

87-2084
No. A-902

Supreme Court, U.S.
FILED
JUN 21 1988

W. R. SPANGLER, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

NORMAN JETT,
Petitioner,
v.

DALLAS INDEPENDENT SCHOOL DISTRICT,
Respondent.

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

FRANK M. GILSTRAP
FRANK HILL
SHANE GOETZ
(Counsel of Record)
HILL, HEARD, ONEAL,
GILSTRAP & GOETZ
1400 West Abram Street
Arlington, Texas 76013
(817) 261-2222

Counsel for Petitioner

QUESTIONS PRESENTED *

1. Whether a public employee who claims job discrimination on the basis of race must show that the discrimination resulted from official "policy or custom" in order to recover under 42 U.S.C. § 1981.

2. Whether proof of a policy or custom of conscious indifference to possible racial discrimination in employee reassignment cases, promulgated by the final decisionmaker in such personnel matters, supports the imposition of municipal liability under 42 U.S.C. § 1983.

[NOTE: Petitioner reserves the right to argue Questions 3 and 4 in the event certiorari is granted on either or both of the above questions, but does not include Questions 3 and 4 among the reasons for the grant of certiorari.]

3. Whether a public employee serving under an employment contract possesses a property interest in the intangible, noneconomic benefits of his job itself, or only in his salary.

4. Whether the issue of constructive termination in a suit under 42 U.S.C. §§ 1981 and 1983 is a fact question for determination by the jury; if so, whether the Court of Appeals erred and exceeded its appellate authority in this case by reversing the jury finding of constructive termination, concluding "as a matter of law" that a reasonable person in the Petitioner's circumstances would not have felt compelled to resign.

* The Dallas Independent School District (hereafter "Dallas ISD") and Frederick Todd were defendants in the District Court and appellants in the Court of Appeals. Petitioner

subsequently settled his claims against Frederick Todd, and Mr. Todd has been dismissed as a party to these proceedings. App. 82 - 85A. Thus, the only remaining parties are Petitioner Norman Jett and Respondent Dallas ISD.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	9
CONCLUSION	31
APPENDIX	
A. OPINION OF THE COURT OF APPEALS (August 27, 1986)	1A
B. OPINION AND ORDER OF THE COURT OF APPEALS ON SUGGESTION FOR REHEARING EN BANC (February 5, 1988)	33A

C.	MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT (December 10, 1984)	45A
D.	AMENDED REFORMED JUDGMENT OF THE DISTRICT COURT (February 7, 1985)	64A
E.	JUDGMENT OF THE COURT OF APPEALS (August 27, 1986)	66A
F.	SUGGESTION FOR REHEARING EN BANC FILED IN THE COURT OF APPEALS	68A
G.	COURT OF APPEALS' ORDER OF DISMISSAL OF DEFENDANT FREDERICK TODD (December 10, 1987)	82A
H.	DISTRICT COURT'S ORDER OF DISMISSAL OF DEFENDANT FREDERICK TODD (November 18, 1987)	84A
I.	ORDER EXTENDING TME TO FILE PETITION FOR WRIT OF CERTIORARI (April 18, 1988)	86A
J.	ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI (May 19, 1988)	87A

TABLE OF AUTHORITIES

	Page
<i>Bhandari v. First National Bank of Commerce</i> , 808 F.2d 1082 (5th Cir. 1987)	20
<i>Bronze Shields, Inc. v. New Jersey Dept. of Civil Service</i> , 488 F.Supp. 723 (D.N.J. 1980)	21
<i>Burnett v. Grattan</i> , 468 U.S. 421, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984)	11
<i>Cannon v. University of Chicago</i> , 441 U.S. 577, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979)	24
<i>Chapman v. Houston Welfare Rights Organization</i> , 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979)	11, 21, 23, 24
<i>City of St. Louis v. Praprotnik</i> , __ U.S. __, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988)	8, 11, 13, 17, 19, 26, 28, 30
<i>City of Oklahoma City v. Tuttle</i> , 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985)	11, 28, 30
<i>Daniels v. Williams</i> , 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)	27, 28
<i>Garner v. Giarusso</i> , 571 F.2d 1330 (5th Cir. 1978)	15, 16, 28, 29
<i>General Building Contractors Assn. v. Pennsylvania</i> , 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1985)	11, 13, 19, 26, 28
<i>Goodman v. Lukens Steel Company</i> __ U.S. __, 107 S.Ct. 2617, 6 L.Ed.2d 572 (1987)	11

<i>Greenwood v. Ross</i> , 778 F.2d 448 (8th Cir. 1985) . . .	10
<i>Harlow v. Fitzgerald</i> , 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1985)	27
<i>Johnson v. Railway Express Agency</i> , 421 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1975)	12, 18, 24
<i>Jones v. Alfred H. Mayer Co.</i> , 392 U.S. 454, 95 S.Ct. 1716, 44 L.Ed. 295 (1975)	13, 22, 24, 26, 27
<i>Leonard v. City of Frankfort Electric and Water Plant Board</i> , 752 F.2d 189 (6th Cir. 1985) . . .	10
<i>Mahone v. Waddle</i> , 564 F.2d 1018 (3rd Cir. 1977), cert. denied, 438 U.S. 904, 98 S.Ct. 312, 57 L.Ed.2d 1147 (1978)	15, 20, 21, 23, 25, 28
<i>McDonald v. Santa Fe Transportation Company</i> , 96 S.Ct. 2574, 427 U.S. 273, 49 L.Ed.2d 493 (1976)	12
<i>Monell v. Department of Social Services of the City of New York</i> , 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)	8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 21, 22, 23, 26, 27, 28, 29, 30
<i>Monroe v. Pape</i> , 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961)	12, 13, 15, 16, 17, 18, 21, 22, 27
<i>Moor v. County of Alameda</i> , 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973)	24, 26
<i>Newport v. Fact Concerts, Inc.</i> , 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981)	11

<i>Owen v. City of Independence, Missouri</i> , 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1981)	11, 18
<i>Patterson v. McLean Credit Union</i> , 108 S.Ct. 1419, 1988 USLW 35360 (April 25, 1988)	12, 22
<i>Paul v. Davis</i> , 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976)	27, 28
<i>Pembaur v. Cincinatti</i> , 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986)	8, 11, 25
<i>Polk County v. Dodson</i> , 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981)	11
<i>Runyon v. McCrary</i> , 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976)	12, 19, 20, 22, 23
<i>Saint Francis College v. Al-Khazraj</i> , 481 U.S. ___, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987)	11
<i>Sethy v. Alameda County Water Dist.</i> , 545 F.2d 1157 (9th Cir. 1976)	15, 20
<i>Springer v. Seamen</i> , 821 F.2d 871 (1st Cir. 1987) . .	10, 11, 17
<i>Springfield v. Kibbe</i> , 480 U.S. ___, 107 S.Ct. 1114, 94 L.Ed.2d 293 (1987)	8, 30
<i>Sullivan v. Little Hunting Park</i> , 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969)	17, 24
<i>Taylor v. Jones</i> , 653 F.2d 1193 (8th Cir. 1981)	10
<i>Wells v. Dallas Independent School District</i> , 793 F.2d 679 (5th Cir. 1987)	18

Statutes

42 U.S.C. § 1981	11, 14, 15,
.	16, 17, 18,
.	19, 21, 26,
.	27
42 U.S.C. § 1982	22
42 U.S.C. § 1983	14, 15, 16,
.	17, 19, 21,
.	23, 24, 25,
.	26, 27, 29

Treatises

Brennan, <i>Some Thoughts on the Supreme Court's Workload</i> , <i>Judicature</i> , Vol. 66, No. 6, December-January 1983 p. 230, 233 ("tolerable conflicts")	11
Kohl, <i>The Civil Rights Act of 1866, Its Hour Come Round At Last</i> , Vol 55, U. of Va. L. Rev. p. 272-293 (1969)	22

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

NO. A-802

NORMAN JETT,

Petitioner,

V.

DALLAS INDEPENDENT SCHOOL DISTRICT,
Respondent.

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

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in *Norman Jett v. Dallas Independent School District and Frederick Todd*, 798 F.2d 748 (5th Cir. 1986), supplemented on Petitioner's Suggestion for Rehearing *En Banc*, 837 F.2d 1244 (5th Cir. 1988).

OPINIONS BELOW

The initial opinion of the United States Court of Appeals for the Fifth Circuit is reported at 798 F.2d 748, and is reprinted *infra* at App. 1A. The order of the Fifth Circuit denying

rehearing, and supplementing its initial opinion, is reported at 837 F.2d 1244, and is reprinted at App. 33A. The opinion of the United States District Court for the Northern District of Texas, Dallas Division, is unreported and is printed *infra* at App. 45A.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 27, 1986. App. 1A. A timely petition for rehearing was denied on February 5, 1988. App. 33A. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides in pertinent part as follows:

Congress shall make no law abridging the
Freedom of speech

The Fifth Amendment to the United States Constitution provides in pertinent part as follows:

No person shall be . . . deprived of life, liberty, or
property, without due process of law . . .

The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

Section 1. . . . 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.

42 U.S.C. § 1981 provides that:

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

42 U.S.C. § 1983 provides in pertinent part as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

1. The Facts

Norman Jett served thirteen years as teacher, head football coach, and athletic director at South Oak Cliff High School in Dallas. His teaching record was unblemished; his coaching record was superb. His teams dominated the Dallas high school football scene for years, and over two hundred fifty of his players earned college scholarships. Twenty-five of those went on to the National Football League.

In the spring of 1983 Jett was abruptly removed from his post at the insistence of his school principal, Frederick Todd. Although the District Court and the Fifth Circuit would later agree that Todd's reasons for removing Jett were racial in nature, it appears that something more complex than mere racial antipathy was at work. Todd's racial motives centered on the fact that Jett's South Oak Cliff football teams were all black, while most of the teams they competed against -- especially at the championship level -- were predominantly white.

In Texas, as in other states, the best high school football teams compete at season's end to become state champion. The competition is arduous and at times emotional, and there can be only one winner.

Jett's teams made several appearances in the playoffs, but none made it to the championship game. Jett's final game turned out to be a playoff confrontation with Plano High School, a perennial all white power, before a huge turnout in the Cotton Bowl. There, South Oak Cliff sustained a bitter defeat that deeply affected Principal Todd.

In the wake of the loss Todd decided to replace Jett as head coach. Despite all that Jett had done for South Oak Cliff, Todd apparently doubted that the school could become the first all black team to win the state championship so long as Jett remained at the helm. Todd believed that South Oak Cliff

would have to recruit young black athletes at the junior high school level¹ and he evidently believed that a successful recruiter would have to be black. He decided to replace Jett with a black coach.

Just after the Plano loss, Todd criticized Jett for failing to follow the "game plan" and questioned him about rumors (utterly false) that he had been bribed to "throw the game". Soon afterward he gave Jett an unsatisfactory performance evaluation, the first Jett had received in twenty-six years with the Dallas Independent School District. In March, Todd summoned Jett to his office and summarily relieved him of his coaching/athletic director duties. Jett protested, and the final decision was ultimately made by Dallas ISD Superintendent Linus Wright.

Under Dallas ISD procedures, Jett's removal as coach/athletic director was viewed as a "reassignment". No loss of salary was contemplated. The Dallas ISD Board of Trustees had delegated complete authority to Wright to deal with all aspects of such reassignments; Wright's decisions were final and he had informally promulgated policies to deal with reassignment cases.

Wright cursorily reviewed the matter, first in separate conferences with Jett and Todd, and then with a hastily assembled group of Dallas ISD administrators. Jett told Wright of Todd's racial motives, but Wright disregarded Jett's protests. He resolved the dispute in his customary manner. Faced with an irreconcilable conflict between a principal and

1 Todd criticized Jett for not recruiting black middle school athletes, an unethical practice which is against Dallas ISD policy.

a teacher, Wright always "went with the principal". He did so in this case, even at the risk of upholding a personnel decision arising from unlawful racial motives. Thus, Jett was reassigned as a teacher at the Business Magnet High School, which had no athletic program, and Todd selected a new South Oak Cliff coach, a less experienced black man. SOC's coaching staff was now all black.

Jett did not fare well at his new assignment. He struggled emotionally and was reassigned to the Dallas ISD security department, where he finished the spring semester. Wright promised to give him the next available head coaching position and in the summer of 1983, such a position came open. By then, however, Jett had filed this suit against both Todd and the school district, and the coaching position went to someone else. Just before the beginning of the new school term (and football season), Jett was finally assigned to a coaching position as ninth grade track and football coach at Thomas Jefferson High School. Jett, who had been at the top of his profession, resigned rather than accept this humiliating demotion.

2. *The Proceedings Below.*

The results of the litigation are detailed in the initial Fifth Circuit opinion. App. 5A. The Court of Appeals rejected Jett's § 1983 claim that he had been deprived of a property interest in his head coaching post without procedural due process,² and it set aside the jury finding that he had been constructively terminated.³ This left only Jett's claims that he had been fired from his coach/athletic director position because of impermissible racial concerns and in retaliation for his comments to newspapers.⁴

Jett sought recovery under both 42 U.S.C. §§ 1981 and 1983. The First Amendment claim involved § 1983 only, while the racial claim sounded in both § 1983 (equal protection) and § 1981. The Court of Appeals upheld the liability of Todd⁵ App. 13-19A but reversed as to the Dallas ISD. App. 19-31A.

-
- 2 The Court ruled that Jett had no property interest in his head coaching post, only in his salary which was not interrupted. App. 5-10A.
 - 3 The panel concluded that Jett's "humiliation and embarrassment" at being told to report as a ninth grade coach were simply "not so difficult or so unpleasant". App. 12-13A.
 - 4 Todd took offense to remarks attributed to Jett in the local press concerning the impact of new NCAA academic eligibility requirements on black high school athletes. App. 17-18A.
 - 5 Ultimately the recovery against Todd was reversed and remanded on the issue of damages. App. 31-32A. Todd and Jett have since settled. App. 82-85A.

The Fifth Circuit disposed of Jett's § 1983 claims against the school district under part II of *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). After the Court of Appeals concluded that Wright was the "final decisionmaker" in Jett's case, it posed the question of whether he was also a "policy maker" as required by *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 1298, 89 L.Ed.2d 452 (1986). App. 21-23A.

Discussion on this point was pretermitted, however. The Court concluded that, even if Wright were a "policy maker", the mere fact that he had resolved the matter by mechanically applying his policy of always "going with the principal" would not be enough to satisfy *Monell*. The Fifth Circuit held that Wright's decision itself "must either have been based on Jett's race or Jett's exercise of his First Amendment rights." App. 24A.⁶ Since the evidence as to Wright's state of mind was disputed, App. 25-26A, and since the school district attorneys had objected to the jury instruction, App. 24A, the § 1983 claims against the Dallas ISD were reversed and remanded.

Only Jett's § 1981 claim remained, and here the Fifth Circuit made the unprecedented decision to apply the *Monell* "policy or custom" requirement to that claim as well. Thus, both Jett's First Amendment claim and his racial discrimination claims were reversed and remanded. Jett moved for *en banc* rehear-

6 Our second reason for seeking certiorari turns precisely on this point. Cf. *Springfield v. Kibbe*, 480 U.S. ___, 107 S.Ct. 1114, 94 L.Ed.2d 293 (1987); and *City of St. Louis v. Pranrotnik*, ___ U.S. ___, 108 S.Ct. 915, 936, 99 L.Ed.2d 107 (1988) (Brennan, J., concurring).

ing, and seventeen months later the request was denied by way of a supplemental opinion. App. 33A.

REASONS FOR GRANTING THE WRIT

I. THE ATTEMPT TO IMPOSE A "POLICY OR CUSTOM" REQUIREMENT IN CASES BROUGHT UNDER 42 U.S.C. § 1981 MUST BE REJECTED.

A. Summary

The Fifth Circuit's decision to impose the "policy or custom" requirements of *Monell* onto § 1981 poses enormous difficulties for the jurisprudence of both § 1981 and § 1983. Every other circuit that has addressed the issue has permitted some form of vicarious liability in § 1981 claims. The *Monell* requirement "arose from the language and history of § 1983"⁷, and it makes little sense to apply it to a statute with a different language and history. Ultimately, the decision to engraft a "policy or custom" requirement onto § 1981 is a "policy decision", and on rehearing the Fifth Circuit defended its decision as a legitimate exercise in "judge made law". App. 42A. Because of the insidious nature of racial discrimination, imposition of a "policy or custom" requirement will effectively insulate local governments from liability under § 1981. Finally, the mixing of concepts from two independent and highly complex areas of civil rights jurisprudence threatens to make a shambles of both.

⁷ *City of St. Louis v. Praprotnik*, 108 S.Ct. at 923.

1. The Fifth Circuit decision conflicts with the decisions of other circuits on an important question of federal law.

In Part 2b of its original opinion, App. 26-31A the Court of Appeals held that a local government may be liable under § 1981 only upon proof of a "policy or custom", not on a basis of *respondeat superior*.⁸ The First Circuit, in an opinion handed down between the two *Jett* opinions, expressly disagreed. See *Springer v. Seamen*, 821 F.2d 871, 880 [syl. 6, 7] & n. 10 (1st Cir. 1987). The *Springer* decision followed the earlier lead of at least two other circuits. See, *Leonard v. City of Frankfort Electric and Water Plant Board*, 752 F.2d 189, 194 n. 9 (6th Cir. 1985); *Greenwood v. Ross*, 778 F.2d 448, 456 (8th Cir. 1985); and *Taylor v. Jones*, 653 F.2d 1193, 1200 [syl. 5, 6] (8th Cir. 1981)⁹

8 At the outset we question the dichotomy between "policy or custom" on the one hand and "*respondeat superior*" on the other. There are, in fact, several forms of vicarious liability, and *respondeat superior* is only one of them. See part 4 of this argument.

9 These cases all involve claims against local governments. There are many other cases involving claims against private employers. See Suggestion for Rehearing En Banc App. 68A.

Unfortunately, *Jett* cannot be dismissed as a mere anomaly. In denying our request for *en banc* consideration, the Fifth Circuit noted *Springer* and expressly disagreed with it on this point. App. 43A n. 5. *Jett* is now Fifth Circuit law, and the conflict among the circuits is clear, irreconcilable, and ripe for resolution. See, e.g., *Burnett v. Grattan*, 468 U.S. 421, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984), and *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979). Cf. Brennan, *Some Thoughts on the Supreme Court's Workload*, *Judicature*, Vol. 66, No. 6, December-January 1983 p. 230, 233 ("tolerable conflicts").

The importance of this issue is obvious. No aspect of § 1983 jurisprudence has so perplexed this Court as the *Monell* requirement of "policy or custom,"¹⁰ and cases involving 42 U.S.C. § 1981 have repeatedly come before the Court.¹¹ Indeed, the Court created something of a furor by its recent decision to reexamine the historical underpinnings of 42

10 See, e.g., *City of St. Louis v. Praprotnik*, ___ U.S. ___, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *City of Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985); *Pembaur v. Cincinatti*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986); *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981); *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981); *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed. 673 (1980).

11 See, eg., *Saint Francis College v. Al-Khazraj*, 481 U.S. ___, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987) (discrimination against Arab-Americans); *Goodman v. Lukens Steel Company*, ___ U.S. ___, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987) (statute of limitations for 1981); *General Building Contractors Association*, (Cont. on pg. 12)

U.S.C. § 1981 as set forth in *Runyon v. McCrary*.¹² Moreover, the Fifth Circuit's decision to apply the *Monell* rules to § 1981 cases requires examination of the same historical material at issue in *Runyon*.

Finally, if further "importance" be needed, it can be found in the Fifth Circuit's express rejection of the historical methods that have guided this Court in its treatment of the Reconstruction era civil rights statutes since *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

2. The Court of Appeals opinion rejects the established historical approach of *Monroe* and *Monell*.

11 (Cont. from pg. 11) *Inc. v. Pennsylvania*, 458 U.S. 375, 102 S.Ct. 3141, 72 L.Ed.2d 835 (1982) (requirement of intentional discrimination under section 1981); *Johnson v. Railway Express Agency*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975) (discrimination in private employment); and *McDonald v. Santa Fe Transportation Company*, 427 U.S. 273, 96 S.Ct. 2574, 49 L.Ed.2d 493 (1976) (discrimination against whites).

12 427 U.S. 160, 96 S.Ct. 2586, 49 L.Ed.2d 415 (1976). See *Patterson v. McLean Credit Union*, 108 S.Ct. 1419, 1988 USLW 35360 (April 25, 1988), *per curiam*.

Until now, analysis of problems arising under *Monell* has been based upon the "language and history of § 1983", *Praprotnik*, 108 S.Ct. at 923, and this method of historical analysis is fundamental to the jurisprudence of all of the Reconstruction era civil rights statutes.¹³

This historical approach, along with the modern civil rights era, began with *Monroe v. Pape*, where the Court held that "Congress did not undertake to bring municipal corporations within the ambit of [§ 1983]." *Monell*, 436 U.S. at 654, 98 S.Ct. at 2022. The "sole basis" for the *Monroe* court's conclusion was found in analysis of the legislative debates surrounding the passage of the Ku Klux Klan Act of 1871, and particularly the defeat of the proposed "Sherman Amendment". *Id.*

Seventeen years later in *Monell* the Court reconsidered whether local governments could be liable under § 1983. The Congressional debates concerning the Sherman Amendment were again subjected to detailed scrutiny, and *Monroe* was found to be flawed. "Congress *did* intend municipalities and other local government units to be included among those persons to whom 1983 applies." *Monell*, 436 U.S. at 690, 98 S.Ct. at 2035 (emphasis in original).

Although the *Monell* court reached a result contrary to *Monroe*, the emphasis on historical analysis remained unchanged. Indeed, it was in analyzing the debates over the Sherman Amendment that the Court discovered that Congress had intended to place an onerous limitation on municipal liability.

13 See e.g., *Monell and Monroe v. Pape*, (§ 1983); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 454, 95 S.Ct. 1716, 44 L.Ed. 295 (1975) (§ 1982); and *General Building Contractors Assn. v. Pennsylvania*, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1985) (§ 1981).

Local governments could not be held liable under a "*respondeat superior*" theory. 436 U.S. at 690, 98 S.Ct. at 2036. "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.*

- a. The initial *Jett* opinion fails the test of historical analysis.

In endeavoring to extend the *Monell* "policy or custom" requirement to our § 1981 case, the Fifth Circuit initially embraced *Monell's* historical approach. The Court of Appeals wrote that Congressional intent "provides compelling reasons" for extending the *Monell* rule to § 1981 claims against public employers. App. 30A. Yet, no such historical analysis was performed, and not a single shred of historical material has ever been produced to justify the result of *Jett*.

The attempt to find historical justification for imposing a *Monell* requirement in § 1981 cases had to fail, of course. Section 1983 was passed by the 42nd Congress in 1871, while § 1981 was enacted by an earlier Congress.¹⁴ The inherent difficulty of the Fifth Circuit's approach is evident from its conclusion: "To impose such vicarious liability for only certain wrongs based on § 1981 apparently would contravene the congressional intent behind section 1983." App. 29A.

14 Just which Congress enacted § 1981 continues to be a subject of controversy. While we deal with this issue in part 3 of this argument, the point is of no consequence at this juncture. Whatever the origins of § 1981, they are not to be found in the Ku Klux Klan Act of 1871, which was the subject of the Sherman Amendment debates.

Similar attempts to use § 1983 concepts to limit § 1981 claims had previously been rejected in the pre-*Monell* era. In *Monroe* this Court held that § 1983 did not reach local government entities at all. They were, in a manner of speaking, "immune" from liability under § 1983. In the late 1970's several attempts were made to extend this so-called "immunity" to claims against local governments made under § 1981. In every instance, they were rejected. Thus, in *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157, 1159 (9th Cir. 1976), the Ninth Circuit rejected the argument that the defeat of the Sherman Amendment somehow evidenced the legislative intent behind § 1981. The Third Circuit agreed in *Mahone v. Waddle*, 564 F.2d 1018, 1031 (3rd Cir. 1977), *cert. denied*, 438 U.S. 904, 98 S.Ct. 312, 57 L.Ed.2d 1147, (1978), an opinion that delved deeply into the history of § 1981. Cf. 564 F.2d 1030-1037, with 1037-1065 (Garth, J., dissenting). These cases were summarized by the Fifth Circuit in *Garner v. Giarusso*, 571 F.2d 1330 (5th Cir. 1978), a case which is factually indistinguishable from *Jett*. App. 35-37A.

In *Garner*, after examining the legislative history of § 1981, the Fifth Circuit could find "nothing comparable to the rejection of the Sherman Amendment and nothing else to support an exclusion of municipalities from the reach of [sec. 1981]." 571 F.2d at 1340.

In seeking *en banc* consideration, we asked the Fifth Circuit to tell us just how the substitution of *Monell* for *Monroe* had changed its analysis of *Garner*. The Fifth Circuit responded by attempting to make the facts of *Garner* fit the requirements of *Monell*. App. 35-37A. It chose to ignore, however, the historical difficulties which had been recognized in *Garner* and the other pre-*Monell* cases. Those cases were dismissed as arising during "the reign of *Monroe v. Pape*", and their reasoning was said to have somehow "evaporated" with the advent of *Monell*. App. 35A.

Yet, while this kind of argument may have helped the panel avoid *Garner* as binding precedent,¹⁵ it did nothing to advance the thesis of the original *Jett* opinion, i.e., that the decision to impose the "policy or custom" requirement onto § 1981 could be justified under the rigorous historical methods of *Monroe* and *Monell*. Ultimately the attempt was simply abandoned,¹⁶ and the Fifth Circuit's decision to engraft the "policy or custom" requirement of *Monell* onto §1981 remains, in the words of *Garner*, "wholly without support in either the Supreme Court's § 1983 cases, the wording of § 1981, or its legislative history." 571 F.2d at 1339.

- b. In its opinion on rehearing, the Court of Appeals abandoned the historical method in favor of policy arguments.

15 One panel of the Fifth Circuit cannot overrule an earlier panel decision. App. 78A.

16 The only attempt at some kind of historical analysis is a vague reference to "then perceived constitutional problems." App. 43A. Yet, the only "then perceived constitutional problem" found in *Monell* and *Monroe* was that of imposing an "obligation" on local governments to enforce the law. *Monell*, 436 U.S. at 664-665, 98 S.Ct. at 2022-2023. Of course, the whole purpose of Part I of *Monell* was to demonstrate that this problem was quite different from the problem of imposing "civil liability on municipalities", 436 U.S. at 665, 98 S.Ct. at 2022 (emphasis added), and that *Monroe's* reliance on this "perceived constitutional problem" was misplaced.

Unable to find historical support for its decision, the Court of Appeals turned to the other guidepost in this difficult area: statutory language. Section 1983 imposes liability on any "person" who "subjects or causes [another] to be subjected to" a constitutional deprivation. *Monroe* had held that a local government was not a "person". *Monell* changed that, but it then invoked this very causation language to support its requirement of proof of "policy or custom".¹⁷

Of course, this case involves § 1981, not § 1983. On rehearing the Fifth Circuit examined the language of § 1981 and concluded that "section 1981 contains no language creating *any* liability". App. 38A (emphasis in the original). At this juncture the Court shifted its inquiry. The issue was no longer the nature of § 1981 liability; instead it became the existence *vel non* of any liability. The Court said it was "aware of no specific legislative history of section 1 of the 1866 Civil Right Act indicating an intent to impose municipal liability",¹⁸ App. 41A, and it cited *Sullivan v. Little Hunting Park*, 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969), where this Court had concluded that the existence of a statutory right in § 1982 "implies all necessary and appropriate remedies." 396 U.S. at 239, 90 S.Ct. at 405.

Ultimately, the Fifth Circuit appears to conclude that the *Sullivan* decision, along with *Johnson v. Railway Express Agency*,

17 This Court continues to emphasize that the "policy or custom" requirement arises from the notion of causation. See *Praprotnik*, 108 S.Ct. at 923, and compare *Springer v. Seaman*, 821 F.2d at 876.

18 The Court equated § 1981 with section 1 of the Civil Rights Act of 1866, but see part 3 of our argument.

Inc., 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975), amounted to nothing more than "judge made law." App. 41A. Thus the Court reaches its conclusion. Henceforth, in construing § 1981; the Fifth Circuit will rely 'more on general considerations of likely legislative intent or on judge made law than on specific, express legislative history or statutory language". App. 41A. The enormous significance of this statement should be obvious.

Freed from the strictures of history and language, the Court considers policy arguments, and it finds a suitable policy in the language of *Owen v. City of Independence*. "[W]hen it is the local government itself that is responsible for the constitutional deprivation -- it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government." 100 S.Ct. at 1418 n. 39. Thus, the decision to import *Monell* wholesale into the law of § 1981 is ultimately founded upon concern for the public treasury.¹⁹ While the Court is candid in resorting to policy arguments, problems are immediately apparent. For example, this Court expressly rejected use of this very same "policy consideration", i.e., concern for the municipal treasury, as a basis for deciding both *Monroe*, 365 U.S. at 191, 81 S.Ct. at 495, and *Monell*, 436 U.S. at 664 n. 9, 97 S.Ct. at 2022 n. 9. We suggest that the Court of Appeals should have looked deeper into legislative history before making its momentous decision to jettison the established methodology of *Monroe* and *Monell*.

19 *Cf. Wells v. Dallas Independent School District*, 793 F.2d 679 (5th Cir. 1987), submitted and argued simultaneously with *Jett*.

3. Historical analysis reveals that Congress did intend to allow liability on a respondeat superior basis under § 1981.

At issue is the construction of § 1981. We search for guidance in the "language and history"²⁰ of the statute.

a. Congressional debates

The Fifth Circuit analyzed Congressional debates, but they were the wrong ones. Instead of seeking Congressional intent in the debates that accompanied § 1983, it should have canvassed the debates of the earlier Congress that passed § 1981. Until recently we were confident that this was the 39th Congress which passed the Civil Rights Act of 1866. This was the teaching of *Runyon v. McCrary*, 427 U.S. at 168, 170, and the subsequent cases cited at App. 72A n. 3. Of course, the debates of the 39th Congress in 1866 had been explored at length in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 454, 90 S.Ct. 1716, 44 L.Ed.2d 295 (1975). Using these and the further analysis of those same debates in *General Building Contractors*, we were able to reveal serious flaws in *Jett's* approach to the problem. App. 56-78A.

20 *Praprotnik*, 108 S.Ct. at 923.

This would suggest a canvass of the 1866 debates with an eye to vicarious liability questions, even though similar inquiries in the pre-*Monell* era produced little in the way of useful material.²¹

Now, as everyone knows, the legislative history of § 1981 has again been clouded. This Court has decided to reconsider its *Runyon* decision with an eye toward reexamining whether § 1981 reaches private conduct. It appears possible that the position of the *Runyon* dissent may at long last carry the day. Cf. *Bhandari v. First National Bank of Commerce*, 808 F.2d 1082 (5th Cir. 1987), *rev'd*, 829 F.2d 1343 (1987) (en banc). If that occurs, then § 1981 will be traced back, not to Section 1 of the Civil Rights Act of 1866, but to Section 16 of the 1870 Voting Rights Act, which became in turn section 1977 of the Revised Statutes of 1874. *Runyon* 427 U.S. at 195 n.6 (White, J., dissenting).

This, in turn, suggests a canvass of the debates of the 41st Congress which passed the Voting Rights Act. The Fifth Circuit apparently undertook such a canvass while our suggestion for *en banc* rehearing was pending in *Jett*. See *Bhandari*, *supra*. The fact that none of this material found its way into the *Jett* opinions gives us at least some assurance that there is nothing in the 1870 debates that might shed light on our problem. See also, *Bronze Shields, Inc. v. New Jersey Dept. of*

21 Judge Garth apparently made such a canvass in his *Mahone* dissent to support his contention that the 39th Congress "never contemplated that section 1 of the Act would furnish a private cause of action cognizable in federal courts." *Mahone v. Waddle*, 564 F.2d at 1038. Judge Sneed undertook a similar, though less adversarial, review in his concurring opinion in *Sethy v. Alameda County Water Dist.*, 545 F.2d at 1163 n.1.

Civil Service, 488 F.Supp. 723, (D.N.J. 1980). Because of the present confusion on this point we believe that such a canvass is not necessary to this Court's consideration of our petition for certiorari.

b. Statutory Language

- (i) Congress did not intend to provide for a "policy or custom" requirement in § 1981.

While much has been written concerning the origins of § 1981, there is no similar controversy concerning § 1983. All agree that § 1983 originated as section 1 of the Ku Klux Klan Act of 1871. It is also settled that section 1 of the 1871 Act was, in turn, modeled after section 2 of the Civil Rights Act of 1866.²² See *Monell*, 365 U.S. at 185, and *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 n. 34, 99 S.Ct. 1905, 60 L.Ed.2d 508 (1979), and 441 U.S. at 628 (Powell, J., concurring) and 441 U.S. at 652 n. 12 (White, J., concurring). Certainly the language of the two statutes is almost identical and, when, in *Monroe v. Pape*, Justice Douglas sought the meaning of the phrase "under color of [state law]" in § 1983, he turned to earlier cases that construed the same phrase in 18 U.S.C. § 242. Section 242 is, of course, the modern codification of section 2 of the 1866 Act. *Monroe*, 365 U.S. at 183.

The fact that the "color of law" language was present in section 2 of the 1866 Act, but not in section 1, was also crucial to the holding, in *Jones v. Alfred H. Mayer Co.*, that 42 U.S.C. §1982 reaches private conduct. 392 U.S. at 424-426 & nn. 32-33.

22 The complete text of the Civil Rights Act of 1866 appears as an Appendix to *Mahone*, 564 F2d 1062-1065.

While our arguments involve much of the same material at issue in *Runyon* (and probably in *Patterson v. McLean Credit Union*), Jett was a public employee, and we therefore need not concern ourselves with the "incorporation" question which appears so important to the *Runyon* debate. See generally, Kohl, *The Civil Rights Act of 1866, Its Hour Come Round At Last*, Vol. 55, U. of Va. L. Rev. pp. 272-293 (1969).

While our case does not involve private conduct, it does involve language that originated in section 2 of the 1866 Act, namely the phrase "shall subject or cause to be subjected." This is, of course, the crucial language of part II of *Monell*, and its presence in § 1983 was the basis of *Monell's* conclusion that local governments could be held liable under § 1983 only for an "injury inflicted" by "execution of a government's policy or custom." 436 U.S. at 690-695.

Thus, the *Monell* language was present in the Civil Rights Act of 1866, but only in a section which provided for criminal liability. The inference is strong, therefore, that Congress intended to impose a "policy or custom" requirement only where criminal liability was involved.²³

23 This argument also works under the view of the *Runyon* dissent. According to Justice White, § 1981 originated, not as section 1 of the Civil Rights Act of 1866, but as section 16 of the Voting Rights Act of 1870. *Runyon*, 427 U.S. at 195 n. 6 (White, J., dissenting). Yet that section, like section 1 of the 1866 Act, contains no "shall subject or cause to be subjected to" language, while section 17 does. *Id.*, 427 U.S. at 201 n. 9. Of course, section 17 was the reenactment of section 2 of the 1866 act. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. at 651 (White, J., dissenting).

It is not necessary to our argument that we also demonstrate that Congress intended to provide a civil remedy in the 1866 Act. Regardless of where one discovers the origin of the right to sue for damages under § 1981, it clearly did not come from a statute containing the phrase "shall subject or cause to be subjected". Therefore the notion that Congress intended to write a *Monell* requirement into § 1981 makes no sense.

Admittedly, our argument is more persuasive if we can conclude that Congress intended to provide for a civil remedy in the 1866 statute itself. In fact, such a remedy is provided for in the plain language of section 3 of the 1866 Act. Note also that language in Section 1 of the Ku Klux Klan Act of 1871, which expressly spoke of "like cases" arising under the 1866 Act. See *Mahone v. Waddle*, 564 F.2d at 1032-1033. *Contra, Id.*, at 1038-1041 (Garth, J., dissenting). Justice Powell, for one, found this view "plausible." *Cannon v. University of Chicago*, 441 U.S. 677, 735 n. 7, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (Powell, J., dissenting).²⁴

24 Again, this argument also stands up under the view of the *Runyon* dissent, since section 3 of the 1866 act "was reenacted as section 18 of the 1870 Act." See *Chapman*, 441 U.S. at 654-655, 99 S.Ct. at 1935 (White, J., dissenting).

In making this argument, it is not necessary to argue that a modern descendent of section 3 of the 1866 act somehow served as a basis for the § 1982 and § 1981 causes of action allowed a century later in *Jones v. Alfred H. Mayer Co.*, *Sullivan v. Little Hunting Park*, and *Johnson v. Railway Express Agency*.²⁵ We are seeking the intent of the Congress when it enacted 42 U.S.C. § 1981. Regardless of whether that Congress was the 39th Congress enacting the Civil Rights Act of 1866 or the 41st Congress enacting the Voting Rights Act of 1870, the fact remains that, when the statute was originally enacted, the phrase "subjects or causes to be subjected to" appeared only in the part of the statute providing for criminal penalties.²⁶ It is also quite plausible, as we have seen, that the same Congress simultaneously intended to provide for a private cause of action to enforce the new statute by enacting section 3, which did not contain this phrase.²⁷

Thus, Congress could not have intended for the phrase "subjects or causes to be subjected to" to apply to a private cause of action brought under 42 U.S.C. § 1981. Therefore, it also could not have intended to impose a *Monell*-style "policy or custom" requirement in § 1981 cases.

25 The original 1866 section 3 underwent extensive amendment. Part of it, for example, became § 1988, at least under the view taken by the Court in *Moor v. County of Alameda*, 411 U.S. 693, 705, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973). Justice White, on the other hand, has concluded that the section was simply deleted in the 1874 codification of the federal statutes. See *Chapman*, 441 U.S. at 654-655, 99 S.Ct. at 1935 (White, J., dissenting), a view consistent with his Runyon dissent. 427 U.S. at 207, 96 S.Ct. at 2612.

26 Section 2 of the 1866 Act; section 17 of the 1870 Act.

27 Section 3 of the 1866 Act; section 17 of the 1870 Act.

- ii. Construction of the statutes consistent with then - existing common law principles.

Absent specific provisions to the contrary, this Court is required to construe the Reconstruction era civil right laws in accordance with common law principles as they existed at the time. *See Pembaur*, 106 S.Ct. at 1300-01, & nn. 12, 13 (Stevens, J., dissenting). Congress mandated such construction in section 3 of the Civil Rights Act of 1866, the last sentence of which read as follows:

The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States so far as such laws are suitable to carry same into effect; but *in all cases where such laws are not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.*

Mahone, 64 F.2d at 1063 (emphasis added). "This latter portion of section 3, which has become § 1988 and has been made applicable to Civil Rights Acts generally, was obviously intended to do nothing more than to explain the source of the law to be applied in actions brought to enforce the substantive provisions of the [1866] Act, including section 1." *Moor v. County of Alameda*, 411 U.S. at 706, 93 S.Ct. 1793. Cf. *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 422-437, and *General Building Contractors*, 458 U.S. at 408 (Brennan, J., dissenting) (1866 Act to be construed broadly).

Of course, the principle of *respondeat superior* was well established in the common law by 1866, as Justice Stevens has ably demonstrated in the past. See *Praprotnik*, 108 U.S. 937 at n. 4 (Stevens, J., dissenting), and cases there cited. Of course, the Court has steadfastly refused to retreat from *Monell*, where the phrase "subject or cause to be subjected" can be viewed as a "specific statutory provision" modifying the general *respondeat superior* rule. Since, as shown above, no such language was even included in § 1981, the common law concept of *respondeat superior* should apply.

One final historical argument can be made. Everyone agrees that § 1981 was intended to deal with racial discrimination, and the insidious nature of racial discrimination was as well understood by the 39th Congress, *Jones*, 392 U.S. at 428-429, as it is today. *Id.* at 444-449 (Douglas, J., concurring). Congress must have understood that to curtail the operation of the then established rules of *respondeat superior* would make the 1866 Act useless as a civil remedy. (Indeed the *Monell* requirements have emasculated § 1983 in the modern era). Of course, the imperatives of the historical method decree the *Monell* rule in § 1983 cases, but these factors are simply not at work in § 1981 cases and to somehow infer them, as the Fifth Circuit has attempted to do, would be "to seek ingenious

analytical instruments" to carve an exception from the statute that simply was never intended. *Jones*, 392 U.S. at 437.

4. Limiting § 1981 *respondeat superior* liability to the actions of supervisory officials offers a workable method of limiting local government liability under § 1981, if such a limit is necessary.

Ultimately the factors at work in the Court of Appeals seem easy to understand. This was in part a § 1983 case and, since this Court handed down *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976), it has grappled with the need to find a "logical stopping place" for § 1983 liability and to avoid "federalizing" the law of torts. *Id.* at 424 U.S. 698-699. Thus, the Court has developed doctrines that severely limit the ability of § 1983 plaintiffs to recover in federal court. Cases like *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), and *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) exemplify this trend, and *Monell* can be viewed in that way as well, even though it seemed to represent a significant relaxation of the municipal "immunity" of *Monroe v. Pape*.²⁸

Thus, in retrospect, the ease with which the Fifth Circuit carved up Jett's § 1983 claim was no surprise. The surprise was the Fifth Circuit's decision to deal with Jett's § 1981 claim in the same way, even down to using the same rule of law.

28 This liberalization was more theoretical than practical, and the requirement of "policy or custom" is in most cases extremely difficult, if not impossible, to satisfy.

Section 1981 is not the same as § 1983. The former contains broad language that is not easily limited, as the Court understood in *Paul v. Davis*. On the other hand "[t]he scope of § 1981 is much narrower than that of § 1983. It protects only against discrimination on the basis of race or lineage (citations omitted), and deals only with the protection of a limited range of civil rights, including the right to make and enforce contracts." *Garner v. Giarusso*, 571 F.2d at 1340. Moreover, the Court has limited the scope of § 1981 even further by reading an "intent" requirement into it. See *General Building Contractors*, 102 S.Ct. at 3146-3150. On the other hand, "state of mind" remains an open question where § 1983 is concerned. See *Daniels v. Williams*, 106 S.Ct. at 667 n.3.

Yet, judging from *General Building Contractors*, some members of the Court may view § 1981 as a statute also in need of limits, though certainly these limits would have to be found in the history and language of § 1981, just as the "policy or custom" requirement of *Monell* came from those same sources in § 1983.

If this is so, then the Court can profit from its decade of struggle with *Monell*. We now understand that all governmental liability is in a sense vicarious, since governments must act "through human agents". *Praprotnik*, 106 S.Ct. at 931 (Brennan, J., concurring). There are, in fact, many approaches to vicarious liability, and there is simply no need to make an all or nothing choice between the "policy or custom" requirement of *Monell* on the one hand, and the "broad vicarious liability" suggested by the dissent, on the other. *City of Oklahoma City v. Tuttle*, 105 S.Ct. at 2434, n.5. Indeed, the solutions to the *Monell* problem put forward by the concurrence and the dissent in *Praprotnik* represent attempts to find a more workable solution to the problem of vicarious liability under § 1983, while working within the structures of *Monell*.

Here, of course, the requirements of *Monell* are not present, and there is a better way of limiting liability under § 1981 than by importing *Monell* and all its complexity into the jurisprudence of § 1981, an area that is already intricate enough. We suggest that the Court could do far worse than to adopt the approach of *Garner v. Giarusso*, 571 F.2d 1330. There, the Fifth Circuit drew a logical distinction between a city's liability for the acts of its supervisors, on the one hand, and liability for the acts of its mere "servants", on the other. 571 F.2d at 1338-1341. This same solution has proved most sensible and workable under Title VII.

II. DALLAS ISD LIABILITY UNDER 42 U.S.C. § 1983

The Fifth Circuit correctly noted that the jury instruction did not require proof of "official policy or custom" as a prerequisite to governmental liability. App. 20-21A & n. 8. The District Court avoided the problem by finding that "policy or custom" was proven as a matter of law.

It was undisputed that the Board of Trustees of the Dallas ISD had delegated final, nonreviewable decision-making authority to Superintendent Wright in personnel matters involving "reassignment". Jett's removal as athletic director/head football coach was treated as such a "reassignment". Wright had promulgated his own unwritten policies to deal with "reassignment" cases. One such policy was very simple: in situations involving irreconcilable conflict between an employee and his school principal, Wright always "went with the principal". Wright followed this policy in Jett's case, resulting in Jett's "reassignment."

Wright's policy of avoiding conflict where there is a dispute between a principal and employee may not, in and of itself, be unconstitutional. Still, in Jett's case this policy undoubtedly caused a constitutional violation.

It was undisputed that Jett alerted Superintendent Wright to Todd's racial motives. Jett told Wright that he believed Todd wanted to get rid of him in order to replace him with a black coach. Nevertheless, Wright chose not to look into the matter. Instead, he resolved the dispute by adhering to his policy of avoiding conflict by "going with the principal." As the jury found, Wright affirmed Todd's recommendation without undertaking any independent investigation, and Wright's decision was based solely on Todd's recommendation. The Court of Appeals was incorrect in its repeated statements that here was no evidence that Wright knew, believed, or was consciously indifferent to whether Todd's recommendation was racially motivated. App 25A. Although Wright may not have believed, or known for a fact, that Todd was racially motivated, Wright clearly was consciously indifferent to that possibility. Jett told Wright of Todd's suspected racial motive, yet Wright did nothing to investigate it, choosing instead to follow his policy of avoiding conflict between principal and employee, even at the risk of violating federal law.

Whether these facts satisfy the demands of *Monell* is a question the Court expressly left open in *City of Springfield v. Kibbe*, 480 U.S. ___, 107 S.Ct. 1114, 94 L.Ed.2d 293 (1987). See *City of St. Louis v. Praprotnik*, 108 S.Ct. at 936 (Brennan, J., concurring).

We submit, however, that the policy of always "going with the principal", even at the known risk of violation of the employee's constitutional rights, is nothing more than an official policy of conscious indifference. Thus, the District Court indeed was correct in concluding that, as a matter of law, Jett satisfied the "policy or custom" requirement. See, *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985).

CONCLUSION

For the reasons stated above, this petition for writ of certiorari should be granted.

Respectfully submitted,

FRANK GILSTRAP
FRANK HILL
SHANE GOETZ
(Counsel of Record)
HILL, HEARD, ONEAL,
GILSTRAP & GOETZ
1400 West Abram Street
Arlington, Texas 76013
817/261-2222

CERTIFICATE OF SERVICE

I, Shane Goetz, counsel of record for Petitioner Norman Jett, hereby certify that pursuant to Rules 28.3 and 28.5, three (3) copies of the above and foregoing Petition for Writ of Certiorari were served upon Mr. David W. Townend, counsel of record for Respondent Dallas Independent School District, by placing same in a United States postal service of mailbox, with first class postage prepaid, on June 14, 1988, addressed to Mr. Townend at his post office address, 1302 West Miller Road, P. O. Box 472286, Garland, Texas 75047.

Shane Goetz

APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-1015

NORMAN JETT,
Plaintiff-Appellee,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT
and FREDERICK TODD,
Defendants-Appellants.

Filed August 27, 1986

Before: Thomas Gibbs Gee, Carolyn Dineen Randall, and
Will Garwood, Circuit Judges.

Opinion by Judge Will Garwood

Appeals from the United States District Court
for the Western District of Texas
Barefoot Sanders, District Judge, Presiding

OPINION

WILL GARWOOD, Circuit Judge:

Appellee Norman Jett brought this suit against appellants, his former employer, the Dallas Independent School District (DISD), and Frederick Todd, his immediate supervisor, under 42 U.S.C. §§ 1981 and 1983, alleging due process, First

Amendment, and equal protection violations. The district court entered judgment against the DISD and against Todd in his individual capacity. We reverse the finding that Jett suffered due process violations, holding that Jett was not deprived of a protected property interest. We further hold that the evidence is insufficient to support a finding of constructive discharge. We affirm liability against Todd in his individual capacity based on the racial discrimination and First Amendment claims. However, we reverse and remand on the issue of the DISD's liability, because the jury did not make sufficient findings to support municipal liability. Furthermore, we reverse and remand as to damages.

Facts and Proceedings Below

Norman Jett, a white, was the athletic director/head football coach at South Oak Cliff High School in Dallas, Texas until his reassignment to another DISD school in 1983. He was employed by the DISD from 1957 until 1983, and had taught and coached at South Oak Cliff since 1962. Around 1970, the year Jett was promoted to athletic director/head football coach, the racial composition at South Oak Cliff changed from predominantly white to predominantly black.

Frederick Todd, a black, was assigned as principal at South Oak Cliff in 1975. Tensions developed between Jett and Todd concerning several issues, including Jett's attendance record at faculty meetings, equipment purchasing policies, and lesson plan preparation. Several of the problems centered around the November 19, 1982 football game between South Oak Cliff and Plano. Prior to the game, Jett was quoted by a newspaper as saying his team was bigger and better than SMU and the Dallas Cowboys. Todd objected to this statement, believing that it was not true and that it degraded a collegiate team and a professional team. After South Oak

Cliff lost the game, Jett entered the officials' locker room in violation of league rules and stated to two black officials that he would never use black officials in another game. Jett had requested black officials for the game despite the Plano coach's position against using black officials. Other controversies erupted over the game, including a reporter's accusations that Jett and other coaches were bribed, players' complaints that the game plan was not followed, and coaches' complaints that nonschool personnel were allowed in the booth. Todd felt that Jett did not show proper leadership in responding to these complaints. In another incident, Jett was quoted in the newspaper as stating that only two South Oak Cliff athletes could meet proposed NCAA academic eligibility requirements. Todd objected to this statement because he believed that far more graduates could meet the proposed requirements.

On March 15, 1983, Todd informed Jett that he intended to recommend that Jett be relieved as athletic director/head football coach. Todd sent a letter dated March 17, 1983 to John Kincaide, white, director of athletics for the DISD, recommending Jett's removal based on poor leadership performance, his inability to plan adequately, and the events surrounding the Plano game.

After meeting with Jett on March 15, Todd made an appointment for Jett to see Kincaide that day. Jett met with Kincaide at the DISD Administration Building. Kincaide suggested to Jett that he return to South Oak Cliff until he received something in writing. Jett then met with John Santillo, director of personnel for the DISD, who suggested to Jett that he should transfer schools because the damage had already been done. At this point, Jett became upset and Santillo suggested that he and Jett meet with Linus Wright, white, Superintendent of the DISD. During this meeting, Jett informed Wright and Santillo that he believed Todd's recommendation was unfounded and

that Todd wanted a black coach. Wright suggested that Jett should consider leaving South Oak Cliff, because he and Todd were having difficulties working together. Wright then assured him that the DISD would take care of him and find him another position.

On March 25, 1983, Wright, Santillo, Kincaide, Todd, and two other school officials met to determine whether Jett should remain at South Oak Cliff. Jett was not invited to attend. After the meeting, Wright officially affirmed Todd's recommendation to remove Jett as South Oak Cliff athletic director/head football coach based on irreconcilable conflicts between Jett and Todd. Wright explained at trial that in such circumstances he was compelled to go with the principal.

Soon after the meeting, Santillo notified Jett of his reassignment as a teacher at the Business Magnet School and told him it was the only position available. This assignment, which was effective approximately April 4, 1983, did not include any coaching responsibilities. Although Jett reported to the Business Magnet School, he soon began to miss class because of his emotional distress. After Santillo expressed concern about his poor attendance record, Jett again met with Santillo on May 4, and then with Wright that same day. Wright told Jett that, although no athletic director/head coaching positions were available at the time, Jett would not have to apply for a coaching job and would be considered for any that came open.

On May 5, 1983, Santillo wrote Jett a letter stating that he was being placed on the "unassigned personnel budget," and that he was being assigned to the security department, but that he could not expect to remain in the department for the next school year. The letter also informed Jett that he could pursue any available position and that, if he was not recommended for a staff or quasi-administrative position, he

would be assigned a classroom teacher position. Upon receiving the letter, Jett filed this suit.

Around August 4, 1983, Jett received notice that he had been assigned to Jefferson High School as a history teacher/freshman football coach/freshman track coach. Although a head coaching job had previously become available at Madison High school, Jett was not assigned this position, nor did he apply for it. Kincaide decided against assigning Jett to the Madison position because of the pending lawsuit. On August 19, 1983, Jett sent his letter of resignation to the DISD.

Jett's suit was brought against the DISD, Todd in his individual and official capacities, and the DISD Board of Trustees in their official capacities under 42 U.S.C. §§ 1981 and 1983. The jury determined that Jett was deprived of his position as athletic director/head football coach prior to the end of the 1982-1983 school year based on his race and his exercise of protected speech and in violation of his right to procedural due process. In addition, the jury found that Jett was constructively terminated from DISD employment in August 1983. The jury awarded Jett a total of \$850,000, including \$50,000 punitive damages against Todd. The district court set aside the award of punitive damages, finding "[t]here is absolutely no evidence that Defendant Todd's actions were taken in a malicious, wanton or oppressive manner." It also ordered a remittitur, which plaintiff accepted, with the resulting judgment being against the DISD for \$450,000 actual damages, plus \$112,870.45 for attorneys' fees, with Todd's being jointly and severally liable for all the attorneys' fees and \$50,000 of the damages.

Defendants Todd and DISD timely filed this appeal.

DISCUSSION

Due Process

Defendants first challenge the finding that Jett suffered a due process violation, arguing that Jett did not have a property interest in the athletic director/head football coach position at South Oak Cliff. They also contend that Jett was not constructively terminated in August 1983, and thus was not deprived of any property interest he may have had in the remainder (or in renewal) of his contract.¹ We must decide whether Jett had a constitutionally protected property interest by reference to state law. *Cleveland Board of Education v. Loudermill*, 470 U.S. 352, 105 S.Ct. 1487, 1491, 84 L.Ed.2d 494 (1985); *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972). The Supreme Court has described the "hallmark of property" as "an individual entitlement grounded in state law, which cannot be removed except 'for cause.'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 102 S.Ct. 1148, 1155, 71 L.Ed.2d 265 (1982).

Under Texas law, a school district may adopt the continuing contract scheme provided by Tex. Educ. Code Ann. § 13.101 (Vernon 1972), or it may offer fixed term contracts under section 23.28 of the Education Code. *See Wells v. Hico Independent School District*, 736 F.2d 243, 252 (5th Cir. 1984). The DISD has

1 Defendants' property interest and constructive discharge contentions were adequately raised in their motions for instructed verdict and for judgment n.o.v., as well as in objections to the charge.

No liberty interest claim was submitted to the jury or found by the district court.

adopted a fixed term contract scheme. Jett was employed under a five-year "teacher contract" that extended until the end of the 1983-1984 school year. He taught classes and was a member of the faculty. The written contract provided that Jett was employed as a teacher "subject to assignment." The contract authorized the superintendent "to assign the teacher to such school as he may determine, and may from time to time assign or reassign the teacher to other schools." Jett was assigned as athletic director/head football coach at South Oak Cliff for the 1982-1983 school year.

Defendants challenge the district court's finding that there was sufficient evidence that Jett had a property interest in his athletic director/head football coach position at South Oak Cliff to authorize submission of the due process issue respecting this position to the jury. The district court instructed the jury that "[a] transfer to a position in which the employee receives less pay or has less responsibility than in the previous assignment or which requires a lesser degree of skill can constitute a deprivation of a property interest." The jury found that Jett possessed a property interest in his employment as head coach and athletic director at South Oak Cliff. In ruling on defendants' motion for judgment n.o.v., the district court found that Jett had a property interest based on Superintendent Wright's concession that there was an oral contract for Jett to serve as head coach and athletic director throughout the 1982-1983 school year (August 9, 1982 through June 2, 1983) and on Jett's supplementary pay of \$4,773 for his coaching services during this time. Yet, it is undisputed that Jett received the full supplementary pay throughout the 1982-1983 school year (and would likewise have received it for the 1983-1984 year, under his teaching and coaching assignment at Jefferson High School, had he not resigned).

[1] Superintendent Wright testified at trial that Jett held an oral contract with the DISD to serve as a coach for the 1982-

1983 school year and that he could not be removed as coach except for good cause.²

We have held a public employee's demotion to be a deprivation of a property interest when the employee lost economic benefits that accompanied a position for which he had a legitimate claim of entitlement. See, e.g., *Shawgo v. Spradlin*, 701 F.2d 470, 476 (5th Cir.), cert. denied, 464 U.S. 965, 104 S.Ct. 404, 78 L.Ed.2d 345 (1983). Nevertheless, because Jett received

-
- 2 Jett's written "Notice of Assignment and Salary" explicitly provides that it is not an employment contract, but "an indication of assignment and salary." It assigns Jett to South Oak Cliff High School as a "Teacher-CTU 195." Wright testified that this designation indicates the appropriate number of hours (classroom teacher units) for a head football coach. However, the notice of assignment does not reflect the supplementary pay for coaching, listing Jett's salary as \$27,425. Jett received the supplementary pay for \$4,773 for his coaching services pursuant to his oral agreement with the DISD.

In *Grounds v. Tolar Independent School District*, 694 S.W.2d 241 (Tex. App. - Fort Worth, 1985), a Texas court of appeals construing the term contract scheme, Tex. Educ. Code Ann. section 23.28, and the Term Contract Nonrenewal Act, id. sections 21.201-.211, held: "[T]he statutes indicate that coaches are hired as teachers and may be assigned to other teaching duties at the discretion of the school district unless the coach's contract specifically limits the duties to which he may be assigned." 694 S.W.2d at 245. However, the Texas Supreme Court reversed the decision on jurisdictional grounds. 707 S.W.2d 889 (Tex. 1986).

the economic benefits that accompanied his coaching assignment, we must assess whether the oral contract created a property interest throughout the school year in the duties and responsibilities entailed in his assignment.³

[2] Although "mutually explicit understandings" may create a property interest, *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 2699, 33 L.2d 570 (1972), we find that Jett's oral contract

3 When a public employee has a legitimate entitlement to his employment, the due process clause may protect as "property" no more than the status of being an employee of the governmental employer in question to gether with the economic fruits that accompany the position. Although the governmental employer may specifically create a property interest in a non-economic benefit - such as a particular work assignment - a property interest in employment generally does not create due process property protection for such benefits. See *Findeisen v. North East Independent School District*, 749 F.2d 234, 240-41 & n.3 (5th Cir. 1984) (Garwood, J., concurring), *cert. denied.*, ___ U.S. ___ 105 S.Ct. 2657, 86 L.Ed.2d 274 (1985). Of course, a significant loss in responsibilities may result in a deprivation of a liberty interest when the plaintiff has been stigmatized. See *Kelleher v. Flawn*, 761 F.2d 1079, 1987 (5th Cir. 1985). Moreover, an employee's loss of noneconomic benefits may support an action for breach of contract. However, not every breach of an employment contract on the part of the government amounts to a deprivation of a property interest. See *Casey v. Depetrillo*, 697 F.2d 22 (1st Cir. 1983) (per curiam); *Vail v. Board of Education of Parish Union School District No. 95*, 706 F.2d 1435, 1449 (7th Cir. 1983) (Posner, J., dissenting), *aff'd by an equally divided Court*, 466 U.S. 377, 104 S.Ct. 2144, 80 L.Ed.2d 377 (1984).

here did not create a property interest in the intangible, non-economic benefits of his assignment as coach. Jett's written notice of assignment and his oral contract concerned his assignment as a whole and did not address his specific duties as coach. In *Winkler v. County of DeKalb*, 648 F.2d 411 (5th Cir. 1981), we addressed the due process claim of a public employee who was transferred to a new position at the same salary level, but with greatly reduced responsibilities. We found this transfer to be a deprivation of a property interest, because the DeKalb County Code and the conduct of the parties created a claim of entitlement to certain responsibilities of the employee's prior position. We observed that the County Code "indicates to employees that transfers will be to a position whose duties are of the kind or quality encompassed by their classification. It establishes the reasonable expectation that an employee will not be demoted to a position of vastly diminished responsibilities without cause." *Id.* at 414. However, in *Kelleher v. Flawn*, 761 F.2d 1079 (5th Cir. 1985), we rejected a public employee's claim of entitlement to the specific duties that she had prior to the reassignment, commenting that her new duties were "well within the bounds" of duties generally assigned to those in her position. *Id.* at 1087. The employee had asserted an entitlement to teach certain courses, but we found no guarantee, contract, or statute creating an entitlement to teach courses. *Id.* In the present case, we find that neither Jett's written contract nor his oral contract with the DISD gave Jett a property interest in his coaching duties. Therefore, although he may have had a property interest in his coaching salary for the 1982-1983 school year, he did not have such an interest in the continuation of his coaching responsibilities throughout that year.

Constructive Discharge

As noted, defendants also contend that there is insufficient evidence to support the jury's finding that Jett was constructively terminated from his employment in August 1983.⁴ In reviewing the district court's denial of defendants' motion for judgment n.o.v., we must consider all of the evidence in the light and with all reasonable inferences most favorable to Jett. *Boeing Company v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969) (en banc). Because the facts and inferences point so strongly in favor of defendants on this issue, we find as a matter of law that Jett was not constructively terminated. *Id.*⁵

[3, 4] A constructive discharge occurs when the employer makes conditions so intolerable that a reasonable person in the employee's position would have felt compelled to resign. *Kelleher*, 761 F.2d at 1086; *Junior v. Texaco, Inc.*, 688 F.2d 377, 379 (5th Cir. 1982). The determinative factor is not the

4 Jett clearly had a protected property interest in the remaining year of his five-year teaching contract. As we find insufficient evidence of constructive discharge, we pretermitt the question of whether constructive discharge can give rise to a due process violation, at least where, as here, there is no finding of intent on the part of the employer to thereby cause the employee's termination or to avoid the procedures that would be required for actual discharge. Constructive discharge is also relevant to the damages claimed for the equal protection and First Amendment violations found respecting the March 1983 decision to relieve Jett of his duties as head coach and athletic director at South Oak Cliff.

5 We often have noted in the context of bench trials the uncertainty over whether the issue of constructive discharge is a fact-finding subject to -the clearly (Continued on pg. 12A)

employer's intentions, but the effect of the conditions on a reasonable employee. *Kelleher*, 761 F.2d at 1086. Jett tendered his resignation on August 19, 1983, stating that, after considering his assignment to Thomas Jefferson High School, he could not accept the position and felt "forced to resign from the public education field with much sorrow and humiliation." Jett argues that his significant loss in coaching responsibilities as well as the racial discrimination and the retaliation for his protected speech that prompted his reassignment amounted to a constructive discharge.

[5] Although a demotion or transfer in some instances may constitute a constructive discharge, we find that Jett's loss of coaching responsibilities was not so intolerable that a reasonable person would have felt compelled to resign. We have noted that constructive discharge cannot be based upon the employee's subjective preference for one position over another. *Kelleher*, 761 F.2d at 1086. Although Jett's desire to continue coaching may not be equivalent to *Kelleher's* preference to teach certain courses, *id.* at 1086-87, we believe that Jett's new working conditions simply were not so difficult or so unpleasant that he had no choice but to resign. See *Vaughn v. Pool Offshore Company*, 683 F.2d 922, 926 (5th Cir.

-
- 5 (Cont. from pg. 11A) erroneous rule of a mixed uncertainty over whether the issue of constructive discharge is a fact-finding subject to the clearly erroneous rule or a mixed question of law and fact. *Kelleher*, 761 F.2d at 1086; *Shawgo*, F.2d 377, 379-80 (5th Cir. 1982). The district court here determined constructive discharge to be a question of fact and submitted it to the jury.

1982). Moreover, the humiliation and embarrassment that Jett suffered are not significant enough to support a constructive termination. See *Shawgo*, 701 F.2d at 481-82 (publicity and derogatory comments resulting from disciplinary proceedings were not constructive discharge); *Junior*, 688 F.2d at 380 (unfavorable work evaluations were not constructive discharge).

[6] Furthermore, we believe that the claimed constitutional violations underlying Jett's reassignment cannot alone support a finding of constructive termination. For example, we have held that unlawful discrimination in the form of unequal pay may be relevant to a determination of constructive discharge, but alone cannot constitute such an aggravated situation that a reasonable employee would feel forced to resign. *Pittman v. Hattiesburg Municipal Separate School District*, 644 F.2d 1071, 1077 (5th Cir. 1981) (racial discrimination); *Bourque v. Powell Electrical Manufacturing Company*, 617 F.2d 61, 66 (5th Cir. 1980) (sex discrimination). Jett has not shown any racial discrimination or free speech violations (or likelihood or threats thereof) subsequent to March 1983 that would constitute intolerable working conditions. Significantly, Jett resigned in August 1983 after receiving his assignment for the 1983-1984 school year, but did not resign in March 1983 after the reassignment that he claims violated his equal protection and free speech rights. We conclude that Jett was not constructively terminated from his employment with the DISD.

Racial Discrimination/First Amendment

The district court held that there was sufficient evidence to support the jury's finding that Todd's recommendation of Jett's removal as head coach and athletic director was based on Jett's race, and that Jett's exercise of his First Amendment rights was also a substantial motivating factor in Todd's recommendation. The district court thus found Todd liable in

his individual capacity. Moreover, it also imposed liability on the DISD based on jury findings of Superintendent Wright's action in approving Todd's recommendation without independent investigation, and on the undisputed fact that Wright had exclusive authority to act for the DISD in such matters.

1. Todd's Liability

(a) Racial discrimination claims

Defendants argue that Jett did not establish that Todd's recommendation to transfer him was racially motivated. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the Supreme Court established the usual order of proof and allocation of burdens to be used in cases alleging discriminatory treatment under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* This scheme for proving disparate treatment cases applies also to cases brought under sections 1981 and 1983 when these statutes are used as parallel causes of action with Title VII. *Hamilton v. Rodgers*, 792 F.2d 439, 442 (5th Cir. 1986); *Chaline v. KCOH, Inc.*, 693 F.2d 477, 479 (5th Cir. 1982); *Whiting v. Jackson State University*, 616 F.2d 116, 121 (5th Cir. 1980).

Defendants first contend that Jett failed to establish a *prima facie* case of racial discrimination, suggesting that a white plaintiff may not establish a *prima facie* case by meeting the elements of *Burdine* and *McDonnell Douglas*. However, this scheme of proof applies to white persons in the same manner that it applies to blacks. *McDonald v. Sante Fee Trail Transportation Company*, 427 U.S. 273, 96 S.Ct. 2574, 2582, 49 L.Ed.2d 493 (1976); *Chaline*, 693 F.2d at 479-82. The burden of proving a *prima facie* case is "not onerous." *Burdine*, 101 S.Ct. at 1094.

Jett more than met the normal minimum requirements for a *prima facie* case of racial discrimination by presenting evidence from which the jury could find that he, a white, was a member of a racial minority at South Oak Cliff, that he was well, indeed exceptionally well, qualified for the athletic director/head football coach position, and that on the recommendation of his black superior he was replaced by a black who was not more, and was indeed substantially less, qualified. See *Chaline*, 693 F.2d at 480-81.

Once Jett established a *prima facie* case of racial discrimination, the burden shifted to the DISD to articulate legitimate, nondiscriminatory reasons for its actions. The employer's burden is one of production, not persuasion. *Burdine*, 101 S.Ct. at 1095; see also, *McDaniel v. Temple Independent School District*, 770 F.2d 1340, 1346 (5th Cir. 1985). Defendants met this production burden with, among other things, Todd's March 17, 1983 letter to John Kincaide, recommending Jett's removal based on his poor leadership performance, his failure to prepare lesson plans, and his handling of the Plano game.

Once the employer satisfies this burden of production, the rebuttable presumption of discrimination created by the *prima facie* case disappears. *Burdine*, 101 S.Ct. at 1094-95; *McDaniel*, 770 F.2d at 1346. At this point, the proper inquiry is whether the defendant intentionally discriminated against the plaintiff. The fact finder is to consider all of the plaintiff's evidence, whether introduced to establish the *prima facie* case or to show that the defendant's proffered reasons are unworthy of belief. *Burdine*, 101 S.Ct. at 1095; *Jones v. Western Geophysical Company*, 761 F.2d 1158, 1161 (5th Cir. 1985). The plaintiff may meet this ultimate burden of proof either by showing that the employer's proffered reasons are pretextual or by establishing that the employer's action more likely than not was motivated by a discriminatory reason. *McDaniel*, 770 F.2d at 1346.

[7, 8] We do not suggest that presentation of a *prima facie* case necessarily means that the plaintiff can withstand a motion for directed verdict when faced with a defendant's evidence showing nondiscriminatory reasons for the complained of action. Cf. *Sherrod v. Sears, Roebuck & Company*, 785 F.2d 1312 (5th Cir. 1986). Rather, the issue is whether, on the record as a whole, there is sufficient evidence from which the fact finder may reasonably conclude that race was a substantial motivating factor in the challenged action. While resolution of that issue indeed presents a very close question here, we are ultimately persuaded that there is sufficient evidence to sustain the verdict against Todd in this respect. We have already noted the evidence establishing Jett's *prima facie* case, which exceeded the normally applicable minimum requirements in that respect. Todd's testimony was the primary evidence tending to support the existence of legitimate nondiscriminatory reasons for the complained of action. In contrast, Wright described Jett as a highly valuable employee, an "outstanding" person who "had made a great contribution to the School District," and DISD Director of Athletics Kincaide testified that he knew of no good reason Jett should have been relieved of his responsibilities as South Oak Cliff athletic director. There was persuasive evidence that Jett was a highly capable and successful coach. Moreover, Todd, prior to 1983, had never given Jett an unsatisfactory rating, and had indeed generally rated him highly. The jury could conclude that Todd's attempted explanation of these ratings was not satisfactory. Todd's complaint of Jett's not following the "game plan" in the Plano game could be viewed as questionable, given Todd's admission that he knew essentially nothing about football or coaching. Similarly questionable was the complaint regarding insufficient recruitment efforts at South Oak Cliff "feeder" schools given the severe DISD restrictions on such activities. Further, Todd testified that he placed Jett

on "probation" in early 1983, and that the word "probation" was on an evaluation report signed by Jett at that time. However, Jett testified that "probation" did not appear on the form when he signed it, and the placement of the word on the page was consistent with its having been added at a later time. By the end of the 1982-1983 school year, all twelve of the South Oak Cliff football coaches were black, and all had been recommended by Todd. Likewise, of the four candidates recommended by Todd for final consideration as Jett's replacement, three were black. There was evidence that many of the tensions between Jett and Todd involved issues of race. The events surrounding the Plano game, including Jett's statements to the black officials, formed a significant part of the basis of Todd's recommendation. In addition, Todd had been critical of Jett for not recruiting black middle school athletes to South Oak Cliff. Furthermore, there was evidence beyond that of Jett's replacement that Todd favored black coaches. We therefore conclude that the jury's finding of racial discrimination was supported by at least minimally sufficient evidence.

(b) First Amendment claims

[9] The jury also determined that Jett's exercise of protected speech was a substantial and motivating factor in Todd's recommendation. Jett may recover for resulting injuries if he was reassigned in retaliation for protected speech even though he does not have a protected property interest in his former position. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 574, 50 L.Ed.2d 471 (1977). Whether certain speech addresses a matter of public concern is a question of law "determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983)

(footnote omitted). An employee's speech generally is not protected when it "cannot be fairly considered as relating to any matter of political, social, or other concern in the community." *Id.*; see *Gonzalez v. Benavides*, 774 F.2d 1295, 1300-01 (5th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1789, 90 L.Ed.2d 335 (1986). Jett was quoted in the newspaper as stating that few South Oak Cliff athletics could meet certain proposed NCAA academic eligibility requirements. This remark, which concerns the academic development of public high school football players and their potential eligibility for playing college football, certainly addresses matters of concern to the community. See *Connick*, 103 S.Ct. at 1690; *Thomas v. Harris County*, 784 F.2d 648, 653 (5th Cir. 1986); *Davis v. West Community Hospital*, 755 F.2d 455, 461-62 (5th Cir. 1985).⁶

[10, 11] Defendants claim that because the statements were not true they cannot be protected. However, the First Amendment generally protects false statements unless they were made knowingly or with a reckless disregard for the truth. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 1738, 20 L.Ed.2d 811 (1968); *Gates v. City of Dallas*, 729 F.2d 343, 346 (5th Cir. 1984). There was no evidence that Jett knowingly made false statements or spoke with a reckless disregard for the truth in discussing the eligibility of his athletes

⁶ *Connick* also requires a balancing between the employee's freedom of expression and the school's interest in "the effective and efficient fulfillment of its responsibilities to the public." 103 S.Ct. at 1692; see *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). However, defendants do not argue here that the DISD's concerns of efficient administration outweighed Jett's interest in expression.

under proposed NCAA standards. Moreover, the statements were not made as a part of Jett's performance of his official duties or as a part of DISD business.

Todd conceded in his trial testimony that Jett's published remarks were a "substantial motivating factor" in his decision to recommend Jett's removal. See *Mt. Healthy City*, 97 S.Ct. at 576. Thus, the burden of proof was shifted to defendants to show that Todd's reassignment recommendation would have been made in the absence of the protected speech. *Id.*; *Kelleher*, 761 F.2d at 1083. The evidence at least minimally supports the jury's finding that the recommendation would not have occurred in the absence of this public statement.

[12] Finally, defendants contend that Todd cannot be held individually liable on the racial discrimination or First Amendment claims because he did not have the authority to reassign Jett and because he acted in good faith. First, Jett must establish an affirmative causal link between Todd's action and any injury Jett sustained from the civil rights violations. *Thompson v. Steele*, 709 F.2d 381, 382 (5th Cir.), cert. denied, 464 U.S. 897, 104 S.Ct. 248, 78 L.Ed.2d 236 (1983). Even though Todd lacked the final authority to reassign Jett, the jury found, on adequate evidence, that Wright's reassignment decision was based on Todd's recommendation and that Jett suffered damages proximately caused by Todd's challenged action. The form of the charge in this respect is not complained of as to Todd. We reject Todd's contention that the judgment as to him must be reversed because, as is concededly the case, he had only recommending authority. Second, Todd is not protected by the qualified good faith immunity,

because he violated Jett's constitutional rights and those rights were clearly established at the time of the recommendation. *Davis v. Scherer*, 468 U.S. 183, 104 S.Ct. 3012, 3021, 82 L.Ed.2d 139 (1984).⁷

2. DISD's Liability

(a) Section 1983

[13] We now turn to the DISD's claim that there was insufficient evidence to support a finding of municipal liability under 42 U.S.C. § 1983. The DISD cannot be held liable under section 1983 based on *respondeat superior*, however, liability may be imposed if the constitutional violation is due to official action, policy, or custom. *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). In *Bennett v. City of Slidell*, 735 F.2d 861 (5th Cir. 1984) (en banc) (per curiam) (modified 728 F.2d 762 (en banc)), cert. denied, ___ U.S. ___, 105 S.Ct. 3476, 87 L.Ed.2d 612 (1985), we defined "official policy" as:

"1. A policy statement, ordinance, regulation, or *decision that is officially adopted* and promulgated by the municipality's law-making officers or *by an official to whom the lawmakers have delegated policy-making authority*; or

"2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom

⁷ We also note that the jury rejected Todd's good faith defense.

must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority." *Id.* at 862 (emphasis added).

The district court's instruction to the jury concerning municipal liability, to which the DISD objected, was deficient in light of *Bennett*, because it did not state that the city could be bound by the principal or superintendent only if he was delegated policymaking authority (or if he participated in a well settled custom that fairly represented official policy and actual or constructive knowledge of the custom was attributable to the governing body or an official delegated policymaking authority).⁸ See *Webster v. City of Houston*, 735 F.2d 838, 840-42 (5th Cir.) (en banc) (per curiam), *rev'd on other grounds*, 739 F.2d 993 (5th Cir. 1984) (en banc). Yet, the district court found the *Bennett* test satisfied as a matter of law. The court based this conclusion on its determination that the DISD Board had delegated "sole and unreviewable authority to the superintendent to 'reassign' members of the coaching staff," and that Jett was reassigned in the customary manner.

The evidence is indeed undisputed that although the DISD Board alone had and retained authority to terminate teachers, including coaches, nevertheless Superintendent Wright had

8 The district court instructed the jury: "A public independent school district (such as and including the Dallas Independent School District) is liable for the actions of its Board of Trustees and/or its delegated administrative officials (including the Superintendent and school principals), with regard to wrongful or unconstitutional action taken against or concerning school district personnel."

cluding members of the coaching staff. In *Neubauer v. City of McAllen, Texas*, 766 F.2d 1567 (5th Cir. 1985), we found that a termination decision made by the city manager, who possessed exclusive authority in such decisions, constituted policymaking power sufficient to hold the city liable under section 1983. *Id.* at 1573-74. We observed that the city manager acted "in lieu of the governing body" in deciding whether to fire employees. *Id.* at 1574 (quoting *Bennett*, 728 F.2d at 769). The Supreme Court recently has reaffirmed that "municipal liability may be imposed for a single decision by municipal policymakers under appropriate circumstances." *Pembaur v. City of Cincinnati*, ___ U.S. ___, 106 S.Ct. 1292, 1298, 89 L.Ed.2d 452 (1986). Of course, not every decision by a municipal policymaker subjects the municipality to section 1983 liability: "Municipal liability attaches only where the decisionmaker possesses final authority to establish municipal policy with respect to the action ordered." *Id.* 106 S.Ct. at 1299 (footnote omitted). Moreover, that a policymaking official has discretion in the exercise of a particular function does not give rise to municipal liability for the official's exercise of such discretion unless the official also is responsible for final municipal policy respecting the function. *Id.* at 1299-1300. In this connection, *Pembaur* also seems to indicate that the mere fact that an official has discretionary, and inferentially final, authority to make particular concrete decisions in a given area does not necessarily mean that the official is a policymaker with respect to that area or those decisions. See 106 S.Ct. at

1300 n. 12⁹ If the latter statement is a correct reading of *Pembaur*, then Wright's final exclusive authority to make discrete individual transfer decisions would not alone subject the DISD to responsibility for his actions in the case of a particular individual transfer decision *unless he also* had final authority with respect to general DISD transfer *policy* applicable to teachers or coaches. We need not, however, decide whether this reading of *Pembaur* is correct or whether Wright was shown to be the DISD official responsible for establishing DISD employee transfer policy. Even if the record established as a matter of law that Wright had the requisite policymaking authority, the district court's instructions were nevertheless insufficient.

9 Footnote 12 of *Pembaur* states:

"Thus, for example, the County Sheriff may have discretion to hire and fire employees without also being the county official responsible for establishing county employment policy. If this were the case, the Sheriff's decisions respecting employment would not give rise to municipal liability, although similar decisions with respect to law enforcement practices, over which the Sheriff is the official policymaker, *would* give rise to municipal liability. Instead, if county employment policy was set by the Board of County Commissioners, only that body's decisions would provide a basis of county liability. This would be true even if the Board left the Sheriff discretion to hire and fire employees and the Sheriff delegated its power to establish final employment policy to the Sheriff, the Sheriff's delegate its power to establish final employment policy to the Sheriff, the Sheriff's decisions *would* represent county policy and could give rise to municipal liability." (Emphasis in original)

See also *Rhode v. Denson*, 775 F.2d 107, 109-10 (5th Cir. 1985), cert. denied, ___ U.S. ___, 106 S.Ct. 2891, 90 L.Ed.2d 978 (1986).

The district court instructed the jury that, if it found that Todd's recommendation was based upon consideration of plaintiff's race and would not have been made in the absence of this consideration, the DISD "may be liable for violating plaintiff's constitutional rights if the decision to remove plaintiff was made solely on the basis of defendant Todd's recommendation without any independent investigation." The court also gave the same instruction concerning the DISD's liability conditioned on a finding that Jett's exercise of First Amendment rights was a substantial motivating factor in Todd's recommendation and that his recommendation would not have been made in the absence of the exercise of these rights.¹⁰

[14] The jury's finding that Wright made the decision based solely on Todd's recommendation without further investigaf

10 The DISD objected to the charge concerning its liability on the basis that it was contrary to *Monell*, did not require a finding of custom or policy, and imposed liability on a *respondeat superior* basis. It also objected on the basis that the instruction would impose liability on the DISD without any finding of fault, or even negligence, on its part and amounted to imposing a "form of strict liability" on the DISD.

tion is not sufficient to support the imposition of municipal liability. The jury made no finding that Wright's decision was in fact improperly motivated or that Wright knew or believed that (or was consciously indifferent to whether) Todd's recommendation was so motivated. See *Neubauer*, 766 F.2d at 1578-80.

We have stated that the First Amendment does not protect a government employee "from the possibility that his employment might be terminated--however mistaken or *unreasonable* that decision might be--so long as his employer is not *motivated* by the desire or intention to curtail or retaliate for employee activity which the Constitution protects." *Neubauer*, 766 F.2d at 1578 (emphasis in original); see *Connick*, 103 S.Ct. at 1690. If the DISD is to be liable because of Wright's actions, then those actions must *themselves* have been wrongful, otherwise the DISD is necessarily being held liable for Todd's actions, and Todd clearly was not a policymaker under *Pembaur*.

For Wright's actions to have been wrongful, they must either have been based on Jett's race or Jett's exercise of his First Amendment rights. That Wright may have acted solely on the basis of Todd's recommendation does not establish either fact, at least where, as here, it was neither found nor established as a matter of law that Wright knew or believed that (or, perhaps, was consciously indifferent to whether) Todd's recommendation was so based. Of the *many* facially legitimate matters mentioned in Todd's recommendation letter to Kincaide, only one arguably pertains to either race or freedom of expression, namely, that after the Plano game Jett went into the officials' room, which was contrary to school district policy, and said, "I will never use a Black official again." Wright testified that this played no part in his decision. He also testified that Jett's having made public statements in the media played no part in his decision, and

that he was unaware that Todd based his recommendation on remarks made by Jett to the media. Wright further stated that Jett's race played no part or role in his decision. Todd testified that race played no part in his recommendation, and that the referenced Plano game incident was considered by him not on a racial basis, but because Jett violated school district policy by going into the officials' room and because the race of the officials should not be considered in evaluating their performance. Taken at face value, this does not demonstrate that Todd's actions violated Jett's equal protection or First Amendment rights. While Wright stated that Jett had told him he thought that Todd's recommendation was made because Todd wanted a black coach,¹¹ there is no indication whatever that Wright credited this, nor does the evidence conclusively establish that he should have. Wright testified that he discussed several of Todd's factually legitimate complaints with Jett, and informed him that in a case of a conflict between a coach and his principal, Wright would have to side with the principal, "unless he is in error himself and I hadn't found where Dr. Todd was in error." Wright had ordered an investigation, but was unaware that it was not actually carried out. It was not established as a matter of law that Wright acted other than in complete good faith or with knowledge or belief that (or conscious indifference to whether) Todd's recommendation was based in any way on Jett's race or exercise of his First Amended rights.

11 Jett himself testified that it was not until sometime after his removal as head coach and athletic director had been accomplished that he concluded that race had played a part in Todd's recommendation, and until then he believed it had not.

We thus conclude that the jury findings are insufficient to support the imposition of liability against the DISD under section 1983.

(b) Section 1981

Defendants also challenge the district court's conclusion that liability may be imposed against the DISD solely on the basis of *respondeat superior* under 42 U.S.C. § 1981. The district court relied upon our decision in *Garner v. Giarrusso*, 571 F.2d 1330 (5th Cir. 1978), in which we found that section 1981 did not provide immunity like that available to the municipality under the *Monroe v. Pape*, 365 U.S. 167, 61 S.Ct. 473, 5 L.Ed.2d 492 (1961), interpretation of section 1983.¹² 571 F.2d at 1338-41. See also *Mahone v. Waddle*, 564 F.2d 1018, 1031 (3d Cir. 1977), cert. denied, 438 U.S. 904, 98 S.Ct. 3122, 57 L.Ed.2d 1147 (1978). Of course, *Garner* was decided before the Supreme Court determined in *Monnell* that a municipality may be liable under section 1983, although not on the basis of *respondeat superior*. We therefore must decide whether *respondeat superior* may support municipal liability under section 1981 in light of *Monell* and its progeny.

In *Monell*, the Supreme Court carefully examined the legislative history of section 1981 and concluded that Congress did intend municipalities to be included among those persons to whom the statute applies, 98 S.Ct. at 2035, but that Congress did *not* intend for a municipality to be held liable unless action pursuant to official municipal policy caused a constitu-

12 *Garner* did not address whether the municipal liability could be imposed on the basis of *respondeat superior*.

tional tort. *Id.* at 2036. The Court discussed Congress' rejection of the Sherman Amendment, which was viewed by its proponents "as a form of vicarious liability for the unlawful acts of the citizens of the locality." *Id.* at 2036 n. 57. The Court concluded that "when Congress' rejection of the only form of vicarious liability presented to it is combined with the absence of any language in § 1983 which can be easily construed to create *respondeat superior* liability, the inference that Congress did not intend to impose such liability is quite strong." *Id.* The Court also considered the language of the statute, which appears to require that a municipality found liable have caused the constitutional violation or have caused its employee to violate another's constitutional rights. *Id.* at 2036. Thus, the Court concluded in *Monell*, and has recently reaffirmed, that a municipality may be held liable only for its own constitutional violations. *Pembaur*, 106 S.Ct. at 1297-98; *Oklahoma City v. Tuttle*, 471 U.S. 808, 105 S.Ct. 2427, 2433-34, 85 L.Ed.2d 791 (1985).

[15-18] We believe that to impose municipal liability on a *respondeat superior* theory under section 1981 would be inconsistent with the Supreme Court's reasoning in *Monell* and *Pembaur*. Unlike section 1983, which only provides a remedy for violations of rights secured by federal statutory and constitutional law, *Maine v. Thiboutot*, 448 U.S. 1, 100 S.Ct. 2502, 2504, 65 L.Ed.2d 555 (1980); *Irby v. Sullivan*, 737 F.2d 1418, 1427 (5th Cir. 1984), section 1981 provides a cause of action for public or private discrimination based on race or alienage. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 95 S.Ct. 1716, 44 L.Ed.2d 295 (1975); see generally B. Schlei & P. Grossman, *Employment Discrimination Law* 668-77 (2d ed. 1983). Thus, section 1981 is broader than section 1983 in that it reaches private conduct, but narrower in that it only provides a remedy for discrimination based on race or alienage. B. Schlei & P. Grossman, *supra* at 675-76. Therefore,

to permit municipal liability based on *respondeat superior* under section 1981 would impose liability on a city for only a few types of constitutional violations which might be committed by its employees. We believe that the Supreme Court's focus in *Monell* in this connection was not on particular types of "federal" wrongs, but rather was on a particular type of liability for all such wrongs. The Supreme Court's interpretation of section 1983 and its legislative history indicates that Congress did not intend to impose different types of liability on a municipality based on the particular "federal" wrong asserted. The *Monell* Court concluded that in 1871 when Congress enacted what is now codified as section 1983, which was five years after it had enacted the statute that became section 1981, Congress did not intend municipalities to be held liable for constitutional torts committed by its employees in the absence of official municipal policy. To impose such vicarious liability for only certain wrongs based on section 1981 apparently would contravene the congressional intent behind section 1983.¹³

13 We note that approximately a century later Congress did impose vicarious liability on an employer for its employee's unlawful discrimination when it enacted Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Thus, a municipality may be found liable based on *respondeat superior* under Title VII. See, e.g., *Hamilton*, 791 F.2d at 444. Analogously, neither section 1983, *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 1146-47, 59 L.Ed.2d 358 (1979), nor section 1981, *Sessions v. Rusk State Hospital*, 648 F.2d 1066, 1069 (5th Cir. 1981), overrides the Eleventh Amendment, but Title VII does. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976).

Plaintiff relies on several cases applying a *respondeat superior* theory under section 1981 in the context of private employment. See e.g. *EEOC v. Gaddis*, 773 F.2d 1373 (10th Cir. 1984); *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979). Our reasoning, of course, does not prevent the imposition of vicarious liability on a private employer under section 1981. Other courts have held that a city may be liable for racially motivated actions of its employees on a *respondeat superior* theory under section 1981. See *Haugabrook v. City of Chicago*, 545 F.Supp. 276, 279-81 (N.D. Ill. 1982) (citing cases). In *Haugabrook*, on which plaintiff relies, the court looked to the differences between sections 1983 and 1981, and concluded that the *Monell* reasoning does not bear on section 1981. *Id.* The court stated that "there is no principled reason to distinguish between private and public employers based upon the wording or history and purpose of section 1981...." *Id.* at 281. We believe that the Supreme Court's interpretation in *Monell* of Congress' intent in enacting section 1983 provides compelling reasons for distinguishing between private and municipal liability under section 1981. Moreover, in past decisions we have, albeit without discussion, denied municipal liability asserted on a theory of *respondeat superior* under section 1981. See *Hamilton*, 791 F.2d at 444-45 (city held liable "only under

Title VII" although sections 1981 and 1983 raised); *Irby*, 737 F.2d at 1423-25 (same).¹⁴

Damages

We have reversed all liability findings as to the DISD, but have sustained liability as to Todd for the claimed equal protection and First Amendment violations. However, we have held that there was no evidence to warrant the submittal of the claimed due process violation nor of the claim of constructive discharge. A significant part of the damages were sought on the basis of the theory that Jett had been deprived of employment with the DISD.¹⁵ Accordingly, a retrial is also required as to damages, both for Todd and the DISD. Cf. *Memphis Community, School District v. Stachura*, ___ U.S. ___, 106 S.Ct. 2537, 2544, 91 L.Ed.2d 249 (1986).

14 We also note that in other respects relief is available under Title VII for constitutional violations where it is not under sections 1981 and 1983. See *University of Tennessee v. Elliott*, ___ U.S. ___, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986) (applying collateral estoppel to state administrative fact-findings for purposes of sections 1981 and 1983 but not for purposes of Title VII).

15 In acting on the request for remittitur, the district court assumed that the evidence supported \$294,000 of economic damages, a figure which was clearly based on the hypothesis that Jett had been constructively discharged. While the jury's verdict as to the DISD was segregated into pre- and post-August 20, 1983 damages, it was not so segregated as to Todd. Further, the remittitur was not expressly segregated between pre- and post-August 20, 1983 damages (Cont. 32A)

Conclusion

We determine that Jett has no claim against either Todd or the DISD for due process violation or constructive discharge, and we reverse the district court's contrary determinations. These claims are ordered dismissed. We sustain the findings of liability against Todd for equal protection and First Amendment violations, but reverse and remand the damages awarded against Todd on these counts for a new trial. We reference the findings of liability and damages against the DISD on the equal protection and First Amendment Claims and remand these claims and damages for another trial. The award of attorneys' fees is set aside and remanded for reassessment following retrial, both as to the DISD and Todd.¹⁶

Accordingly, the cause is remanded for further proceedings consistent herewith.

REVERSED and REMANDED.

15 (Cont. from pg. 31A) In light of the very sizable verdict, the district court's remittur and our other action on this appeal, we conclude that the intensity of justice require that the entire verdict on damages be set aside also.

16 Defendants have made various complaints as to the district court's computation of attorney's fees. We do not pass on the merits of defendants' challenges, for the district court must compute the attorneys' fees as to Todd following any retrial as to damages with respect to him and on the basis that Jett has no due process or constructive discharge claim. As to the DISD, should Jett prevail on retrial, attorneys' fees will also have to be recomputed. Jett has not challenged the district court's grant of judgment n.o.v. on his claim against Todd for exemplary damages, and that ruling remains in effect.

APPENDIX B
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1015

NORMAN JETT,

Plaintiff-Appellee,

versus

DALLAS INDEPENDENT SCHOOL
DISTRICT,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Texas

ON SUGGESTION FOR REHEARING EN BANC
(Opinion August 27, 1986, 798 F.2d 748)

(February 5, 1988)

Before GEE, KING,* and GARWOOD, Circuit Judges.

* Formerly Carolyn Dineen Randall.

from section 1981 (section one of the Civil Rights Act of 1866) as they were from section 1983. For purposes of this question-whether municipalities were subject to the statute-*Garner* distinguished between sections 1981 and 1983 on the basis that the latter, but not the former, was expressly restricted to persons, and persons did not include municipalities. *Garner*, 571 F.2d at 1339-40. This ground for treating municipalities differently under section 1983 than under section 1981 of course evaporated with *Monell's* holding that municipalities were persons under section 1983.¹

Garner did not address whether municipal liability under section 1981 could be imposed on the basis of *respondeat superior*, and the opinion does not indicate that any contention in that respect was ever made. In *Garner*, a black police officer, following a bench trial, received a single lump-sum award of \$5,000 damages under section 1918 for mental anguish and humiliation suffered as a result of undergoing a racially discriminatory transfer and reevaluation procedure while serving in the New Orleans police department. In affirming this award, we rejected the city's contention that *Monroe*, and the cases which followed it, wholly exempted municipalities from

1 *Garner* also expressed concern that it would be "anomalous" to hold private parties liable under section 1981, while exempting municipalities. *Id.* at 1341. But, again, this was in the context of rejecting a *Monroe* approach, completely taking municipalities out of the coverage of the statute. A *Monell* approach, by contrast, adequately accommodates this concern, as is reflected by *Garner's* recognition, discussed in the text, *infra*, that it was not holding municipalities to "vicarious liability." *Id.*

section 1981 coverage. *Garner* at 1339. In so holding, however, we explained that:

"Our holding does not pose the problem of imposing vicarious liability upon a municipality because of the acts of its servants. See *Hamilton v. Chaffin*, 506 F.2d 904 (5th Cir. 1975). *Garner's* employment contract was with the city, and the city itself was responsible for assuring an absence of employment discrimination. To the extent that it failed to live up to this responsibility, it is liable in damages." *Garner* at 1341 (emphasis added).

Our explanation was consistent with the facts which were before us. Earlier in our opinion, we had affirmed the district court's findings that the transfer and reevaluation were discriminatory. Involved in the transfer were both *Garner's* superior officer and the city police superintendent, and the latter decided that *Garner* would have to undergo the reevaluation and "took full responsibility for" that decision. The district court found that the superintendent's reevaluation "decision was discriminatory." *Id.* at 1334. The inclusion of the superintendent in the scheme implicated the city directly, and resulted in liability on a basis other than *respondeat superior*. The instant case, however, is in a different posture. Here, we have a specific finding that *Jett's* principal, *Todd*, was racially motivated in his recommendation of *Jett's* reassignment. But as to Superintendent *Wright*, who ordered *Jett's* reassignment and had the sole and unreviewable authority to reassign, there is no finding of racial motivation (or that *Wright* knew or believed that, or was consciously indifferent to whether, *Todd's* recommendation was racially motivated). In the case at bar, wholly unlike *Garner*, the *respondeat superior* question is raised by the parties and presented by the procedural and factual context of the case. *Garner* realized that *respondeat supe-*

rior liability might "pose" a "problem" for municipalities, but did not have to resolve that issue or examine its ramifications.

We also observe that the only other municipal liability argument advanced by the city in *Garner*, apart from reliance on *Monroe*, was a plea for absolute or qualified immunity for municipalities, which we rejected. *Garner* at 1340-41. However, in light of the Supreme Court's reasoning in *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), rejection of municipal qualified immunity for purposes of section 1981 cannot easily co-exist with municipal respondeat superior liability thereunder. In *Owen*, the Court appears to have been significantly influenced by the policy consideration that the denial or qualified immunity to municipalities under section 1983 would not be unduly harsh on them because "when it is the local government itself that is responsible for the constitutional deprivation-it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government, rather than to let the entire burden fall on the injured individual," *id.* at 1418 n. 39, and because "the public will be forced to bear only the costs of injury inflicted by the 'execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.'" *Id.* at 1419 (quoting *Monell*).

Jett argues that the reasons which led *Monell* to reject respondeat superior liability for municipalities under section 1983 are absent under section 1981. We are not persuaded. In the first place, some of the same reasons are clearly applicable. Although *Monell* partially relied in this respect on the rejection of the Sherman amendment, the essential burden of *Monell* is that the Sherman amendment had little if anything to do with section one of the 1871 Act. Among other things, *Monell* points out that "the nature of the obligation created by that amendment was vastly different from that created by § 1," *id.*

at 2022, that the amendment would have made municipalities liable for acts of a few private citizens, that it did not purport to amend section one, and that many supporters of section one opposed the amendment. *Id.* 2023-32. *Monell* also relied on the conclusion that "creation of a federal law of *respondeat superior* would have raised all the constitutional problems associated with" the Sherman amendment. *Id.* at 2037. But whatever constitutional problems the imposition of *respondeat superior* liability on municipalities would have posed respecting the 1871 Act, it is plain that such problems would have likewise been perceived respecting the 1866 Act, as the latter had only the Thirteenth Amendment to rely on, while the 1871 Act additionally had the Fourteenth Amendment.

Monell further references "the absence of any language in § 1983 which can easily be construed to create *respondeat superior* liability." *Id.* at 2037 n. 57. This is, of course, likewise true as to section 1981. Indeed, section 1981 contains no language creating *any* liability; it is merely a declaration of rights, and does not even purport to define prohibited conduct, much less to either create a cause of action or impose or assign liability or responsibility to anyone. Again, *Monell* relies on

the "shall subject, or cause to be subjected" language of section 1983. *Id.* at 2036. But whatever significance the presence of such language in section 1983 may have necessarily derives from the fact that section 1983 purports to assign responsibility to certain parties. As noted, section 1981 does not. Section two of the 1866 Act is the only section thereof which purports to impose any responsibility for deprivation of section one rights.² And, it is particularly relevant in this connection that the "shall subject, or cause to be subjected" language of the 1871 Act was *borrowed* from section two of the 1866 Act. *Id.* at 2032-33; *Monroe*, 81 S.Ct. at 483; *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 90 S.Ct. 1598, 1611, 26 L.Ed.2d 142 (1970). Given this context, the "shall subject, or cause to be subjected" language should not be a basis for differentiation between sections 1981 and 1983 with respect to municipal *respondeat superior* liability.

[1] Finally, account must be taken of the context in which *Monell* dealt with the municipal liability *respondeat superior* issue. The initial and principal holding in *Monell* was that municipalities were covered by section 1983 and that a municipality was a "person" within the meaning of the statute's provision that "any person" who under color of state

2 Section two has been described as the "enforcement section" of the 1866 Act. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 96 S.Ct. 2574, 2583, 49 L.Ed.2d 493 (1976). And the Court has indicated that sections one and two of the 1866 Act cover the same wrongs except for the "under color of law" restriction in section two. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 2195-96, 20 L.Ed.2d 1189 (1968); *McDonald*, 96 S.Ct. at 2583. We also observe that the last clause of section one of the 1871 Act expressly references the 1866 Act.

the "shall subject, or cause to be subjected" language of section 1983. *Id.* at 2036. But whatever significance the presence of such language in section 1983 may have necessarily derives from the fact that section 1983 purports to assign responsibility to certain parties. As noted, section 1981 does not. Section two of the 1866 Act is the only section thereof which purports to impose any responsibility for deprivation of section one rights.² And, it is particularly relevant in this connection that the "shall subject, or cause to be subjected" language of the 1871 Act was *borrowed* from section two of the 1866 Act. *Id.* at 2032-33; *Monroe*, 81 S.Ct. at 483; *Adickes v. S. H. Kress and Co.*, 396 U.S. 144, 90 S.Ct. 1598, 1611, 26 L.Ed.2d 142 (1970). Given this context, the "shall subject, or cause to be subjected" language should not be a basis for differentiation between sections 1981 and 1983 with respect to municipal *respondeat superior* liability.

[1] Finally, account must be taken of the context in which *Monell* dealt with the municipal liability *respondeat superior* issue. The initial and principal holding in *Monell* was that municipalities were covered by section 1983 and that a municipality was a "person" within the meaning of the statute's provision that "any person" who under color of state

2 Section two has been described as the "enforcement section" of the 1866 Act. *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 96 S.Ct. 2574, 2583, 49 L.Ed.2d 493 (1976). And the Court has indicated that sections one and two of the 1866 Act cover the same wrongs except for the "under color of law" restriction in section two. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 2195-96, 20 L.Ed.2d 1189 (1968); *McDonald*, 96 S.Ct. at 2583. We also observe that the last clause of section one of the 1871 Act expressly references the 1866 Act.

or local law violated another's federal constitutional rights "shall . . . be liable to the party injured." This holding was partially based on the act passed in February 1871, a few months before the 1871 Civil Rights Act, providing that "in all acts hereafter passed. . . the word 'person' may extend and be applied to bodies politic and corporate . . . unless the context shows such words were intended to be used in a more limited sense." *Id.* at 2034-35. The Court also relied in this connection on the fact that "the debates [respecting section 1983] show that Members of Congress understood 'persons' to include municipal corporations," *id.* at 2033, and that "the legislative history of the Civil Rights Act of 1871 compels the conclusion that Congress *did* intend municipalities . . . to be included among those persons to whom § 1983 applies." *Id.* at 2035 (emphasis in original). Thus, the *Monell* Court dealt with a statute which expressly and intentionally included municipalities among those subjected to liability thereunder,

and contained no language expressly negating *respondeat superior*. In that context, some rather specific reasons were appropriate in order to negate municipal *respondeat superior* liability. But the section 1981 context is completely different in this respect. As noted, section one of the 1866 Act contains no language which can be construed as covering municipalities, and it does not purport to create a cause of action or to assign or impose liability or responsibility on anyone. Moreover, we are aware of no specific legislative history of section one of the 1866 Act, comparable to that of the 1871 Act, indicating an intent to impose municipal liability³. See Judge Sneed's concurring opinion in *Sethy v. Alameda County Water District*, 545 F.2d 1157, 1163-64 & n. 1 (9th Cir. 1976). Thus, the matter of who is liable for damages, and under what circumstances, for a deprivation of the rights declared in section one of the 1866 Act (section 1981) depends more on general considerations of likely legislative intent or

3 Contrast *Owen*, *supra*, where the Court, in denying municipalities qualified immunity under section 1983, reviewed the status of municipal immunity at common law. 100 S.Ct. at 1412-15. *Owen* recognized that at common law municipalities had generally had immunity, *unless withdrawn by statute*, for "governmental" (as opposed to "proprietary") and "discretionary" functions. But the Court ruled that this history did not justify giving municipalities qualified immunity under section 1983, stating: "[T]he municipality's 'governmental' immunity is obviously abrogated by the sovereign's enactment of a statute making it amenable to suit. Section 1983 was just such a statute. By including municipalities within the class of 'persons' subject to liability (Cont. on pg. 42A)

on judge-made law than on specific, express legislative history or statutory language (except to the extent guidance is afforded by the "subject, or cause to be subjected" language of section two of the 1866 Act, see note 2, *supra*, and accompanying text). This appears to have been recognized in *Sullivan v. Little Hunting Park*, 396 U.S. 229, 90 S.Ct. 400, 405-06, 24 L.Ed.2d 386 (1969) (where the Court first authorized a damage action under section one of the 1866 Act; damages had been left open in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 2189-90 & nn. 13 & 14, 20 L.Ed.2d 1189 (1968)). See also *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454,

-
- 3 (Cont. from pg. 41A) for violations of the Federal Constitution and laws, Congress - the supreme sovereign on matters of federal law - abolished whatever vestige of the State's sovereign immunity the municipality possessed." *Id.* at 1413-14. This reasoning, of course, is wholly inapplicable to section 1981, because nothing in section 1981 includes municipalities within any class.

With respect to the common law of municipal immunity for "governmental" as opposed to "proprietary" functions, it may be noted that many states recognize that school districts exercise *only* governmental, and no proprietary, functions for this purpose. See 33 A.L.R. 3d 703 at 734; *Boyd v. Gulfport Municipal School District*, 821 F.2d 308 (5th Cir. 1987). This has certainly been the rule in Texas. See *Braun v. Trustees of Victoria I.S.D.*, 114 S.W.2d 947, 950 (Tex.Civ.App. - San Antonio 1938, writ ref'd); *Garza v. Edinburg Consolidated I.S.D.*, 576 S.W.2d 916, 918 (Tex.Civ.App. - Corpus Christi 1979, no writ).

160, 96 S.Ct. 2586, 49 L.Ed2d 415 (1976).

[2] We conclude that there is no reason to assume that Congress intended to impose vicarious municipal liability by section one of the 1866 Act though not so intending by section one of the 1871 Act, especially in light of then perceived constitutional problems associated with imposition of that character of municipal liability, and that the considerations enunciated in *Owen* counsel against such vicarious municipal liability, as does also the appropriateness of parallel treatment in this respect of these two post-Civil War statutes, particularly as contrasted to Title VII. See our original opinion, 798 F.2d at 762-63 & nn. 13 & 14.⁴

Accordingly, we reject Jett's complaints respecting our prior opinion's disposition of this section 1981 claim against the school district.⁵

Treating the suggestion of rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for rehearing en banc is DENIED.

4 As noted in our prior opinion, 798 F.2d at 763, our reasoning does not question private *respondeat superior* liability under section 1981. That issue was left open by the Supreme Court in *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 102 S.Ct. 3141, 73 L.Ed.2d 835 (1982).

5 We are aware that *Springer v. Seaman*, 821 F.2d 871, 880-81 (1st Cir. 1987), declined to follow our opinion in this respect. *Springer*, however, does not persuade us to a contrary result.

The mandate shall issue forthwith.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

NORMAN JETT

Plaintiff

CIVIL ACTION NO.

v.

3-83-0824-H

DALLAS INDEPENDENT SCHOOL
DISTRICT, et al.

Defendants

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendants' Motion for a Judgment Notwithstanding the Verdict, for New Trial, Remand or Remittitur, filed November 2, 1984, and Plaintiff's Response, filed November 28, 1984. Defendants' post-verdict motions are directed to the Judgment entered by this Court October 23, 1984, awarding the Plaintiff \$650,000.00 against Defendant Dallas Independent School District ("DISD"), \$150,000.00 against Defendants Todd and DISD, jointly and severally, and \$50,000.00 against Defendant Todd as compensatory and punitive damages for the violation of various constitutional rights arising out of Plaintiff's transfer from the position of head coach and athletic director at South Oak Cliff High School.

The Judgment in this case granted one quantity of damages for all of the constitutional violations found by the jury. The level of these damages would be unaffected by an error concerning one or more of the theories of recovery so long as one theory remains intact. The level of damages is not calibrated to the number of theories on which Plaintiff prevailed, but rather to the extent of his injury. *Clark v. Taylor*, 710 F.2d 4, 8 (1st Cir. 1983).

On a Motion for a Judgment Notwithstanding the Verdict, the Court must review the evidence most favorably to the party against whom the motion is made and give that party the benefit of all reasonable inferences from the evidence. *Alman Brothers Farms and Feed Mill, Inc. v. Diamond Lab., Inc.*, 437 F.2d 1295, 1298 (5th Cir. 1971).

DISD Liability, Part I

Defendants argue that there is no legal basis for the imposition of liability on the DISD because there was no showing or finding that the injuries sustained were inflicted pursuant to official policy. *Bennett v. City of Slidell*, 735 F.2d 861, 862 (5th Cir. 1984).

Official policy is a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy making authority. *Id.*

The Court has no difficulty in finding this test satisfied as a matter of law. The following facts were supported by uncontroverted evidence at trial:

1. The DISD, through the Board, has delegated sole and unreviewable authority to the Superintendent to "reassign" members of the coaching staff. See Defendants' Brief at 15-17; Transcript at 27.

2. Plaintiff was "reassigned" in the customary way that the DISD handles such matters. Tr. at 48-49.

While the Board certainly did not authorize the Superintendent to violate constitutional rights, it did delegate the unreviewable authority to "reassign" personnel as he saw fit. See *Thomas v. Sams*, 734 F.2d 185 (5th Cir. 1984).

A very recent Eighth Circuit case held that municipal liability is appropriate when an unconstitutional employment decision was made pursuant to the city's established policy of allowing certain officials final authority to make their own personnel decisions, and thus may fairly be attributed to the city. *Williams v. Butler*, 53 U.S.L.W. 2210 (8th Cir. 1984). *Accord Rookard v. Health and Hospitals Corp.*, 710 F.2d 41, 45 (2d Cir. 1983).

Even if the imposition of municipal liability under § 1983 were incorrect, such liability is permitted on solely a basis of *respondeat superior* when the claim is one of racial discrimination under § 1981. Plaintiff has prevailed on such a claim here. See *Garner v. Giarrusso*, 571 F.2d 1330, 1341 (5th Cir. 1978); *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977); *Haugabrook v. City of Chicago*, 545 F.Supp. 276 (N.D. Ill. 1982).

Todd Liability

Defendants argue that Defendant Todd is not subject to individual liability because he did not make the ultimate decision to transfer and terminate Plaintiff, but only provided recommendations to his superiors. This is incorrect. While

Defendants can make any recommendations they wish for no reasons whatsoever, Defendants cannot take any action for constitutionally impermissible reasons. See *Perry v. Sindermann*, 408 U.S. 593, 598 (1972); *Gray v. Union County Intermediate Education District*, 520 F.2d 803 (9th Cir. 1975). In *Swilley v. Alexander*, 629 F.2d 1018, 1021 & n.3 (5th Cir. 1980), the court found a letter of reprimand to be an actionable first amendment violation. Accord *Yoggerst v. Stewart*, 623 F.2d 35, 39 (7th Cir. 1980) ("Yoggerst I"); *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970).

One judge has forcefully written of the interests at stake:

Any time government action adverse to an employee is taken in direct response to the employee's exercise of free speech, an unmistakable message is subtly telegraphed to the employee warning that open communication of his views will result in punishment by the government. The warning constitutes a violation regardless of whether it is heeded. . . . "Rights are infringed where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason." *Elrod v. Burns*, 427 U.S. 347, 360 n.13 (1976) (plurality opinion).

MReichert v. Draud, 701 F.2d 1168, 1173 (6th Cir. 1983) (Krupansky, J., dissenting).

Liability for the recommendation alone is justified when the final action is taken, as the jury found here, solely on the basis of that improper recommendation. *Hickman v. Valley Local School District*, 619 F.2d 606, 610 (6th Cir. 1980); *Dick v. Watonwan Cty.*, 562 F.Supp. 1083, 1100 (D.Minn. 1983), reversed on other grounds, 738 F.2d 293 (8th Cir. 1984).

Defendants further argue that Defendant Todd is not subject to individual liability because of the application of the good

faith immunity defense. Todd's individual liability is predicated on the claims of racial discrimination and first amendment violations. Defendants' arguments concerning the "closeness" of the property interest question are irrelevant.

The affirmative defense of good faith immunity is available to the extent that the official's conduct does not violate clearly established constitutional rights, of which a reasonable person would have known. *Davis v. Scherer*, 104 S.Ct. 3012 (1984). The reasonableness of the conduct is measured on a strictly objective standard. *Id.* at 3018.

The rights in question are clearly established. Regardless of the factual arguments raised by Defendants regarding the shared admiration and lack of animosity by all concerned to Plaintiff, the jury's finding that Defendant Todd did not sufficiently prove his good faith defense is supported by the evidence.¹

Property Interest

Defendants renew their oft-raised argument that Plaintiff did not and cannot prove a property interest in his employment as head coach and athletic director sufficient to trigger due process protection. Superintendent Wright, however, conceded that there was an oral contract for Plaintiff to serve as head coach and athletic director through the 1982-1983 school year.Tr. 2-5. Plaintiff received a supplementary pay stipend of \$4,773.00 in consideration of this service. This arrangement certainly constituted more than a mere unilateral expectation

1 The viability of the race and free speech theories is discussed *infra*.

of remaining in the position for the school year. See *Board of Regents of State College v. Roth*, 408 U.S. 564 (1972); *Thomas v. Fort Worth Trustees*, 515 F.Supp. 280 (S.D.Tex. 1981).

The evidence further showed that Plaintiff was removed from that position prior to the end of that contractual term. The proof at trial further demonstrated that Plaintiff had one year remaining (through 1983-1984) on his written contract of employment as a teacher, that the five-year teacher contract would ordinarily be renewed in the absence of good cause for nonrenewal, Tr. 114-115 (yielding a further property interest, *Bueno v. City of Donna*, 714 F.2d 484 (5th Cir. 1983)), and that he was constructively terminated from that employment.

Defendants further argue that Plaintiff received any due process that may have been required. As Plaintiff observes, Defendants mischaracterized the Supreme Court's holding in *Davis v. Scherer*, 104 S.Ct. 3012, 3019 (1984). Although the Supreme Court has yet to specifically delineate the due process requirement in the employment context, the Fifth Circuit has established minimum pretermination procedural elements or "risk reducing procedures". *Bueno v. City of Donna*, 714 F.2d at 493. The Court instructed the jury pursuant to these criteria, the jury found that Plaintiff did not receive the process due, and the Court has no quarrel with that finding.

Waiver

Defendants argue that Plaintiff waived his constitutional rights. The standard for an effective waiver is the "intentional relinquishment of a known right or privilege". *Bueno v. City of Donna*, 714 F.2d at 492. Such an alleged waiver is subject to the most stringent scrutiny; the record must reflect the basis for the conclusion of actual knowledge of the existence of the right, full understanding of its meaning, and clear com-

prehension of the consequence of the waiver. *Id.* The record certainly does not support such a conclusion. See Tr. 29.

Equal Protection

Defendants argue that Plaintiff did not satisfy the elements of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in proving that the recommendation to transfer him was racially motivated. Plaintiff does not have to touch the four *McDonnell Douglas* bases. The formula used in that and other cases is merely one way to establish a *prima facie* case of employment discrimination that is often elusive because of the absence of more direct proof. See *Ramirez v. Sloss*, 615 F.2d 163, 167 (5th Cir. 1980). The eventual destination that a Plaintiff must reach, no matter what the route, is the proof by a preponderance of the evidence that he was discriminated against. The questions asked of the jury were addressed directly to that conclusion, and the evidence was sufficient to support the finding.

First Amendment

Defendants argue that there is insufficient evidence to support the jury's answer that the Plaintiff's exercise of first amendment rights was a substantial motivating factor in Dr. Todd's recommendations. Defendant Todd clearly testified

that certain remarks attributed to Plaintiff in newspaper articles were a "substantial motivating factor" in his decision.

Defendants argue that these statements were not on matters of public concern, and thus unworthy of any protection.² The definition of the scope of first amendment protection given teachers is found in *Pickering v. Board of Education*, 391 U.S. 563 (1968). In *Pickering*, a teacher wrote a letter to a local newspaper in connection with an impending property tax increase, questioning the school board's budgetary judgments. After a Board hearing determined his action to be "detrimental to the efficient operation and administration of the schools of the district", he was dismissed. The state court upheld the dismissal. The Supreme Court, per Justice Marshall, reversed: "To the extent [the state court's opinion suggests] that teachers may constitutionally be compelled to relinquish the first amendment rights they would otherwise enjoy as citizens to comment on *matters of public interest*, [it] proceeds on a premise that has been unequivocally rejected." (Emphasis added).

The most recent Supreme Court pronouncement on the constitutional protection afforded public employee speech is *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983). Myers was an Assistant District Attorney, employed for 5 1/2 years, serving at the pleasure of District Attorney Connick. In October 1980, she was informed that she would be transferred to another division of the office. She objected to her superiors,

2 Defendants do not argue that any first amendment interest Plaintiff possessed was outweighed by Defendants' interest in orderly management of the workplace. See generally *Tate v. Yenoir*, 537 F.Supp. 306, 308 (E.D.Mich. 1982).

expressed her reluctance to accept the transfer, and announced that she would research general dissatisfaction in the office. She distributed a questionnaire to employees, causing one of her supervisors to report to D. A. Connick that Myers was creating a "mini-insurrection". Myers was subsequently dismissed.

The Court, in a 5-4 decision by Justice White, finding no constitutional violation, distinguished *Pickering*:

Pickering's subject was "a matter of legitimate public concern" upon which "free and open debate is vital to informed decision-making by the electorate." [*Pickering*], its antecedent and progeny, lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constitutional speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge. When employee expression cannot be fairly considered as relating to any matter of *political, social, or other concern to the community*, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the first amendment. 103 S.Ct. at 1690. (Emphasis added).

* * *

We hold only that when a public employee speaks not as a citizen upon matters of public concern but instead as an employee upon matters of *personal interest*, absent the most usual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

While, as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the first amendment does not require a public of-

Thus, *Connick's* relevant contribution to *Pickering* is essentially incremental. *Gonzales v. Benavides*, 712 F.2d 142 (5th Cir. 1983). Seizing upon language over which the *Pickering* court did not expend great analytical effort, the Supreme Court decided that the individual's right as a citizen, protected by the first amendment to the extent that it is not outweighed by the government's interest as an employer, is only a right to speak out on matters of public concern. (Actually, *Pickering* spoke more frequently of matters of public "interest" or "importance").

The first incident in this case concerned remarks attributed to Plaintiff in a newspaper interview concerning the perceived future impact of new NCAA academic standards and their impact on minority students. In addition to Plaintiff, other educational leaders in the community and beyond were interviewed. The standards in question were to be applied nationally.

The matter is clearly of "public concern". It addresses matters of national academic and athletic policy of interest to many beyond Plaintiff, Todd, South Oak Cliff and Dallas. It does not concern Plaintiff or any grievance he had with anyone. Compare *Bickel v. Burkhart*, 632 F.2d 1251, 1256-58 (5th Cir. 1980) (institutional criticism) with *Smalley v. Eatonville*, 640 F.2d 765, 768 (5th Cir. 1981) (personnel criticism). See also, *Micilcavage v. Connelie*, 570 F.Supp. 975, 978 (N.D.N.Y. 1983); *Collins v. Robinson*, 568 F.Supp. 1464 (E.D.Ark. 1983), affirmed, 734 F.2d 1321 (8th Cir. 1984).

The second item concerned a public quote by Plaintiff comparing his South Oak Cliff defensive line to that of SMU, and his offense to that of the Dallas Cowboys. While this issue does not implicate any weighty matters of public policy, "public concern" should not be equated with "actual interest". *Egger v. Phillips*, 710 F.2d 292 (7th Cir. 1983), cert. denied, 104

S.Ct. 284 (1983). As long as the speech was not of purely private concern, and it was significant enough for employment action to be taken in response, the speech is sufficiently significant to merit first amendment protection. See *McGee v. South Pemiscot School District*, 712 F.2d 339 (8th Cir. 1983) (distinguishing *Connick* on its facts and holding that the "fate of junior-high track" had become of public concern).

Defendants argue that the NCAA remarks were "false" and thus were not entitled to constitutional protection. Mere falsehood will not bar such protection; proof is required that the false statements were knowingly or recklessly made. *Pickering*, 391 U.S. at 1738; *Gates v. City of Dallas*, 729 F.2d 343, 346 (5th Cir. 1984). There is absolutely no proof of any such knowing or reckless falsehood.

Academic Freedom

Defendant Todd admitted that Plaintiff's departure from a previously practiced game plan in a match against Plano figured in his decision. Plaintiff asserts that such retaliation for an exercise of instructional discretion is an impermissible first amendment violation. The evidence, however, showed that Defendant Todd's actions concerned not the substance or methodology that Plaintiff chose to apply as coach, but complaints and protests that Defendant Todd had received in reaction to Plaintiff's change of plans. This sort of disruptive effect on students is a proper subject of concern and action by school administrators. See *Tinker v. Des Moines Ind. Comm. School Dist.*, 393 U.S. 503 (1969).

Without addressing the question of whether unadulterated Monday morning quarterbacking can rise to the level of a constitutional violation, the Court finds that there is no evidence to support a finding of a violation of academic freedom. The validation of the findings on the other first

amendment issues, however, renders this conclusion of no consequence to the judgment.

DISD Liability, Part II

Defendants next raise the argument that there is no evidence to support the findings that the DISD acted solely on the basis of Defendant Todd's recommendation without any independent investigation, and that the DISD's actions would not have been taken absent the impermissible considerations.

The evidence showed that there was no independent investigation undertaken. Santillo testimony, Tr. 82-83. Where the issue of Plaintiff's fate was before the Superintendent solely because of an impermissible recommendation from the principal, the impermissible reasons are attributable to the Superintendent (and thus the District under § 1981). *Hickman v. Valley Local School District*, 619 F.2d 606 (6th Cir. 1980). See also *Arnett v. Kennedy*, 416 U.S. 134, 216 (1974) (Marshall, J., dissenting) ("The need for an independent decisionmaker is particularly crucial in the public employment context, where the reason for the challenged dismissal may well be related to some personal antagonism between the employee and his superior.").

Constructive Termination

Defendants argue that there is insufficient evidence to support the jury's finding that Plaintiff was constructively terminated from his employment in August 1983. The Court's instruction was in line with current Fifth Circuit authority. The question of how a reasonable person would have felt in Plaintiff's situation is inherently and inexorably a question of fact; the Court cannot say that, considering all of the cir-

cumstances facing Plaintiff, that the jury's finding is unsupported.

Damages

Defendants argue that there is insufficient evidence to support the imposition of \$50,000.00 in punitive damages against Defendant Todd. There is absolutely no evidence that Defendant Todd's actions were taken in a malicious, wanton or oppressive manner.

Next, Defendants assert that the jury's award of \$150,000.00 against Defendant Todd and \$650,000.00 against Defendant DISD are duplicative awards of damages, resulting in irreconcilable findings. The Court is of the opinion that these damages are redundant, though not irreconcilable. The DISD acted on and incorporated Todd's impermissible recommendation and the damages compensate part of the same intangible injuries sustained by Plaintiff. Plaintiff suggests that this problem can be remedied by reforming the judgment to make the DISD liable for damages in the sum of \$650,000.00, of which Todd would be jointly and severally liable for \$150,000.00. Response at 73 n.2. The Court is of the opinion that such a reformation cures the problem.

Motion for New Trial

Defendants assert that the amount of the jury verdict is excessive and have moved for a new trial or, in the alternative to reduce the jury award to \$25,000.00.

In this circuit, the standard for granting a remittitur is the same in the trial court or on appeal:

The jury's award is not to be disturbed unless it is entirely disproportionate to the injury sustained. We have expressed the extent of such distortion that war-

rants intervention by requiring such awards to be so large as to "shock the judicial conscience", "so gross or inordinately large as to be contrary to right reason", so exaggerated as to indicate "bias, passion, prejudice, corruption, or other improper motive", or as "clearly exceed[ing] that amount that *any* reasonable man could feel the claimant is entitled to.

(Emphasis in original). *Hanson v. Johns-Manville Products Corp.*, 734 F.2d 1036 (5th Cir. 1984), *reh. denied*, 774 F.2d 94 (5th Cir. 1984).

The process by which these standards are to be applied has been explained as follows:

Unless we are to accept any verdict, in whatever amount, as a legally acceptable measure, we must review the amount of jury awards. Reassessment cannot be supported entirely by rational analysis. It is inherently subjective in large part, involving the interplay of experience and emotions as well as calculation. The sky is simply not the limit for jury verdicts. . . .

Id.

After the reformations noted above, the judgment stands as follows:

\$250,000 against Defendant DISD for mental anguish and damage to reputation prior to August 20, 1983, of which Defendant Todd is jointly and severally liable for \$150,000.

\$400,000 against Defendant DISD for lost earnings, mental anguish and damage to reputation after August 20, 1983.

The evidence that Plaintiff sustained \$294,000 in damages for lost earnings was not controverted.

Damages may also be awarded for mental distress resulting from a deprivation of constitutional rights. *Solis v. Rio Grande City Indep. School*, 734 F.2d 243 (5th Cir. 1984).

Excessiveness is not determined by comparing verdicts rendered in different cases, each case must be determined on its own facts. *Sosa v. M/V Lago Izabel*, 736 F.2d 1028, 1035 (5th Cir. 1984). Without adhering to any notion of mathematical parity, the Court is compelled to note that this verdict is far in excess of that in other cases one would consider comparable. See *Barnett v. Housing Authority of the City of Atlanta*, 707 F.2d 1571 (11th Cir. 1983) (\$75,000 actual damages); *Simineo v. School District No. 16*, 594 F.2d 1353 (10th Cir. 1979) (\$60,000); *Miller v. City of Mission, Kansas*, 516 F.Supp. 1333 (D.Kans. 1981) (\$190,000). In *Wells v. DISD*, Civil Action No. 3-79-1401-G, the Court reduced a jury verdict of damages for past and future mental anguish, injury to reputation and career to \$250,000 from \$1,050,000.

The Court concludes that the \$356,000 of the verdict compensating items other than lost earnings is excessive and should be reduced when considered in light of the facts of this case.

Defendants argue that a determination of excessiveness of damages mandates a new trial on the entire case, citing *Lowe v. General Motors Corp.*, 624 F.2d 1373 (5th Cir. 1980). This is not quite the teaching of *Lowe*. Judge Brown clearly approved of the use of remittiturs to cure "grossly excessive" verdicts resulting not from bias, passion or prejudice, but from the similar although distinct question of "just too much". 624 F.2d at 1383. Of course, if a plaintiff refuses to remit, the court may order a new trial strictly on the issue of damages.

Accordingly, the Court has determined that a new trial on the issue of damages should be granted unless Plaintiff files a remittitur of \$200,000 of the \$650,000 awarded against Defen-

dant DISD, including \$100,000 awarded jointly and severally against Defendant DISD and Todd.

Other Grounds for New Trial

Defendants urge several other grounds for a new trial, pursuant to Rule 59, Fed.R.Civ.P.

The first objection is the admission of the newspaper article containing the purported quote of Plaintiff on the new NCAA standards on the grounds that it was replete with hearsay.

The article in question was admitted not to prove the truth of the matter asserted, but to demonstrate the content of the comments that admittedly were a "substantial motivating factor" in Defendant Todd's recommendation, and to prove that they constituted protected conduct. The truth of the statements is irrelevant. *Williams v. City of Valdosta*, 689 F.2d 964, 972 n.5 (11th Cir. 1982). Moreover, the Court recalls that an appropriate limiting instruction was requested and given.

Defendants also argue that the article was unduly prejudicial under Rule 403, Fed.R.Evid., because it tended to suggest that there was a division of opinion along racial lines on the issue of whether black students could pass certain NCAA standards. The Court disagrees.

Defendants next argue that the admission of out-of-court statements by Mr. Couch should have been excluded because there was no showing that he was acting within an agency capacity for Defendants in making such statements. Although this objection was not stated as such at trial, and is presumably waived, it would not be grounds for a new trial because the same testimony came in through the testimony of Superintendent Wright. Thus, even if Defendants' objection was timely, they protest harmless error. *United States v. Truitt*, 440 F.2d 1070 (5th Cir. 1971), *cert. denied*, 404 U.S. 847 (1972).

Moving right along, Defendants object to the admission of the testimony of Plaintiff's economic expert concerning lost earnings after August 1983, stating that "Plaintiff voluntarily resigned on August 19, 1983". The jury did not share that view.

Instructions

Defendants further protest the instructions concerning the imposition of district liability. As discussed above, there are adequate grounds for imposing municipal liability as a matter of law, and, further, Defendants' arguments do not address liability under § 1981. Moreover, Defendants did not submit a requested issue on this question.

Next, Defendants state that the Court erred in instructing that due process requires the right to respond "in writing" to the charges, citing *Davis v. Scherer*. As noted above, *Davis* did not delineate the constitutional minima for due process in employment termination cases. The Court's instruction was based on the current Fifth Circuit authority.

Third, Defendants protest the instructions concerning free speech, particularly the failure to instruct that such speech must be truthful and accurate to be protested. Defendants are incorrect in their statement of the law.

Motion to Remand

Alternatively, Defendants move to remand the case to the School Board for further hearings. Defendants cite *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970):

If a procedural deficit appears, the matters should, at that point, be remanded to the institution for its compliance with minimum federal or supplementary academically created standards. This should be done

so that the matter can first be made ripe for court adjudication by the school authorities themselves.

430 F2d at 858.

The Court does not find *Ferguson* controlling here. Defendants have steadfastly maintained for months that no procedural due process was required in this case, despite Plaintiff's arguments to the contrary. The procedural deficit "appeared" long ago. The concerns of the *Ferguson* panel -- that ideally a school district should be given the first opportunity to cure a procedural deficit before resort to a federal court -- are not served by what Defendants seek. In essence, Defendants suggest that they should be entitled to try their luck with a test case in federal court and, if the result is unfavorable, retreat to District procedures for an opportunity to negate Plaintiff's successes. The procedural deficit has now been remedied by this Court. *Fluker v. Alabama State Board of Education*, 441 F.2d 201, 208 n.15 (5th Cir. 1981).

Finally, the alternate grounds supporting the judgment beyond the procedural due process violation would render any remand exercise meaningless.

Accordingly, the Court is of the opinion that Defendants' Motion for Judgment Notwithstanding the Verdict should be, and hereby is, GRANTED to the extent that the award of \$50,000.00 in punitive damages against Defendant Todd is set aside as unsupported by the evidence, the award of \$150,000 in actual damages against Defendant Todd is set aside as duplicative, and the judgment should be reformed to reflect actual damages in the amount of \$650,000 against Defendant DISD, of which Defendant Todd is jointly and severally liable for \$150,000.

Defendants' Motion for New Trial is GRANTED on the issue of damages, unless Plaintiff files a remittitur of \$200,000 awarded against Defendant DISD, including \$100,000

awarded jointly and severally against Defendants DISD and
Todd. Defendants' Motion is, in all other respects, DENIED.
Defendants' Motion for Remand is DENIED.
SO ORDERED.
DATED: December 10, 1984.

/s/ BAREFOOT SANDERS
UNITED STATES DISTRICT COURT

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. CA3-0824-H

NORMAN JETT

v.

DALLAS INDEPENDENT SCHOOL
DISTRICT, ET AL.

AMENDED REFORMED JUDGMENT

This action came on for trial before the Court and a jury, the Honorable Barefoot Sanders, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict, a judgment in accordance with the jury verdict was signed by this Court on October 23, 1984. Thereafter, pursuant to the mandate of this Court's Memorandum Opinion and Order dated December 10, 1984, granting in part Defendants' Motion for Judgment Notwithstanding the Verdict and Motion for New Trial, Plaintiff filed his remittitur and the judgment previously signed by this Court on October 23, 1984, was reformed as set forth in the Reformed Judgment signed by this Court on December 17, 1984. In addition to the amount of damages awarded to the Plaintiff in said Reformed Judgment, Plaintiff was also awarded "his costs of Court, including reasonable attorneys' fees as determined by this

Court." Thereafter, on January 31, 1985, this Court dictated into the record its award to Plaintiff of his costs of court, including reasonable attorneys' fees, having reviewed Plaintiffs' Motion with Supporting Brief and Affidavits for Award of Attorneys' Fees, and Defendants' Response, and Amended Response, thereto. Accordingly, the Reformed Judgment signed by this Court on December 17, 1984, is amended as set forth below:

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Plaintiff, Norman Jett, recover of and from Defendant Dallas Independent School District the sum of \$450,000.00, with interest thereon at the rate of 9.5% per annum from December 17, 1984, until paid.

IT IS FURTHER ORDERED that Defendant Frederick Todd is jointly and severally liable for \$50,000.00 of said \$450,000.00 awarded against the Defendant Dallas Independent School District and that, therefore, Plaintiff Norman Jett have and recover of and from Defendant Frederick Todd the sum of said \$50,000.00, with interest thereon at the rate of 9.5% per annum from December 17, 1984, until paid.

IT IS FURTHER ORDERED AND ADJUDGED that Plaintiff recover of and from Defendants Dallas Independent School District and Frederick Todd, jointly and severally, his costs of court, including reasonable attorneys' fees, through this date, in the sum of \$112,870.45, with interest thereon at the rate of 9.5% per annum from December 17, 1984 until paid.

SIGNED this the 7th day of February, 1985.

/s/ Barefoot Sanders
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1015

D.C. Docket No. CA3-83-0824-H

NORMAN JETT,

Plaintiff-Appellee,

versus

DALLAS INDEPENDENT SCHOOL DISTRICT
AND FREDERICK TODD,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

Before GEE, RANDALL and GARWOOD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that costs on appeal be taxed one-third against appellant Todd and two-thirds against appellee Jett, said costs to be taxed by the Clerk of this Court.

August 27, 1986

ISSUED AS MANDATE: February 5, 1988

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
NO. 85-1015

DALLAS INDEPENDENT SCHOOL DISTRICT
AND FREDERICK TODD,

Appellants,

VS.

NORMAN JETT,

Appellee.

Appeal from the United States District Court
for the Northern District of Texas
Dallas Division

SUGGESTION FOR REHEARING EN BANC

FRANK M. GILSTRAP
SHANE GOETZ

Hill, Heard, Oneal,
Gilstrap & Goetz
1400 West Abram Street
Arlington, Texas 75013
817/261-2222

ATTORNEYS FOR APPELLEE

STATEMENT OF ISSUES ASSERTED TO MERIT
EN BANC CONSIDERATION

1. Must a plaintiff seeking recovery against a local government for employment discrimination under 42 U.S.C. § 1981 prove that the racial discrimination resulted from the employer's "policy or custom"?

2. Did the panel disregard binding precedent in *Garner v. Giarusso*, 571 F.2d 1330 (5th Cir. 1978)?

STATEMENT OF THE COURSE OF
PROCEEDINGS AND DISPOSITION OF THE CASE

The panel opinion correctly sets forth the course of proceedings and disposition of the case. Slip op. at 9000-9001, 9019-9020. [App. 5A, 31-32A].

STATEMENT OF FACTS NECESSARY
TO ARGUMENT OF THE ISSUES

The panel opinion sets forth all facts necessary to argument of the issues. Slip op. at 8998-9001. [App. 2-5A].

ARGUMENT AND AUTHORITIES

1. The panel errs in grafting *Monell's* "policy" requirement onto 42 U.S.C. § 1981.

The panel holds that Part II of *Monell*,¹ which was intended to apply to 42 U.S.C. § 1983, is also applicable to 42 U.S.C. § 1981 claims against local governments. Slip op. 9017-9018. [App. 27-30A]. To recover against a municipality or school board under § 1981, an employee must now show that the racial discrimination resulted from an "official municipal policy." *Id.* at 9016. [App. 27A]. Jett's § 1981 claim against DISD thus becomes the same as his § 1983 claim for deprivation of his Fourteenth Amendment right to equal protection. *But see, Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 412 n.5, 88 S.Ct. 2186, 20 L.Ed.2d 1189, 1192 n.5 (1968).

In seeking to graft a rule developed under § 1983 onto a case under § 1981, the opinion encounters serious difficulty with the latter statute. The problems manifest themselves in the striking anomaly that results from this decision: private employers are subjected to a more demanding racial discrimination standard than are public employers. Slip op. at 9018. [App. 30A]. If a high school principal transfers a head coach to ninth grade coach because of race, the school district is not liable unless the transfer implemented "policy" or "practice". If, however, a corporate supervisor transfers an employee to a less favorable job because of race, the corporation is liable regardless of its policy. *But see, Garner v. Giarusso*, 571 F.2d 1330, 1341 (5th Cir. 1978).

The opinion reasons "that the Supreme Court's interpretation in *Monell* of Congress' intent in enacting Section 1983 provides compelling reasons for distinguishing between private and municipal liability under Section 1981." Slip op.

1 *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)

at 9018. [App. 30A]. We must therefore reread *Monell* and its predecessor, *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492, which held that local governments were not liable under § 1983 because they were not "persons" as defined in that statute. 355 U.S. at 187. Monroe's holding came after a review of the Congressional debates accompanying the Ku Klux Klan Act of 1871 (Section 1 of which became § 1983) and particularly the defeat of the "Sherman Amendment."²

Seventeen years later in *Monell*, the Court concluded that it had misread history. The rejection of the Sherman Amendment had been based, not upon a fear that municipalities might be held liable for damages, as *Monroe* had concluded, but upon a fear of compelling local governments to enforce federal law in violation of the then viable constitutional doctrine of "dual sovereignty", 436 U.S. at 669, 98 S.Ct. at 2025. Congressional intent was found to have been far broader than originally supposed. "Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies." 436 U.S. at 690, 98 S.Ct. at 2035 (emphasis in the original).

The Sherman Amendment was not forgotten. It was used to bolster *Monell's* important new emendation: "When Congress' rejection of the only form of vicarious liability presented to it

2 In its original version the Sherman Amendment would have made the "inhabitants of the county, city, or parish' in which certain acts of violence occurred liable 'to pay full compensation' to the person damaged." *Monroe*, 365 U.S. at 188, and in its second version it would have made "the county, city or parish" itself "liable to pay full compensation to the person or persons damnified by such offense." *Id.* at 188 n.41. See *Monell*, 436 U.S. at 702, 98 S.Ct. at 2041.

[the Sherman Amendment] is combined with the absence of any language which can easily be construed to create respondeat superior liability, the inference that Congress did not intend to impose such liability is quite strong." *Monell*, 98 S.Ct. 2037 n.57, quoted in Slip op. at 9017. [App. 27A]. Thus, local governments are directly liable under § 1983 only when their unconstitutional actions implement or execute a "policy" or "custom". *Monell*, 436 U.S. at 690, 98 S.Ct. at 2035-2036.

If the analysis of legislative intent undertaken in *Monroe* and *Monell* was "fraught with difficulties", 436 U.S. at 675, 98 S.Ct. at 2028, the task contemplated by the panel is even more demanding. Here Congress' rejection of the Sherman Amendment is not used to construe the statute that was before Congress in 1871, i.e., Section 1 of the Ku Klux Klan Act (now § 1983). Rather, it is used to construe Section 1 of the Civil Rights Act of 1866 (now §§ 1981 and 1982).³ Moreover, the

3 The legislative history of § 1981 was settled in *Runyon v. McCrary*, 427 U.S. 160, 168-170, 295, 96 S.Ct. 2586, 2593-94, 49 L.Ed.2d 415 (1976), just as the identical legislative history of 42 U.S. § 1982 had been settled in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 422-437, 88 S.Ct. 2186, 2194-2202, 20 L.Ed.2d 1189, 1198 (1968). See also *District of Columbia v. Carter*, 409 U.S. 362, 421, 93 S.Ct. 602, 604 (1973); *Tillman v. Wheaton-Haven Recreation Assn.*, 410 U.S. 431, 438-40, 93 S.Ct. 1090, 1095, 35 L.Ed. 403 (1973); *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287-296, 96 S.Ct. 2574, 2582-2586, 49 L.Ed.2d 293 (1976); and *General Bldg. Contractors Assn., Inc. v. Pennsylvania*, 458 U.S. 375, 383-390 407-414, 102 S.Ct. 3141, 3146-49, 3159-62, 73 L.Ed.2d 835 (1982).

analysis of this complex problem is reduced to just two sentences.

The *Monell* court concludes that in 1871 when Congress enacted what is now codified as § 1983, which was five years after it had enacted the statute that became § 1981, Congress did not intend municipalities to be held liable for constitutional torts committed by its employees in the absence of official municipal policy. To impose such vicarious liability for only certain wrongs based on § 1981 would contravene the congressional intent behind § 1983.

Slip op. 9017-18 (emphasis added). [App. 29A]. While the first sentence accurately summarizes the conclusions of *Monell*, it implies that *Monell* also considered the 1866 Act, which it did not.⁴ The second sentence summarizes the conclusions of the panel, not of *Monell*.

Of course, the same argument was made prior to *Monell* in a series of cases in which defendants attempted to extend *Monroe's* "municipal immunity"⁵ to claims arising under § 1981. Thus, in *Garner v. Giarusso*, 571 F.2d 1330 (5th Cir.

4 The slip opinion also misspeaks at p. 9016 [App. 27A] when it says that "[i]n *Monell*, the Supreme Court carefully examined the history of § 1981 [sic] and concludes that . . . Congress did not intend for a municipality to be held liable unless action pursuant to official municipal policy caused a constitutional tort." The panel surely meant "§ 1983", not "§ 1981".

5 Those cases used the term "immunity", as does *Monell*. Apparently since local governments were not liable under § 1983 after *Monroe*, they were considered "immune".

1978), this court analyzed the defeat of the Sherman Amendment and concluded that the argument that § 1983 had somehow modified § 1981 was "wholly without support in either the Supreme Court's § 1983 cases, the wording of § 1981, or its legislative history." 571 F.2d at 1339. The argument was also rejected in *Sethy v. Alameda County Water Dist.*, 545 F.2d 1157, 1160-61 (9th Cir. 1976) (en banc) ("[T]here is no basis for finding an implied repeal of any rights created by § 1981 into the failure of Congress in 1871 to force municipal liability under § 1983 upon states that did not at that time permit actions against municipalities"); and *Mahone v. Waddle*, 564 F.2d 1018, 1031 (3rd Cir. 1977). See also, *Campbell v. Gadsden County Dist. School Board*, 534 F.2d 650, 653-654 n.8 (5th Cir. 1976); and *United States v. City of Chicago*, 549 F.2d 415, 425 (7th Cir. 1977).

Yet, this same argument carries the day in *Jett*. Why is the reasoning of *Garner*, *Sethy*, and *Mahone* rendered suddenly worthless by *Monell*? *Monell* had nothing to say about § 1981

and resulted -- it is easy to forget -- in significantly *expanded* liability for local governments under § 1983. The panel simply offers no reason why "repeal by implication"⁶ rejected prior to *Monell*, somehow becomes viable now.

The panel also fails to note that both *Monell* and *Monroe* turned upon "the language of § 1983 as originally passed:

[A]ny person who, under color of any law, statute, ordinance, regulation, custom, or usage of any state, shall subject or cause to be subjected, any person . . . to the deprivation of any rights . . ."

436 U.S. at 691, 98 S.Ct. at 2036 (emphasis in *Monell*). *Monroe* held that municipalities were not liable because they were not "persons" as used in this statute. *Monell* concluded that a municipality was a "person" but that the language "shall subject or cause to be subjected" meant that Congress had intended to require that liability be imposed only for conduct

6 The difficult test for "repeal by implication" is set forth in *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S.Ct. 336, 80 L.Ed. 351, 355 (1936). See also, *Jones v. Alfred H. Mayer*, 392 U.S. at 437, which rejected the claim that Congress intended to exempt private persons from the operation of the Civil Rights Act of 1866, when the statute was reenacted as the Enforcement Act of 1970; *cert. denied*, 401 U.S. 948 (1971). *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097, 1100 (5th Cir. 1970), which held that "by enacting Title VII of the 1964 Civil Rights Act, Congress did not repeal the existence of a private cause of action under 42 U.S.C. § 1981", and *Waters v. Wisconsin Steel Works*, 427 F.2d 476, 484 (7th Cir. 1970), *cert. denied* 400 U.S. 911 (1971) (same).

taken pursuant to municipal "policy or practice." Yet, these considerations are simply inapposite to § 1981.

Nor does the language of § 1981 lend itself to that interpretation. Whereas § 1983 speaks in terms of "persons" who are subjected to liability, § 1981 uses the word "persons" to describe those who are benefited by the enactment. *See Garner*, 571 F.2d at 1340. *See also, Mahone*, 564 F.2d at 1030. Again, we are not told just how *Monell* has changed this.

Since the panel's conclusion is not supported by analysis of the 1871 congressional debates, is there support in the debates of the 39th Congress which passed §§ 1981 and 1982? The legislative intent of this first Reconstruction Congress has been considered at length in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968), and by exhaustive commentary.⁷ Yet, this legislative history only serves to undercut the panel's reasoning. Contrary to the panel's opinion, Congress *did* intend to treat "a few types of violations" differently from other types of "'federal' wrongs". Slip op. at 9017. [App. 29A].

"The First Session of the Thirty-Ninth Congress met on December 4, 1865, some six months after the preceding Congress had sent to the states the Thirteenth Amendment, and a few days before word was received of the Amendment's ratification." *Jones*, 392 U.S. at 455, 20 L.Ed.2d at 1216. "On January 5th, Senator Trumbull introduced both the

7 *See e.g., Bickel, The Original Understanding and the Segregation Decision*, 69 Harvard L. Rev. 1 (November 1955); Kohl, *The Civil Rights Act of 1866, Its Hour Come Round at Last: Jones v. Alfred H. Mayer Co.*, 55 Virginia L. Rev. 272 (1966); and 6 Fairman, *Reconstruction and Reunion, 1864-88, Part 1, History of the Supreme Court of the United States*, 1117-1259.

Freedmen's Bill and the Civil Rights Bill." *Id.* at 456, and on April 9, 1866, the Civil Rights Act of 1866 was passed. Stat. L. 27 (1866), later codified as 16 Stat. 144, Civil Rights Act of 1870, § 16. Section 1 of the Act contains statutory language now codified as 42 U.S.C. §§ 1981 & 1982. It guarantees to "all persons . . . the same right . . . to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, hold, and convey real and personal property." One of these enumerated rights, the "right to make and enforce contracts", would later be found to include racial discrimination in employment. See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460 95 S.Ct. 1716, 44 L.Ed. 295 (1975).

The failure of the panel's position is apparent from the language of the statute itself, which does *not* prohibit racial discrimination in all areas. It "deals only with the protection of a limited range of civil rights, including the right to make and enforce contracts," *Garner* 571 F.2d at 1340, the right to hold property, the right to sue, etc. See also, *Campbell v. Gadsden County District School Board*, 534 F.2d 650, 653-654 n.8.

Indeed, Congress in 1866 *declined* to extend the statute to cover all of the rights that had arguably been granted the newly freed slaves by the 13th Amendment. Language in the bill prohibited "discrimination in civil rights or immunities among the citizens of the United States" (emphasis added) . . . "occasioned controversy . . . because of the breadth of the phrase 'civil rights and immunities'." *General Building Contractors Ass'n, Inc. v. Pennsylvania*, 458 U.S. 375, 388, 102 S.Ct. 3141, 3149 n.15, 71 L.Ed.2d 835 (1982). (emphasis added). To eliminate the possibility that this "broad language . . . could be interpreted to encompass the right of suffrage and other political rights . . . and the difficulty growing out of any other construction *beyond the specific rights named in this section*," *Id.* (emphasis added), "the passage was removed to *narrow* the scope of the Legislation." *Id.* (emphasis in the original).

The legislative history of the 1866 Act also refutes another of the panel's conclusions, i.e., that Congress intended the 1866 Act to apply differently to governments as opposed to private persons. Yet, it is well settled that by passing Section 1 of the 1866 Act Congress intended to reach "discrimination by private owners as well as discrimination by public authorities". *Jones*, 392 U.S. at 421-422, 20 L.Ed.2d at 97.

Ultimately, the result in *Jett* appears to rest upon neither the legislative history of § 1981 nor any statutory language, but upon a belief that the panel's holding would not be "inconsistent with the Supreme Court's reasoning in *Monell*." Slip op. at 9017. [App. 27A]. Yet, *Monell* simply does not involve § 1981 and when § 1981 was considered in *General Building Contractors Association v. Pennsylvania*, *supra*, the Court gave no hint that *Monell* might apply to § 1981. Moreover, other circuits continue to apply § 1981 in government employment discrimination cases. See *Taylor v. Jones*, 563 F.2d 1193, 1200 [syl. 5, 6] (8th Cir. 1981); *Leonard v. City of Frankfort Elec. & Water Plant*, 752 F.2d 189, 94 n.9 (6th Cir. 1985); and *Greenwood v. Ross*, 778 F.2d 448, 456 (8th Cir. 1985). See also, *Haugabrook v. City of Chicago*, 545 Supp. 276, 279-281 (N.D. Ill. 1982), and cases there cited.

2. Garner v. Giarusso is controlling precedent

The opinion dismisses *Garner*, 571 F.2d at 1330, because it was decided "before *Monell*." Yet, the panel cannot "disregard the precedent set by a prior panel, even though it conceives error in the precedent." *Davis v. Estelle*, 529 F.2d 437, 441 (5th Cir. 1976). Nor can *Monell* constitute "intervening contrary authority from the Supreme Court," since *Monell* says nothing about § 1981. Cf., *Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981).

As its sole basis for distinguishing *Garner*, the panel notes that *Garner* "did not address whether the municipal liability could be imposed on the basis of respondeat superior," Slip op. at 9016, n.12 [App. 26A], apparently in reference to the following:

Our holding does not pose the problem of imposing vicarious liability upon a municipality *because of the acts of its servants*. See *Hamilton v. Chaffin*, 506 F.2d 904 (5th Cir. 1975).

Garner, 571 F.2d at 1341 (emphasis added). yet, *Garner* clearly allowed some kind of "vicarious liability", since the City was held liable under § 1981 for the racially motivated actions of *Garner's* superior officer. Apparently, *Garner* meant to distinguish itself from cases involving vicarious liability for the "acts of servants." Thus, in *Hamilton v. Chaffin*, a municipality was held not to be liable under § 1983 for the acts of rank and file policemen, while in *Garner* the City was held liable for a racially motivated transfer which was made or approved by *Garner's* superior officer⁸, i.e., a supervisor.

This distinction between mere "servants" and "supervisors" is crucial in many cases under both § 1981 and Title VII. See e.g., *Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979) ("[R]espondeat superior does apply here, where the action complained of was that of a supervisor authorized to hire, fire, discipline or promote, or at least to participate in or

8 While the opinion does not explicitly say that the transfer was made by the superior officer, the superior officer did testify as to the reasons for the transfer, 571 F.2d at 1333, and a transfer would have to be made by someone with supervisory authority.

recommend such actions."); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977) ("The defendant is liable as principal for any violation of Title VII or § 1981 by Kolkau in his authorized capacity as a supervisor."); *EEOC v. Gaddis*, 733 F.2d 1373, 1380 (10th Cir. 1984) (en banc); and *Mitchell v. Keith*, 752 F.2d 385, 388 [syl. 3, 4] (9th Cir. 1985), *cert. denied* 105 S.Ct. 3502 (1986).

Whatever the precise holding in *Garner* may be, it controls in *Jett*; the two cases simply cannot be distinguished on their facts. As in *Garner*, *Jett's* supervisor, motivated by racial animus, recommended that he be "transferred". (The effect of the panel's rejection of *Jett's* claim that this removal from his coaching post implicated a protected property interest is to treat it as a "transfer.") *Garner* met with Police Chief Giarusso, to attempt to prevent his transfer, 571 F.2d at 1334, and *Jett* met with DISD Superintendent Linus Wright for the same purpose. Slip op. at 8999. [App. 3-4A]. Wright was informed of the possibility of racial discrimination, *Id.*, while *Garner* is not clear on this point. If anything, the operative facts are stronger in *Jett* than in *Garner*. Yet, *Garner* prevailed under § 1981, while *Jett* does not.

CONCLUSION

In the nine years since *Monell*, the courts have wrestled with problems that *Monell* left "for another day." 436 U.S. at 713, 98 S.Ct. at 2047 (Powell, J., Concurring.) While these problems have proved difficult, courts have at least had the "elaborate canvass of . . . legislative history," 436 U.S. at 714, 98 S.Ct. at 2048 (Rhenquist, J., dissenting), as well as the statutory language of § 1983 to guide them. If the panel's opinion in *Jett* is allowed to stand, it will effect a change as significant as *Monell* in a civil rights statute that has survived for 120 years without legislative amendment or significant judicial revision

(except for *General Building Contractors* which is inapposite to this case). Like *Monell*, *Jett* leaves difficult problems for another day. Yet, unlike *Monell*, *Jett* offers no guidance as to how these problems are to be resolved. The opinion refers us to *Monell*, but *Monell* cannot apply to § 1981 on any principled basis. We are told to reach *Monell's* result, but we must leave behind *Monell's* reasoning.

Moreover, the panel's apparent object, i.e., to fuse a § 1981 claim against a governmental employer into a § 1983 claim for deprivation of equal protection, is at odds with the expressed intent of the Congress that enacted § 1981. Before the Fifth Circuit allows the panel's opinion in *Jett* to stand, it should consider the dissent in *Monell*, which cautioned against abandoning a "long and consistent line of precedents," 436 U.S. at 714, 98 S.Ct. at 2048 (Rhenquist, J., dissenting), and noted that "considerations of *stare decisis* are at their strongest when this Court confronts its previous constructions of legislation." *Id.*

Rehearing should be granted, the decision of the panel vacated, and the case heard en banc.

Respectfully submitted,

HILL, HEARD, ONEAL,
GILSTRAP & GOETZ
1400 West Abram Street
Arlington, Texas 76013
817/261-2222

By: _____
Frank M. Gilstrap
Shane Goetz

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 85-1015

NORMAN JETT,

Plaintiff,

v.

DALLAS INDEPENDENT SCHOOL
DISTRICT, ET AL.,

Defendants,

ORDER OF DISMISSAL OF
DEFENDANT FREDERICK TODD

The parties having filed with the Court a Release Restricted as to Frederick Todd and Colony Insurance Company, and having requested the Court to dismiss defendant Todd from this action, it is hereby

ORDERED that defendant Frederick Todd be, and hereby is, DISMISSED, with prejudice, as a party defendant in the above-styled and numbered case.

SIGNED this 10th day of December, 1987.

/s/ Will Garwood
United States Court of Appeals
Judge

Approved as to form:

Leonard J. Schwartz, Esq.
Attorney for Defendant

David L. Kern, Esq.
Attorney for Colony
Insurance Company

David Townend, Esq.
Attorney for Dallas
Independent School District

Kurt Stallings, Esq.
Attorney for Plaintiffs

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CIVIL ACTION NO. 83-0824-H

NORMAN JETT,

Plaintiff,

v.

DALLAS INDEPENDENT SCHOOL
DISTRICT, ET AL.,

Defendants,

ORDER OF DISMISSAL OF
DEFENDANT FREDERICK TODD

The parties having filed with the Court a Release Restricted as to Frederick Todd and Colony Insurance Company, and having requested the Court to dismiss defendant Todd from this action, it is hereby

ORDERED that defendant Frederick Todd be, and hereby is, DISMISSED, with prejudice, as a party defendant in the above-styled and numbered cause.

SIGNED this 18th day of November, 1987.

/s/ Barefoot Sanders
United States District Judge

Approved as to form:

Leonard J. Schwartz, Esq.
Attorney for Defendant

Michael Sean Quinn, Esq.
Attorney for Colony
Insurance Company

David Townend, Esq.
Attorney for Dallas
Independent School District

/s/ Kurt Stallings
Frank Hill, Esq.
Attorney for Plaintiffs

APPENDIX I

SUPREME COURT OF THE UNITED STATES

No. A-802

NORMAN JETT,

Applicant,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT

ORDER EXTENDING TIME TO FILE PETITION
FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for
the applicant,

IT IS ORDERED that the time for filing a petition for writ of
certiorari in the above-entitled cause be, and the same is
hereby, extended to and including June 4, 1988.

/s/ Byron R. White
Associate Justice of the
Supreme Court of the
United States

Dated this 18th
day of April, 1988.

APPENDIX J

SUPREME COURT OF THE UNITED STATES

No. A-802

NORMAN JETT,

Applicant,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT

ORDER FURTHER EXTENDING TIME TO FILE
PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for
the applicant,

IT IS ORDERED that the time for filing a petition for writ of
certiorari in the above-entitled cause be, and the same is
hereby, extended to and including June 14, 1988.

/s/ Byron R. White
Associate Justice of the
Supreme Court of the
United States

Dated this 19th
day of May, 1988.