself obtaining a reversal because, so the argument goes, section 1981 is the progeny of the Civil Rights Act of April 9, 1866, Ch. 31, 14 Stat. 27 (1866), and at the time it was enacted the doctrine of *respondeat superior* existed at common law. The straw man is the assertion that this action was "brought" under § 1981. Actually, the action was brought under the provisions of § 1983, *see Mahone*, 564 F.2d at 1037-38, and, therefore, the focus in this case to ascertain if a local government is subject to vicarious liability should be on § 1983, not § 1981.

A quick look at *Monell v. New York Department of Social Services*, 436 U.S. 658 (1978), reveals the accuracy of this proposition. After concluding in Part I of its opinion that municipalities are "persons" within the meaning of 42 U.S.C. § 1983, the *Monell* Court probed the wording and legislative history of section 1983 to decide if a local government could be held liable on a *respondeat superior* theory. The Court did not look at the legislative history or wording of the Fourteenth Amendment, *id.* at 691-95, the source of the rights being protected in the case, to make its decision. If, indeed, this case is an action at law or suit in equity brought pursuant to authority granted by § 1983 to seek redress for the deprivation of rights, privileges, or immunities secured by the Constitution and laws, and, in particular, section 1981, then this Court's decision in *City of St.*

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20 ____ U.S. ____, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988).

Louis v. Praprotnik, ____ U.S. ____, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), governs.

The Court has found it necessary on several occasions, in the context of actions against **private** as opposed to public defendants, to decree that 42 U.S.C. § 1981 grants an independent, direct implied cause of action against one who deprives another of the rights and privileges granted by the present codification of the early civil rights statutes.[21] *See, e.g., Runyon v. McCrary*, 427 U.S. 160 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454, 459-60 (1975); *see also, Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431 (1973); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). However, in each of these cases, § 1983 was not available to the plaintiffs.

In this action, the plaintiff appears to have lost sight of elementary principles of statutory construction and assumes, without discussion or citation to authority, that he sued defendants, one a state agency, the other a person acting under color of state law, directly under section 1981. His premise may be correct; however, the Court has never implied such an action against a state agency and analysis of the cases involving implied rights of action would suggest that he is not.

The decision in *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), certainly does not preclude this Court from looking at § 1981 in the circumstance of a state rather than a private actor. The case is as inapposite here as it was in *Brown v. Government Services Administration*, 425 U.S. 820, 833 (1976) (hereinafter cited as *GSA*). In *GSA*, the Court recognized that the holding in *Johnson* was limited to the "context of *private employment*." *Id.* Emphasis in original.

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21 It is difficult, if not now impossible, nearly 125 years later, to determine the ancestry of current 42 U.S.C. § 1981. It probably finds its origin in the Act of May 31, 1870, ch. 114, 16 Stat. 144, although many commentators and jurists plainly disagree. *See, e.g., Runyon v. McCrary*, 427 U.S. 160, 168-69, 168n. 8 (1976). However, the net result of the enactment in 1866, the reenactment in 1870, and the codification in 1874 is a statute whose constitutional underpinnings have been lost to posterity. *Cf. id.* at 190 (Stevens J., concurring); *id.* at 195-97, 195n. 6 (White, J., dissenting).

The Court has routinely held that § 1983 does not create any substantive rights; it simply furnishes the mechanism for obtaining redress for the deprivation of rights vested elsewhere. *Id.*; *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980); *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617-18 (1979); *Great American Federal Savings & Loan Assn. v. Novotny*, 442 U.S. 366, 381 (1979) (Stevens, J., concurring) (*dictum*).[22] On the other hand, section 1981, by its language, does not establish any remedy for its violation. It "merely" defines some of the rights and privileges of citizenship. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432 (1965); *Strauder v. West Virginia*, 100 U.S. 303, 312 (1879); *see* Cong. Globe, 39th Cong., 1st Sess. 474-75 (1866) (remarks of Senator Trumbull, the sponsor of the bill (S. No. 61) which became the Civil Rights Act of 1866) (Portions of the debates are reprinted in The Delaware Law School, *The Reconstruction Amendment Debates*, 121-22 (A. Avins, editor 2nd ed. 1974).

We recognize that many lower court judges have offhandedly assumed *sub silentio* the proposition that § 1981 grants an independent, implied right of action against *state* defendants, *but cf. Brown v. General Services Administration*, 425 U.S. 820 (1976) (denying the use of 42 U.S.C. § 1981 in federal employment litigation); *Cannon v. University of Chicago*, 441 U.S. 677, 725 (1978) (White, J., dissenting) (discussing an analagous situation); nonetheless, this does not prevent this Court from directly and thoroughly analyzing the proposition. *Thiboutot*, 448 U.S. at 31 (Powell, J., dissenting); *cf. Burks v. Lasker*, 441 U.S. 471, 476, 476n. 5 (1979). That a right of action has been implied for the private sector does not preclude consideration of whether an implied right exists in the public arena, especially since in *Thiboutot*, 448 U.S. at 4, the Court announced that "42 U.S.C. § 1983 provides a cause of action for state deprivations of 'rights secured' by 'the [statutory] laws' of the United States." *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 28 (1981). It is universally recognized, today, that

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22 The Court ruled in *Daniels v. Williams*, 474 U.S. 327, 330 (1986), that "in any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional right . . . ."

"[u]nder 42 U.S.C. § 1983 (1964 ed.) the [State] officers may be made to respond in damages . . . for violations of rights conferred by federal equal rights laws. . . ." *City of Greenwood v. Peacock*, 384 U.S. 808, 829 (1966). Indeed, in the state action context, the only reason to find an implied right would be to avoid the limitations which Congress grafted on to § 1983. *See National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453, 458 (1974) (hereinafter cited as "*Passenger Corp.*"); *cf. Williams v. Bennett*, 689 F.2d 1370, 1390 (11th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983); *Dean v. Gladney*, 621 F.2d 1331, 1336 (5th Cir. 1980); *Carpenter v. City of Fort Wayne, Ind.*, 637 F. Supp. 889, 891-92 (N.D. Ind. 1986). Plus, when the lower courts have assumed that § 1981 grants an implied right of action against public defendants, the holdings are almost always *dicta* because § 1983 jurisdiction is also present.[23] For an assessment of an analogous situation, *see Cannon v. University of Chicago*, 441 U.S. 677, 722-23 (1978) (White, J., dissenting).

In addition, this Court, at least in *dicta*, has articulated the source of a section 1981 cause of action against state action. In *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979), the Court construed the scope of the civil rights-federal claim jurisdiction of the district courts. In the context of

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23 An exception to this statement existed during the period from the handing down of *Monroe v. Pape*, 365 U.S. 167 (1961), until the rendering of the decision in *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). *See, e.g., Mahone v. Waddle*, 564 F.2d 1018 (3d Cir. 1977), *cert. denied*, 438 U.S. 904 (1978).

Another exception is the decision rendered by the First Circuit in *Springer v. Seamen*, 821 F.2d 871 (1st Cir. 1987), but there, the implied right of action was more akin to one against a private employer, *see, Franchise Tax Bd. of Calif. v. United States Postal Service*, 467 U.S. 512, 520 (1984), and, since the action was against the Postal Service, a federally created entity, it could not involve state action or § 1983. Likewise, *District of Columbia v. Carter*, 409 U.S. 418 (1973), is inapplicable since the version of § 1983 before the Court did not apply to the District of Columbia. The most that can be said for the case is that it stands for the proposition that the Court will imply a cause of action under § 1981 when the Congress has not, by statute, developed one. *Compare Carter, with Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 395-97 (1971).

the issues before it, the Court was called upon to adjudicate the breadth of section 1983. In doing so, it described the parallel nature and common ancestry of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, and § 1983. The starting point from which the Court progressed in its examination was the statement that "[u]nlike the 1866 and 1870 Acts [Act of May 31, 1870, ch. 114, 16 Stat. 140], § 1 of the Civil Rights Act of 1871 did not provide for any substantive rights—equal or otherwise." *Id.* at 617. From this position, the Court recognized that the progenitor of § 1983 was enacted to enforce the "substantive protections afforded by § 1 of the 1866 Act." *Id.* (footnotes omitted). As Justice Powell points out in his concurring opinion, the Reviser of the Statutes in 1874[24] "believed that § 1 of the 1866 Act, to the extent it protected against deprivations under color of state law, was meant to be fully encompassed by the phrase 'rights . . . secured by the Constitution,' in § 1 of the 1871 Act." 441 U.S. at 633 (Powell, J., concurring). And, concluded Justice Powell, the Commissioners' note dealing with federal court jurisdiction demonstrates graphically that Congress meant for the "particularly described rights of §§ 1977 and 1978 [to be] protected against deprivation under color of state law by the

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24 Section 1983 first appeared in its present form in the Revised Statutes of 1874 as § 1979. Pursuant to the Act of June 27, 1866, three Commissioners were appointed to attempt to codify all federal statutes. Later, their work was examined by an attorney, Thomas Jefferson Durant, to insure that the proposed revision met the intent of the Congress that the revision should not substantively change current law.

Section 1979 was itself derived from § 1 of the Civil Rights Act of 1871, ch. 22, 17 Stat. 13. Under the "Ku Klux Klan" Act, as the Civil Rights Act of 1871 is commonly called, the civil cause of action protected only against deprivations, under color of state law, of rights "secured by the Constitution." However, the phrase "secured by the Constitution" includes the rights, privileges, or immunities granted by the 1866 Civil Rights Act since, in passing the 1866 Act, Congress was simply defining the privileges of citizenship guaranteed by the Constitution and in particular the Thirteenth Amendment. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 633n.14 (1979) (Powell, J., concurring).

words 'rights . . . secured by the Constitution' in § 1979." *Id.* at 636.[25]

A study of the relationship between § 1981 and § 1983 reveals that, from the time that "any person" was first authorized by Congress to sue in federal court to enforce his or her Constitutional rights as defined, in part, by the 1866 Act, Congress' understanding was that the mechanism creating the cause of action would be § 1983 or one of its predecessors.[26] Unless the Court **now** creates a cause of action separate and apart from the one which Congress created, the Court's previous rulings involving *respondeat superior* and § 1983 are *stare decisis.* Accordingly, we turn our attention to the subject of whether the Court should imply a direct, independent cause of action against a municipality from § 1981.

B. Implied Actions

Section 1981 reads as follows:

> 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 evi-

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25 During the debates over the Civil Rights Act of 1871, Representative Shellabarger emphasized that Section 1 provides a civil remedy for people "where, under color of law, they or any of them may be deprived of rights to which they are entitled . . . by reason and virtue of their national citizenship." Cong. Globe, 42nd Cong., 1st Sess. App. 68 (1871). Moreover, he defended the 1871 Act's constitutionality by remarking that the first section of the bill, patterned upon the second section of the 1866 Act, was simply another means of enforcement. *Id.* Senator Thurman depicted the anticipated law as "relating wholly to civil suits . . . . Its whole effect is to give to the federal judiciary that which does not now belong to it . . . . It authorizes any person who is deprived of any right, privilege, or immunity secured to him by the Constitution of the United States, to bring an action against the wrong-doer in the Federal Courts . . . ." Cong. Globe, 42nd Cong., 1st Sess. App. 216-17 (1871).

26 "[I]t must be remembered," that at the time the Civil Rights Act of 1866 was adopted, "there existed no general federal-question jurisdiction in the lower federal courts." *District of Columbia v. Carter*, 409 U.S. at 427.

> dence, and to the full and equal benefit of all laws and proceedings for the security of white 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.

The statute does not, as one can plainly see, explicitly sanction a private right of action by a person injured by a denial of any of the rights, privileges, or immunities guaranteed by its terms. *See Passenger Corp.*, 414 U.S. at 456. Moreover, assuming that the predecessor to § 1981 was the Civil Rights Act of 1866, the remedy by which Congress chose to enforce its terms was criminal liability.[27]

An analysis of whether § 1981 contains an implied remedy when the defendant is a public entity starts with the ruling in *Cort v. Ash*, 422 U.S. 66 (1975). Although *Cort* was not the first case to deal with the doctrine of an implied right of action from a federal statute, it is the seminal decision in the area. *Cort* requires an inquiry into the factors which are indicative of the legislative will. Of course, legislative intent is not the *sine qua non*; if the Congress truly intended for a right of action to exist it would have said it in clear and unmistakable language. Rather, the inquiry is to determine if the Court should create the cause of action in an attempt to further Congressional policy.

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27 Likewise, assuming that the source of § 1981 is the Enforcement Act of 1870, ch. 114, 16 Stat. 140, the prescription Congress used to enforce the Act's terms was, nevertheless, criminal. This did not change until 1871 with the passage of the Ku Klux Klan Act, ch. 114, 17 Stat. 13 (April 20, 1871). Of course, the result in this case does not vary with a determination that § 1981 stems from the Enforcement Act or, for that matter, any later enacted Reconstruction Civil Rights Act, although the determination would make § 1981 a Fourteenth Amendment statute, not a Thirteenth.

At the time that § 1981 was adopted there was no federal question jurisdiction in the lower federal courts. Hence, Congress, up until it passed § 1983, relied upon " 'the state courts to vindicate essential rights arising under the Constitution and federal laws.' *Zwickler v. Koota*, 389 U.S. 241, 245 (1967)." *District of Columbia v. Carter*, 409 U.S. 418, 427 (1973).

In deducing whether a private remedy is suggested by a particular act where the right of action is not announced, several elements apply. *See generally* Comment, *Implied Private Rights of Action: The Courts Search for Limitations in a Confused Area of the Law*, 13 Cumb. L. Rev. 569 (1983); *Private Causes of Actions From Federal Statutes: A Strict Standard for Implication By Sole Reliance on Legislative Intent*, 14 U. Rich. L. Rev. 605 (1980) (hereinafter *Private Causes of Action*). Foremost may be the requirement that the plaintiff be "one of the class for whose especial benefit the statute was enacted." *Texas & Pacific R.R. Co. v. Rigsby*, 241 U.S. 33, 39 (1916). This ingredient is basic, since, if the person is not within the class for whom the statute was meant to favor, the case need not proceed further regardless of Congressional design. Here, this criteria is a given. It is now well established that section 1981 was adopted to protect all citizens, not just blacks, in their citizenship rights. We gladly concede the point and move on to the succeeding essential factor.

The next area of inquiry under the *Cort* formulation is the question of legislative history. 422 U.S. at 78. According to *Cort*, one must resolve whether there is any sign of legislative intent, explicit or implicit, either to create such a remedy or to deny one. Here, we are on firm ground in stating that at the time of the adoption of the 1866 Civil Rights Act, the intent was not to create a private right of action. To begin with, it is without question that the 39th Congress doubted its constitutional authority to pass legislation allowing for actions for violations of civil rights. *See Hurd v. Hodge*, 334 U.S. 24, 32-33 (1948). In introducing the proposal which was to thereafter become the Fourteenth Amendment, on February 26, 1866, only days before the 1866 Civil Rights Act would be enacted, Representative Bingham[28] stressed that it "has been the want of the Repub-

28 Representative Bingham, a Radical Republican, voted against the Civil Rights Act of 1866 since he felt that, even as narrowly written as it was, the planned law was unconstitutional. *See* Cong. Globe, 39th Cong., 1st Sess. 1291-92 (1866) (Statement of Bingham). It was for this reason that he introduced the Joint Resolution which became the Fourteenth Amendment. Cong. Globe, 39th Cong., 1st Sess. 1033 (1866) (Introduction of H.R. 63).

lic that there was not an express grant of power in the Constitution to enable the whole people of every State, by congressional enactment, to enforce obedience to those requirements [the privileges and immunities portion of the second section of the fourth article] of the Constitution." Cong. Globe, 39th Cong., 1st Sess. 1034 (1866). Given the intense debate in Congress over constitutional authority to pass the Civil Rights Bill, even in its pristine form, *e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1291-92 (Statement of Bingham); *id.* at 2896 (Statement of Doolittle), it is doubtful, at best, that Congress would have tried to expand its coverage to allow direct damage actions. Such an idea had to await the passage of the Fourteenth Amendment and was the impetus for the Amendment's introduction.

More to the point, on March 8, 1866, one of the foremost supporters of civil rights, Representative Bingham, the father of the Fourteenth Amendment, moved to amend a motion to recommit S. No. 61, the legislation which ultimately became the Civil Rights Act of 1866, as follows:

> I move to amend the motion . . . by adding the following:
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> With instructions to strike out of the first section the words "and there shall be no discrimination in civil rights or immunities among citizens of the United States in any State or Territory of the United States on account of race, color, or previous condition of slavery," and insert in the thirteenth line of the first section, after the word "right" the words "in every State and Territory of the United States." *Also to strike out all parts of said bill which are penal, and which authorize criminal proceedings, and in lieu thereof to give to all citizens* injured by denial or violation of any of the other rights secured or protected by said act *an action in the United States courts* with double costs in all cases of recovery, without regard to the amount of damages; . . . .

Cong. Globe, 39th Cong., 1st Sess. 1271-72 (March 8, 1866) (emphasis added). The motion died on the legislation's floor manager's demand for the previous question, 53-45. *Id.* Incon-

trovertibly, the Congress spoke and its intent cannot be mistaken; it rejected the right to a damage action, opting instead for penal provisions.[29] The rejection of Bingham's amendment and the retention of criminal penalties in the Act of 1866, despite strong arguments about the injustice of criminal liability, compellingly demonstrates that the Congress in 1866 grappled with the availability of a right of action to enforce section 1 and explicitly rejected it. The refusal to adopt the Bingham amendment rejected any concept of *respondeat superior*.

In explaining the intent of the proposal to the Congress, Senator Trumbull remarked that the entire proposal was directed only at persons who act under color of state law. Cong. Globe, 39th Cong., 1st Sess. 1758 (1866). Although Senator Trumbull was talking about section 2 of the bill, his commentary is applicable to the entire legislation since he prefaced his theme by saying: "[I]n my judgment . . . this second section . . . is the vital part of the bill," and "[w]ithout it, it would scarcely be worth the paper on which the bill is written." *Id.* He further explained that section 1 granted only privileges and rights but otherwise has "no consequence."[30] *Id.* Earlier, when he introduced S. 61,

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29 In light of the graphic legislative history rejecting a right of action, it is hard to comprehend *Runyon v. McCrary*, 427 U.S. 160 (1976). However, the Court has signaled that it, too, questions the validity of *Runyon*. *Cf. Patterson v. McLean Credit Union*, No. 87-107 (Order of April 25, 1987). Even if *Runyon* is reaffirmed, it does not invalidate the argument which respondent is making. The fact that this Court has found that a private sector cause of action furthers Congressional policy does not establish the necessity of going around the Congressional will by finding a public sector right of action outside of § 1983. Section 1983 is the means which the Congress authorized for suing public institutions; an implied right is therefore unnecessary. The statutory provision for one form of proceeding normally precludes implying an intent by the Congress that another form of enforcement is warranted. *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U.S. 453 (1974).

30 Justice Harlan quoted Trumbull's statements as to the intent of the legislation, thusly: "It will have no operation in any State where the laws are equal, where all persons have the same civil rights without regard to color or race. It will have no operation in the State of Ken-

he divulged that, while section 1 defines the rights of all persons, "[t]he other provisions of the bill contain the necessary machinery to give [the rights] effect." *Id.* at 474. The machinery being, of course, the criminal sanctions. In explaining why he was voting for the bill, Senator Stewart stated: "He must do it under the color of the law. If there is no law or custom in existence in a State authorizing it, it will be impossible for him to do it under color of any law." Cong. Globe, 39th Cong., 1st Sess. 1785 (1866). *See also id.*, at 2511 (Remarks of Eliot); *id.* at 1294 (Remarks of Shellabarger) (a lawyer). Accordingly, from the time of its adoption, the 1866 Act was considered to be controlled by section 2, the criminal provision.

The later Reconstruction Congresses also viewed the 1866 Act as limited to a criminal remedy, as opposed to granting a civil rights' cause of action for damages. Hence, in 1870 and, especially in 1871, Congress moved to fill the vacuum created by the lack of private enforcement provisions contained in the 1866 Civil Rights Act.[31] In 1870, after the adoption of the Four-

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tucky when her slave code and all her laws discriminating between persons on account of race or color shall be abolished." *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 459 (1968), *quoting* Cong. Globe, 39th Cong., 1st Sess. 476 (1866). This quote, like the other remarks quoted in the text, indicates Congress' intent to limit the 1866 Act's scope to laws, policies, and customs of governments.

31 The 1866 Act contains language that one might construe as allowing a private right of action in the federal courts. Section 3 states in part that "the district courts . . . shall have . . . cognizance . . . of all causes, *civil* and criminal, affecting persons who are denied . . . any of the rights secured to them by the first section of this act . . . ." Emphasis added. However, a close reading of the provision, with an eye on the phrases surrounding the clause, along with consideration of the problem being addressed by the 39th Congress, leads to the inescapable conclusion that the design was meant to allow a person to bring a state law claim into the federal courts when some state requirement precluded it from being litigated in the local system. The Congress was chiefly concerned with old "Slave Codes" and the quasi-slave "Black Codes" which prevented the newly freed Americans from testifying in cases involving whites. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess., at 39, 474, 516-17, 602-03, 1123-25, 1151-53, 1160 (1866); *see generally* S. Exec. Doc. No. 6, 39th Cong., 2nd

teenth Amendment, the 41st Congress reenacted the criminal portion of the 1866 Act (presently 18 U.S.C. § 242) basing its power on the newly enacted Amendment. It also added what is presently 18 U.S.C. § 241, reaching private conspiracies which interfere with civil rights. The debates uncloak the intention of the drafters of the earlier Civil Rights Act. The remarks of Senator Pool of North Carolina, for example, present the view that the Civil Rights Act was solely to be enforced as a criminal statute. Cong. Globe, 41st Cong., 2nd Sess. 3611 (1870).

Even a cursory review of the legislative history of the 18 . Act shows that the opponents of the proposed law were bristling over the break from old constitutional theories by the granting of a private cause of action for damages. Representative McHenry summarized the fear best, asserting that the bill would "rob" the states' tribunals of their rightful jurisdiction "by a power of the Federal Government . . . so flagrant that the people will hold to a strict accountability those men . . . who perpetrate the outrage." Cong. Globe, 42nd Cong., 1st

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Sess. The provision meant to allow, for example, blacks to sue whites in federal court for breach of contract, action of ejectment or negligence. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 602-03 (1866) (Statement of Senator Lane); Cong. Globe, 39th Cong., 1st Sess. 604-05 (1866) (Statement of Senator Trumbull); Cong. Globe, 39th Cong., 1st Sess. 630 (Statement of Rep. Hubbard) (The blacks "are not permitted to sue in the courts or testify against a white man"); Cong. Globe, 39th Cong., 1st Sess. 1159-60 (1866) (Statement of Senator Windom). *See generally* E. McPherson, *The Political History of the United States of America During the Period of Reconstruction* 29-44 (1871); Readers Guide, *Reconstruction Debates* at vi-xiv. This reading of the statute is forcefully supported by later attempts by Senator Sawyer to amend the Act to insure that it achieved its goal. *See, e.g.*, S.B. 715, 41st Cong., 2nd Sess. (1871) ("[I]t being the true intent and meaning of the act to which this is supplementary [Civil Rights Act of 1866] to have the same law administered in the Courts of the United States to the persons denied the right secured to them by said act and is administered in the courts of record of the State to persons not denied these rights . . . ."). For another version of the purpose of this clause, see *Mahone*, 564 F.2d at 1044-47 (although Judge Garth's view is plausible, we believe that our interpretation is the correct one).

Sess. 429 (1871). Even discounting the obvious hyperbole, the speech displays the novelty in 1871, five years after the passage of the Civil Rights Act, of the remedy section 1 was about to grant.

Of course, even on the Republican side, the understanding was that the Civil Rights Act of 1866 would not be enforced by a damage action. In explaining the Ku Klux Klan bill in the House, the floor manager, Representative Shellabarger, who served in Congress in 1866, opened debate on the 1871 Civil Rights Act by analogizing the bill to the 1866 law. He noted that the bill before Congress was patterned on the Civil Rights Act of 1866; but, he continued, whereas the 1866 Act was only criminal, the proposal before the House provides for a "civil remedy." Cong. Globe, 42nd Cong., 1st Sess. app. 68 (1871).[32]

Representative Blair, who is quoted in *Monell*, 436 U.S. at 673, explained, during the debates on the Sherman Amendment:

> The proposition known as the Sherman amendment . . . is entirely new. It is altogether without a precedent in this

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32 After reading the first section of the bill, Mr. Shellabarger justifies it by arguing:

> The model for it 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 for, except that the deprivation under color of State law must, under the civil rights act, have been on account of race, color, or former slavery. This section of this bill, *on the same state of facts*, not only provides a civil remedy . . . to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship.

Cong. Globe, 42nd Cong., 1st Sess. app. 68 (1871) (Statement of Shellabarger). Emphasis added. Thus, the Ku Klux Klan Act was the first effort to "afford a federal right in federal courts [to litigate] . . . claims of citizens to the enjoyment of [the] rights, privileges and immunities," *Monroe v. Pape*, 365 U.S. 167, 180 (1961), defined in the Civil Rights Act of 1866.

> country. . . . [The Amendment] lay[s] . . . obligations . . . upon the municipalities.
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> [I]t is proposed . . . *to create that obligation* . . . .

Cong. Globe, 42nd Cong., 1st Sess. 795 (1871). Emphasis added. Of course, if a civil cause of action allowing municipal liability under the doctrine of *respondeat superior* had been introduced with the 1866 Act, the proposition would hardly have been "without a precedent."

The few federal cases decided between the time of the adoption of the 1866 Act and the civil enforcement provisions in 1871 reflect Congress' intent that section 1 was to be enforced only as a criminal statute or by writ of habeas corpus. *See United States v. Rhodes*, 27 Fed. Cas. 785 (No. 16,151) (C.C.D. Ky. 1866); *In re Turner*, 24 Fed. Cas. 337 (No. 14,247) (C.C.D. Md. 1867). The act was never used during that period, to our knowledge, by any member of a protected class to enforce § 1 by means of a civil damage action in the federal courts. *Mahone*, 564 F.2d at 1040.

The draft of the proposed Revised Statutes also supports the view that § 1983 was meant to provide all deprivations mentioned in § 1981 and was to be the source of civil actions vindicating the rights granted. While there wasn't any note accompanying the chapter on Civil Rights, an extensive note was written regarding the jurisdiction of the federal courts to redress deprivations of rights secured by the Constitution and laws. 1 Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose, Title XIV, Ch. 7, 359-63 (1872). The note follows the proposed jurisdictional statement for the Circuit Courts,[33] and makes clear that the pro-

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33 The proposed jurisdictional provision reads, in part, as follows:

> 15. Of all suits authorized by law to be brought by any person to redress the deprivation, under *color of any law, statute, ordinance, regulation, custom or usage of any State*, of any right, privilege, or immunity, secured by the Constitution of the United States, or *of*

vision is to enforce the Act of 1866, the Act of 1870, and the Act of 1871. In actuality, the marginal note makes this unmistakable.

> Suits to redress deprivation of rights secured by the Constitution and laws to persons within jurisdiction of United States.

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20 April 1871, ch. 22 § 1, vol. 17, p.13
31 May 1870, ch. 114 §§ 16, 18, vol. 16, p. 114
9 April 1866, ch. 31 § 3, vol. 14, p. 27

Id. at 359. The following note only serves to strengthen the salient meaning of the marginal note:

> It may have been the intention of Congress to provide, by this enactment [Civil Rights Act of 1871], for all the cases of deprivations mentioned in the previous act of 1870, and thus actually to supersede the indefinite provision contained in that act. But as it might perhaps be held that only such rights as are specifically secured by the Constitution, and not every right secured by a law authorized by the Constitution, were here intended, it is deemed safer to add a reference to the *civil rights act*.

Id. at 362. Emphasis added.

In light of the jurisdictional provision and the accompanying notes, it is ludicrous to try to distinguish *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) (hereinafter cited as *Monell*), on the grounds that § 1983 includes the "Any person who . . . shall subject, or cause to be subjected" language, although § 1981 does not. *See* Brief of Respondent at 12-13. The language used in § 1981 may be different than that used in § 1983, however, the intention is the same. Section 1981

> any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.
>
> Emphasis added.

was meant to come within the umbrella of § 1983 and was believed by the Revisors in 1872, only a few years after the several acts were adopted, to be co-extensive with it, not expansive.

Justice White persuasively argued in his dissent in *Runyon v. McCrary*, 427 U.S. 160, 195 (White, J., dissenting), that the plain language of 42 U.S.C. § 1981 does not allow an implied right of action against private individuals and that the statute in its present form is completely based on the authority of the Fourteenth Amendment, which controls "state action." *Id.* at 201-02. Although he did not carry the day in *Runyon*, his views were certainly not rejected by all members of the Court. *See id.* at 186 (Powell, J., concurring); *id.* at 189 (Stevens, J., concurring). Moreover, the legislative history leaves "no doubt" that the construction of § 1981 in *Runyon* "would have amazed the legislators who voted for it." *Id.* at 189 (Stevens, J., concurring). In any event, if *Runyon* is overruled and does not imply any direct, right of action to enforce the rights, privileges, or immunities granted by § 1981, the Fifth Circuit must be sustained as then clearly § 1983 will be the only vehicle creating a right of action against a school district. If *Runyon* is sustained and is held to allow a direct right of action against a private entity, the decision will not effect this litigation. The Court will still be called upon to determine if it should imply an action, independent of § 1983, against public agencies. Certainly, it would not be appropriate to imply an action here when § 1983 is already available for persons deprived of their rights by state action. Congress' action in adopting § 1983, by itself, says how they intended civil rights actions to be brought against municipalities. If Congress had wanted civil rights actions to be broader than now allowed under § 1983, the legislation adopting § 1981 would have provided for it.

In *Cort*, it was acknowledged that "an explicit purpose to *deny* such cause of action would be controlling." 422 U.S. at 82 (emphasis added). Where the legislature rejects a cause of action for damages, a private right of action against state entities cannot be presumed. This view is strengthened by the Court's recognition that the Congress, not the Court, is the proper body to be devising legislation, *cf.*, *e.g.*, *National Rail-*

road Passenger Corp. v. National Assn. of Railroad Passengers, 414 U.S. 453 (1974); *Securities Investor Protection Corp. v. Barbour*, 421 U.S. 412 (1975); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Piper v. Chris-Craft Industries*, 430 U.S. 1 (1977), and that a "strict approach" to developing implied rights of action is required, *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1978), by the separation of powers doctrine. *See Private Causes of Action*, *supra* at 619. With these perspectives in mind, Justice, now Chief Justice, Rehnquist, cautioned that "[n]ot only is it 'far better' for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch." *Id.* at 718. "The creation of private causes of actions," according to Justice Powell, "is a legislative function" and the "federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction." *Id.* at 730-31 (Powell, J., dissenting).

The most potent reason why this Court should not imply an independent, direct cause of action comes from *Cort*'s third precept: "[U]nder *Cort*, a private remedy should not be implied if it would frustrate the underlying purpose of the legislative scheme." 441 U.S. at 677. Here, the Congress devised a scheme whereby one could sue to enforce their statutory and constitutional rights. This formula is embodied in section 1983. The scheme, however, has certain restrictions, one of which is that the actor function under color of state law. Section 1983 also requires that a state institution only be subject to liability when its policies create the deprivation and bestows upon defendants a qualified immunity. "It would wholly frustrate explicit congressional intent to hold that the [plaintiff] . . . could evade [these] requirement[s] by the simple expedient of putting a different label on [his] pleadings," to quote this Court's opinion on a different but analogous topic. *Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973).

It is only when the statute granting the privilege has "no other remedy to redress [the] violations of the statute" that a

private remedy will be inferred. 441 U.S. at 728 (White, J., dissenting); *see also Great American Federal Savings & Loan Assn v. Novotny*, 442 U.S. 366 (1979). The Court has often, if not consistently, refused to create a private right of action if Congress has provided some other means of protecting the privileges. 441 U.S. at 735 (Powell, J., dissenting); *see also Switchmen v. National Mediation Board*, 320 U.S. 297, 300-01 (1943). "Where a statutory scheme expressly provides for an alternative mechanism for enforcing the rights and duties created," Justice Powell warns, the Court should "be especially reluctant ever to permit a federal court to volunteer its services for enforcement purposes." 441 U.S. at 748; *see also Passenger Corp.*, 414 U.S. at 458. A warning which in the context of this case should be obeyed.[34] Moreover, in a variety of situations, including at least one involving the 1866 Act, "the Court has held that a precisely drawn, detailed statute preempts more general remedies." *GSA*, 425 U.S. at 834; *see also Preiser v. Rodriguez*, 411 U.S. at 489-90.

C. *Respondeat Superior*

As previously stated, if this Court does not imply a direct, independent cause of action under § 1981, the question becomes solely one of *stare decisis*: Do the past precedents of the Court apply to the facts of this case? The answer, of course, is a resounding, "YES!."

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34 Some might argue that the Civil Rights Act of 1866 granted, in section 3, a cause of action and that it did not require state action as a prerequisite to come into the federal system. *See supra* note 30. Accepting this as true, *arguendo*, the argument goes nowhere. If Congress saw fit to establish a cause of action in 1866 which did not require state action, it was free in 1871, with the adoption of the Klu Klux Klan Act, and, too, with the Revision in 1874 to narrow the scope of the right to sue for damages and require the deprivation to have occurred under color of state law. In any event, if a private right of action was granted in the '66 Civil Rights Act, it would have been limited, no doubt, by section 2 of the act, as it is now by § 1983, to claims of deprivations of rights under color of "any law, statute, ordinance, regulation, or custom." *Cf. The Civil Rights Cases*, 109 U.S. 3, 16-17 (1883); *Jones*, 392 U.S. at 454 (Harlan, J., dissenting).

In *Praprotnik*, ____ U.S. ____, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988), Justice O'Connor undertook to define the parameters of the Court's prior decisions concerning when a decision by a municipal officer or employee may expose the municipality itself to vicarious liability under section 1983.[35] The Court defined the legal standard against the backdrop of an employee who was laid off from his professional position with St. Louis after successfully appealing a suspension for cause to the city's Civil Service Commission. The employee believed, and a jury found, that the city had violated his First Amendment rights. The jury exonerated each of the individual defendants.

On appeal, the verdict against the city was affirmed since the court felt that the jury's verdict absolving the individual defendants could be harmonized with the finding of liability against the city. The appellate court reconciled the apparent conflict between the jury's findings on the grounds that " 'the named defendants were not the supervisors directly causing the layoff, when the actual damages arose.' " *Id.* at 921, *quoting from* 798 F.2d 1168, 1173n. 3 (8th Cir. 1986). Based upon this holding, the Eighth Circuit sustained the jury's implicit finding that the layoff was brought about by a city policy.

It is important to understand what the circuit ruled before discussing the Court's reversal since it has such a strong bearing upon the current proceeding. The Eight Circuit found that the employee's layoff was brought about by an unconstitutional city policy. Furthermore, the court of appeals concluded that the city could be held liable for the adverse personnel decisions taken by the employee's supervisors since, according to the appellate court, a "policymaker" is one whose employment decisions are "final" in the sense that they are not subject to *de novo* review by higher ranking officials. 798 F.2d 1168, 1173-75 (8th Cir. 1986).

This Court initiated its scrutiny by outlining the previous history surrounding municipal liability for violations of civil rights, beginning with its overruling of *Monroe v. Pape*, 365

35 The constitutional principles applied to "municipalities" also apply to school districts.

U.S. 167 (1961), in the case of *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). *Monell*, of course, held that a municipality was a "person" within the meaning of § 1983. The decision went on to announce, however, that a city could not be found vicariously liable by the use of the doctrine of *respondeat superior*. Municipalities can only be held liable when the injury is inflicted by a government's "lawmakers or by those whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694. According to the *Monell* Court, a city can only be held liable for *its own acts*. This holding was based on the Court's reading of the language of § 1983 in light of the Act's legislative history. 436 U.S. at 691-93. The ruling is consistent with this Court's requirement that factual causation be a predicate for constitutional tort liability, *Mt. Healthy City School Dist. Board of Education v. Doyle*, 429 U.S. 274 (1977); *Givhan v. Western Line Consolid. Sch. Dist.*, 439 U.S. 410 (1979); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 823-24, 824n. 8 (1985); *Martinez v. California*, 444 U.S. 277 (1980), and with the "intention" requirements of cases like *Washington v. Davis*, 426 U.S. 229 (1976), and *General Building Contractors Assn. v. Pennsylvania*, 458 U.S. 375 (1982) ("We conclude, therefore, that § 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination." *Id.* at 391); *see also Griffin v. Breckenridge*, 403 U.S. 88 (1971).

After establishing these primary guideposts, the *Praprotnik* Court "reiterated that the identification of policymaking officials is a question of state law." *Praprotnik*, 108 S.Ct. at 924; *see also Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986) (plurality opinion). As a consequence, the identification of policymaking officials is not a question of federal law and is not, the Court emphasized, a fact question. *Id.* at 924. When presented with a civil rights claim against a municipality, a trial court, or, if necessary, a court of appeals, need look only to the laws of the state (which can include valid local ordinances and regulations) to determine whether a person is a policymaker. Under the precedents canvassed by the Court, a municipality or other governmental agency may not be held liable unless the munici-

pality itself is the constitutional tortfeasor. That is, acts which the municipality has actually ordered by custom or policy must be the source of the constitutional injury. Hence, the resolution that "[w]hen an official's discretionary decisions are constrained by policies not of that official's making, those policies, rather than the subordinate's departures from them, are the act of the municipality." *Id.* at 926. The actions of the Board of Trustees and the General Superintendent fall squarely within the parameters of this holding. DISD can only operate through its agents and employees; it is its administrators who are delegated the authority to conduct the school district's day-to-day business. However, the Board of Trustees limits that delegation by passing policies whose purpose is to govern how its administrators are to use the delegated discretion. It is those policies which subject the district to liability; not the actions of an administrator acting contrary to those policies or in making discrete decisions within the scope of legal, non-discriminatory policies. *Cf. City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).

In the case at bar, the Fifth Circuit refused to examine the law of the State of Texas and apply *Praprotnik* to this case. Had it done so, it would have dismissed the claims against Dallas Independent School District because the responsibilities of the General Superintendent under state law are precise: The General Superintendent is an administrator, governed by the rules, regulations and by-laws of the Board of Trustees; he is not a policy-maker. In fact, the plaintiff introduced sufficient policies which governed the Superintendent's actions in transferring Jett that the proposition is incontestable.[36] Plaintiff has

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36 Because of the various school district policies already discussed, *Pembaur* requires that the issue of the status of the General Superintendent of the Dallas Independent School District be resolved in defendant's favor. The General Superintendent is not a policymaker. In addition, state law precludes him from becoming one. Tex. Educ. Code § 23.01 states that "The public schools of an independent school district shall be under the control and management of a board of . . . trustees." Furthermore, state law establishes that these "trustees shall have the *exclusive* power to manage and govern the public free schools

put forth—and certainly the Fifth Circuit found—no evidence which would show that any policy of the Dallas Independent School District violated any of his constitutional rights. Neither can he provide any evidence that the members of the Board of Trustees acted in any way to deprive him of his constitutional rights. In reality, he proved the opposite by introducing policies which were meant to protect employees from racial discrimination and which guaranteed due process upon an involuntary transfer.

Praprotnik applies because this is, quite simply, a § 1983 case, not a direct action under § 1981, and accordingly the precedent is *stare decisis*. The rights to be protected most assuredly come from § 1981; nevertheless, the cause of action comes from § 1983.

II.

Respondeat Superior is Not a Legally Valid Basis for Imposing Liability on the Dallas Independent School District Under 42 U.S.C. § 1981.

In 1978, the Court probed the applicability of *respondeat superior* in a case which arose under section 1983 to enforce rights which were granted by the Fourteenth Amendment's Equal Protection clause to the plaintiffs, women who were forced to take illegal, unpaid pregnancy medical leaves. In the resolution of that case, the Court held that:

> [T]he language of § 1983, read against the background of [its] legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless [municipal] action . . . caused a constitutional tort. In

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of the district," Tex. Educ. Code § 23.26(b) (emphasis added), and "may adopt such rules, regulations, and by-laws as they may deem proper." *Id.* at § 23.26(d). The General Superintendent, unlike a member of the Board of Trustees, is "the educational leader and the *administrative manager* of the school district." *Id.* at § 13.351. Emphasis added.

> particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory.

Monell, 436 U.S. at 691. Emphasis in original.

The Court has several times since *Monell* reaffirmed the conclusion that *respondeat superior* does not support municipal liability and that an agency of the state may be held liable only for its own constitutional violations. *Praprotnik*; *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986); *City of Oklahoma City v. Tuttle*, 471 U.S. 808 (1985). Each of these cases was buttressed by § 1983. Hence, as to litigation brought under the umbrella of § 1983, the question as to municipal responsibility via the doctrine of *respondeat superior* is not open.[37] And, while *Monell* was decided under § 1983, it applies with equal validity here, even if a direct, implied cause of action is found to exist under § 1981 in spite of § 1983's applicability to the school district.

To impose municipal liability on a *respondeat superior* theory simply because the case seeks to vindicate § 1981 rights would be incompatible with the *Monell* Court's logic. Although the Court braced its decision on the specific wording of section 1983, the language of the act was not the only foundation upon which the Court built. *See City of Oklahoma City v. Tuttle*, 471 U.S. at 817-18; *Pembaur*, 475 U.S. at 478-79.[38] *Monell* recognizes that in passing the Civil Rights Act of 1871, ch. 22, 17 Stat. 13, Congress avoided "creation of a federal law of *respon-*

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37 Since *Monell*, the question has arisen in several lower courts as to whether the *respondeat superior* theory may be applied to § 1981. *E.g.*, *Jett v. Dallas Independent School District*, 798 F.2d 748 (5th Cir. 1986), *on motion for rehearing*, 837 F.2d 1244 (5th Cir. 1988); *Springer v. Seamen*, 821 F.2d 871 (1st Cir. 1987); *Leonard v. City of Frankfort Electric and Water Plant Board*, 752 F.2d 189 (6th Cir. 1985) (*dicta*).

38 Justice Brennan maintains that the wording of § 1983 is not the primary source for *Monell*'s conclusion that *respondeat superior* liability cannot be imposed on government bodies for deprivations of civil liberties. Rather, the conclusion rests "[p]rimarily" according to his opinion in *Pembaur*, "upon the legislative history." 475 U.S. at 479.

deat superior [because it] would have raised all the constitutional problems associated with the obligation to keep the peace . . . ." *Id.* at 693. Certainly if § 1983's framers were apprehensive about a constitutional impediment to *respondeat superior* liability in the Civil Rights Act of 1871, *see Monell*, 436 U.S. at 692 n. 57, after the passage of the Fourteenth Amendment, the same fear was, most assuredly, present when the 39th Congress adopted the 1866 Act. *Cf. id.* at 694. Moreover, had the earlier act contemplated vicarious liability, it is safe to assume that the Sherman amendment's[39] supporters would have used it in debate.

Monell speaks of constitutional torts, *id.* at 691, not of § 1983 torts. To the extent that § 1981 defines the limits of the rights, privileges, or immunities of citizenship, a violation of the provision creates a constitutional tort. Moreover, we can discern no legitimate reason why one who sues to protect Constitutional rights, as, for example, First Amendment freedoms, or, like in *Monell*, Fourteenth Amendment equal protection of the laws, should be denied the use of *respondeat superior* whereas a person who sues to protect a statutory right can utilize the doctrine. It seems that we are putting the wrong foot forward when we make statutory rights, even those that define privileges and immunities, more meaningful than those guaranteed by our Constitution. There is, too, little difference in the rights sought to be protected. Petitioners in *Monell* were endeavoring to prevent class based discrimination, albeit, they were not within the ambit of protection offered by the Thirteenth Amendment or § 1981.

City of Oklahoma City v. Tuttle, 471 U.S. 808 (1985), spotlighted the logic of *Monell* and reiterated that a municipality

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39 During the debates over the legislation which lead to the adoption of the Civil Rights Act of 1871, Senator Sherman introducted an amendment which attempted to allow municipal corporations to be named in actions for damages caused by riot. Cong. Globe, 39th Cong., 1st Sess. 663 (1866). As the amendment came out of committee, it placed the responsibility for damages directly upon the municipality. *Id.* at 749-55. The defeat of the amendment has been a mainstay in the analysis of the meaning of section 1983. *See, e.g., Monroe v. Pape*, 365 U.S. 167, 191 (1961); *Monell*, 436 U.S. at 691n. 57.

could only be liable for its own constitutional torts. *Id.* at 818 (plurality opinion).[40] The Court confirmed the position in *Pembaur* and recently, again, in *Praprotnik*.

In *Pembaur*, the Court expressed the conclusion, based upon the legislative history reviewed in *Monell*, that § 1983 could not be interpreted to incorporate any vicarious liability doctrines. It was the view of the *Pembaur* Court 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*." 475 U.S. at 479 (emphasis added). It was the necessity of avoiding the creation of a federal law of *respondeat superior* which inevitably led to the result reached in *Monell*. *Id.*

The Court has tracked the history of section 1981 in numerous opinions, *see General Building Contractors Assn.*, 458 U.S. at 383-84; *see also Georgia v. Rachel*, 384 U.S. 780 (1966), and we do not feel it necessary to attempt to resolve the question of § 1981's ancestry here. *See, e.g., Runyon v. McCrary*, 427 U.S. at 192-205 (White, J., dissenting). Suffice it to say that following the ratification of the Fourteenth Amendment, Congress passed the Civil Rights Act of 1870, Ch. 114, 16 Stat. 140 (also known as the Voting Rights Act or the Enforcement Act), which included, pursuant to the power granted Congress by § 5 of the Amendment, and in order to constitutionally shore up

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40 *Amici* NAACP Legal Defense Fund and ACLU have spent a considerable portion of their brief discussing the availability of *respondeat superior* at the time that the Civil Rights Act of 1866 was adopted. We do not feel that the common law doctrine's existence is relevant. If the Court wishes to imply a direct cause of action, it can certainly draft the contours of the right. If it wishes to deny the use of *respondeat superior*, the fact that it existed at common law now, one or two hundred years ago, is equally irrelevant. In any event, as the majority opinion in *City of Oklahoma City*, 471 U.S. at 819n. 5, points out, the cases known to have allowed vicarious liability to be applied to municipalities at the time that the various Reconstruction Civil Rights Acts were enacted, do not support the broad *respondeat superior* liability requested by the plaintiff.

the previous Civil Rights Act,[41] a reenactment of the 1866 Act in its entirety. Section 16 of the 1870 Act seems to be patterned on § 1 of the Civil Rights Act of 1866, but differs in a few respects from that Act. It does contain virtually the identical language to that which is now contained in present § 1981.[42]

General Building Contractors v. Pennsylvania, 458 U.S. 375 (1982), is instructive, although the Court did not use the opportunity of the case to determine the issue now before the Court. The Court was first called upon to see if "discriminatory intent" is a necessary ingredient of a cause brought to enforce the privileges safeguarded by § 1981. In arriving at its conclusion that "intent" to discriminate is a necessary part of the proof in an action to enforce § 1981, the Court tracked the evolution of present day § 1981 and, quoting from *Hurd v. Hodge*, 334 U.S. 24, 32-33 (1948), recognized the common heritage of the Civil Rights Act of 1866 and the Fourteenth Amendment. 458 U.S. at 384-85. In determining whether § 1981 reaches practices that merely result in a disproportionate impact, it was important to keep in mind, the opinion taught us, the history of the times and the events which forged the law. *Id.* at 386; *see also Strauder v. West Virginia*, 100 U.S. 303, 306-07 (1879); *see generally* K. Stampp, *The Era of Reconstruction, 1865-1877* (1965). The Court's study of those events and the legislative debates led it to conclude that "Congress instead acted to protect the freedmen from *intentional* discrimination by those

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41 *E.g.*, Cong. Globe, 39th Cong., 1st Sess. 2511 (1866) (Remarks of Rep. Eliot); *see* R. Matasar, *Personal Immunities Under Section 1983; The Limits of the Court's Historical Analysis*, 40 Ark. L. Rev. 741, 766n. 112 (1987) ("It is commonly known that the fourteenth amendment was passed in part to insure the constitutionality of the Act of 1866").

42 The legislative history of § 1983 is outlined in *Monell* and need not be summarized here. Section 1981, in its present form, has been law since 1870. It was adopted as § 16 of the Voting Rights Act of May 31, 1870, ch.114, 16 Stat. 140. It was the result of the Congress' view that the States were depriving newly freed persons of the equal protection of the law in violation of the Fourteenth Amendment. *Cf.* Cong. Globe, 41st Cong., 2nd Sess. 3 (1869); Cong. Globe, 41st Cong., 2nd Sess. 3658 (1869) (Statement of Senator Stewart); *see also Runyon*, 427 U.S. at 197-202 (White, J., dissenting).

whose object was . . . [to make them] victims of unjust laws." *Id.* at 388. Emphasis added.

Two things stand out from the Court's explanation of the law's purpose and reach. If the law is meant to reach only "intentional" violations, *respondeat superior* is incompatible with it. The doctrine of *respondeat superior* places liability upon an employer solely because he, she or it is an employer; intent becomes meaningless. Moreover, once intent is removed from the statute, one of the main policy reasons for the law will be lost. The law was meant to reach "constitutional tort-feasors" and to prevent them from denying individuals their rights. If liability is shifted to the state regardless if it is at fault, the deterrent will be moved.

The second aspect of the Court's pronouncement is that § 1981 was aimed at "unjust laws." Clearly, the intention is to punish the state as a creator of those laws and not as an employer. Finally, the Court's concluding remarks about the Fourteenth Amendment and its relationship to the modern day § 1981 are illuminating. The Court wrote:

> [T]he origins of the law can be traced to both the Civil Rights Act of 1866 and the Enforcement Act of 1870. Both of these laws, in turn, were legislative cousins of the Fourteenth Amendment. The 1866 Act represented Congress' first attempt to ensure equal rights for the freedmen following the formal abolition of slavery effected by the Thirteenth Amendment. As such, it constituted an initial blueprint of the Fourteenth Amendment, which Congress proposed in part as a means of "incorporat(ing) the guaranties of the Civil Rights Act of 1866 in the organic law of the land." [Citation omitted] The 1870 Act, which contained the language that now appears in § 1981, was enacted as a means of enforcing the recently ratified Fourteenth Amendment. In light of the close connection between these Acts and the Amendment, it would be incongruous to construe the principal object of their successor, § 1981, in a manner markedly different from that of the [Fourteenth] Amendment itself.

Id. at 389-90. This language answers the challenge that § 1981 does not include the phrase "under color of state law" or the "causes to be subjected" language. Of course, section 2 of the Act did include similar language and it was the means by which section 1 was to be enforced. *The Civil Rights Cases*, 109 U.S. at 16-17. Even with the metamorphosis that the 1866 statute went through, the intention remained that "cause" under "color of state law" be required for enforcement. *See Virginia v. Rives*, 100 U.S. 313, 317-18 (1879) (*dictum*). The drafters' notes accompanying the previously discussed proposed revision makes this explicit.

The above-referenced language leads to the inevitable conclusions that § 1981 should not be construed in a manner markedly different from the Act, section 1983, which implemented the Fourteenth Amendment. Statutory law is not drafted in a closet. Past legislative decisions influence the drafting of bills. New legislation ties to past experience and prior enactment. Uniformity and consistency of regulation is as important in the halls of Congress as it is in the hallowed room of this Court. *See generally* 2A Sutherland, Statutes and Statutory Construction § 45.10 (J. Singer 4th ed. 1984). The Congress that passed the Civil Rights Act of 1866, initiated the Amendment that was implemented by the Congress that adopted the Civil Rights Act of 1871. Unquestionably, it knew of the construction that had been placed upon the 1866 Act by the Congress that adopted it and sought to have § 1983 fit the same mold. *See generally* A. Avins, *The Civil Rights Act of 1866, The Civil Rights Bill of 1966, and the Right to Buy Property*, 40 S. Cal. L. Rev. 274, 304 (1967). Looking backward, the defeat of the Sherman amendment in 1871, just as decidedly, was caused by the same concerns which had to govern the drafters of the 1866 Act. *See Monell*, 436 U.S. at 658 n. 57. If the defeat of the Sherman amendment tells us that § 1983 does not support the use of the doctrine of *respondeat superior*, it equally reveals the same about § 1981.[43] *See* R. Matasar, *Personal Immunities Under*

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43 "[W]hen Congress' rejection of the only form of vicarious liability presented to it is combined with the absence of any language in

Section 1983: The Limits of the Court's Historical Analysis, 40 Ark. L. Rev. 741, 766-68, 766n. 112 (1987).

In 1866, without the benefit of the Fourteenth Amendment, concerns about federalism almost prevented the 1866 Act from becoming law. *Cf.*, *e.g.*, Globe at 1083 (Remarks of Rep. Davis); *id* at 2446 (Remarks of Senator Grimes). Those who doubted its legitimacy presumed that the law would impinge on the domain of the states by interfering with their internal law-making and judicial affairs. *E.g.*, Cong. Globe, 39th Cong., 1st Sess. 1120-21 (1866) (Remarks of Rep. Rogers); *see generally* J. TenBroek, *Equal Under the Law* 183 (1958). These fears would have prevented the Congress from expanding the reach of the 1866 Act by the use of the doctrine *respondeat superior*.

Monell, as the Fifth Circuit recognized in *Jett*, 837 F.2d at 1247, was in part grounded on the absence of any language in § 1983 which could be construed to create *respondeat superior* liability. 436 U.S. at 2037n. 57. "This is, of course," to quote the appellate court, "likewise true as to section 1981." *Id.* Moreover, as we have tried to emphasize throughout this brief, § 1981 contains no language of liability; it is only the declaration of rights to be protected. The absence of language creating a cause of action is significant for another reason—one should not construe a statute to allow vicarious liability against municipalities in the absence of a clear Congressional mandate. And, we might add, looking for Congressional intent to allow *respondeat superior* in a statute that does not contemplate any type of civil liability is a gesture in futility. Finally, in the same vain, we are not aware of any criminal prosection of a municipality based upon the official criminal conduct of one of its employees. The employee may face criminal charges; the city does not.[44] If a municipality could not be vicariously charged

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§ 1983 which can easily be construed to create *respondeat superior* liability, the inference that Congress did not intend to impose such liability is quite strong," according to *Monell*. 436 U.S. at 693 n. 57. The same is true when applied to § 1981.

44 Representative Bingham imparted this very thought to the Congress during the debate over the Ku Klux Klan act: "It is clear that if Con-

with a crime, then it is logical to assume that the Congress that passed the 1866 Civil Rights Act as a criminal law could not have had any type of *respondeat superior* liability in mind when they voted it into law. Recognizing that the 1866 Act was a criminal law statute, looking at it to determine if the Congress intended to apply the common law doctrine of *respondeat superior* to § 1981 civil actions can, of course, lead to uniquely one result: by definition, the intent to incorporate the doctrine must be absent.[45]

The above cases apply whether the present day § 1981 is derived from the Civil Rights Act of 1866, the Enforcement Act of 1870 or the Ku Klux Klan Act. Starting with the 1866 Act, two points are salient. As passed, section 1 of the Act was intended to be enforced by the provisions of section 2. *See, e.g.*, Globe at 1758 (Remarks of Senator Trumbull). Section 2 was, according to Senator Trumbull, the "machinery to carry [section 1] into effect." *Id.* at 475. In interpreting the measure, one cannot look at section 1 in a shadow. Section 2 provides, in almost identical language to the language from § 1983 which was compelling in deciding *Monell*: "*Any person who*, under color of any law . . . *shall subject, or cause to be subjected*, any person . . . to the deprivation of any right . . . shall . . ." *Compare* Civil Rights Act of 1866, § 2, ch. 31, 14 Stat. 27 (1866), *with Monell*, 436 U.S. at 691-92. Emphasis added.

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gress do so provide by penal laws for the protection of these rights, those violating them must answer for the crime, and *not the States*. The United States punishes men, not States, for a violation of its laws." Cong. Globe, 42d Cong., 1st Sess. app. 85-86 (1871). Emphasis added.

45 Plaintiff argues in his brief that the legislative intent to include *respondeat superior* in the 1866 Civil Rights Act can be drawn from the Congress' silence in the face of settled principles existing at the time the statute was adopted. Brief of Petitioner at 26-27. Whether *respondeat superior* existed at the time the 1866 Act was adopted is irrelevant. A principle must apply to the statute being considered before one can assume that silence meant that Congress intended to include the doctrine. Here, unlike the situation with § 1983, where the Congress was passing a civil statute that specifically allowed damage actions, the argument makes little sense.

Given the relationship of section 1 of the 1866 Act to section 2 of the Act, *Monell*'s interpretation of the meaning of "cause to be subjected" applies here in spite of the phrase's absence in present day § 1981.

The intent of Congress in passing the 1866 Act, if it intented any civil remedy at all, which is, of course, highly improbable, was to impose liability via section 2, not section 1, on a government that, under color of some official policy, "causes" an employee to violate another's section 1 rights. *Cf.* 436 U.S. at 692. At the same time, following *Monell*'s reasoning, the language of section 2 "cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Id.*

Furthermore, section 1 of the 1866 Act concluded with the expression "any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding."[46] This language signifies that it was the intention of the Congress to strike down any of the state laws, etc., that were interfering with the ability of former slaves to obtain all the privileges of citizenship. It was the actions of the states at which section 1 was directed, not at individuals, and the use of the "contrary notwithstanding" phraseology in section 1 only served to reinforce the language of section 2. If a legislature did not pass any offensive laws, the Civil Rights Act would not operate within their state. Of course, the legislative history confirms this. *See* Globe at 476 (Remarks of Senator Trumbull); *id.* at 1758. This Court, too, after reviewing this language, arrived at this identical conclusion, in 1883, over one hundred years ago, albeit in *dictum*. *The Civil Rights Cases*, 109 U.S. at 16.

One of the persuasive statements demonstrating the fallacy of the assertion that the Congress intented *respondeat superior* to

46 The above-quoted language does not appear in § 1981, however, it was removed from the earlier act when the laws were revised in 1874, hence, its omission is of no consequence. The commissioners were specifically instructed to omit "redundant" enactments and to "simplify" the statutes. Act of June 27, 1866, §§ 1, 2, 14 Stat. 74. The language was unnecessary since the vehicle for enforcement was § 1983.

apply to the 1866 Act was made by Senator Trumbull in his defense of section 2 of the act. In its proper construction, he asks rhetorically, "Who is to be punished?" "Is the law to be punished?" "Are the men who make the law to be punished?" And, most importantly to our inquiry, "Does this section propose to punish the community where the custom prevails?" He answers himself, "Not at all" and continues:

> Or is it to punish the person who, under color of the custom, deprives the party of his right? It is a manifest perversion of the meaning of the section to assert anything else.

Id. Application of the doctrine of *respondeat superior* in the circumstances of § 1981 would most certainly "punish the community" and be a flagrant perversion of the meaning of the section.

Justice White's *Runyon* analysis of the legislative history of § 1981 applies with greater force to the facts of this case than to *Runyon* itself, and leads to the inevitable conclusion that, if § 1981 is a Fourteenth Amendment statute, it must be read, like § 1983, to preclude liability based upon the doctrine of *respondeat superior.* As such, it requires state action as defined in *Monell*, and, accordingly the doctrine of *respondeat superior* cannot be applied to § 1981. Therefore, whether § 1981 is derived from the Civil Rights Act of 1866 or from a later enactment, *respondeat superior* is not a part of the statute's enforcement provisions.

CONCLUSION

The Court should affirm the decision of the Fifth Circuit Court of Appeals that the doctrine of *respondeat superior* does not apply to claims brought to protect the rights, privileges, or immunities granted by section 1981 and affirm the application of *Praprotnik* to the free speech claims. However, the Court should order the case against the defendant Dallas Independent School District dismissed, since no actor involved in the alleged deprivations was a policymaker of the district, as a matter of state law, and the alleged wrongdoers were governed by policies which did not create the asserted constitutional torts.

Respectfully submitted,

LEONARD J. SCHWARTZ*
DENNIS J. EICHELBAUM
BEN W. NIEDECKEN
Dallas Independent School District
3700 Ross Avenue
Dallas, Texas 75204
(214) 824-1620 Ext. 468

*Counsel for Respondent***

* Counsel of Record for the Respondent

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