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To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Stevens
Justice O'Connor
Justice Scalia
Justice Kennedy

From: Justice Brenna

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2nd 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

[June 22, 1989]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

To anyone familiar with this and last Terms' debate over whether *Runyon* v. *McCrary*, 427 U. S. 160 (1976), should be overruled, see *Patterson* v. *McLean Credit Union*, 491 U. S. —— (1989), today's decision can be nothing short of astonishing. After being led to believe that the hard question under 42 U. S. C. § 1981—the question that prompted this Court, on its own initiative, to set *Patterson* for reargument, *Patterson* v. *McLean Credit Union*, 485 U. S. 617 (1988)—was whether the statute created a cause of action relating to *private* conduct, today we are told that the hard question is, in fact, whether it creates such an action on the basis of *governmental* conduct. Strange indeed, simultaneously to question whether § 1981 creates a cause of action on the basis of private conduct *(Patterson)* and whether it creates one for government conduct (this case)—and hence to raise the possibility that this landmark civil-rights statute affords no civil redress at all.

In granting certiorari in this case we did not, as the Court would have it, agree to review the question whether one may bring a suit for damages under § 1981 itself on the basis of governmental conduct. The Court hints that petitioner Jett offered this issue for our consideration, *ante*, at 8 ("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"), when in fact, it was *respondent* who raised this issue, and who did so for the first time in its brief on the merits in this Court.[1] In six years of proceedings in the lower courts, including a jury trial and an appeal that produced two opinions, respondent never once suggested that Jett's only remedy was furnished by § 1983. Petitioner was able to respond to this argument only in his reply brief in this Court. While it is true that we often affirm a judgment on a ground not relied upon by the court below, we ordinarily do so only when that ground at least was raised below. See, *e. g.*, *Heckler* v. *Campbell*, 461 U. S. 458, 468, n. 12 (1983); *Washington* v. *Yakima Indian Nation*, 439 U. S. 463, 476, n. 20 (1979); *Hankerson* v. *North Carolina*, 432 U. S. 233, 240, n. 6 (1977); *Massachusetts Mutual Life Ins. Co.* v. *Ludwig*, 426 U. S. 479 (1976); *Dandridge* v. *Williams*, 397 U. S. 471, 475, n. 6 (1970).

It is not only unfair to decide the case on this basis; it is unwise. The question is important; to resolve it on the basis of largely one-sided briefing, without the benefit of the views of the courts below, is rash. It is also unnecessary. The Court appears to decide today (though its precise holding is less than pellucid) that liability for violations of § 1981 may not be predicated on a theory of *respondeat superior*. The

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[1] The Court twice cites petitioner Jett's opening brief, *ante*, at 8, as if it presents this question. Neither of the passages to which the Court refers, however, even remotely suggests that Jett anticipated, let alone raised, the argument that respondent advanced for the first time in its own brief on the merits.

answer to that question would dispose of Jett's contentions. In choosing to decide, as well, whether § 1983 furnishes the exclusive remedy for violations of § 1981 by the government, the Court makes many mistakes that might have been avoided by a less impetuous course.

Because I would conclude that § 1981 itself affords a cause of action in damages on the basis of governmental conduct violating its terms, and because I would conclude that such an action may be predicated on a theory of *respondeat superior*, I dissent.

I

Title 42 U. S. C. § 1981, originally enacted as part of § 1 of the Civil Rights Act of 1866 (1866 Act), provides in full:

> "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."

The question is whether this statute permits a cause of action in damages against those who violate its terms.

The Court approaches this issue as though it were new to us, recounting in lengthy and methodical detail the introduction, debate, passage, veto, and enactment of the 1866 Act. The story should by now be familiar to anyone with even a passing acquaintance with this statute. This is so because we have reviewed this history in the course of deciding—and reaffirming the answer to—the very question that the Court deems so novel today. See *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409 (1968); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969); *Tillman* v. *Wheaton-Haven Recreation Assn., Inc.*, 410 U. S. 432 (1973); *Johnson* v. *Railway Express Agency, Inc.*, 421 U. S. 454 (1975); *Runyon* v. *Mc-*

Crary, *supra*; *McDonald* v. *Santa Fe Trail Transp. Corporation*, 427 U. S. 273 (1976); *Delaware State College* v. *Ricks*, 449 U. S. 250 (1980); *General Building Contractors Assn., Inc.* v. *Pennsylvania*, 458 U. S. 375 (1982); *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604 (1987); *Shaare Tefila Congregation* v. *Cobb*, 481 U. S. 615 (1987); *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656 (1987); *Patterson* v. *McLean Credit Union*, 491 U. S. —— (1989). An essential aspect of the holding in each of these cases was the principle that a person injured by a violation of § 1 of the 1866 Act (now 42 U. S. C. §§ 1981 and 1982) may bring an action for damages under that statute against the person who violated it.

We have had good reason for concluding that § 1981 itself affords a cause of action against those who violate its terms. The statute does not explicitly furnish a cause of action for the conduct it prohibits, but this fact was of relatively little moment at the time the law was passed. During the period when § 1 of the 1866 Act was enacted, and for over 100 years thereafter, the federal courts 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. See, *e. g.*, *Marbury* v. *Madison*, 1 Cranch 137, 162–163 (1803); *Kendall* v. *United States*, 12 Pet. 524, 624 (1838); *Pollard* v. *Bailey*, 20 Wall. 520, 527 (1874); *Hayes* v. *Michigan Central R. Co.*, 111 U. S. 228, 240 (1884); *De Lima* v. *Bidwell*, 182 U. S. 1, 176–177 (1901); *Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U. S. 548, 569, 570 (1930); *Bell* v. *Hood*, 327 U. S. 678, 684, and n. 6 (1946); *J. I. Case Co.* v. *Borak*, 377 U. S. 426, 433 (1964). The classic statement of this principle comes from *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S. 33, 39–40 (1916), in which we observed: "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."

This case fits comfortably within *Rigsby*'s framework. It is of small consequence, therefore, that the 39th Congress established no explicit damages remedy in § 1 of the 1866 Act.[2]

Indeed, the debates on § 1 demonstrate that the legislators' worry was not that their actions would do too much, but that they would do too little. In introducing the bill that became the 1866 Act, Senator Trumbull explained that the statute

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[2] During the 1970s, we modified our approach to determining whether a statute contains an implied cause of action, announcing the following four-part test:

"First, is the plaintiff 'one of the class for whose *especial* benefit the statutes was enacted'—that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Cort* v. *Ash*, 422 U. S. 66, 78 (1975) (citations omitted), quoting *Texas & Pacific R. Co.* v. *Rigsby*, 241 U. S., at 39.

It would make no sense, however, to apply a test first enunciated in 1975 to a statute enacted in 1866. An inquiry into Congress' actual intent must take account of the interpretive principles in place at the time. See *Cannon* v. *University of Chicago*, 441 U. S. 677, 698–699 (1979); *Merrill Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U. S. 353, 375–378 (1982). See also *Welch* v. *Texas Dept. of Highways and Public Transportation*, 483 U. S. 468, 496 (1987) (SCALIA, J., concurring) (advising against construing a statute on the basis of an interpretive principle announced after the statute was passed). Thus, I would interpret § 1981 in light of the principle described *Rigsby*, rather than the one described in *Cort*.

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. Jett belongs to the special class of persons (those who have been discriminated against in the making of contracts) for whom the statute was created; all of the indicators of legislative intent point in the direction of an implied cause of action; such an action is completely consistent with the statute's purposes; and, in view of the fact that this Civil War-era legislation was in part designed to curtail the authority of the States, it would be unreasonable to conclude that this cause of action is one relegated to state law.

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 country." *Id.*, at 1151.

In these circumstances, it would be unreasonable to conclude that inferring a private cause of action from § 1981 is incompatible with Congress' intent. Yet in suggesting that § 2 of the 1866 Act demonstrates Congress' intent that criminal penalties serve as the only remedy for violations of § 1, *ante*, at 11–15, this is exactly the conclusion that the Court apparently would have us draw. Not only, however, is this argument contrary to legislative intent, but we have already squarely rejected it. In *Jones* v. *Alfred H. Mayer Co.*, respondent argued that because § 2 furnished criminal penalties for violations of § 1 occurring "under color of law," § 1 could not be read to provide a civil remedy for violations of the statute by private persons. Dismissing this argument, we explained: "[Section] 1 was meant to prohibit *all* racially motivated deprivations of the rights enumerated in the statute, although only those deprivations perpetrated 'under color of law' were to be criminally punishable under § 2." 392 U. S., at 426.[*]

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[*] The Court's heavy emphasis on § 2 of the 1866 Act also ignores the fact that the modern-day descendant of § 1 of the Act, 42 U. S. C. § 1981, includes no remedy or penalty at all. Section 2 of the 1866 Act now appears

The only way that the Court can distinguish *Jones*, and the cases following it, from this case is to argue that our recognition of an implied cause of action against private persons did not include recognition of an action against local governments and government officials. But before today, no one had questioned that a person could sue a government official for damages due to a violation of § 1981. We have, in fact, reviewed two cases brought pursuant to § 1981 against government officials or entities, without giving the vaguest hint that the lawsuits were improperly brought. See *Hurd* v. *Hodge*, 334 U. S. 24 (1948); *Takahashi* v. *Fish and Game Comm'n*, 334 U. S. 410 (1948). Indeed, in *Jones* v. *Alfred H. Mayer Co.*, the dissenters relied on *Hurd* v. *Hodge* in arguing that § 1981 applied *only* to government conduct. 392 U. S., at 452. The lower courts have heeded the message from our cases well: they unanimously agree that suit may be brought directly under § 1981 against government officials who violate the statute's terms. See, *e. g.*, *Metrocare* v. *Washington Metropolitan Area Transit Auth.*, 220 U. S. App. D. C. 104, 679 F. 2d 922 (1982); *Springer* v. *Seaman*, 821 F. 2d 871 (CA1 1987); *Mahone* v. *Waddle*, 564 F. 2d 1018 (CA3 1977), cert. denied, 438 U. S. 904 (1978); *Jett* v. *Dallas Independent School Dist.*, 798 F. 2d 748 (CA5 1986), on motion for rehear-

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at 18 U. S. C. § 242, see *United States* v. *Classic*, 313 U. S. 299, 327, n. 10 (1941), a part of the Code entirely separate from § 1981, and is applicable to provisions other than § 1981. These facts strongly argue against placing too much weight on the availability of criminal penalties in deciding whether § 1981 contains an implied cause of action.

The Court's assertion that the 1866 Act created no original federal jurisdiction for civil actions based on the statute, see *ante*, at 17, is similarly unavailing. The language of § 3 easily includes original jurisdiction over such suits, and we have in fact concluded as much. See *Moor* v. *County of Alameda*, 411 U. S. 693, 704–705 (1973) ("The initial portion of § 3 of the Act established federal jurisdiction to hear, among other things, civil actions brought to enforce § 1"). In addition, the Court's argument confuses the question of which courts (state or federal) will enforce a cause of action with whether a cause of action exists.

ing, 837 F. 2d 1244 (CA5 1988) (case below); *Leonard* v. *Frankfort Electric and Water Plant Board*, 752 F. 2d 189 (CA6 1985); *Bell* v. *Milwaukee*, 746 F. 2d 1205 (CA7 1984); *Taylor* v. *Jones*, 653 F. 2d 1193 (CA8 1981); *Greenwood* v. *Ross*, 778 F. 2d 448 (CA8 1985); *Sethy* v. *Alameda County Water Dist.*, 545 F. 2d 1157 (CA9 1976) (en banc).

Perhaps recognizing how odd it would be to argue that one may infer from § 1 of the 1866 Act a cause of action against private persons, but not one against government officials, the Court appears to claim that the 1871 Act erased whatever action against government officials previously existed under the 1866 Act. The Court explains:

> "That we have read § 1 of the 1866 Act 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 § 1981, where Congress has established its own remedial scheme. In the context 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.*' 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." *Ante*, at 28, quoting *Cannon* v. *University of Chicago*, 441 U. S. 677, 728 (1979) (WHITE, J., dissenting) (emphasis added; footnote omitted).

This argument became available only after § 1983 was passed, and thus suggests that § 1983 changed the cause of action implicitly afforded by § 1981. However, not only do we generally disfavor repeals by implication, see, *e. g.*, *Morton* v. *Mancari*, 417 U. S. 535, 549–550 (1974); *Posadas* v. *National City Bank*, 296 U. S. 497, 503 (1936); *Henderson's Tobacco*,

11 Wall. 652, 656–658 (1871), but we should be particularly hostile to them when the allegedly repealing statute specifically rules them out. In this regard, § 7 of the 1871 Act is highly significant; it provided "[t]hat nothing herein contained shall be construed to supersede or repeal any former act or law except so far as the same may be repugnant thereto." § 7, 17 Stat. 15.[4]

[4]Several *amici* argue that we need not conclude that § 1983 impliedly repealed the cause of action furnished by § 1981 in order to decide that § 1983 provides the sole remedy for violations of § 1981. See Brief for International City Management Association et al. as *Amici Curiae* 18–19. Their theory is that an implied cause of action did not exist when the 1871 Act was passed, and that therefore one may argue that the 1871 Act furnished the only remedy for the 1866 Act without arguing that the later statute in any way repealed the earlier one. To support their premise, they observe, first, that it was not until the 1960s that courts recognized a private cause of action under § 1 of the 1866 Act. In doing so, they ignore our earlier cases approving actions brought directly under § 1981. See *Hurd* v. *Hodge*, 334 U. S. 24 (1948). In any event, the relevance of the date on which we expressly recognized that one could bring a suit for damages directly under § 1 escapes me; that we did so in the 1960s does not suggest that we would not have done so had we faced the question in the 1860s.

Amici assert, in addition, that "[i]n recognizing an implied cause of action" under § 1981, we "rested in part on congressional actions that postdate the creation in 1871 of an explicit civil cause of action for violations of Section 1981." Brief for International City Management et al. Association as *Amici Curiae* 19. It is true that *Jones* v. *Alfred H. Mayer Co.*, 392 U. S. 409, 412, n. 1 (1968), and *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229, 238 (1969), cited 28 U. S. C. § 1343(4) in support of federal jurisdiction over those cases. I do not understand, however, how this shows that the 1866 Act as originally enacted did not confer federal jurisdiction over actions to recover damages for violations of the statute. Moreover, even if the 1866 Act did not confer such jurisdiction, the jurisdictional question is separate from the question whether a cause of action may be inferred from the statute. Indeed, *amici* appear to recognize as much when they argue that although § 1 did not establish federal jurisdiction to hear civil actions based on the statute, Congress "left the task of civil enforcement to the state courts." Brief for International City Management Association et al. as *Amici Curiae* 17. I cannot imagine what "civil enforcement" *amici* have in mind, unless it is the civil remedy that Jett seeks.

The Court's argument fails for other reasons as well. Its essential point appears to be that, in § 1983, "Congress has established its own remedial scheme" for the "'state action' portion of § 1981."[4] *Ante*, at 28. For this argument, the Court may not rely, as it attempts to do, on the principle that "'when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies.'" *Ante*, at 28, quoting *National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U. S. 453, 458 (1974). That principle limits the inference of a remedy for the violation of a statute only when *that same statute* already sets forth specific remedies. It cannot be used to support the argument that the provision of particular remedies in § 1983 tells us whether we should infer a damages remedy for violations of § 1981.

The suggestion, moreover, that today's holding "finds support in" *Brown* v. *GSA*, 425 U. S. 820 (1976), is audacious. *Ante*, at 30. Section 1983—which, for example, specifies no exhaustion requirement, no damages limitation, no defenses, and no statute of limitations—can hardly be compared with § 717 of the Civil Rights of 1964, at issue in *Brown*, with its many detailed requirements and remedies, see 425 U. S., at 829–832. Indeed, in *Preiser* v. *Rodriguez*, 411 U. S. 475, 489 (1973), we emphasized the "general" nature of § 1983 in refusing to allow former prisoners to challenge a prison's withholding of good-time credits under § 1983 rather than under the federal habeas corpus statute, 28 U. S. C. § 2254. We never before have suggested that § 1983's remedial scheme is so thorough that it pre-empts the remedies that might otherwise be available under other statutes; indeed, all of our intimations have been to the contrary. See, *e. g.*, *Middlesex County Sewerage Authority* v. *National Sea Clammers Assn.*, 453 U. S. 1, 19–21 (1981).

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[4] The one bright spot in today's decision is its reaffirmation of our holding in *Maine* v. *Thiboutot*, 448 U. S. 1 (1980).

According to the Court, to allow an action complaining of government conduct to be brought directly under § 1981 would circumvent our holding in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), that liability under § 1983 may not be based on a theory of *respondeat superior*. *ante*, at 31–32. Not only am I unconvinced that we should narrow a statute as important as § 1981 on the basis of something so vague and inconclusive as "federalism concerns which had very real constitutional underpinnings for the Reconstruction Congress," *ante*, at 31, but I am also unable to understand how *Monell's* limitation on § 1983 liability begins to tell us whether the same restriction exists under § 1981, enacted five years earlier than § 1983 and covering a far narrower range of conduct. It is difficult to understand, in any case, why the Court is worried that construing § 1981 to create a cause of action based on governmental conduct would render local governments vicariously liable for the delicts of their employees, since it elsewhere goes to great lengths to suggest that liability under § 1981 may *not* be vicarious. See *ante*, at 14–16.

The Court's primary reason for distinguishing between private and governmental conduct under § 1981 appears to be its impression that, because private conduct is not actionable under § 1983, we "had little choice" but to hold that private individuals who violated § 1981 could be sued directly under § 1981. See *ante*, at 28. This claim, however, suggests that whether a cause of action in damages exists under § 1981 depends on the scope of § 1983. In deciding whether a particular statute includes an implied cause of action, however, we have not in the past suggested that the answer will turn on the reach of a different statute. In *National Sea Clammers*, for example, we analyzed both the question whether the Federal Water Pollution Control Act included an implied cause of action for damages, 453 U. S., at 13–19, and the question whether an action could be brought under § 1983 for violations of that statute, *id.*, at 19–21, thus indicating that the

answer to the latter question does not tell us the answer to the former one.

The Court's approach not only departs from our prior analysis of implied causes of action, but also attributes an intent to the 39th Congress that fluctuates depending on the state of the law with regard to § 1983. On the Court's theory, if this case had arisen during the period between our decisions in *Monroe* v. *Pape*, 365 U. S. 167 (1961), and *Monell* v. *New York City Dept. of Social Services*, *supra*, when we believed that local governments were not "persons" within the meaning of § 1983, we would apparently have been required to decide that a cause of action could be brought against local governments and their officials directly under § 1981. The Court, in fact, confirms this conclusion in distiguuishing *Hurd* v. *Hodge*, *supra*, solely on the ground that we decided it at a time when § 1983 did not apply to the District of columbia. See *ante*, at 10. In other words, on the Court's view, a change in the scope of § 1983 would at the same time alter the reach of § 1981. I cannot endorse such a bizarre conception of congressional intent.

II

I thus would hold that Jett properly brought his suit against respondent directly under § 1981. It remains to consider whether that statute permits recovery against a local government body on a theory of *respondeat superior*.

Because § 1981 does not explicitly create a cause of action in damages, we would look in vain for an express statement that the statute contemplates liability based on the doctrine of *respondeat superior*. In *Monell* v. *New York City Dept. of Social Services*, *supra*, however, our background assumption appears to have been that unless a statute subjecting institutions (such as municipalities) to liability evidenced an intent not to impose liability on them based on *respondeat superior*, such liability would be assumed. *Id.*, at 691. The absolute language of § 1981 therefore is significant: "All per-

sons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . as is enjoyed by white citizens." 42 U. S. C. § 1981. Certainly nothing in this wording refutes the argument that vicarious liability may be imposed under this law.

Section 1983, in contrast, forbids a person to "subjec[t], or caus[e] to be subjected" another person to a deprivation of the rights protected by the statute. It is telling that § 1981 does not contain this explicit language of causation. In holding in *Monell* v. *New York City Dept. of Social Services*, *supra*, that liability under § 1983 may not be predicated on a theory of *respondeat superior*, we emphasized that § 1983 "plainly imposes liability on a government that, under color of some official policy, 'causes' an employee to violate another's constitutional rights. . . . Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent." 436 U. S., at 692. The absence of this language in § 1 of the 1866 Act, now § 1981, argues against the claim that liability under this statute may not be vicarious.

While it acknowledged that § 1 of the 1866 Act did not contain the "subjects, or causes to be subjected" language of § 1983, the Court of Appeals nevertheless emphasized that § 2 of the 1866 Act did contain this language. 837 F. 2d 1244, 1247 (CA5 1988). There is not the least inconsistency, however, in arguing that the *criminal* penalties under the 1866 Act may not be imposed on the basis of *respondeat superior*, but that the civil penalties may be. Indeed, it is no surprise that the history surrounding the enactment of § 2, as the Court stresses, *ante*, at 15–16, indicates that Congress envisioned criminal penalties only for those who by their own conduct violated the statute, since vicarious criminal liability

would be extraordinary. The same cannot be said of vicarious civil liability.

Nor does anything in the history of § 1981 cast doubt on the argument that liability under the statute may be vicarious. The Court of Appeals placed heavy reliance on Congress' rejection of the Sherman Amendment, which would have imposed a dramatic form of vicarious liability on municipalities, five years after passing the 1866 Act. 837 F. 2d, at 1246–1247. That the Court appears to accept this argument, see *ante*, at 23–26, is curious, given our frequent reminder that "'the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.'" *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 117 (1980), quoting *United States* v. *Price*, 361 U. S. 304, 313 (1960). I do not understand how Congress' rejection of an amendment imposing a very new kind of vicarious liability on municipalities can tell us what a different and earlier Congress intended with respect to conventional vicarious liability.

According to the Court, the history of the Sherman Amendment is relevant to the interpretation of § 1981 because it reveals Congress' impression that it had no authority to subject municipalities to the kind of liability encompassed by the amendment. See *ante*, at 24–26. The Court fails to recognize, however, that the circumstances in which municipalities would be vicariously liable under the Sherman Amendment are very different from those in which they would be liable under § 1981. As the Court describes it, the Sherman Amendment "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.'" *Ante*, at 23, quoting Cong. Globe, 42nd Cong., 1st Sess., 755 (1871). Because the threat of such liability would have forced municipalities to en-

sure that private citizens did not violate the rights of others, it would have run up against Justice Story's conclusion in *Prigg* v. *Pennsylvania*, 16 Pet. 539, 616 (1842), that Congress could not "insist that the states are bound to provide means to carry into effect the duties of the national government." To hold a local government body liable for the discriminatory cancellation of a contract entered into by that local body itself, however, is a very different matter. Even assuming that the 39th Congress had the same constitutional concerns as the 42nd, therefore, those concerns cast no doubt on Congress' authority to hold local government bodies vicariously liable under § 1 of the 1866 Act in circumstances such as those present here.

I thus would conclude that liability under § 1981 may be predicated on a theory of *respondeat superior*.

III

No one doubts that § 1983 was an unprecedented federal statute. See *ante*, at 20–22. The question is not whether § 1983 wrought a change in the law, but whether it did so in such a way as to withdraw a remedy that § 1 of the 1866 had implicitly afforded. Unlike the Court, I would conclude that it did not.