

2013

Cold Comfort: Sec. 1983 as the Exclusive Damages Remedy for Violations of Sec. 1918 by State Actors

Darlene Goring

Louisiana State University Law Center, dgoring@lsu.edu

Follow this and additional works at: https://digitalcommons.law.lsu.edu/all_scholarship



Part of the [Civil Rights and Discrimination Commons](#)

Recommended Citation

Goring, Darlene, "Cold Comfort: Sec. 1983 as the Exclusive Damages Remedy for Violations of Sec. 1918 by State Actors" (2013). *All Scholarship*. 17.

https://digitalcommons.law.lsu.edu/all_scholarship/17

This Article is brought to you for free and open access by the Faculty Scholarship at LSU Law Digital Commons. It has been accepted for inclusion in All Scholarship by an authorized administrator of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

HEINONLINE

Citation:

Darlene C. Goring, Cold Comfort: Sec. 1983 as the Exclusive Damages Remedy for Violations of Sec. 1918 by State Actors, 14 Rutgers Race & L. Rev 24 (2013)

Provided by:

LSU Law Library

Content downloaded/printed from [HeinOnline](#)

Wed Mar 14 16:35:23 2018

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)



Use QR Code reader to send PDF to your smartphone or tablet device

Cold comfort: § 1983 as the exclusive damages remedy
for violations of § 1981 by State Actors

Darlene C. Goring *

Table of Contents

Abstract

- I. Introduction
- II. Civil Rights Jurisprudence - Civil Rights Act of 1866
- III. Implied Private Right of Action against State Actors
 - A. *Jett* and the Supreme Court's rejection of an implied damages remedy for § 1981 actions
 - B. Justice Brennan's Dissent in *Jett*
- IV. Congressional Response following *Jett* - Civil Rights Act of 1991
- V. Split in the Federal Circuits
 - A. Majority Views - Continued Viability of *Jett*
 - B. Minority View - Ninth Circuit - *Federation*
 - C. Ninth Circuit's Clarification of *Federation*
- VI. Limits of § 1983 Remedial Scheme
- VII. Resolution - Abrogation of 11th Amendment Immunity
- VIII. Conclusion

Injunctive relief from a federal court may address a violation going forward, but this fact will be of cold comfort to the victims of serious, non-recurring violations for which equitable relief may be inappropriate.¹

*Professor of Law, Louisiana State University Paul M. Hebert Law Center. The author wishes to thank my colleague, Joseph Bockrath for his support and encouragement, and Daniel Schilling, for his wonderful research assistance. Thanks are also extended to the law firms of Gay Lynn Babin, LLC and James Kirk Piccione, APLC for providing office space and administrative support. This article is dedicated to my sister, Cherryl Silas.

¹ *Sossamon v. Texas*, 131 S.Ct. 1651, 1669 (2011) (Sotomayor, J., dissenting).

Introduction

Identifying a meaningful remedial mechanism to address deprivations of civil rights by States and state actors acting in their official capacity has become an exercise in futility. There are millions of African American men and women employed by State governments as doctors, teachers, professors, janitors, engineers, police officers, court personnel, and administrators.² These African American employees “constitute a disproportionately large share of the state and local public sector workforce.”³ Millions more African Americans interact on a daily basis with and are affected by decisions made by States, state agencies and offices, and state actors acting in their official capacities. Although African Americans are facially protected by Civil Rights legislation enacted by Congress to address racially motivated deprivations of civil rights by States and state actors, the remedies afforded to them to address deprivations of their rights are quite limited.

Federal jurisprudence does not recognize any meaningful damages remedy for deprivations by States and state actors of the civil rights guaranteed by Congress. Additionally, the question of whether the federal judiciary can imply a private right of action to enforce the rights guaranteed by Civil Rights legislation against States and state actors remains unresolved.

In 1989, the United States Supreme Court in *Jett v. Dallas Independent School Dist.*,⁴ acknowledged the existence of an implied private right of action for violations of 42 U.S.C. § 1981, hereinafter referred to as § 1981, by private actors within the textual framework of the statute.⁵ Unfortunately, neither the text of § 1981 or its legislative history offered guidance regarding the appropriate remedial scheme for addressing violations of § 1981 by governmental actors. In *Jett*, the Court held that 42 U.S.C. § 1983,⁶ hereinafter referred to as § 1983, provides the exclusive federal remedy for civil rights violations against state actors originating from the language of § 1981 as it was

² See generally Steven Pitts, Research Brief: Black Workers and the Public Sector, Work in the Black Community, UC Berkeley Labor Center, (April 4, 2011) (“The public sector is the single most important source of employment for African Americans.”).

³ David Cooper, Mary Gable & Algernon Austin, *The Public-sector Jobs Crisis: Women and African Americans Hit Hardest by Job Losses in State and Local Governments*, ECON. POLICY INST. (May 2, 2012), <http://www.epi.org/publication/bp339-public-sector-jobs-crisis/> (“Historically, the state and local public sectors have provided more equitable opportunities for women and people of color. As a result, women and African Americans constitute a disproportionately large share of the state and local public-sector workforce.”).

⁴ *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701 (1989).

⁵ *Id.* at 731.

⁶ Originally enacted as Section 1 of “An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and For other Purposes,” Act of April 20, 1871, ch. 22, 17 Stat. 13 (1871), and currently codified as 42 U.S.C. § 1983 (2006).

codified at the time of the decision.⁷ The Supreme Court concluded that

We have noted in the past that the addition of the phrase ‘and laws’ to the text of what is now § 1983 . . . was at least intended to make clear that the guarantees contained in § 1 of the 1866 Act were to be enforced against state actors through the express remedy for damages contained in § 1983.⁸

One of the primary reasons underlying the Supreme Court’s decision in *Jett* can be traced to its determination that Congress established another remedial scheme to address § 1981 claims against state actors. The Court looked to § 1983 as the exclusive source of “remedies available” for private actions against state actors. To be held liable for a violation of § 1983, a “person” must act “under color of [State] law.”⁹ The United States Supreme Court in *Will v. Michigan Dept. of State Police*¹⁰ held that under § 1983, the term ‘person’ does not include “a State nor its officials acting in their official capacities.”¹¹ Thus, § 1981 claimants pursuing private actions against state actors were left to face an impenetrable hurdle that cannot be overcome in light of the holding in *Jett*.

This analysis became even more difficult in 1991 when Congress amended § 1981 to make it clear that the rights created therein are “protected against impairment by nongovernmental discrimination and impairment under color of state law.”¹² Thus, as amended, § 1981 expressly provides for a private right of action against state actors.¹³ The critical question left outstanding after *Jett* and the addition of § 1981 (c) is whether Courts have the authority to imply a private right of action for damages against a state actor into the textual framework of § 1981. Federal circuits have taken divergent views on the continued viability of *Jett* following the 1991 amendments to § 1981.¹⁴ Some federal judges have adopted the position that a private right of action for damages against governmental actors can be implied from the textual framework of § 1981. However, the majority of the circuits following the Supreme Court’s analysis in *Jett* hold § 1983 is the exclusive remedial statute for asserting § 1981 damages claims against governmental actors.

⁷ *Jett*, 491 U.S. at 735 (“We hold that the express ‘action at law’ provided by § 1983 for the ‘deprivation of any rights, privileges, or immunities secured by the Constitution and laws,’ provides the exclusive federal damages remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor.”).

⁸ *Id.* at 731.

⁹ The text of Section 1983 limits its coverage to “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia.”

¹⁰ *Will v. Mich. Dept. of State Police*, 491 U.S. 58 (1989).

¹¹ *Id.* at 71.

¹² Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071-1109 (1991), codified in pertinent part in 42 U.S.C. § 1981(c) (2006).

¹³ *Id.*

¹⁴ See generally *McCormick v. Miami Univ.*, 693 F.3d 654, 658-63 (6th Cir. 2012).

Notwithstanding the position adopted by the federal judiciary regarding the continued viability of *Jett*, it is certain that Congress enacted § 1981 amendments to safeguard the rights of African Americans to remain free from deprivations of their civil rights by States and state actors. It is also certain that, contrary to the holding in *Jett*, § 1983 does not offer African Americans a meaningful damages remedy against States and state actors for violations of § 1981 because these governmental parties enjoy Eleventh Amendment¹⁵ immunity from liability under § 1983.

This Article will examine the scope of civil rights remedies afforded to African Americans in the Civil Rights Act of 1866¹⁶ and the Civil Rights Act of 1871,¹⁷ and their present day codifications found in Title 42 U.S.C. § 1981¹⁸ and 42 U.S.C. § 1983,¹⁹ respectively. The existence of a viable private damages remedy against States and state actors depends on the resolution of two issues. First, this Article will examine whether a right of action for damages against States and state actors may be implied from the 1991 amended text of § 1981 (c).

Second, if there is no implied right of action and the *Jett* decision controls this analysis, this Article will then argue that § 1983 fails to afford a meaningful remedy to address civil rights deprivations committed by States and state actors because these governmental actors are immunized from § 1983 liability. Finally, this Article will propose that Congress exercise its power under § 5 of the Fourteenth Amendment, and abrogate the sovereign immunity that these governmental actors enjoy under § 1983.

II. Civil Rights Jurisprudence - Civil Rights Act of 1866

Section 1981, which was originally enacted as part of the Civil Rights Act of 1866,²⁰ provided that:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.²¹

Section 1981 descended from the Section 1 of Civil Rights Act of 1866, which was passed one

¹⁵ U.S. CONST. amend. XI.

¹⁶ “An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their Vindication,” Act of April 9, 1866, ch. 31, 14 Stat. 27 (1866), codified as 42 U.S.C. § 1981.

¹⁷ Section 1 of “An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and For other Purposes,” Act of April 20, 1871, ch. 22, 17 Stat. 13 (1871).

¹⁸ 42 U.S.C. § 1981 (2006).

¹⁹ *Id.*

²⁰ Civil Rights Act of 1866, 14 Stat. 27, codified in 42 U.S.C. § 1981.

²¹ *Id.*

year after ratification of the Thirteenth Amendment.²² The language of the 1866 Act and § 1981 created a number of rights, including the right to contract, the right to participate in the judicial process, and the right to hold and protect real and personal property.²³ The text of Section 1 of the Civil Rights Act of 1866 created essential civil rights protections for African Americans, but failed to provide an express private enforcement scheme within the language of the statute.²⁴ The failure to include a remedial scheme in the 1866 Act did not go un-noticed. When introducing the Civil Rights Act of 1866 before the 39th Congress, Senator Lyman Trumbull argued that the language of the 1866 Act would amount to “nothing more than the declaration in the Constitution itself unless we have the machinery to carry it into effect.”²⁵

Federal jurisprudence clearly requires that private rights of action to enforce federal laws must be created by Congress.²⁶ In *California v. Sierra Club*,²⁷ the United States Supreme Court, held that where, as with § 1981, statutory language is silent, “[t]he federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.”²⁸ In the absence of an express congressionally enacted remedial scheme, the judiciary has limited authority to imply statutory remedies into its textual framework.²⁹

There are, however, circumstances where courts imply a remedial scheme to address a violation of rights granted within the terms of that statute. The common law has developed the Implied Remedy Doctrine to address these situations. Dating back to the 1803 decision of *Marbury v. Madison*,³⁰ and the 1916 decision in *Texas & Pacific R. Company v. Rigsby*,³¹ the United States Supreme Court has long recognized that the absence of an express statutory remedy was not fatal to the enforcement of the rights granted within the four corners of that statute. Under the historical application of the Implied Remedy Doctrine, courts were authorized to effectuate the underlying purpose of the statute by implying “the right to recover the damages from the party in default. . . .”³²

As common law evolved, the United States Supreme Court adopted a four-part test in *Cort v. Ash*³³ to determine whether the Court should recognize a private right of action for statutory violations. Although never overruled, the *Cort* test has been narrowed to focus the Court’s inquiry primarily on

²² U.S. CONST. amend. XIII.

²³ 42 U.S.C. § 1981 (2006).

²⁴ The Civil Rights Act of 1866 did not “provide for an express damages remedy for violations of the provisions of § 1.” *Jett*, 491 U.S. at 720.

²⁵ *Id.* at 714 (citing Cong. Globe, 39th Cong., 1st Session, 475 (1866)).

²⁶ *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979).

²⁷ *California v. Sierra Club*, 451 U.S. 287 (1981).

²⁸ *Id.* at 297.

²⁹ *Jett*, 491 U.S. at 732.

³⁰ *Marbury v. Madison*, 5 U.S. 137, 163-64 (1803).

³¹ *Texas & Pac. R.R. Co. v. Rigsby*, 241 U.S. 33 (1916).

³² *Id.* at 39.

³³ *Cort v. Ash*, 422 U.S. 66 (1975).

whether recognition of an implied remedy is within the scope of Congressional intent underlying the statute.

III. Implied Private Right of Action against state actors

III.C Jett and the Supreme Court's rejection of an Implied Damages Remedy for § 1981 actions

In 1989, the Supreme Court was asked to apply the Implied Remedy Doctrine within the context of a § 1981 violation. The Jett decision sets forth two holdings, only one of which is relevant herein.³⁴ Justice O'Connor, writing the plurality opinion in Jett, held that 42 U.S.C. § 1981 does not provide an independent federal cause of action for damages against governmental entities. Instead, Jett held that "Congress intended that the explicit remedial provisions of § 1983 be controlling in the context of damages actions brought against state actors alleging violation of the rights declared in § 1981."³⁵

Justice O'Connor acknowledged that § 1981 created a right against private actors for violating the guarantee of equal rights to make and enforce contracts, and an implied damages remedy within § 1981 as a mechanism for enforcement of that right.³⁶ However, with respect to state actors, Congress did not intend for the implicit damages remedy to extend to state actors. The Plurality in Jett determined that Congress intended that the remedial provisions of Section 1983³⁷ to be the exclusive remedy against state actors for violations of § 1981. After examining the legislative history of both statutes, Justice O'Connor argued that

there is very strong evidence that the 42nd Congress which enacted the precursor of section 1983 thought that it was enacting the first, and at that time the only, federal damages remedy for the violation of federal constitutional and statutory rights by state governmental actors. The historical evidence surrounding the revision of 1874 further indicates that Congress thought that the declaration of rights in § 1981 would be enforced against state actors through the remedial provisions of § 1983.³⁸

³⁴ Jett, 491 U.S. at 740 (Scalia, J., concurring in part and concurring in the judgment) ("The Court appears to decide today (though its precise holding is less than pellucid) that liability for violations by the government of § 1981 may not be predicated on a theory of respondeat superior.").

³⁵ Id. at 731.

³⁶ Jett, 491 U.S. at 731 ("That we have read [Section 1981] to reach private action and have implied a damages remedy to effectuate the declaration of rights contained in that provision does not authorize us to do so in the context of the 'state action' portion of section 1981, where Congress has established its own remedial scheme.").

³⁷ Civil Rights Act of 1871 (ch. 22, 17 Stat. 13 codified as amended at 18 U.S.C.A. § 241, 42 U.S.C.A. §§ 1983, 1985(3), and 1988 (commonly referred to as the Ku Klux Klan Act).

³⁸ Jett, 491 U.S. at 734.

The plurality in *Jett* read an implied cause of action for damages into § 1981 against private actors out of necessity. Citing *Cannon v. University of Chicago*,³⁹ Justice O'Connor acknowledged that "there existed no other remedy to address such violations of the statute."⁴⁰ That was not the case with actions brought against state actors. Following the creation of a remedy for damages in § 1983, speculation as to whether there should be an implied remedy was no longer necessary because § 1983 was an explicit indicator that "Congress has established its own remedial scheme."⁴¹ It is this reasoning that supports *Jett*'s holding that an action brought under § 1983 is the exclusive remedy for violations of § 1981 by state actors. Notwithstanding *Jett*, and the trend within the Federal judiciary supporting its holding, many litigants continue to pursue § 1981 claims against governmental entities.⁴² These aggrieved litigants argue that the remedial scheme relied upon by Justice O'Connor in *Jett* is inherently flawed. Contrary to the position adopted by Justice O'Connor, the remedial scheme established by Congress to address § 1981 violations specifically immunizes some state actors from liability under § 1983.⁴³

II.B Justice Brennan's dissent in Jett

Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, authored a blistering opinion dissenting to the plurality's decision in *Jett*. In his dissent, Justice Brennan argued that § 1981, originally enacted as a part of Section 1 of the Civil Rights of 1866, "itself affords a cause of action in damages on the basis of governmental conduct violating it terms. . . ."⁴⁴ This position certainly bolsters the minority position taken by the Ninth Circuit that a cause of action for all violations of the rights guaranteed by § 1981 can be implied solely from the language of the statute itself.

The dissenters in *Jett* argued that the plurality needed to look no further than the Court's own jurisprudence to find that a private cause of action against state actors can be implied under § 1981. Justice Brennan noted that Congressional omission of an express cause of action in the language of Section 1981 was of "little moment"⁴⁵ and "small consequence"⁴⁶ because the federal judiciary had "routinely concluded that a statute setting forth substantive rights without specifying a remedy contained an implied cause of action for damages incurred in violation of the statute's terms."⁴⁷

³⁹ *Cannon v. Univ. of Chicago*, 441 U.S. 677, 728 (1979) (White, J., dissenting).

⁴⁰ 491 U.S. at 732.

⁴¹ *Id.* at 731.

⁴² See *Showell v. Bd. of Educ. of Wicomico Cnty.*, 2011 WL 5877220; *Victors v. Kronmiller*, 553 F. Supp. 2d 533 (D. Md. 2008).

⁴³ See discussion *infra* at Section VI.

⁴⁴ *Jett*, 491 U.S. at 740.

⁴⁵ *Id.* at 742.

⁴⁶ *Id.*

⁴⁷ *Id.*

In the absence of any reference to an implied cause of action in the legislative history of the Civil Rights Act of 1991, which amended § 1981, modern jurists have used statutory methods of interpretation to conclude that Congress did not intend to create a private remedy against state actors under § 1981 itself.⁴⁸ Justice Brennan's discussion of the legislative history of the 1866 Civil Rights Act in his dissenting opinion foreshadowed this argument. Justice Brennan argued that it was better to interpret Congressional intent by using the common law principles set forth in the 1916 decision from *Texas v. Rigsby*,⁴⁹ arguing that "[a]n inquiry into Congress' actual intent must take account of the interpretive principles in place at the time."⁵⁰ Justice Brennan afforded considerable weight to the *Rigsby* test which stated that:

A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied, according to a doctrine of the common law.⁵¹

The determination that a cause of action could be implied into the interpretation of § 1981, using *Rigsby*, was clear to Justice Brennan. Over one hundred years before the passage of the Civil Rights Act of 1991, Section 1 of the 1866 Civil Rights Act guaranteed that African Americans would enjoy the same contractual rights as enjoyed by white citizens.⁵² Failure to imply a cause of action for damages within the textual language of Section 1 of the Civil Rights Act of 1866 would have rendered the protections afforded by Congress meaningless.⁵³ A review of the legislative history of the Civil Rights Act of 1866 supports Justice Brennan's approach to interpreting the 39th Congress's intent.

In introducing the bill that became the 1866 Act, Senator Trumbull explained that the statute was necessary because "[t]here is very little importance in the general declaration of abstract truths and principles [contained in the Thirteenth Amendment] unless they can be carried into effect, unless the persons who are to be affected by them have some means of availing themselves of their benefits." Cong. Globe, 39th Cong., 1st Sess., 474 (1866) (emphasis added). Representative Thayer of Pennsylvania echoed this theme: "When I voted for the amendment to abolish slavery ... I did not suppose that I was offering ... a mere paper guarantee." "The bill which now engages the attention of the House has for its object to carry out and guaranty the reality of that great measure. It is to give to it practical effect and force. It is to prevent that great measure from remaining a dead letter upon the constitutional page of this

⁴⁸ See generally *Pittman v. Oregon*, 509 F.3d 1065, 1069 (6th Cir. 2007) (summarizing recent cases examining the legislative history of § 1981 (c)).

⁴⁹ *Texas & Pac. R.R. Co. v. Rigsby*, 241 U.S. 33 (1916).

⁵⁰ *Jett*, 491 U.S. at 742 n.2.

⁵¹ *Id.* at 742 (citing 247 U.S. at 39-40).

⁵² U.S. CONST. amend. XI.

⁵³ Five years passed before Congress enacted the Civil Rights Act of 1871, codified in 42 U.S.C. § 1983.

country.”⁵⁴

Finally, Justice Brennan rejected the use of the four-part test articulated by the Court in its 1975 decision in *Cort v. Ash*⁵⁵ to determine whether § 1981 contained an implied cause of action. Although Justice Brennan determined that using the *Cort* test would lead to the same outcome,⁵⁶ he concluded that “[i]t would make no sense, however, to apply a test first enunciated in 1975 to a statute enacted in 1866. . . . Thus I would interpret § 1981 in light of the principle described in *Rigsby* rather than the one described in *Cort*.”⁵⁷

IV. Congressional Response following *Jett* - Civil Rights Act of 1991

Congressional response following *Jett* was swift. In 1990, Congress took up the task of amending the existing civil rights legislation.⁵⁸ Congress amended § 1981 by adding a specific subsection that addresses deprivations of rights committed by governmental actors.⁵⁹ The stated purposes of these amendments were “to strengthen and improve Federal civil rights laws”⁶⁰ and “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.”⁶¹ The legislative history of the 1991 Civil Rights Act reveals that Congress made specific references to the Supreme Court’s decisions *Wards Cove Packing Co. v. Atonio*,⁶² *Patterson v. McLean Credit Union*,⁶³ and *Runyon v. McCrary*⁶⁴ when debating the merits

⁵⁴ *Jett*, 491 U.S. at 743.

⁵⁵ *Cort v. Ash*, 422 U.S. 66 (1975).

⁵⁶ 491 U.S. at 742 n.2, (Brennan, J., dissenting) (“Application even of the test fashioned in *Cort*, however, would lead to the conclusion that *Jett* may bring a cause of action in damages against respondent under § 1981.”).

⁵⁷ *Id.*

⁵⁸ “By restoring the broad scope of Section 1981, Congress will ensure that all Americans may not be harassed, fired or otherwise discriminated against in contracts because of their race.” 1991 U.S.C.C.A.N. 694, 695. House Report No. 102-40(II), May 17, 1991, P.L. 102-166, 1991 WL 87020.

⁵⁹ Civil Rights Act of 1991, Pub. L. 102-166, as enacted November 21, 1991, Section 3 [42 U.S.C. 1981 note], the Purposes of which were “to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.”

⁶⁰ *Id.*; see generally Roger Clegg, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459 (1994); Donald R. Livingston, *The Civil Rights Act of 1991 and EEOC Enforcement*, 23 STETSON L. REV. 53 (1993).

⁶¹ Civil Rights Act of 1991, Pub. L. No. 102-66, § 3(4) 105 Stat. 1071 (1991).

⁶² *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989). See generally, H.R. Rep. 102-40, 6, 1991 U.S.C.C.A.N. 694, 698

For eighteen years following the *Griggs* decision, the employer in a disparate impact case indisputably bore the burden of demonstrating that a practice shown by the complaining party to have a disparate impact was required by business necessity. In *Wards Cove*, the Supreme Court overruled this aspect of *Griggs*, holding that while the employer has the burden of producing evidence justifying an employment practice shown to have a disparate impact, the ‘burden of persuasion ... remains with the disparate-impact plaintiff.’ *Wards Cove Packing*, 490 U.S. at 659. Subsection 703(k)(1) is intended to overrule this part of the *Wards Cove* decision and would restore to the employer the burden of justifying practices shown to have a disparate impact. *Id.* at 699.

of this legislation. Curiously, in the hearings, no references were made to the Jett decision, position statements, or other supporting materials considered by the U.S. House of Representatives or the Senate.

During this time period, the United States Supreme Court addressed a number of cases relevant to the interpretation and application of § 1981. The first case was *Runyon v. McCrary*,⁶⁵ in which the Court considered whether § 1981 prohibits private schools from using race as the sole basis for excluding qualified African American children.⁶⁶ As to this issue, the Court held that § 1981 “prohibits racial discrimination in the making and enforcement of private contracts.”⁶⁷ The *Runyon* majority held that:

The petitioning schools and school association argue principally the Section 1981 does not reach private acts of racial discrimination. The view is wholly inconsistent with [*Jones v. Alfred H. Mayer Co.*’s] interpretation of the legislative history of section 1 of the Civil Rights Act of 1866 and this consistent interpretation of the law necessarily requires the conclusion that section 1981, like section 1982, reaches private conduct.⁶⁸

The Supreme Court re-visited its decision in *Runyon* in 1989 in *Patterson v. McLean Credit Union*.⁶⁹ Relying upon the doctrine of stare decisis, the Court in *Patterson* decided against overturning the *Runyon* decision,⁷⁰ but the Court recognized that “[s]ome Members of th[e] Court believe[d] that *Runyon* was decided incorrectly. . . .”⁷¹ To civil rights advocates, the continued validity of *Runyon* was tenuous victory. In *Patterson*, the Supreme Court’s textual interpretation of § 1981 rendered the statute functionally useless. As to the statutory guarantee that the right to make contracts is free of racial bias, the Court held that § 1981’s language was limited “only to the formation of a contract, but not to problems that may arise later from the conditions of continuing employment.”⁷² The Court went on to note that the right to make contracts free from racial discrimination does not extend “to conduct by the employer after the contract relation has been established.”⁷³ Such matters were viewed as more appropriately within the purview of “state contract law and Title VII.”⁷⁴

⁶³ *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989).

⁶⁴ *Runyon v. McCrary*, 427 U.S. 160 (1976).

⁶⁵ *Id.*

⁶⁶ *Id.* at 164-65.

⁶⁷ *Id.* at 168.

⁶⁸ *Id.* at 173.

⁶⁹ *Patterson*, 491 U.S. 164 (superseded by 42 U.S.C. § 1981). After hearing oral arguments in *Patterson v. McLean Credit Union*, the Court requested the parties’ briefs and requested that the parties argue the additional question of whether the Court’s interpretation of Section 1981 as adopted in *Runyon* should be reconsidered.

⁷⁰ *Id.* at 170-72.

⁷¹ *Id.*

⁷² *Id.* at 176.

⁷³ *Id.* at 177.

⁷⁴ *Id.*

As to the rights guaranteed in § 1981 pertaining to the enforcement of contracts, the Court in *Patterson* held that “the right to enforce contracts does not . . . extend beyond conduct by an employer which impairs an employee’s ability to enforce through legal process his or her established contract rights.”⁷⁵ Section 1981, properly interpreted, applied to “wholly private efforts to impede access to the courts or obstruct nonjudicial methods of adjudicating disputes about the force of binding obligations, as well as discrimination by private entities. . . .”⁷⁶ As a result, the Court refused to recognize that the plaintiff had a cognizable claim for racial harassment arising from the “postformation conduct by the employer relating to the terms and conditions of continuing employment.”⁷⁷

In 1991, Congress added two new subsections to the Civil Rights Act.⁷⁸ Subsection (b) was added to § 1981 in direct response to the Supreme Court’s narrow interpretation of Section 1981 in *Patterson*.⁷⁹ Subsection 1981 (b) provides that

(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.⁸⁰

The Legislative History of subsection (b) clearly indicates that Congress intended to overrule *Patterson* by defining the scope of § 1981 to “bar all racial discrimination in contracts”⁸¹ including conduct occurring prior to, during and subsequent to the formation of the contract. Congress was also concerned that the *Patterson* decision “had profoundly negative consequences both in the employment context and elsewhere,”⁸² noting that hundreds of racial discrimination claims were dismissed by federal courts after the ruling.⁸³

⁷⁵ 491 U.S. at 177-78.

⁷⁶ *Id.* at 177.

⁷⁷ *Id.* at 179.

⁷⁸ 42 U.S.C. §§ 1981 (b), (c).

⁷⁹ “This section amends 42 U.S.C. § 1981 (commonly referred to as ‘Section 1981’) to overturn *Patterson v. McLean Credit Union* and to codify *Runyon v. McCrary*, 427 U.S. 160 (1976).” 1991 U.S.C.C.A.N. 694, 728. H.R. No. 102-40(II), May 17, 1991, P.L. 102-66, 1991 WL 87020.

⁸⁰ 42 U.S.C. § 1981 (b).

⁸¹ 1991 U.S.C.C.A.N. 694, 731. H. Rep. No. 102-40(II), May 17, 1991, P.L. 102-66, 1991 WL 87020.

⁸² 1991 U.S.C.C.A.N. 549, 629. H. Rep. No. 102-40(I), Apr. 24, 1991, P.L. 102-66, 1991 WL 70454.

⁸³ 1991 U.S.C.C.A.N. 549, 630. H. Rep. No. 102-40(I), Apr. 24, 1991, P.L. 102-166, 1991 WL 70454 (“The Committee finds that the Supreme Court’s ruling in *Patterson* conflicts with a substantial body of federal appellate case law defining the scope of section 1981. The Committee also finds no basis in the Civil Rights Act of 1966 or its legislative history for distinguishing between race discrimination which occurs at the formation of the employment contract and that which occurs later in the performance of the contract. The Committee further finds that the Court’s interpretation of one of our most important federal civil rights laws crippled the statute’s deterrent value and left millions of workers without federal protection against employment

The language of § 1981 (c) broadened the scope of the Civil Rights Act to include protection “against impairment by nongovernmental discrimination and impairment under color of State law.”⁸⁴ The Congressional intent underlying this subsection was to codify *Runyon* by prohibiting racial discrimination in public and private contracting.⁸⁵ Although the additional language in section (c) created a private cause of action, the amended Act did not expressly create a private cause of action against state actors for violations of its provisions. The legislative history of § 1981 (c) does not help to clarify this question in that it does not reveal any explicit Congressional intent to overrule the plurality’s decision in *Jett*.⁸⁶ A report to the House of Representatives, which discusses the Supreme Court, noted that amendments to 1981 were necessary because:

[The Supreme Court]. . . cut back dramatically on the scope and effectiveness of civil rights protections, and that as a result, existing protections and remedies are not adequate to deter unlawful discrimination or to compensate victims of intentional discrimination.⁸⁷

Although the language of § 1981 was amended, Congress offered no guidance regarding the appropriate means or remedy for enforcing the amended statute against States or state actors.⁸⁸ Current Supreme Court jurisprudence does not offer any definitive analysis regarding whether a private right of action for damages against state actors may be implied into the textual framework of the amended § 1981. The federal judiciary has, therefore, been left to decide whether *Jett* requires § 1981 claimants to enforce civil rights violations guaranteed in section (c) by asserting their claims under 42 U.S.C. § 1983.⁸⁹ This is

discrimination. As a consequence, the Committee concludes that there is a compelling need for legislation to overrule the *Patterson* decision and ensure that federal law prohibits all race discrimination in all phases of the contractual relationship.”)

⁸⁴ 42 U.S.C. § 1981 (c).

⁸⁵ “This subsection is intended to codify *Runyon v. McCrary*. In *Runyon*, the Court held that Section 1981 prohibited intentional racial discrimination in private, as well as public, contracting. The Committee intends to prohibit racial discrimination in all contracts, both public and private.”) 1991 U.S.C.C.A.N. 694, 731. H. Rep. No. 102-40(II), May 17, 1991, P.L. 102-66, 1991 WL 87020.

⁸⁶ “H.R. 1, the Civil Rights Act of 1991, has two primary purposes. The first is to respond to recent Supreme Court decisions by restoring the civil rights protections that were dramatically limited by those decisions. The second is to strengthen existing protections and remedies available under federal civil rights laws to provide more effective deterrence and adequate compensation for victims of discrimination.” 1991 U.S.C.C.A.N. 694. H. Rep. No. 102-40(II), May 17, 1991, P.L. 102-66, 1991 WL 87020.

⁸⁷ H.R. Rep. No. 102-40, at 18 (1991), reprinted in 1991 U.S.C.C.A.N. 549, 556.

⁸⁸ The Supreme Court has criticized legislative actions such as these that fail to provide a comprehensive remedial scheme for the rights created therein. In *Cannon v. University of Chicago*, the Court implied a private remedy into the provisions of Title IX, but noted that “[w]hen Congress intends private litigants to have a cause of action to support their statutory rights, the far better course is for it to specify as much when it creates those rights.” 441 U.S. 677, 728 (1979).

⁸⁹ See *Bolden v. City of Topeka*, 441 F.3d 1129, 1136 (10th Cir. 2006) (“Courts have divided, however, over whether *Jett* is still good law. Some contend that *Jett* was overruled by an amendment to § 1981 in the Civil Rights Act of 1991.”). See also *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204, 1209 (9th Cir. 1996) (Whether this amendment

an especially difficult task when federal jurisprudence clearly requires that private rights of action to enforce federal laws must be created by Congress.⁹⁰ As the United States Supreme Court held in *California v. Sierra Club*,⁹¹ “[t]he federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide.”⁹² The absence of a Congressional directive is painfully illustrated in the body of jurisprudence compiled in the years following *Jett*.

V. Split in Circuits

V.A Majority Views on Viability of Jett

The split between the circuit courts regarding whether an implied right of action exists under § 1981 against state actors has reached an apparent stalemate. The First,⁹³ Second,⁹⁴ Seventh,⁹⁵ and D.C. Circuits have not yet issued a controlling opinion on this issue. The Third,⁹⁶ Fourth,⁹⁷ Fifth,⁹⁸ Sixth,⁹⁹

overturns either or both of *Jett*'s holdings is an unsettled question of law. The validity of *Jett*'s two holdings following the Civil Rights Act of 1991 has been challenged by courts and commentators alike.)

⁹⁰ *Touche Ross & Co. v. Redington*, 442 U.S. 560, 578 (1979).

⁹¹ *California v. Sierra Club*, 451 U.S. 287 (1981).

⁹² *Id.* at 297.

⁹³ The First Circuit Court of Appeals has not ruled on this issue, but the District Court in *Powell v. City of Pittsfield*, followed the Ninth Circuit's analysis in *Cort* and held that “[t]he court, therefore, recommends the adoption of the Ninth Circuit's conclusion that the amended section 1981 overturns *Jett*'s holding that section 1983 provides the exclusive federal remedy against state actors for violations of section 1981 rights.” 143 F. Supp. 2d 94, 112 (D. Mass. 2001).

⁹⁴ See *Webster v. Fischer*, 694 F. Supp. 2d 163, 195 (N.D.N.Y. 2010) (“While the Second Circuit has yet to rule on the continued vitality of *Jett* following the amendments of section 1981 included within the Civil Rights Act of 1991, without clear guidance from that court, other district courts have declined to deviate from *Jett*. Consistent with the decisions of these courts, I too opt not to deviate from the Supreme Court's analysis of section 1981 in *Jett*.”); *Lawson v. New York City Bd. of Edu.*, 2011 WL 5346091 (S.D.N.Y.) (“Second Circuit Court of Appeals has not addressed this issue....”); *Ortiz v. City of New York*, 755 F. Supp. 2d 399 (E.D.N.Y. 2010).

⁹⁵ *McQueen v. City of Chicago*, 803 F. Supp. 2d 892, 900 (N.D. Ill. 2011) (“Whether this holding [*Jett*] survived the Civil Rights Act of 1991 is an open question, one not yet addressed by the Seventh Circuit.”). *But see* *Harrison v. Ill. Dept. of Transp.*, 2011 WL 2470626, n.2 (N.D. Ill. 2011) (“Thus, a violation of the rights guaranteed in § 1981 by a state actor is properly brought as a so-called ‘and laws’ § 1983 claim.... That is how we construe the complaint, and that is how Plaintiff should plead any amended complaint he files in the wake of this opinion.”).

⁹⁶ *McGovern v. City of Philadelphia*, 554 F.3d 114, 121 (3d Cir. 2009) (“In sum, because Congress neither explicitly created a remedy against state actors under § 1981(c), nor expressed its intent to overrule *Jett*, we hold that ‘the express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state government units.’ ... Accordingly, McGovern's § 1981 claim must fail”; *see also* “*A*” a *minor, et al. v. Gloucester Twp.*, 2011 WL 297 3644 (D.N.J. 2011)) (“The Gloucester School District defendants are state actors. Indeed, Plaintiffs' § 1983 claim implicitly concedes this point. Accordingly, the Amended complaint fails to state a claim under § 1981.”).

⁹⁷ *Dennis v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995) (“To the extent that these claims were pleaded under § 1981, they run afoul of *Jett*.... *Jett* held that when suit is brought against a state actor, § 1983 is the ‘exclusive federal’ remedy for violation of the rights guaranteed in § 1981”).

Eighth,¹⁰⁰ Tenth,¹⁰¹ and Eleventh¹⁰² Circuits clearly follow *Jett*'s holding, and do not recognize private actions against state actors under § 1981. Only the Ninth Circuit in *Federation* has reached a contrary conclusion.

V.B Minority View – Ninth Circuit - Federation

The most significant body of jurisprudence supporting Justice Brennan's dissent in *Jett* arises from the Ninth Circuit. Following its 1996 decision in *Federation*,¹⁰³ the Ninth Circuit has been routinely cited as the only federal circuit to recognize that "the amended 42 U.S.C. § 1981 contains an implied cause of action against state actors,"¹⁰⁴ thereby overruling *Jett*'s holding that § 1983 provides that exclusive federal remedy against state actors for violations of rights under § 1981.¹⁰⁵ Although the Ninth Circuit's decisions are consistent with Justice Brennan's dissent, the analytical framework in *Federation* relies heavily on *Cort* to evaluate the § 1981 amended text of the Civil Rights Act.¹⁰⁶ Justice Brennan used *Rigsby* instead of *Cort* to determine whether a cause of action could be implied from the Civil Rights Act, as originally enacted in 1866. He noted, however, that even using *Cort*, his finding of an implied cause of action would have remained the same.¹⁰⁷

⁹⁸ *Oden v. Oktibbeha County*, 246 F.3d 458, 463 (5th Cir. 2001) ("Subsection (c) does not expressly create a remedial cause of action against local governmental entities, and we are not persuaded that such a remedy should be implied. In *Jett* the Court held that Congress intended § 1983 to be the sole remedy for discrimination by persons acting under color of state law.").

⁹⁹ *Arendale v. City of Memphis*, 519 F.3d 587, 598-99 (6th Circuit 2008) ("Having rejected Plaintiff's argument that § 1981(c) overrules *Jett*, this Court has no choice but to follow *Jett* as binding authority. Accordingly, we hold that 'the express cause of action for damages created by § 1983 constitutes the exclusive federal remedy for violation of the rights guaranteed in § 1981 by state governmental units,' ... no independent cause of action against municipalities is created by § 1981(c).")

¹⁰⁰ *Artis v. Francis Howell N. Band Booster Assn.*, 161 F.3d 1178, 1181 (8th Cir. 1998) ("A federal action to enforce rights under § 1981 against a state actor may only be brought pursuant to § 1983.").

¹⁰¹ *Bolden*, 441 F.3d at 1137 ("We also agree with *Butts*, Congress does not overrule recent Supreme Court precedent so subtly. The amendments to § 1981 do not expressly provide a private cause of action, as one would expect if Congress intended to set aside *Jett*. The language of subsection (c) reaffirms the Supreme Court's holding in *Runyon*; it hardly confronts the holding in *Jett*. And only one who never relies on committee reports would fail to be impressed by the total absence in the committee reports of any mention of *Jett* and the language in both that the subsection was intended to codify *Runyon*. We, therefore, conclude that even after the 1991 amendments to § 1981, damages claims against state actors for § 1981 violations must be brought under § 1983.").

¹⁰² *Butts v. County of Volusia*, 222 F.3d 891, 894 (11th Cir. 2000) ("Instead, the *Federation* court and others have noted Congress added subsection (c) to codify the Supreme Court's decision in *Runyon v. McCrary* [citation omitted] which established that § 1981 protects against private discrimination as well as discrimination by state actors. ... Congress provided no indication that it contemplated creating a cause of action against state actors outside of § 1983, nor did it even mention the Supreme Court's opinion in *Jett*.").

¹⁰³ *Fed'n. of African American Contractors v. City of Oakland*, 96 F.3d 1204 (9th Cir. 1996).

¹⁰⁴ *See Sledge v. District of Columbia*, 869 F. Supp. 2d 140, 143-44 (D.C. Cir. 2012).

¹⁰⁵ 96 F.3d at 1214.

¹⁰⁶ *Id.* at 1210-14.

¹⁰⁷ *See* U.S. CONST. amend. XI.

The first *Cort* factor considered by the Ninth Circuit was whether the plaintiff was within the class of persons for “whose ‘especial benefit’” Congress enacted section (c) to § 1981.¹⁰⁸ With respect to this factor, the Ninth Circuit in *Federation* held that the plain language of section (c) “confers a right in favor of the plaintiff.”¹⁰⁹ The amendment created a “broad anti-discrimination principle,” as evidenced by the language in (c), prohibiting both governmental and non-governmental discrimination.¹¹⁰ This statutory language was interpreted by the Court to not only prohibit discrimination, but to further vest its intended beneficiaries with federal rights to pursue a cause of action for such a violation.

The second *Cort* factor required the Ninth Circuit to examine the legislative history of § 1981 (c) to determine whether Congress intended to create a cause of action against state actors. It is this factor that the United States Supreme Court in *Touche Ross & Co. v. Redington*¹¹¹ viewed as the principle component of the *Cort* analysis.¹¹² Although acknowledging that the legislative history of § 1981 (c) “does not explicitly announce an intent to create (or deny) a private rights of action against a state actor”¹¹³ or “express an intent to overrule *Jett*,”¹¹⁴ the Ninth Circuit in *Federation* adopted an expansive reading of the legislative history of § 1981 (c).

The doctrine of mutuality of remedies serves as the foundation for the Ninth Circuit’s lone stance on this issue. First, the Court identified language from two Committee Reports¹¹⁵ that bolster the argument that the Supreme Court’s recognition of a cause of action against private entities requires a similar determination for actions against state actors. The Ninth Circuit repeatedly uses the terms “similarly,”¹¹⁶ “parallel protections,”¹¹⁷ “consistent,”¹¹⁸ and “comparable”¹¹⁹ to reach the conclusion that Congress intended that the remedy implied in *Jett* for private violations of § 1981 (c) applies with equal force to remedy conduct committed by state actors.

Additionally, the Ninth Circuit noted that the legislative history of § 1981(c) clearly indicates that

¹⁰⁸ *Fed’n. of African American Contractors*, 96 F.3d at 1210. The Ninth Circuit analogized § 1981(c) to Title XI, noting that both statutes “articulate broad anti-discrimination principles.”

¹⁰⁹ *Id.* at 1212.

¹¹⁰ *Id.* at 1211.

¹¹¹ *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979).

¹¹² *Id.* at 575-76 (“The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort* - the language and focus of the statute, its legislative history, and its purpose ... are ones traditionally relied upon in determining legislative intent.”).

¹¹³ *Fed’n. of African American Contractors*, 96 F.3d at 1212.

¹¹⁴ *Id.* at 1213.

¹¹⁵ *Id.* at 1212-13. See reports from the House Education and Labor Committee, H. Rep. No. 102-40(I), 102nd Cong., 1st Sess. 92, reprinted in 1991 U.S.C.C.A.N. 549, 630; and the House Committee on the Judiciary, H. Rep. No. 102-40(II), 102nd Cong., 1st Sess. 37, reprinted in 1991 U.S.C.C.A.N. 694, 731.

¹¹⁶ 96 F.3d at 1212.

¹¹⁷ *Id.* at 1213.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

Congress enacted this section to codify *Runyon*.¹²⁰ Since *Runyon* recognized that an implied cause of action exists for violations of § 1981 by private defendants, the Ninth Circuit, relying on the mutuality doctrine, concluded that Congress also intended that the same remedy should be available to address discriminatory conduct committed by state actors.¹²¹ Federation noted:

Because § 1981(c) affords identical protection against ‘impairment by nongovernmental discrimination’ and ‘impairment under color of State law,’ and because § 1981(c) implicitly codifies an implied cause of action against private defendants, we infer that § 1981(c) also contains an implied cause of action against state actors who ‘impair’ a claimant’s § 1981 rights.¹²²

The third and fourth factors of the *Cort* analysis were easily addressed by the Ninth Circuit in Federation. The third factor required the Court to consider whether “it is consistent with the underlying purpose of the legislative scheme to imply such a remedy[.]”¹²³ Evaluating the Congressional purpose and enactment of the 1991 amendment to the Civil Rights Act,

[s]ubsections 1981(b) and (c) were both added by the Civil Rights Act of 1991. Pub.L. No. 102-166, 105 Stat. at 1071-72. The Civil Rights Act of 1991 was enacted for the express purpose of “respond[ing] to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.” 105 Stat. at 1071. Congress believed that recent decisions by the Supreme Court had “cut back dramatically on the scope and effectiveness of civil rights protections,” leaving what remained of historic civil rights legislation “[in]adequate to deter unlawful discrimination or to compensate victims of intentional discrimination.” H.R.Rep. No. 102-40(I), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 556. Much of the Act is intended to “restor[e] the civil rights protections that were so dramatically limited” by these Supreme Court decisions. *Id.*¹²⁴ **CITATION W/ IN QUOTE**

Federation adopted an expansive reading of § 1981(c) to “ensur[e] that the well-established rights contained in the statute are guaranteed against both private parties and state actors.”¹²⁵ The Ninth Circuit argued that this implied cause of action was not precluded by any other statutory scheme,¹²⁶ that there is

¹²⁰ *Id.*

¹²¹ *Id.* (“In our view, Congress, in adding § 1981 (c) to codify *Runyon*, necessarily codified the implied cause of action on which *Runyon* was based. We infer from § 1981(c)’s identical treatment of private entities that § 1981 (c) permits both an implied cause of action against private defendants and an implied cause of action against governmental defendants.”).

¹²² 96 F.3d at 1213.

¹²³ *Id.* at 1210.

¹²⁴ For an excellent discussion of the 1991 Civil Rights Act, *see generally* *Arendale v. City of Memphis*, 519 F.3d 587, 597 (6th Cir. 2008).

¹²⁵ *Fed’n. of African American Contractors*, 96 F.3d at 1214.

¹²⁶ *Id.*

no alternative enforcement mechanism in § 1981,¹²⁷ it would not disrupt existing federal civil rights litigation,¹²⁸ and would impose no greater burden on governmental parties than they already face under the paradigm established by *Jett*.¹²⁹ As a result, the Ninth Circuit adopted the position that there was no need to go outside of the language of the section (c) when a cause of action could be crafted within the framework of the statutory language of § 1981(c).

The fourth factor of the *Cort* analysis considered whether “the cause of action one traditionally relegated to state law, so that it would be inappropriate to infer a cause of action based solely on federal law?”¹³⁰ The answer to that question was a resounding ‘no’. The Ninth Circuit concluded that “[p]rivate causes of action against state actors who impair federal civil rights have not been traditionally relegated to state law.”¹³¹ Upon concluding that § 1981(c) overruled *Jett*’s holding, the Ninth Circuit in *Federation* found an implied cause of action against state actors for violating the provisions of § 1981.

The Ninth Circuit’s opinion in *Federation* does not reveal any clues as to why the Ninth circuit continued to rely on *Cort* in light of its growing judicial condemnation. Almost seven years before *Federation* was decided, Justice Scalia, in his concurring opinion in *Thompson v. Thompson*,¹³² explicitly criticized continued use of *Cort*’s four factor test. Justice Scalia argued that “[i]t could not be plainer that we effectively overruled the *Cort v. Ash* analysis in *Touche Ross*. . . .”¹³³ Although the Supreme Court never overruled *Cort*, beginning with its decision in *Touche Ross v. Redington*, the Court limited its focus to the second *Cort* factor, “whether Congress intended to create, either expressly or by implication, a private cause of action.”¹³⁴

Justice Scalia revisited the continued survival of *Cort* when writing the majority opinion in *Alexander v. Sandoval*,¹³⁵ where he reiterated that the Court “abandoned” the statutory method of interpretation from *Cort*, “and ha[s] not returned to it since.”¹³⁶ The United States Supreme Court’s decision in *Alexander v. Sandoval*¹³⁷ sets forth the Court’s most recent analysis of the Implied Remedy

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 1210.

¹³¹ *Fed’n. of African American Contractors*, 96 F.3d at 1214.

¹³² *Thompson v. Thompson*, 484 U.S. 174 (1988).

¹³³ *Id.* at 189.

¹³⁴ In *Touche Ross*, the Supreme Court noted that (It is true that in *Cort v. Ash*, the Court set forth four factors that it considered “relevant” in determining whether a private remedy is implicit in a statute not expressly providing one. But the Court did not decide that each of these factors is entitled to equal weight. The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action. Indeed, the first three factors discussed in *Cort* - the language and focus of the statute, its legislative history, and its purpose, see 422 U.S. at 78 - -are ones traditionally relied upon in determining legislative intent.”) *Touche Ross v. Redington*, 442 U.S. 560, 575 (1979).

¹³⁵ See generally *Alexander v. Sandoval*, 532 U.S. 275 (2001).

¹³⁶ *Id.* at 287.

¹³⁷ See generally 532 U.S. 275.

Doctrine. In *Alexander*, the Court utilized a two-step inquiry to determine whether a private right of action exists under a federal statute. First, the inquiry will focus on “whether Congress intended to create a personal right in the plaintiff.”¹³⁸ The Supreme Court has defined a ‘right’ as “a well-founded or acknowledged claim.”¹³⁹ The second part of the inquiry focuses on “whether Congress intended to create a personal remedy for the plaintiff,”¹⁴⁰ which requires the court to determine the “means employed to enforce a right or redress an injury.”¹⁴¹ Instead, Justice Scalia argued that

[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. [citation omitted]. Statutory intent on this latter point is determinative. . . . Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.¹⁴²

Following Justice Scalia’s directive in *Alexander*, judicial determinations of whether a private cause of action may be implied into the statutory framework of §1981 focus on whether congressional intent can be determined from the text and structure of the statute.¹⁴³ Beyond a reference to “text and structure,” unfortunately, Supreme Court jurisprudence has not developed clear parameters for this test.¹⁴⁴

In order to ascertain Congressional intent from statutory text, Justice Scalia, citing *California v. Sierra Club*,¹⁴⁵ noted that statutes must contain “‘rights-creating’ language”¹⁴⁶ that focuses on “the person regulated rather than the individuals protected [and] create[s] ‘no implication of an intent to confer rights on a particular class of persons.’”¹⁴⁷ In *Federation*, the Ninth Circuit found that the rights creating language of § 1981 was broad enough to sustain an interpretation that it prohibits discrimination committed by both private and state actors. The addition of § 1981 (c) included “language that explicitly protects § 1981 rights from ‘impairment’ by both private and governmental entities” and makes it clear

¹³⁸ *Id.*

¹³⁹ *Chelentis v. Luckenbach*, 247 U.S. 372, 384 (1918).

¹⁴⁰ *McGovern v. City of Philadelphia*, 554 F.3d 114, 116 (3d Cir. 2009); *see also* *Three Rights Ctr. for Indep. Living v. Housing Auth. of the City of Pittsburgh*, 382 F.3d 412, 412 (3d Cir. 2004) (“Put succinctly, for an implied right of action to exist, a statute must manifest Congress’s intent to create (1) a personal right, and (2) a private remedy.”).

¹⁴¹ 247 U.S. at 384.

¹⁴² 532 U.S. at 286-87.

¹⁴³ *Id.* at 288 (stating that “we have never accorded dispositive weight to context shorn of text. In determining whether statutes create private rights of action, as in interpreting statutes generally, . . . legal context matters only to the extent it clarifies text.”).

¹⁴⁴ *See generally* *Wisniewski v. Rodule, Inc.*, 510 F.3d 294, 300 (3d Cir. 2007) (In the generation since the Supreme Court declared that legislative intent to create an implied private right of action is the sole touchstone of our inquiry, the Court has not provided a test for discerning this intent.”).

¹⁴⁵ 532 U.S. at 289 (citing *California v. Sierra Club*, 451 U.S. 287, 294 (1981)).

¹⁴⁶ *Id.* at 288.

¹⁴⁷ *Id.* at 289.

“that Congress intended a comparable scope of protection against each type of defendant.”¹⁴⁸

Additionally, courts must be able to ascertain the enforcement method from the statute in order to determine a congressional intent to create a private remedy.¹⁴⁹ This is especially true when Congress provides an enforcement method, in this case, § 1983, that “suggests that Congress intended to preclude others.”¹⁵⁰ Justice Scalia argued:

when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer’s apprentice but not the sorcerer himself.¹⁵¹

In a minor rebuke to Congress, Justice Scalia went on to suggest that incomplete draftsmanship is the primary reason why litigants attempt to imply a private cause of action into statute when “no such right of action exists.”¹⁵² The *Alexander* decision notes that “when . . . Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, we have spoken more bluntly: ‘It is ‘impossible to assert with any degree of assurance that congressional failure to act represents’ affirmative congressional approval of the Court’s statutory interpretation.’”¹⁵³

The one statutory method of interpretation that the *Alexander* court did not place great faith in requires an examination of the “expectations that the enacting Congress had formed in light of the contemporary legal context” of the statute.¹⁵⁴ The contemporary legal context of a statute encourages an examination of the legislative history and circumstances existing when the statute was passed.¹⁵⁵ This examination oftentimes gives the court clear evidence of Congressional intent. The Supreme Court cautioned that engaging in statutory interpretation to imply a private right of action contemporary legal context is only relevant “to the extent it clarifies text,”¹⁵⁶ and will never be afforded dispositive weight “shorn of text.”¹⁵⁷

¹⁴⁸ *Fed’n. of African American Contractors*, 96 F.3d at 1213.

¹⁴⁹ *Alexander*, 532 U.S. at 289.

¹⁵⁰ *Id.* at 290.

¹⁵¹ *Id.* at 291.

¹⁵² *Id.* at 293.

¹⁵³ *Id.* at 292.

¹⁵⁴ *Id.* at 287.

¹⁵⁵ See *Arendale v. Memphis*, 519 F.3d 587, 597-98 (6th Cir. 2008); see also *McCormick v. Miami Univ.*, 693 F.3d 654 (6th Cir. 2011).

¹⁵⁶ *Id.* at 288.

¹⁵⁷ *Id.* at 288. Although the *Alexander* decision suggests only limited circumstances where a review of the legislative history would be appropriate, the Sixth Circuit in *Arendale v. Memphis*, did explore the legislative history of § 1981 before concluding

However, with respect to the 1991 amendments to § 1981, the legislative history is not helpful in ascertaining whether Congress intended that a private cause of action could be implied from the language of § 1981. As the Supreme Court noted in *Cannon*, “[t]he legislative history of a statute that does not expressly create or deny a private remedy will typically be equally silent or ambiguous on the question.”¹⁵⁸

V.C Ninth Circuit’s Clarification of Federation

In 2007, the Ninth Circuit muddied the waters of this analysis even more. In *Pittman v. State of Oregon*,¹⁵⁹ the Court questioned the applicability of *Federation’s* holding to actions brought against state actors. The Ninth Circuit acknowledged the holding in *Federation* that “the amended 42 U.S.C. § 1981 contains a cause of action against state actors.”¹⁶⁰ But, in *Pittman*, the Ninth Circuit, although not overruling *Federation*, concluded that *Federation* was inconsistent with the guiding principle underlying the recognition of implied causes of action that courts cannot expand the scope of Congressionally enacted statutory remedies.¹⁶¹ As Justice O’Connor noted in *Jett*, “whatever the limits of the judicial power to imply or create remedies, it has long been the law that such power should not be exercised in the face of an express decision by Congress concerning the scope of remedies available under a particular statute.”¹⁶²

In *Pittman*, the Ninth Circuit argued that *Federation’s* interpretation of § 1981(c) wrongfully “expand[ed] the remedies available under that statute beyond those available under § 1983.”¹⁶³ *Federation’s* holding would permit private causes of action against state actors under § 1981, thus, abrogating the State’s Eleventh Amendment immunity.¹⁶⁴ Similarly, *Federation’s* recognition of implied liability against state actors under § 1981 ignored the Supreme Court’s long-standing conclusion that States are immunized from § 1981 liability by the Eleventh Amendment.¹⁶⁵ The Ninth Circuit clearly

that the statute does not provide parallel remedies against private and state actors for § 1981 violations. *Arendale v. Memphis*, 519 F.3d at 597-98.

¹⁵⁸ *Cannon*, 441 U.S. at 694.

¹⁵⁹ *Pittman v. State of Oregon*, 509 F.3d 1065 (9th Cir. 2007).

¹⁶⁰ *Id.* at 1069. (“We, however, in [*Federation*], concluded that the addition of subsection (c) overruled *Jett* to create a cause of action against municipalities. In reaching this holding, we acknowledge that ‘the amended 42 U.S.C. § 1981 does not expressly authorize private claimants to sue state actors directly.’ . . . But we held that ‘the amended 42 U.S.C. § 1981 contains a cause of action against state actors.’”) *Id.*

¹⁶¹ *Id.* at 1070 (“We nonetheless reject the extension of *Federation* to suits against arms of the state . . .”).

¹⁶² *Jett*, 491 U.S. at 732.

¹⁶³ 509 F.3d at 1071.

¹⁶⁴ *Id.* at 1071-73.

¹⁶⁵ See generally *Binum v. Warnes*, 2007 WL 54778 (D. Or. 2007) (“Generally actions for damages brought against the State or its instrumentalities are banned by the Eleventh Amendment.”); see also *Kentucky v. Graham*, 473 U.S. 159, 169 n.17 (1985) (“sovereign immunity under Eleventh Amendment protects state officials from suit in official capacity”); see also *Pennhurst State*

noted that in the absence of a waiver or Congressional abrogation, the principle of sovereign immunity prevents any private actions for damages under § 1981 and § 1983 against state actors.¹⁶⁶

VI. Limits of § 1983 Remedial Scheme

Section 1983 was originally enacted in 1871 when the 42nd Congress enacted the Civil Rights Act of 1871, which was also referred to as the Ku Klux Klan Act.¹⁶⁷ By exercising the grant of authority found in § 5 of the Fourteenth Amendment, Congress passed the 1871 Act to create a remedy that was “designed to expose state and local officials to a new form of liability.”¹⁶⁸ This legislation was intended to broaden the scope of Federal remedies available to African Americans who could not rely upon State and local governments for protection and redress from violence, especially widespread acts and terror perpetrated by members of the KKK and white supremacists.¹⁶⁹ The 1871 Act was intended to create a new federal private action for damages against every person, who, acting under the color of state law, caused the “deprivation of any rights, privileges, or immunities secured by the Constitution of the United States.”¹⁷⁰

School & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). In fact numerous courts have held that actions against the State pursuant to § 1981 are banned by Eleventh Amendment sovereign immunity. *See, e.g.*, *Freeman v. Michigan Dept. of State*, 808 F.2d 1174, 1179 (“Thus, the Eleventh Amendment bars a § 1981 action against a State.”); *Demuren v. Old Dominion Univ.*, 33 F.Supp.2d 469, 474-75, n.5 (E.D. Va. 1999) (“With respect to suits under 42 U.S.C. § 1981, this Court concurs with the view held by a number of other federal courts that Eleventh Amendment immunity is not abrogated.”).

¹⁶⁶ 509 F.3d at 1072.

¹⁶⁷ *See Monroe v. Pape*, 365 U.S. 167, 171 (1961) for a discussion of the legislative history of § 1983.

Section 1983] came onto the books as § 1 of the Ku Klux Act of April 20, 1871. 17 Stat. 13. It was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment. Senator Edmunds, Chairman of the Senate Committee on the Judiciary, said concerning this section: ‘The First section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principle of the civil rights bill, [Act of 1866] which has since become a part of the Constitution,’ viz., the Fourteenth Amendment.”

See also McGovern, 554 F.3d at 117 (“In other words, Congress believed the 1871 bill was necessary because no federal cause of action yet existed to enforce civil rights violations by state actors.”).

¹⁶⁸ *Jett*, 491 U.S. at 723 (“Second, the 1871 Act explicitly provided original federal jurisdiction for prosecution of these civil actions against state actors.”); *see also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 66 (1989) (“[A] principle purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims.”).

¹⁶⁹ The legislative history reveals that the swift passage of 1871 Act was due in large measure to President Ulysses S. Grant’s concern that the Post-Civil War terror inflicted upon African Americans “render[ed] life and property insecure, and that ‘the power to correct these evils [was] beyond the control of state authorities.’” Cong. Globe, 42nd Cong., 1st Session, 244 (1871). App. 68, 80, 83-85.

¹⁷⁰ Section 1 of “An Act to Enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States and for other Purposes,” 17 Stat. 13. Act of April 20, 1871, ch. 22.

Subsection § 1981(c) of the Civil Rights Act creates a statutory framework that protects against impairment of civil rights “under color of State law.” The United States Supreme Court, under *Jett*, requires litigants to assert § 1983 claims for damages against state actors for violations of rights guaranteed by § 1981. One of the primary reasons underlying the Supreme Court’s decision in *Jett* that there is no § 1981 implied private action against states can be traced to its determination that Congress established another remedial scheme to address these types of violations.

The Court looked to § 1983 as the exclusive source of “remedies available” for private actions against state actors.¹⁷¹ The text of § 1983 limits its coverage to “[e]very person who [is] under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia.”¹⁷² The United States Supreme Court, in *Will v. Michigan Dept. of State Police*,¹⁷³ determined that under § 1983, the term ‘person’ does not include “a State nor its officials acting in their official capacities.”¹⁷⁴

Unfortunately, the Eleventh Amendment¹⁷⁵ immunizes a significant percentage of state actors from the damages remedy provided by § 1983.¹⁷⁶ The Eleventh Amendment protects States and state actors acting in their official capacity from suit in federal court.¹⁷⁷ The immunity is not, however, absolute. States can waive Eleventh Amendment immunity,¹⁷⁸ consent to suit,¹⁷⁹ or Congress can abrogate the immunity.¹⁸⁰ Additionally, Eleventh Amendment immunity does not bar litigants from seeking injunctive relief from States.¹⁸¹

The Supreme Court has made it clear, however, that the legislative history of § 1983 does not

¹⁷¹ *Cannon v. Univ. of Chicago*, 441 U.S. 677, 728 (1979) (White, J., dissenting).

¹⁷² 42 U.S.C. § 1983.

¹⁷³ *Will*, 491 U.S. 58.

¹⁷⁴ *Id.* at 66. Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties. The Eleventh Amendment bars such suits unless the State has waived its immunity or Congress has exercised its undoubted power under § 5 of the Fourteenth Amendment to override that immunity. *Id.*

¹⁷⁵ The Eleventh Amendment to the United States Constitution provides that:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State U.S. CONST. amend XI.

¹⁷⁶ *Will*, 491 U.S. at 71 (“[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official’s office. As such, it is no different from a suit against the State itself.”).

¹⁷⁷ *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984).

¹⁷⁸ *Coll. Sav. Bank v. Fla. Prepaid Post-Secondary Ed. Expense Bd.*, 527 U.S. 666, 670 (1999).

¹⁷⁹ *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 (1985) (stating that if a “state waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action.”).

¹⁸⁰ *Kimel v. Fla. Bd. Of Regents*, 528 U.S. 62, 81 (2000) (“The ADEA is not a valid exercise of Congress’ power under § 5 of the Fourteenth Amendment. The ADEA’s purported abrogation of the States’ sovereign immunity is accordingly invalid.”).

¹⁸¹ *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 73 (1996); *Atascadero State*, 473 U.S. 234, 238 (1985); *Edelman v. Jordan*, 415 U.S. 651, 677 (1974).

reveal Congressional intent to “abrogate the Eleventh Amendment immunity of the States.”¹⁸² In *Quern v. Jordan*,¹⁸³ the Supreme Court, citing *Edelman v. Jordan*,¹⁸⁴ held that

[t]hough a § 1983 action may be instituted . . . a federal court’s remedial power, consistent with the Eleventh Amendment, is necessarily limited to prospective injunctive relief . . . , and may not include a retroactive award which requires the payment of funds from the state treasury.¹⁸⁵

Jett would require a litigant to simultaneously assert that a state actor deprived the claimant of his § 1981 rights, and somehow also argue that the state actor falls within § 1983’s definition of ‘persons.’ It is clearly established, however, that “[f]or the purposes of § 1983, states and arms of a state are not ‘persons,’ and a § 1983 claim may therefore not be brought against those entities or their officials acting in an official capacity.”¹⁸⁶ Restricting the remedial scheme available to claimants to a limited category of ‘persons’ creates an impenetrable hurdle that the holding of *Jett* failed to consider. The limited applicability of § 1983 is especially ironic in light of Justice O’Connor’s reasoning for refusing to recognize an implied private right of action in § 1981 against state actors.

In *Jett*, Justice O’Connor noted, when discussing the legislative history of the Civil Rights Act of 1871, which was the precursor to § 1983, that Congress enacted the legislation “to expose State and local officials to a new form of liability” that did not exist under § 1981.¹⁸⁷ She further argued that “judicial power to imply or create remedies”¹⁸⁸ is limited “in the context of the ‘state action’ portion of § 1981, where Congress has established its own remedial scheme.”¹⁸⁹ There is, however, no form of liability or remedial scheme under § 1983 for damages that can be successfully raised against sovereign States, or state actors acting in their official capacity for violations of the rights created by § 1981. As a result, the provisions of § 1983 fail to offer § 1981 litigants the ‘remedial scheme’ Congress intended when the Civil Rights Act of 1871, the precursor to § 1983, was enacted.

VII. Resolution

Notwithstanding *Jett*, litigants continue to file futile § 1981 actions against states and state actors. In many instances, these litigants unsuccessfully argue that § 1981 actions for damages against

¹⁸² *Quern v. Jordan*, 440 U.S. 332, 340-41 (1979).

¹⁸³ See generally *id.*

¹⁸⁴ *Edelman*, 415 U.S. at 677.

¹⁸⁵ *Quern*, 440 U.S. at 340-41 (citing *Edelman*, 415 U.S. at 677).

¹⁸⁶ *Adams v. Orleans Parish Recovery Sch. Dist.*, 463 Fed. Appx. 297, 298 (5th Cir. 2012).

¹⁸⁷ *Jett*, 491 U.S. 723.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 731.

governmental entities may be implied from the text of § 1981(c).¹⁹⁰ Other litigants rely on *Jett* and raise their § 1981 claims against States or state actors under § 1983.¹⁹¹ Regardless of their method of pleading, litigants seeking damages against state actors are routinely thwarted by Federal Rule of Civil Procedure 12(b)(6).¹⁹² *Jett* holds that § 1983 is the exclusive damage remedy for § 1981 actions against States and state actors acting within their official capacities, but these governmental entities are not ‘persons’ subject to liability under § 1983.¹⁹³ This circularity cannot possibly be the remedy Congress intended in 1991 when it enacted § 1981(c), and expressly created a right to be free from deprivations by “governmental actors.”¹⁹⁴

Fortunately, the Constitution is both the source of this problem and the source of its resolution. The Eleventh Amendment’s grant of immunity insulates States and state actors acting in their official capacity from liability for damages. However, the Fourteenth Amendment authorizes Congress to abrogate States’ sovereign immunity and limit the scope of the Eleventh Amendment.¹⁹⁵ Section 5 of the Fourteenth Amendment provides that:

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.¹⁹⁶

There are many instances where Congress utilized § 5 of the Fourteenth Amendment to abrogate States’ sovereignty to permit private litigants to pursue actions for damages against governmental actors. In *Franklin v. Gwinnett*,¹⁹⁷ the Supreme Court identified a number of statutes, including the Age Discrimination Act of 1975, in which Congress abrogated the States’ Eleventh Amendment immunity.¹⁹⁸ Congress amended Title VII to give victims of discrimination an opportunity to “recover for the very real

¹⁹⁰ See *Owens v. Dist. of Columbia*, 2013 WL 563425 (D.C. Cir. 2013); *Grinter v. Knight*, 532 F.3d 567 (6th Cir. 2008); *McCormick v. Miami Univ.*, 693 F.3d 654 (6th Cir. 2011); *Sledge v. Dist. of Columbia*, 869 F. Supp. 2d 140 (D.C. Cir. 2012); *De v. City of Chicago*, 2012 WL 6605009 (N.D. Ill. 2012).

¹⁹¹ *Mveng-Whitted v. Va. State Univ.*, 2013 WL 65333 (E.D. Va. 2013); *BBF Eng’g Servs. v. Mich.*, 2012 WL 380282 (E.D. Mich. 2012).

¹⁹² Federal Rule of Civil Procedure 12(b)(6) provides, in pertinent part, that “... a party may assert the following defenses by motion...(6) failure to state a claim upon which relief can be granted.”

¹⁹³ *Will*, 491 U.S. at 71; see also *Ah Sing v. Haw. Dept. of Pub. Safety*, 2013 WL 179482 (D. Ariz. 2013).

¹⁹⁴ 42 U.S.C. § 1981 (c).

¹⁹⁵ *Coleman v. Court of Appeals of Md.*, 132 S. Ct. 1327 (2012). Plurality opinion authored by Justice Kennedy states that “[a] foundation premise of the federal system is that States, as sovereigns, are immune from suits for damages, save as they elect to waive that defense.... As an exception to this principle, Congress may abrogate the States’ immunity from suit pursuant to its powers under § 5 of the Fourteenth Amendment.” *Id.* See also *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

¹⁹⁶ U.S. CONST. amend. XIV §5.

¹⁹⁷ *Franklin v. Gwinnett*, 503 U.S. 60, 72 (1992).

¹⁹⁸ *Id.* at 72 (“In the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7, Congress abrogated the States’ Eleventh Amendment immunity under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.”).

effects of [the statutory violations].”¹⁹⁹ Similarly, in 1990, Congress abrogated the States’ sovereign immunity under Title II of the Americans with Disabilities Act to “authorize suits by private citizens for money damages against public entities that violate § 12132.”²⁰⁰ The United States Supreme Court, in *US v. Georgia*,²⁰¹ held that “[i]n enacting the ADA, Congress ‘invoke[d] the sweep of congressional authority, including the power to enforce the Fourteenth Amendment.’”²⁰²

Congressional abrogation of States’ sovereignty is especially appropriate in this context where Congress added express language in § 1981(c) to ameliorate racially discriminatory deprivations by governmental actors. In this instance, § 1981 was derived from the Civil Rights Act of 1866.²⁰³ The Fourteenth Amendment was passed to provide constitutional protection for rights guaranteed in the 1866 Act, and to prevent repeal of the 1866 Act by future Congressional bodies.²⁰⁴ The language of the Fourteenth Amendment expressly provides that “Congress shall have the power to enforce by appropriate legislation the provisions of this article.”²⁰⁵ Consequently, there is no question that the Congressional power to abrogate State immunity falls squarely within the scope of “appropriate legislation”²⁰⁶ to enforce the statutory provisions upon which the Fourteenth Amendment was founded.

In *Kimel v. Florida Bd. Of Regents*,²⁰⁷ the Supreme Court addressed the scope of Congress’ § 5 powers. The Court noted that

Congress’ § 5 power is not confined to the enforcement of legislation that merely parrots the precise wording of the Fourteenth Amendment. Rather, Congress’ power to ‘enforce’ the Amendment includes the authority both to remedy and to deter violations of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself

¹⁹⁹ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000). H.R. Rep. No. 102-40, pt. 2, p.25 (1991). U.S. Code Cong. & Admin. News 1991, pp. 549, 718 (Report of Committee on the Judiciary on the Civil Rights Act of 1991); *see also* Fitzpatrick v. Bitzer, 427 U.S. 445, n.9 (1967) (“There is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment.” *See* H.R. Rep. No. 92-238, p.19 (1971); S. Rep. No. 92-415, pp.10-11 (1971); *see* Perez v. Region 20 Educ. Serv. Ctr, 307 F.3d 318, 326, n.1 (5th Cir. 2002).

²⁰⁰ *United States v. Georgia*, 546 U.S. 151, 154 (2006) (“Congress abrogated the States’ sovereign immunity under Title II of the Americans with Disabilities Act of 1990, 104 Stat. 337, as amended, 42 U.S.C. § 12131 et seq.”).

²⁰¹ *See generally id.*

²⁰² *Id.* at 154.

²⁰³ U.S. CONST. amend. XI.

²⁰⁴ *Jett*, 491 U.S. at 721 (“Many of the Members of the 39th Congress viewed § 1 of the Fourteenth Amendment as ‘constitutionalizing’ and expanding the protections of the 1866 Act and viewed what became § 5 of the Amendment as laying to rest doubts shared by both sides of the aisle concerning the constitutionality of that measure. *See, e.g.,* Cong. Globe, 39th Cong., 1st Sess., 2465 (1866)”).

²⁰⁵ U.S. CONST. amend. XIV.

²⁰⁶ *Id.*

²⁰⁷ *Kimel v. Fla Bd. of Regents*, 528 U.S. 62 (2000).

forbidden by the Amendment's text.²⁰⁸

The absence of a meaningful remedy under § 1983 is totally opposite of the Supreme Court's argument in *Jett* that "Congress intended that the explicit remedial provisions of § 1983 be controlling in the context of damages actions brought against state actors alleging violation of the rights declared in § 1981."²⁰⁹ In fact, no meaningful damages remedy exists against States or state actors acting in their official capacities. Abrogation of State sovereign immunity insures potential litigants of remedies that extend far beyond potential financial redress for violations of § 1981(c). Imposition of damage remedies may deter future discriminatory conduct, encourage States to change employment and other practices that have historically deprived minority groups of the rights guaranteed by § 1981, and encourage more litigants to challenge State policies and practices that violate § 1981.²¹⁰

For example, the 1972 Congress abrogated governmental immunity from Title VII liability.²¹¹ This action resulted in "10 million more employees being immediately added to Title VII's coverage."²¹² Justice Sotomayor discussed the benefits resulting from Congressional abrogation of States' immunity in her dissenting opinion in *Sossamon v. Texas*.²¹³ In *Sossamon*, the Court held that the language of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA")²¹⁴ was "too ambiguous" to provide States with clear notice that they would be liable for monetary damages.²¹⁵ Justice Sotomayor argued, however, that the "unavailability of monetary relief will effectively shield unlawful policies and practices from judicial review in many cases."²¹⁶

Congressional abrogation of States' sovereign immunity is an exceptional remedy that must conform to longstanding Supreme Court jurisprudence. First, Congressional abrogation of States' immunity "must be expressly and unequivocally stated in the text of the relevant statute."²¹⁷ The Supreme Court noted that express abrogation is necessary because it "ensures that Congress has specifically considered State sovereign immunity . . . intentionally legislated on the matter. . ."²¹⁸ and given "notice to the States."²¹⁹ The statutory language from § 12101(b)(4) of the ADA clearly illustrates

²⁰⁸ *Id.* at 81 (2000); *see also* *Coleman v. Court of Appeals of Md.*, 132 S. Ct 1327, 1333 (2012), plurality opinion.

²⁰⁹ *Jett*, 491 U.S. at 731.

²¹⁰ *See Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 737 (2003).

²¹¹ Equal Employment Opp. Act of 1972, Sec. 2., 78 Stat. 253, 42 U.S.C. 2000e.

²¹² *See generally EEOC History: 35th Anniversary: 1965-2000*, EEOC, <http://www.eeoc.gov/eeoc/history/35th/index.html>.

²¹³ *Sossamon v. Texas*, 131 S. Ct. 1651, 1663 (2011) (Sotomayor, J., dissenting).

²¹⁴ Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C.S. § 2000cc et seq. (LexisNexis 2000).

²¹⁵ *Sossamon*, 131 S.Ct. at 1663.

²¹⁶ *Id.* at 1669.

²¹⁷ *Id.*; *see also Coleman*, 132 S.Ct. at 1333 ("Congress must make its intention to abrogate unmistakably clear in the language of the statute.").

²¹⁸ *Id.*

²¹⁹ *Id.*

this point. The amended ADA statute provides, in pertinent part that, “[a] State shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for a violation of this Chapter.”²²⁰ In *U.S. v. Georgia*, the Supreme Court considered this language and determined that it is an “unequivocal expression [of] Congress’s intent to abrogate state sovereign immunity.”²²¹

Second, in *Coleman v. Court of Appeals of Maryland*,²²² the Supreme Court reiterated the principle that “[l]egislation enacted under § 5 must be targeted at ‘conduct transgressing the Fourteenth Amendment’s substantive provisions.’”²²³ The Court further noted that Congress “must rely on more than abstract generalities to subject the States to suits for damages.”²²⁴ This analysis requires Congress to “identify a pattern of constitutional violations,” not merely respond to “a theory for why abrogating the States’ immunity aids in, or advances a stated congressional purpose.”²²⁵ In *Coleman*, the Court held that the self-care provision of the Family and Medical Leave Act of 1993²²⁶ (“FMLA”) was not targeted at an identified pattern of gender-based discrimination which would warrant abrogation of the States’ immunity from suit.²²⁷

Nine years earlier, the Supreme Court in *Nevada Dept. Of Human Resources v. Hibbs*,²²⁸ interpreted the family-care provision in the FMLA²²⁹ and reached a different conclusion. In *Hibbs*, the Court found a well-documented pattern of unconstitutional gender discrimination in the administration family-leave policies by States.²³⁰ This finding, coupled with specific statutory language demonstrating Congressional intent to abrogate, was deemed “weighty enough to justify” abrogation of States’

²²⁰ ADA, 42 U.S.C. § 12101(b)(4). In *United States v. Georgia*, the Supreme Court considered this language and held that “Title II [of the ADA] creates a private cause of action for damages against the States for conduct that actually violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity.” *United States v. Georgia*, 546 U.S. 151, 159 (2000); *see also* family-care provisions of the FMLA at issue in *Nev. Dept. of Human Res. v. Hibbs*:

The Act enables employees to seek damages against any employer (including a public agency) in any Federal or State Court of competent jurisdiction, . . . [a]nd Congress has defined ‘public agency’ to include both ‘the government of a State or political subdivision thereof’ and ‘any agency of . . . a State, or a political subdivision of a State.’ *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 726 (2003).

²²¹ *United States v. Georgia*, 546 U.S. 151, 154 (2006).

²²² *Coleman v. Court of Appeals of Md.*, 132 S.Ct 1327 (2012), plurality opinion.

²²³ *Id.* at 1333.

²²⁴ *Id.* at 1337.

²²⁵ *Id.* at 1338.

²²⁶ Family and Medical Leave Act, 29 U.S.C. § 2612 (a)(1)(D).

²²⁷ *Coleman*, 132 U.S. at 1336-37.

²²⁸ *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

²²⁹ Family care provision of the Family Medical Leave Act, 29 U.S.C. § 2612 (a)(1)(C).

²³⁰ *Nev. Dept. of Human Res.*, 538 U.S. at 736 (“[T]he States’ record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation.”).

immunity.²³¹

Finally, the Supreme Court will apply the “congruence and proportionality”²³² test to determine whether there is a nexus “between the injury to be prevented or remedied and the means adopted to that end.”²³³ This component of the analysis is accomplished by an “assessment of both the ‘evil’ or ‘wrong’ that Congress intended to remedy, and the means Congress adopted to address that evil.”²³⁴

VIII. Conclusion

Congress enacted § 1981(c) to protect the rights of African Americans to make and enforce contracts free of “impairment by nongovernmental discrimination and impairment under color of State law.”²³⁵ Notwithstanding this express rights-creating language of § 1981(c), African Americans employed by and interacting with States and state actors cannot successfully sustain a private cause of action for damages against States and state actors under § 1981. A right without a meaningful remedy is meaningless. Creation of such a useless right is a direct affront to the stated purpose of § 1981, which was to expose States to “a new form of liability.”²³⁶ When arguing in support of the 1991 Civil Rights Act, former Congressman Leon Panetta echoed the criticism made over 100 years prior by Senator Lyman Trumbull²³⁷ against the creation of rights without accompanying enforcement remedies.²³⁸ Mr. Panetta argued that

[t]here is a basic principle in this country, and it is a principle that says we believe in equality of rights and that we believe that there are no rights unless there are remedies. We cannot just talk about rights unless we are prepared to remedy wrongs.²³⁹

Mr. Panetta’s argument continues to resonate today. Half of the twelve federal circuits capable of exercising jurisdiction over a § 1981 claim follow *Jett*, and require litigants to plead their § 1981 actions

²³¹ *Id.* at 722.

²³² In his concurring opinion in *Coleman*, Justice Scalia criticized this test arguing that it is a “flabby test” which is a “standing invitation to judicial arbitrariness and policy-driven decision-making.” *Coleman*, 132 S. Ct at 1338.

²³³ *Coleman*, 132 S. Ct at 1333.

²³⁴ *Id.* (citing *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997)). While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. . . Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.” *Id.*

²³⁵ 42 U.S.C. § 1981 (c).

²³⁶ *Jett*, 491 U.S. at 723.

²³⁷ *See Jett*, 491 U.S. at 714.

²³⁸ Remarks by Leon Panetta, GOA Congressional Record, 102nd Congress, House, p. H10848-49, (Nov. 22, 1991).

²³⁹ *Id.*

under § 1983. Notwithstanding the merits of their potential claims, litigants in these federal circuits do not have any chance of prevailing against States or state actors because the Eleventh Amendment insulates these governmental entities from liability. Potential litigants in the remaining federal circuits face uncertainty regarding whether they will be required to overcome both barriers established by the Supreme Court in *Jett* as well as the grant of sovereign immunity in the Eleventh Amendment.

The result is a body of jurisprudence without controlling precedent, and a population of African Americans without recourse for deprivation of their rights. This could not possibly be the intended result of the 1991 Congressional amendments to § 1981. The federal judiciary seems unwilling, absent express direction from the Supreme Court, to craft an implied private cause of action for damages into the framework of § 1981. The only viable solution is the abrogation of the Eleventh Amendment immunity currently enjoyed by States and state actors from claims asserted under § 1983. Such an action would provide a meaningful opportunity for the intended beneficiaries of § 1981 to have the merits of their claims brought before the court, and give litigants the meaningful “remedial scheme” that Congress intended when the Civil Rights Act of 1871 was enacted.

example, the English are a people, who occupy a discrete territory, and speak a separate language from the French, who have their own language, lands, and culture (in this scheme, intense nationalism blinded theorists from considering the strong similarities among European languages, and the common culture of the continent). Today, and every bit as much in the past, every society, no matter how small-scale, is multi-racial, multi-cultural (especially when embedded in a larger nation-state), and unbounded in its social relations. When this is overlooked, all groups, when examined up close, appear to be dissolving, and their members all cultural half-breeds. Under this standard, few petitioning groups can live up to the idealized model of the “real” Indian.

VIII. Conclusion

As shown in this paper, the Mandatory Criteria have deep roots. They have survived more than a century of development in social scientific thinking and a major shift in Indian policy, and stand incompatible with both. Anthropology has long since abandoned most of the principles of its 19th century origins. However, no elements from contemporary cultural theory have seeped into the FAP. Only minor changes have been made. The use of race as an element, for instance, was eliminated by Cohen’s time (and would probably be glaringly anachronistic and improper if it appeared in the Mandatory Criteria today). Territoriality was replaced in 1994 in recognition of the fact that groups do not have to live together to maintain social relations (but its replacement seems much more demanding). Yet, the OFA fails to see how equally anachronistic the other elements that make up the Criteria are. The elements are inextricably bound to their original intentions--to determine which tribes have sufficiently advanced up the scale of social evolution by assimilation to be “emancipated” from the wardship of federal trust. Ostensibly, this is no longer the goal of the BIA--“restoration” is part of a broader policy of self-determination. However, within the FAP, the principles and elements employed to meet the restoration goal are incompatible with the goal itself.