12-16-2009


Allison M. McKeen

Follow this and additional works at: http://digitalcommons.law.wne.edu/lawreview

Recommended Citation

This Note is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Western New England Law Review by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.
I. Introduction

Norman Jett made a somewhat unlikely Civil Rights plaintiff. Jett, a white man, was employed by the Dallas Independent School District ("DISD") and worked at South Oak Cliff High School ("South Oak") as a teacher, athletic director, and head football coach. During Jett's career, the school's racial composition had gradually changed from predominantly white to predominantly black, so Jett was considered a racial minority when Dr. Frederick Todd, a black man, was hired as principal.

Todd and Jett clashed on many issues, but most significant was their disagreement about the way that Jett ran the football program. In March 1983, tensions came to a head and Todd recommended that Jett be relieved of his position at South Oak. The superintendent followed the principal's recommendation. Jett was transferred to another school in the district, but his new position did not include coaching responsibilities. In May 1983, Jett filed a lawsuit in federal district court alleging that Todd and the DISD had constructively discharged him and had violated his due process, equal protection, and First Amendment rights. His underlying claim was that Todd's actions were motivated by racism: Todd transferred Jett because he was white. Jett formally resigned from his tenure in August 1983, after twenty-six years of teaching.

Jett brought his claims under 42 U.S.C. §§ 1981 ("§ 1981") and 1983 ("§ 1983"). Section 1981 is based on the first section of
the Act of 1866: the first national civil rights statute. In its modern form, § 1981 is used to supplement Title VII discrimination actions in both the public and private sector. There are real advantages to litigating a claim under § 1981 when compared with Title VII: § 1981 is not limited to employers of fifteen or more; it is not confined by a short statute of limitations; § 1981 does not place a cap on damages; and it does not require plaintiffs to exhaust administrative remedies before seeking judicial relief. Section 1983, derived from section one of the Ku Klux Act of 1871, enables plaintiffs to bring a claim against persons who, when acting under color of law, violate federally protected rights.

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .


10. For a thorough discussion of historical inaccuracies that have arisen in the Supreme Court while discussing the legislative history of the Ku Klux Act, see David Achtenberg, A "Milder Measure of Villainy": The Unknown History of 42 U.S.C. § 1983 and the Meaning of "Under Color of" Law, 1999 UTAH L. REV. 1 (1999).

At trial, the jury found that Todd and the DISD were indeed improperly motivated by Jett's race. Todd was found personally liable for violating Jett's rights under § 1981, and because Todd was an agent of the DISD, the jury also found the DISD vicariously liable under the doctrine of respondeat superior. The United States Court of Appeals for the Fifth Circuit reversed in part and remanded, holding that Congress had not intended for § 1981 to allow for respondeat superior liability, and therefore the DISD could not be held liable for Todd's actions.

In reaching its decision, the Fifth Circuit relied on language from Monell v. Department of Social Services of the City of New York. In dicta, often referred to as Monell Part II, Justice Brennan asserted that Congress had not intended to hold municipalities liable under the doctrine of respondeat superior for § 1983 claims. Brennan concluded that under § 1983, a municipality may only be held liable for the actions of its employees when the municipality has a custom or policy that essentially "causes" an employee to vio-

---

12. The United States Court of Appeals for the Fifth Circuit affirmed the jury's finding that Todd was liable in his individual capacity for racial discrimination and violation of Jett's First Amendment rights. Jett v. Dallas Indep. Sch. Dist., 798 F.2d 748, 756 (5th Cir. 1986). The majority wrote:

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 . . . 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 . . . substantially less . . . qualified.

Id.

13. Respondeat superior is "the doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." Black's Law Dictionary 1053 (7th ed. 2000).

14. Specifically, the court of appeals reversed the finding that Jett's due process rights had been violated. It further found that the jury had insufficient evidence to find Jett had been constructively discharged. Jett, 798 F.2d at 748.

15. The court of appeals determined the trial court had insufficient evidence to find the DISD had been liable for Jett's transfer and remanded this question. The remand was based on the court of appeals' reading of § 1981 as requiring a showing of a "custom or policy" of discrimination when bringing § 1981 claims against municipalities. Id. at 761-63.

16. Id. at 762.

17. 436 U.S. 658 (1978). This Note will primarily focus on two parts of Monell: Part I [hereinafter Monell Part I], which covered the legislative history of § 1983 and determined that municipalities could be considered "persons" under § 1983, and Part II [hereinafter Monell Part II], which consisted of dicta and stated that municipalities could not be held vicariously liable for their agents' violations of § 1983.

late another’s constitutional rights.”

Monell was a case that interpreted § 1983, not § 1981; § 1981 was based on a statute that had been passed earlier than § 1983 and covered a much narrower range of conduct. Nevertheless, the Fifth Circuit reasoned that § 1983 principles of interpretation should also apply to § 1981. Based on Monell Part II, the Fifth Circuit concluded that in order for Jett to hold the DISD liable for Todd’s violations of § 1981, Jett would have to prove that the DISD had a custom or policy of discriminating based on race, and that this custom or policy had “caused” Todd to violate Jett’s constitutional rights. Clearly, this ruling set the bar rather high for future § 1981 plaintiffs who were hoping to hold employers liable for the actions of their employees.

But the Fifth Circuit’s holding was much more than an application of the stricter § 1983 standard to § 1981; this ruling was rather novel jurisprudence that ran counter to most courts’ understanding of § 1981. In fact, other courts faced with this issue had already ruled that the Monell Part II dicta did not affect § 1981. For instance, in Springer v. Seamen, the First Circuit stated that legislative history indicated that Congress passed § 1981 intending “to enact sweeping legislation implementing the thirteenth amendment to abolish all the remaining badges and vestiges of the slavery system.” Monell Part II’s “custom or policy” requirements, therefore, should not be applied to § 1981, as these requirements would

19. Id. at 692.
20. Jett, 798 F.2d at 762. According to the Jett court:
   Unlike section 1983, which only provides a remedy for violations of rights secured by federal statutory and constitutional law, section 1981 provides a cause of action for public or private discrimination based on race or alienage. 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.

Id. (internal citations omitted).
21. Id.
22. See id.
24. 821 F.2d 871 (1st Cir. 1987).
25. Id. at 880-81 (quoting Haugabrook v. City of Chicago, 545 F. Supp. 276, 280 (N.D.Ill. 1982)).
improperly narrow its scope. The Sixth Circuit, in *dictum*, had also stated that § 1983's requirements did not affect § 1981. The Fifth Circuit's ruling created a circuit split, and although the "split" really only consisted of a few courts, the United States Supreme Court determined this issue was ripe for review and granted certiorari.

Justice O'Connor wrote for a plurality of the Supreme Court and based her decision on legislative history. After her analysis, O'Connor agreed with the Fifth Circuit: § 1981 does not provide an independent claim when it is brought against a municipality, and therefore claims to vindicate § 1981 rights violated by municipalities must be brought through § 1983. According to O'Connor, it then followed that in claims against municipalities, § 1981 must adhere to the custom or policy requirements of § 1983.

A. *The Supreme Court's 1988-89 Term: Civil Rights Take a Backseat*

*Jett* was not the only controversial civil rights decision to emerge from the Supreme Court's 1988-89 term. In fact, *Jett* was not even the only decision to narrow § 1981. In this term alone, § 1981, Title VII, the Age Discrimination in Employment Act, and the Fourteenth Amendment were narrowed by decisions

---

26. Id.
30. Id. at 730.
31. Id. at 731.
32. In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Court determined that § 1981 only protected individuals up until the moment a contract was formed; protection in the course of performance under a contract was outside the scope of § 1981. *Id.* at 179-80. This ruling received much more attention than *Jett*.
36. *See* Peter Brandon Bayer, *Patterson and Civil Rights: What Rough Beast*
that infuriated civil rights groups.\textsuperscript{37} Congress responded by passing the 1991 Amendments to the Civil Rights Act (the “1991 Amendments”), which were primarily intended to strengthen Title VII and § 1981\textsuperscript{38} and to overturn the more controversial Court decisions.\textsuperscript{39}

\section*{B. The 1991 Amendments to the Civil Rights Act: Congress Solves One Problem and Creates Another}

Before the 1991 Amendments, the text to § 1981 read:

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.

Parts (b) and (c) were added in 1991:\textsuperscript{40}

(b) “Make and enforce contracts” defined

For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) Protection against impairment


\textsuperscript{37} Reginald C. Govan, \textit{Honorable Compromises and the Moral High Ground: The Conflict Between the Rhetoric and the Content of the Civil Rights Act of 1991}, 46 \textsc{Rutgers L. Rev.} 1, 23-24 (1993) (quoting a July 10, 1989 article in the \textit{New York Times} in which Benjamin Hooks, Director of the National Association for the Advancement of Colored People (“NAACP”), promised “civil disobedience on a mass scale that has never been seen in this country before”).


\textsuperscript{40} Part (b) was added to overturn \textit{Patterson v. McLean Credit Union}, and Part (c) was added to codify \textit{Runyon v. McCrory}. H.R. Rep. No. 102-40, pt. 2, at 93 (1991). \textit{See also} Patterson v. McLean Credit Union, 491 U.S. 164, 188 (1989) (holding that § 1981 did not protect individuals from discrimination in the course of performing a contract); Runyon v. McCrary, 427 U.S. 160 (1976) (holding that § 1981 applies to private action).
The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.41

Section (c), intended to ensure that § 1981 would apply equally to private and public action,42 is currently at the center of a circuit split.43 It is no longer clear whether the Supreme Court’s holdings in Jett remain good law. Some courts have argued that the 1991 Amendments only overrule Jett’s first holding by allowing plaintiffs to bring § 1981 actions against municipalities independent of § 1983.44 These courts claim that Jett's second holding remains good law—that is, § 1981 actions, when brought against municipalities, do not allow for respondeat superior liability and must still comply with the custom or policy requirements of § 1983. On the other side are those courts which claim that the 1991 Amendments did not overrule either of Jett's holdings.45 Then there are the courts that simply declare that Jett is overruled but do not offer an analysis of the issue.46

If § 1981 claims may be brought against municipalities without

42. H.R. REP. No. 102-40, pt. 2, at 92 (1991). It is worth noting that Jett’s holdings have never applied to § 1981 claims brought against private actors. Arguably, Congress’ desire to treat state and private actors equally under § 1981 either (1) evinces its intent to overrule Jett, or (2) overrules Jett by implication.
43. See Fed’n of African-American Contractors v. City of Oakland, 96 F.3d 1204, 1214-15 (9th Cir. 1996) (holding that the amendment allows a cause of action against state actors but preserves Monell requirements); contra Oden v. Oktibbeha County, Miss., 246 F.3d 458, 463-64 (5th Cir. 2001) (holding that without express language from Congress indicating an intent to create an independent federal damages remedy in § 1981, the court is neither willing to imply one or to deviate from Jett); Butts v. County of Volusia, 222 F.3d 891, 894 (11th Cir. 2000) (Congress did not express an explicit intent to overrule Jett, and the court is not willing to imply a cause of action against a prior court ruling); Dennis v. County of Fairfax, 55 F.3d 151, 156 n.1 (4th Cir. 1995) (holding that Jett was unaffected by the amendments).
§ 1983, but must still meet the § 1983 requirements, then Congress has not significantly strengthened § 1981. However, Congress has significantly strengthened § 1981 if (1) § 1981 may now be brought independent of § 1983, and (2) § 1981 no longer requires plaintiffs to meet the custom or policy requirements of § 1983 and instead allows plaintiffs to rely on the doctrine of respondeat superior.

This Note argues that the reasoning relied upon in the Jett decision was flawed. However, even if Jett remains intact as a reasonable interpretation of § 1981 at the time, the statute has changed since the Jett ruling. Therefore, courts should consider § 1981 anew, without strict adherence to Jett. Most importantly, when determining the current scope of § 1981, courts should reject a reading of the amended statute that would perpetuate the faulty logic used in Jett.

This Note will argue, based on plain text and the modern implied remedy doctrine, that Congress overturned both of Jett's rulings. Therefore, § 1981 as amended should be read as providing remedies independent of § 1983 and allowing for respondeat superior liability. Part II will give the background of the controversy, including the history of §§ 1981 and 1983, the Jett decision, and the circuit split. Part III will argue that the Ninth Circuit was correct in holding that § 1981 provides a claim independent of § 1983 when brought against municipalities. Furthermore, this section will urge courts to read § 1981 as also allowing for respondeat superior liaibil-

47. This is not to imply that an independent § 1981 would be insignificant to civil rights litigants—quite the contrary. In Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989), the Supreme Court held that neither states nor state officials acting in their official capacity were “persons” subject to liability under § 1983. Id. at 71. Because § 1981 does not limit its application to “persons,” civil rights litigants after the Will decision would theoretically have been able to bring § 1981 actions against states and state officials as a (much narrower) alternative to a § 1983 claim: as long as states waived sovereign immunity, § 1981 suits would have been possible. See id. at 66. After Jett, however, this was no longer a possibility because § 1981 was held to be a guarantee of rights without a remedial structure. Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 701 (1989). Requiring § 1981 actions to be brought through § 1983 prevented litigants from bringing either action against states or state officials acting in their official capacity. See, e.g., Charles A. Sullivan, Accounting for Price Waterhouse: Proving Disparate Treatment Under Title VII, 56 BROOK L. REV. 1107, 1109 (1991). Federation of African-American Contractors, the Ninth Circuit's decision, is significant for this reason: if § 1981 now provides an implied remedy, then § 1981 suits are not limited to “persons,” and can be brought against states and state actors acting in their official capacities. This Note, however, is concerned with municipal liability under § 1981.

Two points are worth noting. First, Will does not impact Monell because the Eleventh Amendment does not apply to municipalities. Will, 491 U.S. at 70. Second, state officials may be sued in their individual capacity, even when acting within the scope of their official authority. Hafer v. Melo, 502 U.S. 21, 31 (1991).
ity against municipalities, as this reading is faithful to the original purpose of the statute, as well as its most recent renewal in 1991.

II. BACKGROUND

A. *The History of §§ 1981 and 1983*

1. The Origins of § 1981

Despite the lofty aspirations of its enactors, the Thirteenth Amendment did not by itself grant equal protection to newly emancipated slaves. Shortly after the Civil War ended, Southern states enacted the Black Codes, some of which criminalized “vagrancy” and allowed whites to purchase vagrants’ labor for a term of bondage. Other laws allowed whites to take children from “unfit” freedmen and force them to labor until adulthood. Although the Black Codes were effectively dealt with by the Freedmen’s Bureau and the Union Army, the enactment of such laws reflected the South’s desire to maintain slavery in practice, if not in fact.

48. Calling it “the joyous ‘consummation of abolitionism,’ the Congress that passed the Thirteenth Amendment fully intended it to protect *all* men, “fully and equally in the enjoyment of all the essential rights which . . . constitute freedom.” Jacobus tenBroek, *Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment*, 39 CAL. L. REV. 171, 173-76 (1951).


50. Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981, 1015 n.188 (2002) (citing DANIEL A. NOVAK, *THE WHEEL OF SERVITUDE: BLACK FORCED LABOR AFTER SLAVERY* (1978)) (stating that the Thirteenth Amendment was intended to do much more than emancipate slaves—it was intended to embody the full realization of the founders’ original ideals of freedom for all human beings).


53. See id. at 549-50. Sullivan quotes Major General Carl Schurz as saying: The general government of the republic has, by proclaiming the emancipation
But according to General Oliver O. Howard, the head of the Freedmen's Bureau, most discrimination resulted not from statutes, but from private actions: whites refused to contract with freedmen, used corporal punishment in employment, and generally made it difficult, if not impossible, for the freedmen to acquire labor contracts on a fair basis or to purchase or hold land. Moreover, individual racism made it unlikely that freedmen would have access to judicial protection in the Southern states. As Justice Strong explained: "It is . . . well known that in many quarters prejudices [exist] against the colored race, which naturally [affect] the administration of justice in the State courts . . . ." Despite the Thirteenth Amendment, the vestiges of slavery still clung to the institutions of the South.

The Act of 1866, the first national civil rights statute, was

of the slaves, commenced a great revolution in the south, but has, as yet, not completed it. Only the negative part of it is accomplished. The slaves are emancipated in point of form, but free labor has not yet been put in the place of slavery in point of fact[.]

Id.

54. See John Hope Franklin, The Civil Rights Act of 1866 Revisited, 41 HASTINGS L.J. 1135, 1141 (1990) (giving brief history of the Civil Rights Act of 1866 in light of the Supreme Court's reconsideration of Runyon); Sullivan, supra note 52, at 554-55 (stating that former masters often did not refuse to contract with freedmen, but insisted on "labor contracts" that placed the freedmen in a position of "practical slavery").


57. The first section of the Act of 1866 conferred rights, while the other sections dealt with enforcement of those rights. Section one of the Act read:

That all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery, . . . shall have the same right in every state and territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, sell and convey real and personal property; and to full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

United States v. Rhodes, 27 F. Cas. 785, 786 (C.C.D. Ken. 1866) (No. 16,151).

58. For an exceptionally detailed account of the legislative debates on the Civil Rights Act of 1866, see Alexander M. Bickel, The Original Understanding and the Segregation Decision, 69 HARV. L. REV. 1, 11-30 (1955).
passed in response to the Thirteenth Amendment’s inability to ade­quately protect the rights of the freedmen.59 In essence, this Act was intended to provide the mechanism by which to accomplish the ideals of the Thirteenth Amendment.60 This monumental yet often forgotten statute not only granted the freedmen citizenship status,61 it also protected their right to purchase and sell real estate, testify against white defendants in federal court,62 and to acquire employment on an equal basis with their white neighbors.63 Section 1981 is derived from section one of the Act of 1866.64

2. Early Judicial Construction of the Scope of the Act of 1866

Since its passage, the legal community has debated the proper

59. *Rhodes*, 27 F. Cas. at 794 (even after the Thirteenth Amendment, “[s]lavery, in fact, still subsisted in thirteen states. Its simple abolition, leaving [racist state] laws and this exclusive power of the states over the emancipated in force, would have been a phantom of delusion.”).

60. *Blyew*, 80 U.S. at 595-96.

61. *Schwartz*, supra note 51, at 100. The citizenship clause was intended to respond to *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), in which the Supreme Court held it had no jurisdiction to hear Scott’s case because he was a slave, and therefore not a citizen of the United States. *Id.* at 475-76. The Court wrote:

It may be assumed as a postulate, that to a slave . . . there appertains and can appertain no relation, civil or political, with the State or the Government. He is himself strictly property, to be used in subserviency to the interests, the convenience, or the will, of his owner; and to suppose . . . the existence of any privilege or discretion, or of any obligation to others incompatible with the magisterial rights just defined, would be by implication . . . to deny the relation of master and slave, since none can possess and enjoy, as his own, that which another has a paramount right and power to withhold.

*Id.*


62. *Rhodes*, 27 F. Cas. 785 (declaring the Act of 1866 constitutional under the Thirteenth Amendment, and affording a black woman’s right to testify against the white man who robbed her, despite a Kentucky law prohibiting black persons from testifying against white persons).

63. *Blyew*, 80 U.S. at 589. In tracing the purpose of the Act of 1866, the Court wrote:

In this age no man can be called free who is denied the right to make contracts, sue and be sued, and to give evidence in the courts . . . . So long as he is denied the right to testify against those who violate his person or his property he has no protection, and is denied the power to defend his own freedom.

*Id.*

scope of the Act of 1866. *United States v. Rhodes* was the first case to consider the Act. Rhodes, a white man, robbed the home of Nancy Talbot, a black woman and a resident of Kentucky. Under state law, Talbot was not allowed to testify against Rhodes, so she tried to pursue her case in federal court, where her right to testify was protected by the Act of 1866. The Circuit Court held that it had jurisdiction to hear this case because one of the purposes of the Act was to allow the federal government to protect the rights of black citizens when these rights were violated by states. Supreme Court Justice Swayne, riding the circuit, recognized that Congress intended the Act of 1866 to be a wide-sweeping response to an insidious problem and advocated a liberal application of the terms of the Act. Swayne's was a reasonable interpretation: the plain language of the Act of 1866 was broad and without limitation, and only covered a narrow range of conduct.

However, the Supreme Court, which appears to have been uncomfortable with the Act's broad scope from the very beginning, narrowed its application several years later in another Kentucky case, *Blyew v. United States*. This particularly heinous hate crime involved the axe murder of Jack and Sallie Foster, a married couple, Richard, the couple's seventeen-year-old son, and Lucy Armstrong, Sallie Foster's blind, ninety-year-old mother. Richard Foster survived two days after the attack—long enough to identify the defendants: two white men. Laura Foster, the couple's thirteen-year-old daughter, witnessed the crimes and managed to escape

---

65. 27 F. Cas. 785 (C.C.D. Ken. 1866) (No. 16,151). *Rhodes* concerned the scope of the third section of the Act of 1866, which gave the federal courts exclusive jurisdiction of "all causes, civil and criminal, affecting persons who are denied, or cannot enforce in the courts or judicial tribunals of the state . . . any of the rights secured to them by the first section of this act . . . ." *Id.* at 787.
67. *Rhodes*, 27 F. Cas. at 785.
68. *Id.* at 785-86.
69. The Act of 1866 gives all citizens the equal right to testify in court. *Id.* at 786.
70. *Id.* at 787.
71. *Id.* at 788 ("We regard [the Act of 1866] as remedial in its character, and to be construed liberally, to carry out the wise and beneficent purposes of congress in enacting it.").
72. See *supra* note 57 and accompanying text.
73. See Tsesis, *supra* note 49, at 577 ("Initial judicial interpretations of federal civil rights statutes emaciated the [Thirteenth Amendment's potential uses for human rights reform.").
74. 80 U.S. 581 (1871).
75. *Id.* at 584-85.
76. *Id.* at 585.
unharmed. 77

Because the defendants were white, Kentucky state law prohibited Richard and Laura Foster's testimony, so the Attorney General of the United States sought to remove this case to federal court under the Act of 1866. The Act gave the right of removal only to those who were "affected" by a case, 78 and the Supreme Court determined that only parties to an action could properly be deemed "affected." 79 Because this was a criminal matter, then, the defendants were affected, and the government was affected. 80 The Court reasoned that if the scope of protection in a criminal action was extended to every witness or potential witness, then every criminal proceeding would fall under federal jurisdiction. 81 As this could not have been Congress' intent, the Court determined that in a criminal suit, victims were considered "affected," but witnesses were not. 82 As applied to this case, the only persons who had been "affected" by this crime were dead, and deceased persons did not fall within the contemplated scope of the Act of 1866. 83 The tragic result of this ruling was that the case had to be tried in state court without the benefit of eyewitnesses. Because of racist state laws, Richard Foster's deathbed identification of his murderers was inadmissible, as was Laura Foster's eyewitness testimony of the slaughter of her entire family. Surely, this could not have been what Congress had intended.

From the very first Act of 1866 cases, then, it is clear that its proper scope has always been a point of contention. It is also clear that since 1871, the Supreme Court has made a sport of this controversy, placing its enjoyment of word games above the obvious purpose of the Act.

77. Id.
78. Section three of the Act of 1866 read:
That the District Courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also concurrently with the Circuit Courts of the United States, of all causes, civil and criminal, affecting persons who are denied, or cannot enforce in the courts or judicial tribunals of the State, or locality, where they may be, any of the rights secured to them by the first section of the act.
Id. at 582 (emphasis omitted).
79. Id. at 591.
80. Id.
81. Id. at 591-92.
82. Id.
83. See id. at 593-94.
3. The Origins of § 1983

Section 1983 was derived from § 1 of the Civil Rights Act of 1871, or the Ku Klux Act. The Ku Klux Act was passed in response to a rash of Klan violence against freedmen and their white supporters in the former Confederate states. William Stoughton, a Republican from Michigan, expressed concern over the Southern states' inability to control the violence, and ultimately the House and Senate voted to adopt a law that would allow the federal government to use force to protect the civil rights of those who were being terrorized. Section 1 of the adopted Ku Klux Act, modeled after § 2 of the Civil Rights Act of 1866, gave federal courts jurisdiction to hear cases involving federal and constitutional rights violations by persons acting "under color of law," and provided victims with a civil cause of action. Section 7 of the Act detailed that nothing in the 1871 Act should be construed to repeal any former act.

Section one of the Ku Klux Act was passed exactly as introduced in both the House and Senate. This fact is significant—it should be noted that § 1 had already been passed when Congress

84. See Achtenberg, supra note 10.
85. Id. at 7.
86. CONG. GLOBE, 42nd Cong., 1st Sess. 322 (1871). Stoughton said:
When thousands of murders and outrages have been committed in the southern States and not a single offender brought to justice, when the State courts are notoriously powerless to protect life, person, and property, and when violence and lawlessness are universally prevalent, the denial of the equal protection of the laws is too clear to admit of question or controversy.

Id.
87. Section one of the Ku Klux Act reads in part:
That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject ... any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution ... shall ... be liable to the party injured in any action at law ... such proceeding to be prosecuted in the several district or circuit courts of the United States.

SCHWARTZ, supra note 51, at 593.
88. Section seven of the Ku Klux Act reads:
That nothing herein contained shall be construed to supercede or repeal any former act or law except so far as the same may be repugnant thereto; any offences heretofore committed against the tenor of any former act shall be prosecuted, and any proceeding already commenced for the prosecution thereof shall be continued and completed, the same as if this act had not been passed, except so far as the provisions of this act may go to sustain and validate such proceedings.

SCHWARTZ, supra note 51, at 596 (emphasis added).
began debating the infamous Sherman Amendment.\footnote{Id.}

4. The Sherman Amendment\footnote{Id. This section recounts the legislative history of the Sherman Amendment as written by Justice Brennan in Monell. Id.}

The Sherman Amendment, named for its author, Senator John Sherman, was not intended to alter § 1 of the Ku Klux Act (the section that was later adopted as § 1983),\footnote{Id. This section was passed without debate in either the House or Senate. Id. at 666.} but to be added as an additional section.\footnote{Id. See generally Ken Gromley, Private Conspiracies and the Constitution: A Modern Vision of 42 U.S.C. Section 1985(3), 64 Tex. L. Rev. 527 (1985).} The Sherman Amendment went through a total of three versions\footnote{Monell, 436 U.S. at 666.} before finally being adopted as what is now known as 42 U.S.C. § 1986.\footnote{Id. at 669. 42 U.S.C. § 1986 reads in part: Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in [section 1985] of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case . . . .} The first version of the Sherman Amendment allowed victims of racially-motivated violence to recover from the inhabitants of the city or town in which the violence had occurred—essentially, the cost of racial violence would be borne by the community.\footnote{Monell, 436 U.S. at 666.} This version passed the Senate, but was rejected by the House.\footnote{Id.}

Sherman then produced the second, highly controversial version of his amendment. This proposal would have allowed victims to recover when injured by “any persons riotously and tumultuously assembled . . . with intent to deprive any person of any right conferred upon him by the Constitution.”\footnote{Id. at 667.} This second version of the Amendment differed from the first in that it would have allowed a victim to recover damages from the county, city, or parish in which the violence had occurred, and the government would have been liable for the full amount of the award if the victim could not collect from the individual wrongdoers.\footnote{Id.} Municipalities, there-
fore, could be held liable for the actions of private citizens. 100

Although the Senate approved the second version of the Sherman Amendment, it sparked debate in the House. 101 In effect, the second version of the Sherman Amendment would have required municipalities to maintain police forces in order to avoid liability under federal law. 102 Representative Blair expressed his concern that the second version of the Sherman Amendment would be an unconstitutional infringement of states' rights, saying, "[the states] create these municipalities, they say what their powers shall be and what their obligations shall be. If the Government of the United States can step in and add to those obligations, may it not utterly destroy the municipality?" 103

Blair's federalism concerns stemmed from contemporary Supreme Court decisions holding that the federal government had no power to impose peace-keeping obligations on state officers. 104 However, these rulings did not prevent Congress from imposing civil liability under § 1983 on municipalities that had themselves violated federally protected rights. 105 In fact, the issue of civil liability was not in question during the Sherman Amendment debates. 106

The House ultimately rejected the second version of the Sherman Amendment, and a third was proposed. The third version of the Sherman Amendment allowed recovery only from those who (1) knew of a conspiracy to deprive others of their civil rights, and (2) were in a position to stop the violation from occurring. 107 Congress approved the third version of the Sherman Amendment, and it is now codified at 42 U.S.C. § 1986. 108 Most important to this Note was the debate over the second version of the Sherman

100. Id.
101. Id. at 668.
102. Id. at 674-75.
103. Id. at 675.
105. Id. at 680-81. Justice Brennan, writing for the Court, determined that imposing civil liability on municipalities for their own violations of § 1983 was appropriate because Congress had not raised this issue during the Sherman Amendment debates. Id. at 680-82.
106. Id.
107. Id. at 668-69.
108. Id. at 669.
Amendment, upon which the Supreme Court has relied in order to determine how far Congress intended to extend municipal liability under § 1983 and § 1981.109

5. The Sherman Amendment Debates in Action: Monell v. Department of Social Services of the City of New York110

The petitioners in Monell were women employed by New York agencies that had an official policy requiring pregnant employees to take unpaid leaves of absence before such leaves became medically necessary. Petitioners sued under § 1983, and the Supreme Court granted certiorari to determine whether local governing bodies could be considered "persons" under § 1983.111

Monell Part I, written by Justice Brennan, is both a reconstruction of the legislative history of the Sherman Amendment and a criticism of the Supreme Court's reliance on those debates to interpret § 1983 in Monroe v. Pape.112 Brennan first explained why the rejection of the second version of the Sherman Amendment was irrelevant to the question of whether municipalities were intended to be considered "persons" under § 1983: the Sherman Amendment (1) imposed a radically different form of liability than § 1983, and (2) was not proposed as a change to the section now codified as § 1983, but as an addition to the Ku Klux Act.113

Yet ironically, in Monell Part II, Brennan stated that Congress' rejection of the type of vicarious liability imposed by the second version of the Sherman Amendment indicates that Congress had not intended to hold municipalities vicariously liable for § 1983 violations committed by their employees.114 From this section, the "custom or policy" requirement emerges. Brennan stated that Congress intended to hold municipalities liable for an agent's violation of § 1983 only when the agent had acted pursuant to a municipal custom or policy.115

To be sure, Monell Part II was dicta—the only question before

111. Id. at 662.
112. 365 U.S. 167 (1961) (holding that municipalities were not "persons" within the scope of § 1983).
113. Monell, 436 U.S. at 664.
114. Id. at 691.
115. Id. at 692.
the Court was whether municipalities could be considered "persons." But *Monell Part II* has nevertheless been treated as law; this is troubling considering the fallacies upon which the reasoning in this section is based. It should be further noted that four of the current justices on the Supreme Court have expressed a willingness to reconsider *Monell*.

B. *Jett v. Dallas Independent School District: The Supreme Court Applies Monell Part II to §1981*

When Norman Jett presented his case to the Supreme Court, he asked two questions. First, could §1981 stand separate from §1983? In other words, did §1981 provide an independent claim for violations of its provisions? And second, if §1981 provided an independent claim, did it allow for *respondeat superior* liability, as other courts had already held? Therefore, Jett reasoned, even without explicit language, Congress had originally intended for §1981 to provide a claim and to allow for *respondeat superior* liability.

The Fifth Circuit had held that when §1981 was brought against a municipality, the same limitations that apply to §1983 must also apply to §1981. Under *dicta* in *Monell Part II*, a plaintiff must therefore show his §1981 rights were violated as a matter of municipal custom or policy. On appeal, Jett tried to separate the pairing of §§1981 and 1983. Assuming Congress had originally intended for §1981 to contain an implied cause of action, Jett tried to show the Court that Congress had not intended to repeal §1981 by passing §1983. He argued that when §1983 was passed in 1871—as the Ku Klux Act—Congress did not explicitly repeal the

---

117. See *supra* note 23.
120. See *supra* note 88.
Act of 1866, and "repeals by implication are not favored." Therefore, Jett claimed, § 1981 must continue to be read independent of § 1983, and so limitations placed on § 1983 suits should not apply to § 1981. The Supreme Court had to determine (1) the relationship between §§ 1981 and 1983, and (2) whether § 1983's explicit damages remedy controlled § 1981's implied remedy when § 1981 was brought against a municipality.

1. The Plurality Opinion

Justice O'Connor wrote the Court opinion, in which Justices Rehnquist, White, and Kennedy joined. O'Connor relied heavily on legislative history in order to craft her response to the issue presented—namely, whether § 1981 could provide a federal damages remedy against municipalities independent of § 1983.

The opinion begins with the introduction of S.61—the bill that would later become the Act of 1866—in 1865, and an examination of a proposal by Representative Bingham. Bingham wanted the bill sent back to committee with instructions to strike the provisions of the bill providing criminal penalties and substitute provisions for civil remedies. O'Connor noted that Bingham's colleagues seemed concerned by this particular solution: they stated that the government had a duty to protect its citizens from these violations, and a civil remedy would require the "humblest citizen" to maneuver his way through the court system in order to vindicate his rights. Bingham's proposal was defeated. From this, O'Connor concluded that the Act of 1866 did not originally provide for federal damages, and none was intended by the Congress.

Next, the plurality looked at President Johnson's veto of S.61. According to O'Connor, President Johnson expressed concern that S.61 would hold liable the legislators who passed discriminatory laws. In response to Johnson's concern, O'Connor noted that Senator Trumbull had responded: "Are the men who make the law to be punished? Is that the language of the bill? Not at all .... Who [is to be punished]? The person who, under the color of the

121. Jett, 491 U.S. at 712.
122. Alternatively, Jett argued that § 1981 should be read according to common law principles, and in that case respondeat superior would still apply. Id.
123. Id. at 717.
124. Id. at 718.
125. Id.
126. Id. at 720.
127. Id. at 719.
law, does the act, not the men who made the law.”

From this response, O’Connor concluded, the penal provisions of the Act of 1866 were constructed to punish the person who acted improperly under state law and not “the community where the custom prevails.”

The plurality further noted Johnson’s concern that S.61 would grant original and exclusive jurisdiction to the federal courts in all matters relating to civil rights. Senator Trumbull responded to this charge as well, stating that civil rights matters could be brought to state courts, but if the state court were to uphold racist state legislation, then the party would have the right to remove her case to federal court. From this, O’Connor concluded that because no original federal jurisdiction was created by the Act of 1866, the Act “could [not] support a federal damages remedy against state actors.”

Through an examination of the language of the Ku Klux Act, O’Connor stated that “three points are immediately clear”: (1) Unlike the Act of 1866, the Ku Klux Act made liable “in any action at law” any “person” acting under color of state law to deprive another of constitutional rights; (2) The Ku Klux Act granted original federal jurisdiction in order to prosecute state actors; and (3) Section 1 of the Ku Klux Act was seen as an expansion of the provisions of the Act of 1866 through its new civil remedy for use against state actors.

The Court looked once again to the notorious Sherman Amendment debates. O’Connor noted that the 42nd Congress had turned to three earlier Supreme Court decisions to determine whether it could impose vicarious liability on municipalities: Collector v. Day, Kentucky v. Dennison, and Prigg v. Pennsylvania. O’Connor quoted Justice Story’s opinion in Prigg, which stated that Congress could not “insist that the states are bound to provide

128. Id.
129. Id. at 721.
130. Id. at 719.
131. Id. at 720.
132. Id. at 721.
133. Id. at 723. O’Connor noted that the more expansive use of the word “person” opened state and municipal governments to liability. Id.
134. Id. at 723-24.
135. Id. at 724.
136. Id. at 728 (citing Collector v. Day, 78 U.S. (11 Wall.) 113 (1870); Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861); Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842)).
means to carry into effect the duties of the national government."¹³⁷
To O'Connor, the Sherman Amendment debates¹³⁸ revealed Congress' federalism concerns: Congress could not impose vicarious liability on state agencies without the Supreme Court ruling such liability an unconstitutional means to enforce federal law.¹³⁹ O'Connor concluded by reiterating Brennan's *dicta* in *Monell Part II* and stating that Congress believed it could only prosecute a state or municipality for its own constitutional torts resulting from "official municipal policy."¹⁴⁰

The plurality had made several findings up to this point. First, the Act of 1866 had provided neither a federal damages remedy nor original federal jurisdiction, and it did not support a claim under a theory of *respondeat superior*. Second, the Ku Klux Act expanded on the Act of 1866 by providing a civil remedy, original federal jurisdiction, and a claim against "persons," which the Supreme Court had decided in *Monell Part I* could include government agencies. And third, the Sherman Amendment debates revealed that Congress did not intend to hold state or municipal governments vicariously liable for discriminatory actions absent a showing that the actions were driven by governmental policy or custom. O'Connor had only to conclude whether §§ 1981 and 1983 were somehow connected so as to be read together.

O'Connor wrote that in 1874, Congress had added the words "and laws" to section one of the Ku Klux Act so that it prohibited "the deprivation of any rights, privileges, or immunities secured by the Constitution [and laws] of the United States."¹⁴¹ Noting that there is no explanation for the addition, O'Connor stated that those who revised the act cross-referenced the Act of 1866.¹⁴² Furthermore, the revisers indicated the laws to which original federal jurisdiction would apply. O'Connor quoted a marginal note which read:

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

---

¹³⁸. *See supra* Part II, Section A(4).
¹⁴⁰. *Id.* (quoting *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1976)).
¹⁴². *Id.* at 730.
a law authorized by the Constitution, were here intended, it is
deeded safer to add a reference to the civil rights act.143

If this marginal note is to be relied upon, then the addition of
the words "and laws" was intended to insure that the rights guaran­
teed by other civil rights acts would be protected under this provi­
sion and given original federal jurisdiction. To the plurality, this
marginal note indicated that § 1983 was at least intended to provide
a remedy for the rights specified in § 1981.144 Therefore, O'Connor
concluded, § 1983 provides the only federal damages remedy for
§ 1981.145 In order to prevail in his claim against the DISD, Jett
would have to prove that his right to contract was violated as the
result of an official policy or custom.146 The case was remanded in
order to allow the trial court to determine whether those who had
violated Jett's rights had acted according to an official policy or
custom.147

Justice Scalia concurred in the judgment of the court except as
it relied on legislative history. Scalia believed that the more specific
provisions of § 1983 should control the more general provisions of
§ 1981 and that the two statutes, dealing with similar subject matter,
should be interpreted harmoniously.148

2. Justice Brennan's Dissent

Justice Brennan wrote a dissenting opinion in which Justices
Marshall, Blackmun, and Stevens joined. Brennan's dissent is of
particular interest because O'Connor based her conclusion in Jett
on Brennan's own analysis in Monell Parts I and II.

Brennan first argued that the plurality decision was hastily
drafted based on an issue, raised by the respondent, that had not
been raised in the lower courts.149 Jett, said Brennan, did not have
enough time to craft a response to the issue, and the Court should
not decide the matter based on only one side of the argument.

In countering the plurality, Brennan also relied on legislative
history. He argued that the Congressional debates on the Act of
1866 indicate that the legislators' concern was that the bill would do

143. Id. at 730-31.
144. Id. at 731.
145. Id. at 731-32
146. Id. at 735-36.
147. Id. at 737-38.
148. Id. at 738-39.
149. Id. at 740 (Brennan, J., dissenting).
too little, not too much.\textsuperscript{150} Noting that Representative Thayer had stated that he did not vote for the Thirteenth Amendment with the intent that it would be “a mere paper guarantee,” Brennan indicated that Thayer had relied on the Act of 1866 as a means of giving “practical effect” to the ideals in the Thirteenth Amendment.\textsuperscript{151} Therefore, when confronting a question of statutory construction, the Act of 1866 should be interpreted broadly, not narrowly.\textsuperscript{152}

The dissenting opinion also took issue with the plurality’s claim that the question before the Court—whether § 1981 provided an independent civil remedy—was novel.\textsuperscript{153} According to Brennan, the Supreme Court had already decided that the Act of 1866 had provided an independent civil remedy in \textit{Jones v. Alfred H. Mayor Co.}.\textsuperscript{154} The Court in \textit{Jones} wrote: “[Section] 1 [of the Act of 1866] was meant to prohibit all racially motivated deprivations of the rights enumerated in the statute, although only those deprivations perpetrated ‘under color of law’ were to be criminally punishable under § 2.”\textsuperscript{155} According to Brennan, the holding from \textit{Jones} indicates that Congress had intended the Act of 1866 to provide a civil remedy. The plurality’s opinion, which held that the Act of 1866 did not provide a civil remedy, could therefore only be correct if this remedy had been repealed when the Ku Klux Act was passed. However, the Ku Klux Act specifically provided that “nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto.”\textsuperscript{156} Brennan noted that while repeals by implication are generally disfavored, they should be regarded with particular “hostility” when the statute itself expressly cautions against such a reading.\textsuperscript{157}

Generally, Brennan opposed O’Connor’s reading of § 1981 through § 1983. He addressed her concern—that allowing respondeat superior liability in § 1981 would circumvent legislative intent in regard to § 1983—by pointing out that § 1981 had been passed

\begin{itemize}
  \item \textsuperscript{150} \textit{Id.} at 743 (Brennan, J., dissenting).
  \item \textsuperscript{151} \textit{Id.} at 743-44 (Brennan, J., dissenting).
  \item \textsuperscript{152} \textit{See id.}
  \item \textsuperscript{153} \textit{Id.} at 741 (Brennan, J., dissenting).
  \item \textsuperscript{154} 392 U.S. 409 (1968).
  \item \textsuperscript{155} \textit{Jones}, 392 U.S. at 426. In his dissent, Brennan stated that the plurality could only distinguish \textit{Jones} from \textit{Jett} if it recognized that the implied cause of action against private persons did not apply to local and state governments. \textit{Jett}, 491 U.S. at 745 (Brennan, J., dissenting).
  \item \textsuperscript{156} \textit{Jett}, 491 U.S. at 746 (Brennan, J., dissenting).
  \item \textsuperscript{157} \textit{Id.}
independent of § 1983 and had been designed to cover a much narrower range of conduct.\(^{158}\) Furthermore, Brennan wrote, when deciding in the past whether a statute implied a claim, the Supreme Court has never looked to the scope of another statute.\(^{159}\) The analysis used in \textit{Jett} therefore not only deviated from methods of analysis used by the Court in the past, but it ascribed a Congressional intent that varied according to the way in which § 1983 was currently being interpreted.\(^{160}\)

Finally, Brennan responded to the plurality's use of the Sherman Amendment debates to determine Congress' intent when passing § 1981. He noted that the Sherman Amendment "would have imposed a dramatic form of vicarious liability on municipalities" far different from the liability that would have been imposed through § 1981.\(^{161}\) Also, in relying on the Sherman Amendment debates, the plurality was using the point of view of a later Congress to determine the intent of an earlier one.\(^{162}\)

\section*{C. The Circuit Split Since the 1991 Amendment\(^{163}\)}

Federal and state courts have divided the \textit{Jett} opinion into two holdings: first, that § 1983 provides the sole federal damages remedy for actions pressed against a municipal actor, and second, when the defendant is a municipality, § 1981 does not allow for \textit{respondeat superior} liability. Currently, the United States Courts of Appeals are split on whether the 1991 Amendments overturned \textit{Jett}'s first holding by providing § 1981 with an independent federal cause of action against local governments. If § 1981 does provide an independent cause of action, then it may no longer need to adhere to the strict requirements of § 1983. Arguably, if § 1981 does not need to be brought through § 1983, it follows that § 1981 may allow for \textit{respondeat superior} liability.

---

\(^{158}\) \textit{Id.} at 749 (Brennan, J., dissenting).

\(^{159}\) \textit{Id.}

\(^{160}\) \textit{Id.}


\(^{163}\) \textit{See supra} Part I, Section B.
1. Courts Finding That the 1991 Amendments Did Not Affect *Jett*

a. Butts v. County of Volusia\(^{164}\)

The Eleventh Circuit stated that the language in § 1981(c), which protects § 1981 rights against private and state discrimination, functions only to create a right, not a remedy.\(^{165}\) The court noted that according to the legislative history of the 1991 Amendments, § 1981(c) was intended to codify *Runyon v. McCrary*\(^{166}\) so as to allow § 1981 to protect against private actions. However, nothing was said about *Jett*.\(^{167}\) Therefore, the 1991 Amendments left *Jett* intact.

b. Oden v. Oktibbeha County, Miss.\(^{168}\)

When determining whether the court should imply a claim against state actors under § 1981, the Fifth Circuit stated that § 1983 already controlled such claims, so there was no need to imply one.\(^{169}\) Addressing the legislative history of the 1991 Amendments, the Fifth Circuit stated that Congress' intent was to codify an implied claim against private actors, but there was no intent to imply a claim against municipalities because these actions were already covered by § 1983.\(^{170}\)

2. The Ninth Circuit: *Jett* Was Partially Overturned by the 1991 Amendments

The 1991 Amendments did not explicitly provide § 1981 plaintiffs with an independent claim against municipalities. However, the Ninth Circuit addressed whether the 1991 Amendments nevertheless imply an independent federal claim against municipalities in

---

164. 222 F.3d 891 (11th Cir. 2000).
165. *Id.* at 894.
167. *Id.*
168. 246 F.3d 458 (5th Cir. 2001).
169. *Id.* at 463.
170. *Id.* This Note will not address the Fourth Circuit's holding in *Dennis v. County of Fairfax*, 55 F.3d 151 (4th Cir. 1995), because this court simply held that *Jett* was unaffected by the 1991 Amendments, without offering an analysis of the issue. *Id.* at 156 n.1.
Federation of African American Contractors v. City of Oakland.\textsuperscript{171}

In its analysis, the Ninth Circuit applied the four-factor test created by the Supreme Court in \textit{Cort v. Ash}.\textsuperscript{172} The \textit{Cort} test, which is used to determine whether a statute implies a claim, asks four questions:

(1) Is the plaintiff one of the class for whose "\textit{especial benefit}" the statute was enacted; that is, does the statute create a federal right in favor of the plaintiff? (2) Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? (3) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? (4) Is the claim one traditionally relegated to state law . . . , so that it would be inappropriate to infer a claim based solely on federal law?\textsuperscript{173}

The Ninth Circuit explained that the modern implied remedy doctrine, which began with \textit{Cart}, really centers around one question: Did Congress intend, either expressly or by implication, to provide a private claim?\textsuperscript{174} In answering this question, one must look to "the language of the statute, its legislative history, and the legislative scheme of which the statute is a part."\textsuperscript{175} The following is a summary of the Ninth Circuit’s analysis of § 1981 using the \textit{Cort} test, which it called the "touchstone of the modern implied remedy doctrine."\textsuperscript{176}

\textbf{a. Does § 1981, as amended, create a federal right in favor of plaintiffs with claims against municipalities?}

In \textit{Cort v. Ash}, the Court emphasized that if Congress has protected the rights of a certain class of persons, then it is not necessary to uncover actual evidence of Congress’ intent to provide a private federal remedy in order to imply such an action.\textsuperscript{177} Rather, the more significant inquiry is whether Congress has explicitly intended

\begin{itemize}
  \item \textsuperscript{171} 96 F.3d 1204 (9th Cir. 1996).
  \item \textsuperscript{173} \textit{Cort}, 422 U.S. at 78 (internal quotations omitted).
  \item \textsuperscript{174} \textit{Fed’n of African-American Contractors}, 96 F.3d at 1210 (quoting \textit{Touche Ross & Co. v. Redington}, 442 U.S. 560, 575 (1979)).
  \item \textsuperscript{175} \textit{Id.} at 1211 (quoting \textit{Touche Ross}, 442 U.S. at 568, 571-72).
  \item \textsuperscript{176} \textit{Id.}
  \item \textsuperscript{177} \textit{Cort}, 422 U.S. at 82.
\end{itemize}
to deny a private cause of action to certain protected groups.\textsuperscript{178} The presence or absence of words of limitation is highly important when determining whether a statute implies a remedy.

The Ninth Circuit acknowledged that the amended text of § 1981 does not explicitly provide an independent claim. However, § 1981(c) specifies, without using words of limitation, that the statute protects "against impairment by nongovernmental discrimination and impairment under color of State law."\textsuperscript{179} The Ninth Circuit concluded that this provision suggests that Congress intended plaintiffs with claims against municipalities to bring § 1981 actions independent of § 1983.\textsuperscript{180}

\textbf{b. Was there legislative intent, either explicit or implicit, to create or deny such a remedy?}

The court again relied on the text of § 1981(c) to answer this question, noting that the language of the text indicates that Congress intended § 1981 rights to be similarly protected against both state and private actors.\textsuperscript{181} To determine the extent to which rights against state actors are protected, the court looked to Congress' intent in protecting rights against private actors.\textsuperscript{182}

One of the purposes in amending § 1981 was to codify \textit{Runyon}, thus ensuring that § 1981 rights would be protected against private actors.\textsuperscript{183} In essence, Congress' intent in adding § 1981(c) was to codify an implied claim: the text of § 1981 still does not expressly provide a claim against private actors, and yet, the clearly stated purpose of the amendment was to provide one.\textsuperscript{184} By analogy, it would not be unreasonable to imply a claim against municipal actors based on Congress' instruction to apply § 1981 equally to state and private actors.\textsuperscript{185} The Ninth Circuit inferred from Congress' equal treatment of state and private action in § 1981(c) that Con-

\begin{footnotesize}
\textsuperscript{178} \textit{Id.} The Court states, "in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention to create a private cause of action, although an explicit purpose to deny such cause of action would be controlling." \textit{Id.}


\textsuperscript{180} \textit{Fed'n of African American Contractors}, 96 F.3d at 1211.

\textsuperscript{181} \textit{Id.} at 1213.

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} \textit{Fed'n of African-American Contractors}, 96 F.3d at 1213.

\textsuperscript{184} \textit{Id.}

\textsuperscript{185} See, e.g., 42 U.S.C. § 1981(c) ("The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.").
\end{footnotesize}
c. Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy?

According to the court, Congress had cited as one of its purposes in passing the 1991 Amendments its desire to provide “appropriate remedies for intentional discrimination and unlawful harassment in the workplace.” The Ninth Circuit determined that implying an independent claim against municipal employers would advance this purpose. Furthermore, the court was comfortable implying an independent claim because doing so would do little to actually alter the state of the law—essentially, plaintiffs would simply no longer be required to bring a § 1981 action through § 1983.

d. Is the cause of action one traditionally relegated to state law?

The Ninth Circuit noted that federal civil rights actions are not an area traditionally relegated to state law. The court also stated that these statutes—§ 1981 and § 1983—were originally passed to remedy civil rights abuses perpetrated by state actors. Therefore, it would not conflict with traditional notions of federalism to imply a federal remedy in this case.

Based on its application of the Cort test, the Ninth Circuit concluded that it is appropriate to imply an independent claim in § 1981 when the claim is being brought against a municipality. However, implying an independent claim does little to alter the state of § 1981 or to restore it to its position before Jett. The real harm in the Jett ruling came from the Supreme Court’s determination that § 1981 did not allow for respondeat superior liability. Absent any direction from Congress, the Ninth Circuit declined to rule that § 1981 now allows this type of liability. To buttress its decision, the Ninth Circuit noted that § 1981 was amended by the words

187. Id. at 1214 (citing § 3 of the Civil Rights Act of 1991).
188. Id.
189. Id. This conclusion assumes that the “custom or policy” requirements of § 1983 would continue to apply to § 1981, despite its independence from § 1983.
190. Id.
191. Id.
192. Id.
193. But see supra note 47.
194. Fed’n of African-American Contractors, 96 F.3d at 1215.
A MERE PAPER GUARANTEE?

"under color of law"—language taken from § 1983. Based on this borrowed language, the Ninth Circuit concluded that Congress intended to extend § 1983's custom or policy requirement to § 1981.

Several lower courts have agreed with the Ninth Circuit and have determined that § 1981 provides an independent federal claim when brought against state actors. However, the majority of courts confronted with this question have disagreed with the Ninth Circuit, each hesitating to deviate from the Jett ruling without explicit direction from Congress indicating its intent to overrule Jett.

III. Analysis

When considering the current state of the debate over the modern scope of § 1981, it is perhaps best to use a baseball analogy. Imagine a team of courts attempting to reach "home," which for purposes of this analogy is the proper interpretation of § 1981 based on its text, purpose, and legislative history. The Fourth, Fifth, and Eleventh Circuits have gone to bat, but have struck out: they have continued to rely on Jett, which was a holding based on the statute before it was modified by the 1991 Amendments. The Ninth Circuit has fared a little better and has hit a single, perhaps even a double. However, no one has yet hit a home run. Section 1981 is still misunderstood.

If the courts are going to finally fulfill the intended purpose of § 1981, Jett and Monell Part II can no longer be relied upon. First, Brennan's "custom or policy" language in Monell Part II was not just dicta; it was wrong. O'Connor's reliance on the dicta in Monell Part II when deciding Jett was therefore misplaced. Furthermore, it is worth noting that Brennan himself did not rely on Monell Part II in deciding Jett. In fact, Brennan adamantly opposed a Monell Part II reading in his dissent.

But even if the flaws in Monell Part II and Jett are overlooked,

195. See supra note 43.
197. See supra note 43.
198. See City of Oklahoma City v. Tuttle, 471 U.S. 808, 842 (1985) (Stevens, J., dissenting) ("Part II of Monell contains dicta of the least persuasive kind.").
Jett involved an analysis of § 1981 before it was amended. One can continue to read Jett as a reasonable interpretation of § 1981 as it existed before the 1991 Amendments and still conclude that Jett no longer applies to the amended statute. This section will examine the text, purpose, and legislative history of § 1981, and it will urge courts to read the amended § 1981 as (1) implying an independent federal remedy against municipalities, and (2) allowing for respondeat superior liability.

A. The Consequences of Municipal Liability Under § 1981

At first, interpreting § 1981 so as to allow for respondeat superior liability may seem to open the proverbial floodgates: such liability has the potential to burden local governments and local taxpayers. But these fears should be alleviated when one considers the narrow scope of § 1981. Unlike § 1983, which can be applied to a wide range of conduct, § 1981 protects citizens from racial discrimination in contracts. To be sure, § 1981 was intended to be a broad civil rights statute and is not limited to employment contracts. However, this statute is not nearly as far-reaching as § 1983, and so the same policy concerns should not apply. If courts read § 1981 to allow for respondeat superior liability, several stars must still align before a municipal employer will feel the consequences: a municipal employee must racially discriminate against another municipal employee in the formation or performance of a contract, and this discrimination must occur under the actual or apparent authority of the municipal employer.

Jett already allows for municipal liability when discrimination occurs under the actual authority of the municipal employer. Extending the doctrine of respondeat superior to § 1981 actions would only provide additional relief when discrimination occurs under apparent authority. Considering the narrow scope of the statute and the rather minor extension respondeat superior would provide, there does not seem to be much support for a “floodgates” argument.

B. Analyzing the Circuit Split: Why the Ninth Circuit Got It (Almost) Right

Although the Ninth Circuit currently stands alone, it has

---

presented the soundest reasoning on the relationship between *Jett* and the 1991 Amendments. The Ninth Circuit has been the only federal appellate court to actually apply the Supreme Court’s own modern implied remedy doctrine in order to determine whether § 1981 was altered. None of the other circuits have even responded to the Ninth’s use of the *Cart* test.

The Fifth Circuit’s holding—that a remedy against municipalities should not be implied because it is not necessary—is interesting, but it misses the mark. In the modern implied remedy doctrine, the question is one of Congressional intent and not what is deemed judicially necessary. Therefore, this reasoning should not be adopted.

The Eleventh Circuit’s reasoning—that § 1981 provides rights without providing remedies—is similarly unconvincing. Plaintiffs have never been required to bring § 1981 claims through other statutes when litigating a claim against a private actor. Therefore, it is incorrect to read § 1981 as providing rights without remedies, as § 1981 currently *does* provide a remedy for those whose rights are violated by private actors.

*Jett* distinguished between § 1981 actions brought against public and private actors. Before the 1991 Amendments, the language of § 1981 was neutral as to how it applied to different defendants, so distinctions drawn by the courts were perhaps defensible. Now, however, the plain text of the statute does not support this reading. The language in § 1981(c), which guards rights “against impairment by nongovernmental discrimination and impairment under color of State law,” makes no distinction between actions brought against private and state actors. It is incorrect to assume that Congress intended § 1981 to be read differently depending on

---

202. The Supreme Court has said that the reasons for the modern implied remedy doctrine include “the increased complexity of federal legislation and the increased volume of federal litigation, as well as the desirability of a more careful scrutiny of legislative intent.” *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 811 (1986) (emphasis added) (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 377 (1982)) (internal quotes omitted).


204. See discussion *supra* Part I, Section B.
the status of the defendant, since there is nothing in the words of the statute with which to justify this difference in treatment. The Fourth, Fifth, and Eleventh Circuits still continue to apply Jett, yet fail to explain this anomaly.

C. The 1991 Amendments Should be Read as Overturning Both of Jett's Holdings

The Ninth Circuit’s reasoning was sound when it used the Cort test to hold that § 1981 provides a private remedy when brought against a municipality. But the more important question is whether the 1991 Amendments to § 1981 allow municipalities to be held liable under the doctrine of respondeat superior. Does the fact that § 1981 provides an implied independent remedy against municipal actors require one to read the statute independent of the § 1983 “custom or policy” requirements? This Note argues that it is reasonable to find that § 1981 currently allows for such liability, and that such a reading is faithful to the original Congressional intent and the 1991 Amendments.

1. An Examination of the Text of § 1981

The Ninth Circuit stopped short of holding that § 1981 allows for respondeat superior liability205 by using the following reasoning: the language used to amend § 1981 was borrowed from § 1983; § 1983 does not allow for respondeat superior liability;206 therefore, § 1981 does not allow for respondeat superior liability.207 An examination of the language borrowed from § 1983 reveals, however, that the Ninth Circuit’s holding is unsupported by the language of the statute.

a. The Meaning of “Under Color of Law”

When Congress amended § 1981, the only language it borrowed from § 1983 was the phrase “under color of law.”208 Although the Ninth Circuit concluded that this language indicates that Congress did not intend to hold municipalities liable under respondeat superior, the words “under color of law” really have nothing to do with vicarious liability.

205. Fed’n. of African-American Contractors v. City of Oakland, 96 F.3d 1204, 1215 (9th Cir. 1996).
207. Fed’n. of African-American Contractors, 96 F.3d at 1215.
208. See supra note 3; supra Part I, Section B.
The Supreme Court has interpreted the phrase “under color of law,” as used in § 1983, on several occasions. For example, in *Monroe v. Pape*, the Supreme Court determined that government officials who carry “a badge of authority” act “under the color of law” whether or not their behavior is legal. The Court reached similar conclusions in *Williams v. United States*, *Screws v. United States*, and *United States v. Classic*. Based on these cases, the phrase “under color of law” is not one that traditionally implicates the doctrine of *respondeat superior*. Instead, these words instruct courts as to when an individual is a “state actor” who may be held liable under the Fourteenth Amendment for a violation of another’s federal rights. Standing alone, the words “under color of law” neither bar nor allow for vicarious liability.

The Ninth Circuit is mistaken when it relies upon this borrowed language to infer that Congress intended to extend § 1983’s “custom or policy” requirement to § 1981. Despite the Ninth Circuit’s assertion, this phrase did not influence the *dicta* in *Monell Part II*. Essentially, Congress’ use of the phrase “under color of

---

209. 365 U.S. 167 (1961). James Monroe alleged that thirteen Chicago police officers entered his home in the middle of the night and made him stand naked in his living room while they ransacked his personal property. *Id.* at 169. Monroe was then taken to the police station, detained, and questioned about a recent homicide. *Id.* During the time Monroe was not allowed to call his family or an attorney, and he was not brought before a magistrate, although one was available. *Id.* After ten hours, Monroe was released without criminal charges being pressed. *Id.* Because the Chicago police had conducted a warrantless search of his home and had held him without arraignment, Monroe alleged his civil rights had been violated and brought a § 1983 action. *Id.*

210. *Id.* at 172.

211. 341 U.S. 97, 99-100 (1951) (finding that police officers who had beaten a man to death in the course of an arrest had acted under color of law because (1) making an arrest was within the scope of their official duties, and (2) they had abused government-vested authority).

212. 325 U.S. 91, 107-08 (1945) (a special police officer who used force to elicit confessions from suspects acted under the color of law).

213. 313 U.S. 299, 326 (1941) (“Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken ‘under color of’ state law.”).

214. *See Ex parte Virginia*, 100 U.S. 339, 347 (1879) (holding that individuals using state-vested authority to deprive another of their civil rights violate the Fourteenth Amendment).

215. Section 1983 will hold liable “[a]ny person who, under color of any law . . . shall subject, or cause to be subjected, any person . . . to the deprivation of any rights . . . secured by the Constitution of the United States . . . .” 42 U.S.C. § 1983 (emphasis added). In *Monell Part II*, Brennan determined that the phrase “shall subject, or cause to be subjected” meant that municipalities could only be liable under § 1983 if (1) they directly violated federal rights, or (2) they caused federal rights to be violated through official policies or customs. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691-92 (1978). The phrase “under color of law” was irrelevant to Brennan’s analysis. *Id.* at 692.
law" is irrelevant when determining whether Jett remains good law and should not be used to analyze this question.

b. The Plain Meaning of the Text of § 1981

If the words "under color of law" are not determinative, then how should § 1981 be read? As a basic rule of statutory interpretation, one must begin with the plain meaning of the words used by Congress and proceed to legislative history only if that language is ambiguous.

Section 1981 protects "against impairment by nongovernmental discrimination and impairment under color of State law." The plain language of the text indicates that § 1981 will be applied in the same way to state and private actors, and there is no language that would limit such a reading. So as an initial matter, it seems clear that Congress intends to treat state and private actors equally under § 1981. At least, the text does not support the distinction that courts currently draw between the two.

When the defendant is a private actor, plaintiffs may bring an independent § 1981 claim. Furthermore, courts currently allow for respondeat superior liability when a § 1981 action is brought against private actors. However, under Jett, § 1981 cannot be brought against a municipality independent of § 1983, and it cannot support vicarious liability. This is ambiguous: if both actors should be treated equally, which set of rules did Congress intend to apply?

Legislative history offers no answer to this question—Jett was not discussed during the debates over the 1991 Amendments. However, legislative history does make clear that by amending § 1981, Congress had two purposes: (1) to overturn Patterson v. McLean Credit Union, which had narrowed the statute, and

216. See United States v. Fisher, 6 U.S. (2 Cranch) 358, 399 (1805) ("Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction.").
219. See supra note 203.
221. In Patterson, the Court held that § 1981 only protected individuals until a contract was formed—protection in the course of performing that contract was outside the scope of § 1981. Id. at 180.
(2) to codify Runyon, which had broadened the statute.222 One may conclude that Congress intended to broaden, rather than narrow, the powers of § 1981 through its amendment. If Congress intended first to treat state and private actors equally under § 1981, and second to broaden § 1981, then the broader "private actor" construction of § 1981 should be applied to municipal actors. Therefore, in keeping with Congressional intent to expand the powers of § 1981, it is best to read § 1981(c) as authorizing respondeat superior liability in both instances, rather than neither.

2. Rejection of the Second Version of the Sherman Amendment

The only reason § 1981 exposes state and private actors to different types of liability is because of the Supreme Court's misplaced reliance on the Sherman Amendment debates.

Simply put, the Supreme Court's use of these debates to interpret § 1983 has been widely criticized.223 The very notion that the Sherman Amendment debates could give insight to § 1983, a different part of the same Ku Klux Act, has been called into question.224

223. See, e.g., Bd. of County Comm'rs v. Brown, 520 U.S. 397, 430 (1997) (Breyer, J., dissenting); Jack M. Beermann, Municipal Liability For Constitutional Torts, 48 DEPAUL L. REV. 627, 634 (1999) (stating that it is analytically problematic to read the rejection of the Sherman Amendment as "anything more than [the rejection of the] actual terms of the . . . amendment itself," rather than a rejection of municipal liability in general); Karen M. Blum, From Monroe to Monell: Defining the Scope of Municipal Liability in Federal Courts, 51 TEMP. L. Q. 409 (1978); Steven Stein Cushman, Municipal Liability Under § 1983: Toward a New Definition of Municipal Policymaker, 34 B.C. L. REV. 693, 699 (1993) (the Sherman Amendment was much broader than § 1983); Theodore Eisenberg, Section 1983: Doctrinal Foundations and an Empirical Study, 67 CORNELL L. REV. 482, 516 (1982) (Monell's conclusion, that § 1983 did not allow for respondeat superior liability, is unsupported by the rejection of the Sherman Amendment); Robert J. Kaczorowski, Reflections on Monell's Analysis of the Legislative History of § 1983, 31 URB. LAW. 407, 418 (1999) (Sherman Amendment liability was much different than the liability imposed by § 1983); Mead, supra note 161, at 525-26 (saying it is unlikely that Congress' rejection of the Sherman Amendment was intended to be a rejection of respondeat superior liability, which is much narrower than the type of liability the Sherman Amendment would have imposed); James F. Basile et al., Comment, Constitutional Law—Jett v. Dallas Independent School District: The Applicability of Municipal Vicarious Liability Under 42 U.S.C. Section 1981, 63 NOTRE DAME L. REV. 233, 243 n.87 (1988); William H. Pryor, Jr., Note, The Single Incident Inference of Municipal Liability Under Section 1983: City of Oklahoma City v. Tuttle, 60 TUL. L. REV. 874, 881-82 (1986) (noting that the Sherman Amendment would have involved a very extreme form of liability).
224. See Beermann, supra note 223, at 634. Beermann writes:

Given the diversity of views within Congress on the desirability of the Sher-
It would add little to the discussion to simply rehash the already voluminous amount of criticism on the Court’s use of the Sherman Amendment to interpret § 1983. The central criticism, however, is important to this Note. Most critics disagree with *Monell Part II* because § 1983 and the Sherman Amendment involved completely different types of vicarious liability.

The second version of the Sherman Amendment proposed a radical form of vicarious liability that would have made municipalities liable for private citizens’ violations of federal rights.\(^{225}\) Section 1983, however, is limited to redressing actions of the government itself.\(^{226}\) These two sections, although intended for the same statute, were in essence about very different types of liability.\(^{227}\) Clearly, there is a practical difference between holding a municipality liable for the actions of its private citizens and holding it liable for the actions of its employees. The rejected versions of the Sherman Amendment would have forced municipalities to maintain police forces in order to avoid liability; § 1983, even when interpreted

---


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


\(^{227}\) Mead, *supra* note 161, at 525-26; Kaczorowski, *supra* note 223, at 418. Kaczorowski writes:

> The nature of municipal liability under the Sherman Amendment was entirely different from that of § 1983. Section 1983 imposes liability on persons acting under color of law for their own violations of civil rights. In contrast, the Sherman Amendment, in all of its versions, imposed liability for failing to protect individuals from civil rights violations committed by others. Unlike § 1983, the Sherman Amendment imposed an affirmative duty to protect individuals from the wrongdoing of others, whereas § 1983 imposes an affirmative duty of care not to violate the constitutional rights of individuals.

*Id.* at 419.
as allowing *respondeat superior* liability, imposes no such burden.\textsuperscript{228} It makes little sense to conclude that Congress' rejection of the second version of the Sherman Amendment, which proposed extreme forms of liability, was also a rejection of common law *respondeat superior* liability.\textsuperscript{229}

If the Court's use of the Sherman Amendment to interpret § 1983 is problematic, its use when reading § 1981 is even more so. Section 1981 is extremely narrow, covering only a few specific rights,\textsuperscript{230} whereas the Sherman Amendment, and even § 1983, were much broader. It simply does not follow from the rejection of the Sherman Amendment's broad form of vicarious liability that § 1981's narrow form of vicarious liability would also have been rejected. Moreover, § 1981 was originally passed by a different Congress than the one that passed § 1983 and debated the Sherman Amendment—it makes little sense to use the intent of one Congress to interpret the intent of another.\textsuperscript{231}

Furthermore, the text of § 1981 has no limiting language that would suggest Congress did not intend to hold municipalities vicariously liable for the actions of their agents. The Court's reading, in fact, presents a practical problem: how does one separate the actions of a government (which can fall under § 1981) from the actions of its agents (which cannot fall under § 1981)?\textsuperscript{232} How does a government act, if not through its agents? The Court has had to create a fiction in order to make this reading viable, saying that Congress only intended to hold municipalities liable if discrimination was a custom or policy. But if the Court's reading of the Sherman Amendment is not reliable, then there is simply no good support for this reading in the legislative history.\textsuperscript{233} This reasoning should be abandoned as courts look to reevaluate § 1981 in light of the 1991 Amendments.
3. Justice Stevens' Criticism of Monell Part II

Justice Stevens attacked the Court's reliance on Monell Part II in City of Oklahoma City v. Tuttle. Stevens noted that the doctrine of respondeat superior was widely known and accepted at the time Congress passed the Ku Klux Act, and that § 1983 "should be construed to incorporate common-law doctrine absent specific provisions to the contrary." Stevens cited extensively to William Blackstone, who wrote in support of vicarious liability in 1765:

We may observe, that in all the cases here put, the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer: he may frequently be answerable for his servant's misbehaviour, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim that no man shall be allowed to make any advantage of his own wrong.

Based on this common, contemporaneous understanding of the master/servant relationship, it is not at all obvious that Brennan's conclusion in Monell Part II was accurate: that Congress' rejection of a radical form of vicarious liability was also a rejection of its most basic form.

Stevens noted that the debates over the second version of the Sherman Amendment indicated that Congress had "seriously considered imposing additional responsibilities on municipalities without ever mentioning the possibility that they should have any lesser responsibility than any other person." Furthermore, § 1983 allows the Fourteenth Amendment to apply to individuals who deprive others of federally protected rights while acting under the

234. 471 U.S. 808, 834 (1985) (Stevens, J., dissenting). An Oklahoma City police officer shot and killed Albert Tuttle outside of a bar in the course of investigating a robbery in progress. Id. at 810-11. Tuttle's widow brought a § 1983 suit against the officer and the City, alleging her husband's constitutional rights had been violated. Id. at 811. At trial, the jury returned a verdict for the officer, who they believed had acted with a reasonable belief that Tuttle was armed. Id. at 813. (Tuttle had drawn a toy gun from his boot. Id. at 811.) However, the jury found the City liable and awarded $1.5 million in damages. Id. at 813. The Supreme Court reversed, finding that one could not infer that the City had a "custom or policy" of inadequately training its police officers based on a single egregious act. Id. at 823-24.

235. Id. at 838 (Stevens, J., dissenting) (internal quotations omitted).

236. Id. at 835 n.6 (Stevens, J., dissenting) (emphasis added).

237. Id. at 839 (Stevens, J., dissenting).
color of law. As Stevens noted, individual behavior can only be considered "unconstitutional" when the individual act is indistinguishable from that of a government employer. If individual conduct may be attributed to a government employer for purposes of constitutional analysis, then it should also be attributed under tort law in order to determine liability.

Justice Stevens emphasized that stare decisis does not apply to Monell Part II because it is mere dicta, and "wholly irrelevant" to the Court's holding. Stevens concluded by noting that policy considerations favor applying respondeat superior liability to municipalities for violations of § 1983. Stevens acknowledged that the fear of bankrupting municipalities was legitimate, but that concern could be easily addressed by Congress by either (1) limiting damages, or (2) requiring municipalities to purchase appropriate insurance.

It should be noted once again, as lower courts face this issue, that four current members of the Supreme Court have expressed a willingness to reconsider Monell Part II.

IV. Conclusion

The Supreme Court has never fully understood the broad remedy the nation's first civil rights act was intended to supply. The first Civil Rights Act was intended to provide the machinery with which to enforce the ideals of the Thirteenth Amendment: equality for all citizens and the complete eradication of the customs of slavery. Supreme Court decisions narrowing the Civil Rights Act and its reenactments have only served to frustrate Congressional pur-

238. Supra Part II, Section B(1).
239. Tuttle, 471 U.S. at 839 (Stevens, J., dissenting).
240. Id. at 839-40 (Stevens, J., dissenting).
241. Id. at 842-43 n.30 (Stevens, J., dissenting).
242. Id. at 843-44 (Stevens, J., dissenting). Stevens listed several interests involved in § 1983 litigation: "[t]he interest in providing fair compensation for the victim, the interest in deterring future violations by formulating sound municipal policy, and the interest in fair treatment for individual officers who are performing difficult and dangerous work . . . ." Id. (Stevens, J., dissenting).
243. Id. at 844 (Stevens, J., dissenting).
244. Justices Souter, Ginsberg, Stevens, and Breyer have also indicated their willingness to overrule Monell. See Bd. of County Comm'rs of Bryan County, Okla. v. Brown, 520 U.S. 397, 430-31 (1997) (Souter, J., Stevens, J., and Breyer, J., dissenting); Catherine Fisk & Erwin Chemerinsky, Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX, 7 WM. & MARY BILL RTS. J. 755, 777 (1999).
245. See supra Part II, Section A(2).
pose, relegating what should have been monumentally powerful legislation to a virtual paper guarantee of equality.

The misunderstanding comes from the Court's over-reliance on and misuse of legislative history. The Court has exaggerated the significance of the Sherman Amendment debates, and in doing so, it has ignored not only the plain meaning of the texts of §§ 1981 and 1983, but also the plain pro-civil rights intent of Congress. Congress’ 1991 amendment of § 1981 provides courts with the ideal opportunity to reconsider the Supreme Court’s narrowing of § 1981 in Jett. Under the modern implied remedy doctrine, courts may easily imply an independent remedy into the § 1981 using the Ninth Circuit’s reasoning. Furthermore, courts may imply respondeat superior liability based on the text of § 1981(c), which reveals Congress’ intent to treat private and state violators of § 1981 equally. If respondeat superior liability applies to private actors, then it should also apply to state actors. This reading is in keeping with Congress’ desire to broaden § 1981.

Because there is no constitutional bar to imposing vicarious liability on municipalities for their own violations of § 1981, it only makes sense to hold municipalities liable for the discriminatory actions of agents acting within the scope of employment. After all, how can a municipality discriminate, if not through its agents? In the end, the only bar to allowing vicarious liability under § 1981 was established by the Supreme Court. This is the definition of judicial legislation.

*Allison M. McKeen*

* For my husband, Ryan. Special thanks to all who helped me in writing this Note, especially Professor John Egnal, who read countless drafts and offered advice. Any mistakes are my own.