To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice Scalia
Justice Kennedy

From: **Justice O'Connor**

Circulated: MAY 22 1989

Recirculated: _____

SDO
I concur the dissent

1st DRAFT

SUPREME COURT OF THE UNITED STATES

Nos. 87-2084 AND 88-214

NORMAN JETT, PETITIONER
87-2084 *v.*
DALLAS INDEPENDENT SCHOOL DISTRICT

DALLAS INDEPENDENT SCHOOL DISTRICT, PETITIONER
88-214 *v.*
NORMAN JETT

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

[May ——, 1989]

JUSTICE O'CONNOR delivered the opinion of the Court.

The question before us in these cases is whether 42 U. S. C. § 1981 provides an independent federal cause of action for damages against local governmental entities, and whether that cause of action is broader than the damage remedy available under 42 U. S. C. § 1983, such that a municipality may be held liable for its employees' violations of § 1981 under a theory of *respondeat superior*.

I

Petitioner Norman Jett, a white male, was employed by respondent Dallas Independent School District (DISD) as a teacher, athletic director, and head football coach at South Oak Cliff High School (South Oak) until his reassignment to another DISD school in 1983. Petitioner was hired by the DISD in 1957, was assigned to assistant coaching duties at South Oak in 1962, and was promoted to athletic director and head football coach of South Oak in 1970. During petitioner's lengthy tenure at South Oak, the racial composition of

the school changed from predominately white to predominately black. In 1975, the DISD assigned Dr. Fredrick Todd, a black, as principal of South Oak. Petitioner and Todd clashed repeatedly over school policies, and in particular over petitioner's handling of the school's football program. These conflicts came to a head following a November 19, 1982 football game between South Oak and the predominately white Plano High School. Todd objected to petitioner's comparison of the South Oak team with professional teams before the match, and to the fact that petitioner entered the official's locker room after South Oak lost the game and told two black officials that he would never allow black officials to work another South Oak game. Todd also objected to petitioner's statements, reported in a local newspaper, to the effect that the majority of South Oak players could not meet proposed NCAA academic requirements for collegiate atheletes.

On March 15, 1983, Todd informed petitioner that he intended to recommend that petitioner be relieved of his duties as athletic director and head football coach at South Oak. On March 17, 1983, Todd sent a letter to John Kincaide, the director of athletics for DISD, recommending that petitioner be removed based on poor leadership and planning skills and petitioner's comportment before and after the Plano game. Petitioner subsequently met with John Santillo, director of personnel for DISD, who suggested that petitioner should transfer schools because any remaining professional relationship with Principal Todd had been shattered. Petitioner then met with Linus Wright, the superintendent of the DISD. At this meeting, petitioner informed Superintendent Wright that he believed that Todd's criticisms of his performance as head coach were unfounded and that in fact Todd was motivated by racial animus and wished to replace petitioner with a black head coach. Superintendent Wright suggested that the difficulties between Todd and petitioner might preclude petitioner from remaining in his coaching position at

South Oak, but assured petitioner that another position in the DISD would be secured for him.

On March 25, 1983, Superintendent Wright met with Kincaide, Santillo, Todd and two other DISD officials to determine whether petitioner should remain at South Oak. After the meeting, Superintendent Wright officially affirmed Todd's recommendation to remove petitioner from his duties as coach and athletic director at South Oak. Wright indicated that he felt compelled to follow the recommendation of the school principal. Soon after this meeting, petitioner was informed by Santillo that effective August 4, 1983, he was reassigned as a teacher at the DISD Business Magnet School, a position that did not include any coaching duties. Petitioner's attendance and performance at the Business Magnet School were poor, and on May 5, 1983, Santillo wrote petitioner indicating that he was being placed on "unassigned personnel budget" and being reassigned to a temporary position in the DISD security department. Upon receiving Santillo's letter, petitioner filed this lawsuit in the District Court for Northern District of Texas. The DISD subsequently offered petitioner a position as a teacher and freshman football and track coach at Jefferson High School. Petitioner did not accept this assignment, and on August 19, 1983, he sent his formal letter of resignation to the DISD.

Petitioner brought this action against the DISD and Principal Todd in his personal and official capacities, under 42 U. S. C. §§1981 and 1983, alleging Due Process, First Amendment, and Equal Protection violations. Petitioner's Due Process claim alleged that he had a constitutionally protected property interest in his coaching position at South Oak, of which he was deprived without due process of law. Petitioner's First Amendment claim was based on the allegation that his removal and subsequent transfer were actions taken in retaliation for his statements to the press regarding the sports program at South Oak. His Equal Protection and §1981 causes of action were based on the allegation that his

removal from the athletic director and head coaching positions at South Oak was motivated by the fact that he was white, and that Principal Todd, and through him the DISD, were responsible for the racially discriminatory diminution in his employment status. Petitioner also claimed that his resignation was in fact the product of racial harassment and retaliation for the exercise of his First Amendment rights and thus amounted to a constructive discharge. These claims were tried to a jury, which found for petitioner on all counts. The jury awarded petitioner $650,000 against the DISD, $150,000 against Principal Todd and the DISD jointly and severally, and $50,000 in punitive damages against Todd his personal capacitity.

On motion for judgment notwithstanding the verdict respondents argued that liability against the DISD was improper because there was no showing that petitioner's injuries were sustained pursuant to a policy or custom of the school district. Pet. for Cert. in 87–2084 at 46A. The District Court rejected this argument, finding that the DISD Board of Trustees had delegated final and unreviewable authority to Superintendent Wright to reassign personnel as he saw fit. *Id.*, at 47A. In any event, the trial court found that petitioner's claim of racial discrimination was cognizable under § 1981 as well as § 1983, and indicated that "liability is permitted on solely a basis of *respondeat superior* when the claim is one of racial discrimination under § 1981." *Ibid.* The District Court set aside the punitive damage award against Principal Todd as unsupported by the evidence, found the damage award against the DISD excessive and ordered a remittitur of $200,000, but otherwise denied respondents' motions for judgment n.o.v. and a new trial and upheld the jury's verdict in all respects. *Id.*, at 62A–63A. Principal Todd has reached a settlement with petitioner and is no longer a party to this action. *Id.*, at 82A–84A.

On appeal, the Court of Appeals for the Fifth Circuit reversed in part and remanded. 798 F. 2d 748 (1986). Ini-

tially, the court found that petitioner had no constitutionally protected property interest "in the intangible, noneconomic, benefits of his assignment as coach." *Id.*, at 754. Since petitioner had received both his teacher and coach's salary after his reassignment, the change in duties did not deprive him of any state law entitlement protected by the Due Process Clause. The Court of Appeals also set aside the jury's finding that petitioner was constructively discharged from his teaching position within the DISD. The court found the evidence insufficient to sustain the claim that petitioner's loss of coaching duties and subsequent offer of reassignment to a lesser coaching position were so humiliating or unpleasant that a reasonable employee would have felt compelled to resign. *Id.*, at 754–756. While finding the question "very close," the Court of Appeals concluded that there was sufficient evidence from which a reasonable jury could conclude that Principal Todd's recommendation that petitioner be transferred from his coaching duties at South Oak was motivated by impermissible racial animus. The court noted that Todd had replaced petitioner with a black coach, that there had been racial overtones in the tension between Todd and petitioner before the Plano game, that Todd's explanation of his unsatisfactory rating of petitioner was questionable and was not supported by the testimony of other DISD officials who spoke of petitioner's performance in laudatory terms. *Id.*, at 756–757. The court also affirmed the jury's finding that Todd's recommendation that petitioner be relieved of his coaching duties was motivated in substantial part by petitioner's protected statements to the press concerning the academic standing of athletes at South Oak. These remarks addressed matters of public concern, and Todd admitted that they were a substantial consideration in his decision to recommend that petitioner be relieved of his coaching duties.

The Court of Appeals then turned to the DISD's claim that there was insufficient evidence to support a finding of municipal liability under 42 U. S. C. § 1983. The Court of Appeals

found that the District Court's instructions as to the school district's liability were deficient in two respects. First, the District Court's instruction did not make clear that the school district could be held liable for the the actions of Principal Todd or Superintendent Wright only if those officials were delegated policymaking authority by the school district or acted pursuant to a well settled custom that represented official policy. Second, even if Superintendent Wright could be considered a policymaker for purposes of the transfer of school district personnel, the jury made no finding that Superintendent Wright's decision to transfer petitioner was either improperly motivated, or consciously indifferent to the improper motivations of Principal Todd. *Id.*, at 759–760.

The Court of Appeals also rejected the District Court's conclusion that the DISD's liability for Principal Todd's actions could be predicated on a theory of *respondeat superior* under § 1981. The court noted that in *Monell* v. *Department of Social Services*, 436 U. S. 658 (1978), this Court held that Congress did not intend municipalities be subject to vicarious liability for the federal constitutional or statutory violations of their employees. The Court of Appeals reasoned that "[t]o impose such vicarious liability for only certain wrongs based on section 1981 apparently would contravene the congressional intent behind section 1983." *Id.*, at 762.

The Court of Appeals published a second opinion in rejecting petitioner's suggestion for rehearing en banc in which the panel gave further explanation of its holding that *respondeat superior* liability against local governmental entities was unavailable under § 1981. 837 F. 2d 1244 (1988). The Court of Appeals noted that our decision in *Monell* rested in part on the conclusion that "'creation of a federal law of *respondeat superior* would have raised all the constitutional problems'" associated with the Sherman amendment which was rejected by the framers of § 1983. *Id.*, at 1247, quoting *Monell*, *supra*, at 693.

Because the Court of Appeals' conclusion that local governmental bodies cannot be held liable under a theory of *respondeat superior* for their employees' violations of the rights guaranteed by § 1981 conflicts with the decisions of other Courts of Appeals, see, *e. g.*, *Springer* v. *Seaman*, 821 F. 2d 871, 880–881 (CA1 1987); *Leonard* v. *City of Frankfort*, 752 F. 2d 189, 194, n. 9 (CA6 1985) (dictum), we granted Norman Jett's petition for certiorari in No. 87–2084. —— U. S. —— (1989). We also granted the DISD's cross-petition for certiorari in No. 88–214, see —— U. S. —— (1989), to clarify the application of our decisions in *City of Saint Louis* v. *Praprotnik*, —— U. S. —— (1988) (plurality opinion), and *Pembaur* v. *City of Cinncinatti*, 475 U. S. 469 (1986) (plurality opinion), to the school district's potential liability for the discriminatory actions of Principal Todd.

We note that at no stage in the proceedings has the school district raised the contention that the substantive scope of the "right . . . to make contracts" protected by § 1981 does not reach the injury suffered by petitioner here. See *Patterson* v. *McLean Credit Union*, —— U. S. ——, at —— (1989). Instead, the school district has argued that the limitations on municipal liability under § 1983 are applicable to violations of the rights protected by § 1981. Because petitioner has obtained a jury verdict to the effect that Dr. Todd violated his rights under § 1981, and the school district has never contested the judgment below on the ground that § 1981 does not reach petitioner's employment injury, we assume for purposes of these cases, without deciding, that petitioner's rights under § 1981 have been violated by his removal and reassignment. See *City of Canton* v. *Harris*, —— U. S. ——, at ——, n. 8 (1989); *United States* v. *Leon*, 468 U. S. 897, 905 (1984). See also Supreme Court Rule 21.1(a).

II

42 U. S. C. § 1981, as amended, provides that:

"All persons within the jurisdiction of the United States

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

In essence, petitioner argues that in 1866 the 39th Congress intended to create a cause of action for damages against municipal actors and others who violated the rights now enumerated in § 1981. While petitioner concedes that the text of the 1866 Act itself is completely silent on this score, see Brief for Petitioner in 87–2084 at 26, petitioner contends that a civil remedy was nonetheless intended for the violation of the rights contained in § 1 of the 1866 Act. Petitioner argues that Congress wished to adopt the prevailing approach to municipal liability to effectuate this damage remedy, which was *respondeat superior*. Petitioner concludes that with this federal damage remedy in place in 1866, it was not the intent of the 42nd Congress, which passed present day § 1983, to narrow the more sweeping remedy against local governments which Congress had created five years earlier. Since "repeals by implication are generally disfavored," *id.*, at 15 (citations omitted), petitioner concludes that § 1981 must provide an independent cause of action for racial discrimination against local governmental entities, and that this broader remedy is unaffected by the constraints on municipal liability announced in *Monell*. In the alternative, petitioner argues that even if § 1981 does not create an express cause of action for damages against local governmental entities, 42 U. S. C. § 1988 invites this Court to craft a remedy by looking to common law principles, which again point to a rule of *respondeat superior*. *Id.*, at 27–29. To examine these contentions, we must consider the text and history of both the Civil Rights Act of 1866 and Civil Rights Act of 1871, the precursers of §§ 1981 and 1983 respectively.

A

On December 18, 1865, the Secretary of State certified that the Thirteenth Amendment had been ratified and become part of the Constitution. Less than three weeks later, Senator Lyman Trumbull, Chairman of the Senate Judiciary Committee, introduced S. 61, which was to become the Civil Rights Act of 1866. See Cong. Globe, 39th Cong., 1st Sess., 129 (1866). The bill had eight sections as introduced, the first three of which are relevant to our inquiry here. Section 1, as introduced to the Senate by Trumbull, provided:

> "That there shall be no discrimination in civil rights or immunities among the the inhabitants of any State or Territory of the United States on account of race, color, or previous condition of slavery; but the inhabitants of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as punishment for a crime whereof the party shall have been duly convicted, shall have the same right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to the full and equal benefit of all laws and proceedings for the security of person and property, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." *Id.*, at 474.

On January 29, 1866, Senator Trumbull took the floor to describe S. 61 to his colleagues. Trumbull indicated that "the first section will amount to nothing more than the declaration in the Constitution itself unless we have the machinery to carry it into effect." *Id.*, at 475. The Senator then alluded to the second section of the bill which provided:

> "That any person who, under color of any law, statute ordinance, regulation, or custom shall subject, or cause to be subjected, any inhabitant of any State or Territory

> to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, . . . or by reason of his race color or race, than is proscribed for the punishment of white persons , shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court." *Ibid.*

Senator Trumbull told the Senate, "[t]his is the valuable section of the bill so far as protecting the rights of freedmen is concerned." *Ibid.* This section would allow for criminal prosecution of those who denied the freedman the rights protected by section 1, and Trumbull felt, in retrospect somewhat naively, that, "it will only be necessary to go into the late slaveholding States and subject to fine or imprisonment one or two in a State, and the most prominent ones I should hope at that, to break up this whole business." *Ibid.*

Trumbull then described the third section of the bill, which, as later enacted, provided in pertinent part:

> "That the district courts of the United States, within their respective districts, shall have, exclusive of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever . . . such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'act relating to habeas corpus and regulating judi-

cial proceedings in certain cases,' approved March three, eighteen hundred and sixty three; and all acts amendatory thereof." 14 Stat. 27.

Trumbull described this section as "giving to the courts of the United States jurisdiction over all persons committing offenses against the provisions of this act, and also over the cases of persons who are discriminated against by state laws or customs." Cong. Globe, 39th Cong., 1st Sess. 475 (1866). Much of the debate in both the Senate and the House over the 1866 Act was taken up with the meaning of the terms "civil rights or immunities" contained in the first sentence of § 1 of the bill as introduced in the Senate. The phrase remained in the bill throughout the Senate's consideration of S. 61, but was stricken by amendment in the House shortly before that body passed the bill.

Discussion of § 2 of the bill focused on both the propriety and constitutionality of subjecting state officers to criminal punishment for effectuating discriminatory state laws. Opponents of the bill consistently referred to criminal punishment and fines being levied against state judges and other state officers for the enforcement of state laws in conflict with § 1. See *id.*, at 475, 499, 500 (1866) (Sen. Cowan); *id.*, at 598 (Sen. Davis); *id.*, at 1121 (Rep. Rogers); *id.*, at 1154 (Rep. Eldridge). They never intimated that they understood any part of the bill to create a federal damage remedy against state officers or the political subdivisions of the States.

Debate concerning § 3 focused on the right of removal of civil and criminal proceedings commenced in state court. Senator Howard, an opponent, engaged in a section by section criticism of the bill after its introduction by Trumbull. As to § 3 he gave numerous examples of his perception of its operation. All of these involved removal of actions from state court, and none alluded to original federal jurisdiction except in the case of the exclusive criminal jurisdiction expressly provided for. *Id.*, at 479 ("All such cases will be sub-

ject to be removed into the federal courts"); see also *id.*, at 598 (Sen. Davis) ("Section three provides that all suits brought in State courts that come within the purview of the previous sections may be removed into the federal courts"). On February 2, 1866, the bill passed the Senate by a vote of 33–12 and was sent to the House. *Id.*, at 606–607.

Representative Wilson of Iowa, Chairman of the House Judiciary Committee, introduced S. 61 in the House on March 1, 1866. Of § 1 of the bill, he said:

> "Mr. Speaker, I think I may safely affirm that this bill, so far as it declares the equality of all citizens in the enjoyment of civil rights and immunities merely affirms existing law. We are following the Constitution. . . . It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen." *Id.*, at 1117.

As did Trumbull in the Senate, Wilson immediately alluded to § 2, the criminal provision, as the main enforcement mechanism of the bill. "In order to accomplish this end, it is necessary to fortify the declaratory portions of this bill with sanctions that will render it effective." *Ibid.*

The only discussion of a civil remedy in the House debates surrounding the 1866 Act came in response to Representative Bingham's proposal to send the bill back to the House Judiciary Committee with instructions "to strike out all parts of said bill which are penal and which authorize criminal proceedings, and in lieu thereof to give all citizens of the United States injured by a denial or violation of any of the other rights secured or protected by said act, an action in the United States courts, with double costs in all cases of emergency, without regard to amount of damages." *Id.*, at 1266, 1291. Bingham was opposed to the Civil Rights Bill strictly on the grounds that it exceeded the constitutional power of the federal government. As to States "restored in all [their] constitutional relations to the United States," Bingham, along with several other Republicans, doubted the power of

the federal government to interfere with the reserved powers of the States to define property and other rights. *Id.*, at 1291. While Bingham realized that the same constitutional objections applied to his proposal for modification of the bill, he felt that these would make the bill "less oppressive, and therefore less objectionable." *Ibid.*

Representative Wilson responded to his Republican colleague's proposal. Wilson pointed out that there was no difference in constitutional principle "between saying that the citizen shall be protected by the legislative power of the United States in his rights by civil remedy and declaring that he shall be protected by penal enactments against those who interfere with his rights." *Id.*, at 1295. Wilson did however see a difference in the effectiveness of the two remedies, he stated:

> "This bill proposes that the humblest citizen shall have full and ample protection at the cost of the Government, whose duty it is to protect him. The [Bingham] amendment . . . recognizes the principle involved, but it says that the citizen despoiled of his rights, instead of being properly protected by the Government, must press his own way through the courts and pay the bills attendant thereon. . . . The highest obligation which the Government owes to the citizen in return for the allegiance exacted of him is to secure him in the protection of his rights. Under the amendment of the gentleman the citizen can only receive that protection in the form of a few dollars in the way of damages, if he shall be so fortunate as to recover a verdict against a solvent wrongdoer. This is called protection. This is what we are asked to do in the way of enforcing the bill of rights. Dollars are weighed against the right of life, liberty and property." *Ibid.*

Bingham's proposal was thereafter defeated by a vote of 113 to 37. *Id.*, at 1296. The Senate bill was subsequently carried in the House, after the removal of the "civil rights

and immunities" language in § 1, and an amendment adding a 9th section to the bill providing for a final appeal to the Supreme Court in cases arising under the Act. *Id.*, at 1366–1367. On March 15, 1866, the Senate concurred in the House amendments without a record vote, see *id.*, at 1413–1416, and the bill was sent to the President.

After holding the bill for a full ten days, President Johnson vetoed the bill and returned it to the Senate with his objections. The President's criticisms of §§ 2 and 3 of the bill, and Senator Trumbull's responses thereto, are particularly illuminating. As to § 2, the President declared that it was designed to counteract discriminatory state legislation, "by imposing fine and imprisonment upon the legislators who may pass such . . . laws." *Id.*, at 1680. As to the third section, the President indicated that it would vest exclusive federal jurisdiction over all civil and criminal cases where the rights guaranteed in § 1 were affected. *Ibid.*

Trumbull took issue with both statements. As to the charge that § 2 would result in the criminal prosecution of state legislators, Trumbull replied:

> "Who is to be punished? Is the law to be punished? Are the men who make the law to be punished? Is that the language of the bill? Not at all. If any person, 'under color of any law,' shall subject another to the deprivation of a right to which he is entitled, he is to be punished. Who? The person who, under color of the law, does the act, not the men who made the law. In some communities in the South a custom prevails by which different punishment is inflicted upon the blacks from that meted out to the whites for the same offense. Does this section propose to punish the community where the custom prevails? Or is it to punish the person who, under color of the custom, deprives the party of his right? It is a manifest perversion of the meaning of the section to assert anything else." *Id.*, at 1758.

Trumbull also answered the President's charge that the third section of the bill created original federal jurisdiction in all cases where a freedman was involved in a state court proceeding. He stated:

> "So in reference to this third section, the jurisdiction is given to the Federal courts of a case affecting the person who is discriminated against. Now, he is not necessarily discriminated against, because there may be a custom in the community discriminating against him, nor because a Legislature may have passed a statute discriminating against him; that statute is of no validity if it comes in conflict with a statute of the United States; and it is not to be presumed that any judge of a state court would hold that a statute of a state discriminating against a person on account of color was valid when there was a statute of the United States with which it was in direct conflict, and the case would not therefore rise in which a party was discriminated against until it was tested, and then if the discrimination were held valid he would have a right to remove it to federal court." *Id.*, at 1759.

Senator Trumbull then went on to indicate that "[i]f it be necessary in order to protect the freedman in his rights that he should have authority to go into the Federal courts in all cases where a custom [of discrimination] prevails in a State . . . I think we have authority to confer that jurisdiction under the second clause of the constitutional amendment." *Ibid.* Two days later, on April 6, 1866, the Senate overrode the President's veto by a vote of 33–15. *Id.*, at 1809. On April 9, 1866, the House received both the bill and the President's veto message which were read on the floor. *Id.*, at 1857–1860. The House then promptly overrode the President's veto by a vote of 122–41, *id.*, at 1861, and the Civil Rights Act of 1866 became law.

Several points relevant to our present inquiry emerge from the history surrounding the adoption of the Civil Rights Act

of 1866. First, nowhere did the Act provide for an express damage remedy for violation of the provisions of § 1. See *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 414, n. 13 (1968) (noting "[t]hat 42 U. S. C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement"); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 238 (1969); *Cannon* v. *University of Chicago*, 441 U. S. 677, 690, n. 12 (1979); *id.*, at 728 (WHITE, J., dissenting). Second, no original federal jurisdiction was created by the 1866 Act which could support a federal damage remedy against state actors. See *Allen* v. *McCurry*, 449 U. S. 90, 99, n. 14 (1980) (Section 3 of the 1866 Act embodied remedy of "post-judgment removal for state court defendants whose civil rights were threatened"); *Georgia* v. *Rachel*, 384 U. S. 788–789 (1966); *Strauder* v. *West Virginia*, 100 U. S. 303, 311–312 (1879). Finally, the penal provision, the only provision explicitly directed at state officials, was, in Senator Trumbull's words, designed to punish the "person who, under color of the law, does the act," not "the community where the custom prevails." Cong. Globe, 39th Cong., 1st Sess., 1758 (1866).

Two events subsequent to the passage of the 1866 Act bear on the relationship between §§ 1981 and 1983. First, on June 13, 1866, just over two months after the passage of the 1866 Act, a joint resolution was passed sending the Fourteenth Amendment to the States for ratification. As we have noted in the past, the first section of the 1866 Act, "constituted an initial blueprint of the Fourteenth Amendment." *General Building Contractors Association, Inc.* v. *Pennsylvania*, 458 U. S. 375, 389 (1982). Many of the Members of the Thirty-ninth 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) (Rep. Thayer) ("As I understand it, it is but incorporating in the

Constitution of the United States the principle of the civil rights bill which has lately become law"); *id.*, at 2498 (Rep. Broomhall); *id.*, at 2459 (Rep. Stevens); *id.*, at 2461 (Rep. Finck); *id.*, at 2467 (Rep. Boyer). See also *Hurd* v. *Hodge*, 334 U. S. 24, 32 (1948) ("[A]s the legislative debates reveal, one of the primary purposes of many Members of of Congress in supporting the adoption of the Fourteenth Amendment was to incorporate the guarantees of the Civil Rights Act of 1866 in the organic law of the land.") (footnote omitted).

Second, the 41st Congress reenacted the substance of the 1866 Act in a Fourteenth Amendment statute, the Enforcement Act of 1870. 16 Stat. 144. Section 16 of the 1870 Act was modeled after § 1 of the 1866 Act. Section 17 reenacted with some modification the criminal provisions of § 2 of the earlier civil rights law, and § 18 of the 1870 Act provided that the entire 1866 was reenacted. See *The Civil Rights Cases*, 109 U. S. 3, 16–17 (1883). We have thus recognized that present day 42 U. S. C. § 1981 is both a Thirteenth and a Fourteenth Amendment statute. *Runyon* v. *McCrary*, 427 U. S. 160, 168–169, n. 8 (1976); *id.*, at 190 (STEVENS, J., concurring); *General Building Contractors*, 458 U. S., at 383–386.

B

What is now § 1983 was enacted as § 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. The immediate impetus for the bill was evidence of widespread acts of violence perpetrated against the freedmen and loyal white citizens by groups such as the Ku Klux Klan. On March 23, 1871, President Grant sent a message to Congress indicating that the Klan's reign of terror in the Southern States had "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 Sess., 244 (1871). A special joint committee consisting of 10 distinguished Republicans,

five from each House of Congress, was formed in response to President Grant's call for legislation, and drafted the bill that became what is now known as the Ku Klux Klan Act of 1871. As enacted, sections 2 through 6 of the bill specifically addressed the problem of the private acts of violence perpetrated by groups like the Klan.

Unlike the rest of the bill, § 1 was not specifically addressed to the activities of the Klan. As passed by the 42nd Congress, § 1 provided in full:

> "That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled 'An act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication'; and all other remedial laws of the United States which are in their nature applicable to such cases." 17 Stat. 13.

Three points are immediately clear from the face of the act itself. First, unlike any portion of the 1866 Act, this statute explicitly ordained that any "person" acting under color of state law or custom who was responsible for a deprivation of constitutional rights "would be liable to the party injured in an action at law." Thus, "[t]he 1871 Act was designed to expose state and local officials to a new form of liability."

Newport v. *Facts Concerts, Inc.*, 453 U. S. 247, 259 (1981). Second, the 1871 Act explicitly provided original federal jurisdiction for prosecution of these civil actions against state actors. See *Will* v. *Michigan*, —— U. S. ——, —— (1989) ("[A] principle purpose behind the enactment of § 1983 was to provide a federal forum for civil rights claims"); accord *Mitchum* v. *Foster*, 407 U. S. 225, 239 (1972). Third, the first section of the 1871 Act was explicitly modeled on § 2 of the 1866 Act, and was seen by by both opponents and proponents as amending and enhancing the protections of the 1866 Act by providing a new civil remedy for its enforcement against state actors. See *Chapman* v. *Houston Welfare Rights Org.*, 441 U. S. 600, 610–611 n. 25 (1979) ("Section 1 of the [1871] Act generated the least concern; it merely added a civil remedy to the criminal penalties imposed by the 1866 Civil Rights Act"); *Monroe* v. *Pape*, 365 U. S. 167, 185 (1961); *Mitchum*, *supra*, at 238.

Even a cursory glance at the House and Senate debates on the 1871 Act makes these three points clear. In introducing the bill to the House, Representative Shellabarger, who served on the joint committee which drafted the bill, stated:

> "The model for it will be found in the second section of the act of April 9, 1866, known as the 'civil rights act.' That section provides a criminal proceeding in identically the same case as this one provides a civil remedy for, except that the deprivation under color of State law must, under the civil rights act, have been on account of race, color or former slavery." Cong. Globe, 42 Cong., 1st Sess., App. 68 (1871).

Representative Shellabarger added that § 1 provided a civil remedy "on the same state of facts" as § 2 of the Civil Rights Act of 1866. *Ibid.* Obviously Representative Shellabarger's introduction of § 1 of the bill to his colleagues would have been altogether different if he had been of the view that the 39th Congress, of which he had been a Member, had *already* created a *broader* federal damage remedy

against state actors in 1866. The view that § 1 of the 1871 Act was an amendment of or supplement to the 1866 Act designed to create a new civil remedy against state actors was echoed throughout the debates in the House. See *id.*, at 461 (Rep. Coburn); *id.*, at app. 312–313 (Rep. Burchard). Opponents of § 1 operated on this same understanding. See *id.*, at 429 (Rep. Henry) ("[t]he first section of the bill is intended as an amendment of the civil rights act"); *id.*, at 365 (Rep. Arthur).

Both proponents and opponents in the House viewed § 1 as working an *expansion* of federal jurisdiction. Supporters continually referred to the failure of the State courts to enforce federal law designed for the protection of the freedman, and saw § 1 as remedying this situation by interposing the federal courts between the State and citizens of the United States. See *id.*, at 376 (Rep. Lowe) ("The case has arisen . . . when the Federal Government must resort to its own agencies to carry its own authority into execution. Hence this bill throws open the doors of the United States courts to those whose rights under the Constitution are denied or impaired"). Opponents recognized the expansion of original jurisdiction and railed against it on policy and constitutional grounds. See *id.*, at 429 (Rep. McHenry) ("The first section of the bill . . . vests in the Federal courts jurisdiction to determine the individual rights of citizens of the same State; a jurisdiction which of right belongs only to the state tribunals"); *id.*, at app. 50 (Rep. Kerr); *id.*, at 365–366 (Rep. Authur); *id.*, at 373 (Rep. Archer).

The Senate debates on § 1 of the 1871 Act are of a similar tenor. Senator Edmunds, Chairman of the Senate Judiciary Committee, and one of the Members of the joint committee which drafted the bill, introduced § 1 to the Senate in the following terms:

> "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 principles of the civil rights bill, which has since become a part of the Constitution." Cong. Globe, 42nd Cong, 1st Sess., 568 (1871), quoted in *Monroe* v. *Pape*, 365 U. S. 167, 171 (1961).

Again Senators addressed § 1 of the act as creating a new civil remedy and expanding federal jurisdiction to accommodate it in terms incompatible with the supposition that the 1866 Act had already created such a cause of action against state actors. See Cong. Globe, 42nd Cong., 1st Sess., 653 (1871) (Sen. Osborn) ("I believe the true remedy lies chiefly in the United States district and circuit courts. If the State courts had proven themselves competent . . . we should not have been called upon to legislate on this subject at all. But they have not done so"); *id.*, at app. 216 (Sen. Thurman) ("Its whole effect is to give to the Federal Judiciary that which does not belong to it—a jurisdiction that may be constitutionally conferred upon it, I grant, but that has never yet been conferred upon it."); see also *id.*, at 501 (Sen. Frelinghuysen).

The final aspect of the history behind the adoption of present day § 1983 relevant to the question before us is the rejection by the 42nd Congress of the Sherman amendment, which specifically proposed the imposition of a form of vicarious liability on municipal governments. This history was thoroughly canvassed in the Court's opinion in *Monell*, and only its broadest outlines need be traced here. Immediately prior to the vote on the bill in the Senate, Senator Sherman introduced an amendment which would have constituted a 7th section of the 1871 Act. Cong. Globe, 42nd Cong., 1st Sess., 663 (1871). In its original form, the amendment did not place liability on municipal corporations *per se*, but instead rendered the inhabitants of a municipality liable in civil damages for injury inflicted to persons or property in violation of federal constitutional and statutory guarantees "by any persons riotously and tumultuously gathered together."

The initial Sherman amendment was passed by the Senate, but was rejected by the House and became the subject of a conference committee. The committee draft of the Sherman amendment explicitly provided that where injuries to person or property were caused by mob violence directed at the enjoyment or exercise of federal civil rights, "the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense." *Id.*, at 755. Judgments in such actions were to run directly against the municipal corporation, and were to be enforceable through a "lien . . . upon all moneys in the treasury of such county, city or parish, as upon other property thereof." *Ibid.*

Opposition to the amendment in this form was vehement, and ran across party lines, extending to many Republicans who had voted for § 1 of the 1871 Act, as well as earlier reconstruction legislation, including the Civil Rights Act of 1866. See *id.*, at 758 (Sen. Trumbull); *id.*, at 798–799 (Rep. Farnsworth).

The Sherman amendment was regarded as imposing a new and theretofore untested form of liability on municipal governments. As Representative Blair put it:

> "The proposition known as the Sherman amendment—and to that I shall confine myself in the remarks which I may address to the House—is entirely new. It is altogether without a precedent in this country. Congress has never asserted or attempted to assert, so far as I know, any such authority. That amendment claims the power in the General Government to go into the States of this Union and lay such obligations as it may please upon the municipalities, which are the creations of the States alone." Cong. Globe, 42nd Cong., 1st Sess., 795 (1871) (Rep Blair), partially quoted in *Monell*, *supra*, at 673–674. See also Cong. Globe, 42nd Cong., 1st Sess., 758 (1871) (Sen. Trumbull) (referring to the conference committee version of the Sherman amendment as "as-

serting principles never before exercised, on the part of the United States at any rate").

The strong adverse reaction to the Sherman amendment, and continued references to its complete novelty in the law of the United States, make it difficult to entertain petitioner's contention that the 1866 Act had already created a form of vicarious liability against municipal governments. Equally important is the basis for opposition. As we noted in *Monell*, a large number of those who objected to the principle of vicarious liability embodied in the Sherman Amendment were of the view that Congress did not have the power to assign the duty to enforce federal law to state instrumentalities by making them liable for the constitutional violations of others. See *Monell*, *supra*, at 674–679. As Representative Farnsworth put it: "The Supreme Court of the United States has decided repeatedly that Congress can impose no duty on a State officer." Cong. Globe, 42nd Cong., 1st Sess., 799 (1871). Three decisions of this Court lent direct support to the constitutional arguments of the opponents, see *Collector* v. *Day*, 11 Wall 113 (1871); *Kentucky* v. *Dennison*, 24 How. 66 (1861), and *Prigg* v. *Pennsylvania*, 16 Pet. 539 (1842). *Day* and *Prigg* were repeatedly cited in the House debates on the Sherman Amendment. See *Monell*, *supra*, at 673–683, and n. 30. In *Prigg*, perhaps the most famous and most-oft cited of this line of cases, Justice Story wrote for the Court that Congress could not constitutionally "insist that the states are bound to provide means to carry into effect the duties of the national government." *Prigg*, *supra*, at 616. In *Monell*, we concluded that it was this constitutional objection which was the driving force behind the eventual rejection of the Sherman amendment. *Monell*, *supra*, at 676.

Although the debate surrounding the constitutional principles established in *Prigg*, *Dennison*, and *Day* occurred in the context of the Sherman amendment and not § 1 of the 1871 Act, in *Monell* we found it quite inconceivable that the same legislators who opposed vicarious liability on consti-

tutional grounds in the Sherman amendment debates would have silently adopted the same principle in § 1. Because the "creation of a federal law of *respondeat superior* would have raised all the constitutional problems associated with the obligation to keep the peace" embodied in the Sherman amendment, we held that the existence of the constitutional background of *Prigg*, *Dennison*, and *Day* "compell[ed] the conclusion that Congress did not intend municipalities to be held liable [under § 1] unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Monell*, *supra*, at 691.

Both *Prigg* and *Dennison* were on the books when the 39th Congress enacted § 1 of the 1866 Act. Supporters of the 1866 Act were clearly aware of *Prigg*, and cited the case for the proposition that the Federal Government could use its *own* instrumentalities to effectuate its laws. See, *e. g.*, Cong. Globe, 39th Cong., 1st Sess., 1294 (1871) (Rep. Wilson). There was, however, no suggestion in the debates surrounding the 1866 Act that the statute violated *Prigg*'s complementary holding that federal duties could not be imposed on state instrumentalities by rendering them vicariously liability for the violations of others. Just as it affected our interpretation of § 1 of the 1871 Act in *Monell*, we think the complete silence on this score in the face of a constitutional background known to those who enacted the 1866 Act militates against imputing to Congress an intent to silently impose vicarious liability on municipalities under the earlier statute. Cf. *Tenny* v. *Brandhove*, 377 U. S. 367, 376 (1951).

As originally enacted, the text of § 1983 referred only to the deprivation "of any rights, privileges, or immunities secured by the Constitution of the United States." In 1874, Congress enacted the Revised Statutes of the United States. The words "and laws" were added to the remedial provision of § 1 of the 1871 Act which became Rev. Stat. § 1979. At the same time, the jurisdictional grant in § 1 of the 1871 Act was split into two different provisions, Rev. Stat. § 563 (12),

granting jurisdiction to the district courts of the United States to redress deprivations under color of state law of any right secured by the Constitution or "by any law of the United States," and Rev. Stat. § 629 (16), granting jurisdiction to the old circuit courts for any action alleging deprivation under state authority of any right secured "by any law providing for equal rights." In 1911, Congress abolished the circuit courts of the United States and the Code's definition of the jurisdiction of the district courts was taken from Rev. Stat. § 629 (16) with its narrower "providing for equal rights" language. This language is now contained in 28 U. S. C. § 1343(3), the jurisdictional counterpart of § 1983. *Chapman*, *supra*, at 608.

There is no commentary or other information surrounding the addition of the phrase "and laws" to the remedial provisions of present day § 1983. The revisers' draft of their work, published in 1872, and the marginal notes to §§ 629 (16) and 563 (12), which appeared in the completed version of the Revised Statutes themselves, provide some clues as to Congress' intent in adopting the change. The marginal note to § 629 (16) states: "Suits to redress the deprivation of rights secured by the Constitution and laws to persons within the jurisdiction of the United States." The note then cross cites to § 1 of the 1871 Act, §§ 16 and 18 of the Enforcement Act of 1870, and § 3 of the 1866 Act. Both §§ 629 (16) and 563 (12), were followed by bracketed citations to Rev. Stat. § 1979, present day § 1983, and Rev. Stat. § 1977, present day § 1981. Rev. Stat. 95, 111 (1874). The revisers' draft of 1872 contains the following notation concerning § 629 (16):

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

by a law authorized by the Constitution, were here intended, it is deemed safer to add a reference to the civil rights act." 1 Revision of the United States Statutes as Drafted by the Commissioners Appointed for that Purpose 362 (1872).

We have noted in the past that the addition of the phrase "and laws" to the text of what is now § 1983, although not without its ambiguities as to intended scope, was *at least* intended to make clear that that the guarantees contained in § 1 of the 1866 Act and § 16 of the Enforcement Act of 1870, were to be enforced against state actors through the express remedy for damages contained in § 1983. See *Chapman*, *supra*, at 617 (footnote omitted) (Section 1 of the 1871 Act "served only to ensure that an individual had a cause of action for violations of the Constitution, which in the Fourteenth Amendment embodied and extended to all individuals the substantive protections afforded by § 1 of the 1866 Act"); *id.*, at 668 (WHITE, J., concurring in result). See also *Maine* v. *Thiboutot*, 448 U. S. 1, 7 (1980) ("There is no express explanation offered for the insertion of the phrase 'and laws.' On the one hand, a principal purpose of the added language was to ensure that federal legislation providing specifically for equality of rights would be brought within the ambit of the civil action authorized by that statute.") (internal quotations omitted).

III

We think the history of the 1866 Act and the 1871 Act recounted above indicates that Congress intended that the explicit remedial provisions of § 1983 be controlling in the context of damage actions brought against state actors alleging violation of the rights declared in § 1981. That we have read § 1 of the 1866 Act to reach private action and have implied a damage 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 § 1981, where Congress has established its own remedial scheme. In the con-

text of the application of § 1981 and § 1982 to private actors, we "had little choice but to hold that aggrieved individuals could enforce this prohibition, *for there existed no other remedy to address such violations of the statute.*" *Cannon*, 441 U. S., at 728 (WHITE, J., dissenting) (emphasis added, footnote omitted). That is manifestly not the case here, and 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. See *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 458 (1974) ("A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies"); accord *Fleischmann Corp.* v. *Maier Brewing*, 386 U. S. 714, 720 (1967); *Cannon*, *supra*, at 718–724 (WHITE, J., dissenting).

Petitioner cites 42 U. S. C. § 1988, and argues that that provision "compels adoption of a *respondeat superior* standard." Brief for petitioner in 87–2084 at 27. That section, as amended, provides in pertinent part:

> "The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect, but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and the statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and the laws of the United States, shall be extended

to and govern the said courts in the trial and disposition of the cause. . . ."

Far from supporting petitioner's call for the creation or implication of a damage remedy broader than that provided by § 1983, we think the plain language of § 1988 supports the result we reach here. As we noted in *Moor* v. *County of Alemeda*, 411 U. S. 706 (1973), in rejecting an argument similar to petitioner's contention here, "[§ 1988] expressly limits the authority granted federal courts to look to the common law, as modified by state law, to instances in which that law 'is not inconsistent with the Constitution and laws of the United States.'" *Id.*, at 706. See also *Johnson* v. *Railway Express Agency*, 421 U. S. 454, 465 (1975). As we indicated in *Moor*, "Congress did not intend, *as a matter of federal law*, to impose vicarious liability on municipalities for violations of federal civil rights by their employees." 411 U. S., at 710, n. 27. Section 1983 provides an explicit remedy in damages which, with its limitations on municipal liability, Congress thought "suitable to carry . . . into effect" the rights guaranteed by § 1981 as againt state actors. Thus, if anything, § 1988 points us in the direction of the express federal damage remedy for enforcement of the rights contained in § 1981, not state common law principles.

Our conclusion 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 finds support in our decision in *Brown* v. *General Services Administration*, 425 U. S. 820 (1976). In *Brown*, we dealt with the interaction of § 1981 and the provisions of § 717 of Title VII, 42 U. S. C. § 2000e–16, which proscribe discrimination in federal employment and establish an administrative and judicial enforcement scheme. The petitioner in *Brown* had been passed over for federal promotion on two occasions, and after the second occasion he filed a complaint with his agency alleging that he was denied promotion because of his race. The agency's Director of Civil

Rights concluded after investigation that race had not entered into the promotional process, and informed Brown by letter of his right under § 717(c) to bring an action in Federal District Court within 30 days of the agency's final decision. Forty-two days later Brown filed suit in federal court, alleging violations of both Title VII and § 1981. The lower courts dismissed Brown's complaint as untimely under § 717(c), and this Court affirmed, holding that § 717 of Title VII constituted the exclusive remedy for allegations of racial discrimination in federal employment.

The Court began its analysis by noting that "Congress simply failed to explicitly describe § 717's position in the constellation of antidiscrimination law." *Id.*, at 825. We noted that in 1972, when Congress extended the strictures of Title VII to federal employment, the availability of an implied damage remedy under § 1981 for employment discrimination was not yet clear. *Id.*, at 828. The Court found that this perception on the part of Congress, "seems to indicate that the congressional intent in 1972 was to create an exclusive, pre-emptive andministrative and judicial scheme for the redress of federal employment discrimination." *Id.*, at 829. The Court bolstered its holding by invoking the general principle "that a precisely drawn, detailed statute pre-empts more general remedies." *Id.*, at 834.

In *Brown*, as here, while Congress has not definitively spoken as to the relationship of § 1981 and § 1983, there is very strong evidence that the 42nd Congress which enacted the precurser of § 1983 thought that it was enacting the first, and at that time the only, federal damage 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. That remedial scheme embodies certain limitations on the liability of local governmental entities based on fed-

eralism concerns which had very real constitutional underpinnings for the Reconstruction Congresses. As petitioner here would have it, the careful balance drawn by the 42nd Congress between local automomy and fiscal integrity and the vindication of federal rights could be completely upset by an artifice of pleading. As we said in *Brown*, "[i]t would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading." *Id.*, at 833. See also *Preiser* v. *Rodriguez*, 411 U. S. 475 (1973) (holding that despite "the literal applicability" of § 1983 the more specific habeas corpus statute was the exclusive federal remedy for allegations of unconstitutional confinement); *Goodman* v. *Lukens Steel Company*, —— U. S., at —— (1987) (harmonizing statute of limitations applicable to actions under § 1981 with precedents under § 1983).

Since our decision in *Monell*, the Courts of Appeals have unanimously rejected the contention, analogous to petitioner's argument here, that the doctrine of *respondeat superior* is available against a municipal entity under a *Bivens*-type action implied directly from the Fourteenth Amendment. See, *e. g.*, *Tarpley* v. *Greene*, 684 F. 2d 1, 11, n. 25 (CADC 1982) (Edwards, J.) ("Because Congress has elected not to impose *respondeat superior* liability under § 1983, appellant invites this court to expand the remedial options under *Bivens*. We can find no good logic nor sound legal basis for this view; we therefore decline the invitation"); accord *Owen* v. *City of Independence*, 589 F. 2d 335, 337 (CA8 1978); *Thomas* v. *Shipka*, 818 F. 2d 496 (CA6 1987); *Ellis* v. *Blum*, 643 F. 2d 68, 85 (CA2 1981); *Cale* v. *City of Covington*, 586 F. 2d 311, 317 (CA4 1978); *Molina* v. *Richardson*, 578 F. 2d 846 (CA9), cert. denied, 439 U. S. 1048 (1978). Given our repeated recognition that the Fourteenth Amendment was intended in large part to embody and expand the protections of the 1866 Act as against state actors, we believe that the logic these decisions applies with equal force to petitioner's invita-

tion to this Court to create a damage remedy broader than § 1983 from the declaration of rights now found in § 1981. 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 damage remedy for the violation of the rights guaranteed by § 1981 when the claim is pressed against a state actor. Thus to prevail on his claim for damages against the school district, petitioner must show that the violation of his "right to make contracts" protected by § 1981 was caused by a custom or policy within the meaning of *Monell* and subsequent cases.

IV

The jury found that Principal Todd had violated petitioner's rights under § 1981, the First Amendment, and the Equal Protection Clause in recommending petitioner's removal from the athletic director and head coaching positions at South Oak. As to the liability of the DISD, the trial judge gave the jury the following instruction:

> "A public independent school district (such as and including the Dallas Independent School District), acts by and through its Board of Trustees and/or its delegated administrative officials (including the Superintendent and school principals), with regard to action taken against or concerning school district personnel.
>
> A public independent school district (such as and including the Dallas Independent School District) is liable for the actions of its Board of Trustees and/or its delegated administrative officials (including the Superintendent and school principles), with regard to wrongful or unconstitutional action taken against or concerning school district personnel." App. 31.

We agree with the Court of Appeals that this instruction was manifest error. The instruction seems to rest either on the assumption that both Principal Todd and Superintendent

Wright were policymakers for the school district, or that the school district is vicariously liable for any actions taken by these employees. Since we have rejected *respondeat superior* as a basis for holding a state actor liable under § 1983 for violation of the rights enumerated in § 1981, we refer to the principles to be applied in determining whether either Principal Todd or Superintendent Wright can be considered policymakers for the school district such that their decisions may rightly be said to represent the official policy of the DISD subjecting it to liability under § 1983.

Last Term in *City of Saint Louis* v. *Praprotnik*, —— U. S. ——, (plurality opinion), we attempted a clarification of tools a federal court should employ in determining where policymaking authority lies for purposes of § 1983. In *Praprotnik*, the plurality reaffirmed the teachings of our prior cases to the effect that "whether a particular official has 'final policymaking authority' is a question of *state law*." *Id.*, at ——, (emphasis in original), quoting *Pembaur*, 475 U. S., at 483 (plurality opinion). As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury. Reviewing the relevant legal materials, including state and local positive law, as well "'custom or usage' having the force of law," *Praprotnik*, *supra*, at ——, n. 1, the trial judge must identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue. Once those officials who have the power to make official policy on a particular issue have been identified, it is for the jury to determine whether *their* decisions have caused the deprivation of rights at issue by policies which affirmatively command that it occur, see *Monell*, *supra*, at 661, n. 2, or by acquiescence in a longstanding practice or custom which con-

stitutes the "standard operating procedure" of the local governmental entity. See *Pembaur, supra*, at 485–487 (WHITE, J, concurring).

We cannot fault the trial judge for not recognizing these principles in his instructions to the jury since this case was tried in October of 1984, and the District Court did not have the benefit of our decisions in either *Pembaur* or *Praprotnik* to guide it. Similarly, the Court of Appeals issued its decision in this case before our decision in *Praprotnik*. Pursuant to its cross-petition in No. 88–214, the school district urges us to review Texas law and determine that neither Principal Todd nor Superintendent Wright possessed the authority to make final policy decisions concerning the transfer of school district personnel. See Brief for Respondent in 87–2084 at 6–8. Petitioner Jett seems to concede that Principal Todd did not have policymaking authority as to employee transfers, see Brief for Petitioner in 87–2084 at 30, but argues that Superintendent Wright had been delegated authority to make school district policy concerning employee transfers and that his decisions in this area were final and unreviewable. *Id.*, at 30–32.

We decline to resolve this issue on the record before us. We think the Court of Appeals, whose expertise in interpreting Texas law is greater than our own, is in a better position to determine whether Superintendent Wright possessed final policymaking authority in the area of employee transfers, and if so whether a new trial is required to determine the responsibility of the school district for the actions of Principal Todd in light of this determination. We thus affirm the judgment of the Court of Appeals to the extent it holds that the school district may not be held liable for its employees' violation of the rights enumerated in § 1981 under a theory of *respondeat superior*. We remand the case to the Court of Appeals for it to determine where final policymaking authority as to em-

ployee transfers lay in light of the principles enunciated by the plurality opinion in *Praprotnik* and outlined above.

It is so ordered.