SUPERVISORY LIABILITY UNDER 42 U.S.C. § 1983 IN THE WAKE OF IQBAL AND CONNICK: IT MAY BE MISCONCEIVED, BUT IT'S NOT A MISNOMER

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The Supreme Court's blockbuster opinion in Ashcroft v. Iqbal has been the herald of substantive change throughout several areas of law. Most recently, however, discourse regarding its effects in the context of the supervisory liability doctrine has blossomed throughout the federal appellate fora and has resulted in a *circuit split. At the center of the debate is the Court's unadorned proclamation that the term "'supervisory liability' is a misnomer" because "[a]bsent vicarious* liability, each Government official, his or her title notwithstanding, is only liable for *his or her own misconduct." Adding to that debate, this Note joins a growing chorus* of scholarship discussing the continued existence of supervisory liability claims in constitutional tort litigation post-Iqbal, *given the Court's subsequent decision in* Connick v. Thompson.

Rather than simply mourn the current state of the legal doctrine, or rehash views on the subject that have previously been published, this Note offers a practical analysis that federal courts should adopt in favor of a pre-Iqbal understanding of *supervisory liability. To that end, this Note concludes that the Court's decision in* Connick *suggests that supervisory liability is anything but a "misnomer." This, of* course, is derived from Connick*'s observation that a supervisor's deli*berate indifference is functionally equivalent to intentional conduct. To be certain, *however, this Note establishes that equivalence independent of the Court's* discussion in Connick *by looking to the Supreme Court's previous discussions* regarding 42 U.S.C. § *1983's outer limits, the statute's legislative history, and* corresponding circuit court precedent. Through that analysis, this Note confirms

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that a supervisor's deliberate indifference to their subordinate's constitutionally tortious conduct must be redressable under § 1983.

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> "The effect of the Court's actions will no doubt be to deny many plaintiffs with meritorious claims access to the Federal courts and, with it, any legal redress for their injuries. I think that is an especially unwelcome development at a time when, with the litigating resources of our executive branch and administrative agencies stretched thin, the enforcement of Federal . . . civil rights and other laws that benefit the public will fall increasingly to private litigants."

Senator Arlen Specter, July 22, 2009.[1]

INTRODUCTION

Five years after its publication, the Supreme Court's decision in Ashcroft v. Iqbal[2] continues to foster significant discourse regarding its many meanings and effects.[3] Among many jurists, lawyers, scholars, and students, Iqbal is famously associated with the Court's decision in Bell Atlantic Corp. v. Twombly[4] and is championed for modifying the pleading standard under Rule Eight of the Federal Rules of Civil Procedure.[5] Notwithstanding its civil procedure fame, Iqbal exists as a catalyst of change outside that relam. Specifically, some scholars,[6] attorneys,[7] and courts[8] claim that Iqbal sounded the death knell for supervisory liability claims in constitutional tort litigation.

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1. 155 CONG. REC. 18, 756–57 (2009) (statement of Sen. Arlen Specter).
2. 556 U.S. 662 (2009).
3. See, e.g., Patricia W. Hatamyar, The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?, 59 AM. U. L. REV. 553, 554–83, 597–616 (2010); Goutam U. Jois, Pearson, Iqbal, and Procedural Judicial Activism, 37 FLA. ST. U. L. REV. 901 (2010); Linda S. Mullenix, Dropping the Spear: The Case for Enhanced Summary Judgment Prior to Class Certification, 43 AKRON L. REV. 1197, 1198–1201 (2010); Louise N. Smith, Employers Beware: Civil RICO Provision Creates Private Enforcement of Immigration Laws, 27 ABA J. LAB. & EMP. L. 103, 106–19 (2011).
4. 550 U.S. 544 (2007).
5. "Unless they have been living in a cave, there are by now no members of the federal bench or bar who are unfamiliar with the changes wrought in the federal pleading landscape by the Supreme Court's decisions in Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal." Jeremiah J. McCarthy & Matthew D. Yusick, Twombly and Iqbal: Has the Court *"Messed Up the Federal Rules"?*, 4 FED. CTS. LAW. REV. 1, 2 (2010) (discussing whether the pleading standard enunciated by the Supreme Court in Twombly and Iqbal was implemented in violation of the Rules Enabling Act, 28 U.S.C. §§ 2071–77 (2006)).
6. See, e.g., Desiree L. Grace, Supervisory Liability Post-Iqbal*: A "Misnomer"* Indeed, 42 SETON HALL L. REV. 317 (2012) (concluding that the scope of the Supreme Court's discussion in Iqbal could not have abolished supervisory liability).
7. See, e.g., Petition for Certiorari at 10–14, Baca v. Starr, 132 S. Ct. 2101 (2012) (No. 11-834); Brief for Petitioner at 43–44, Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2012) (No. 10-98).
8. See Moss v. U.S. Secret Serv., 675 F.3d 1213, 1231 n.6 (9th Cir. 2012); Starr v. Baca, 652 F.3d 1202, 1205–07 (9th Cir. 2011) ("We see nothing in Iqbal indicating that the Supreme Court intended to overturn longstanding case law on deliberate indifference claims against supervisors . . . ."); Sandra T.E. v. Grindle, 599 F.3d 583, 591 (7th Cir. 2010) (same); Sanchez v. Pereria-Castillo, 590 F.3d 31, 49 (1st Cir. 2009) (citing and quoting Ashcroft v. Iqbal, 556 U.S. 662, 675–76 (2009)) (same); cf. Dodds v. Richardson, 614 F.3d 1185, 1204 (10th Cir. 2010), cert. denied, 131 S. Ct. 2150 ("We therefore conclude that after

In the decades prior to Iqbal, plaintiffs could redress constitutional injuries due to a supervisor's deliberate indifference by suing for money damages under a theory of supervisory liability.[9] Before Iqbal, supervisory liability was commonly described as a doctrine that subjected supervisors to liability if their actions were the proximate cause—or were a moving force behind the proximate cause—of a constitutional injury.[10] Liability was, therefore, apportioned if the supervisor: violated a plaintiff's rights by directing others to do so; acquiesced in their subordinates' constitutional violations; or had knowledge of constitutional violations committed by their subordinates, but acted with deliberate indifference to continuing violations.[11]

Today, the argument that supervisory liability no longer exists is rooted in five lines of dicta within Iqbal.[12] Writing for the majority, Justice Kennedy noted that plaintiffs seeking damages under the supervisory liability doctrine must establish that supervisor–defendants acted with "purpose rather than knowledge"[13] because "the term 'supervisory liability' is a misnomer," and "masters do not answer for the torts of their servants."[14] That unqualified conclusion, however, quixotically jettisons long-standing and well-heeled jurisprudence.[15] Echoing this point in dissent, Justice Souter pointed to "quite a spectrum of possible tests for supervisory liability" which have been established by the circuit courts of appeal that are neither foreign to our case law, nor legally incorrect.[16] By citing Justice Kennedy's conclusory statement regarding supervisory liability in Iqbal, supervisor–defendants seek to foreclose an avenue of recovery central to our nation's constitutional tort jurisprudence.

Iqbal, Plaintiff can no longer succeed on a § 1983 claim against Defendant by showing that as a supervisor he behaved knowingly or with deliberate indifference that a constitutional violation would occur at the hands of his subordinates unless that is the same state of mind required for the constitutional deprivation he alleges." (internal quotation marks omitted)); Bayer v. Monroe Cnty. Children & Youth Servs., 577 F.3d 186, 190 n.5 (3d Cir. 2009) ("In light of the Supreme Court's recent decision in . . . [Iqbal] it is uncertain whether proof of such personal knowledge, with nothing more, would provide a sufficient basis for holding . . . [defendant] liable with respect to plaintiffs' Fourteenth Amendment claims under § 1983.").

9. William N. Evans, Supervisory Liability After Iqbal: Decoupling Bivens From Section 1983, 77 U. CHI. L. REV. 1401, 1402 (2010) ("This academic controversy blossomed into a real-world conflict after Ashcroft v Iqbal, in which the Supreme Court directly addressed supervisory liability for the first time in three decades and called the doctrine into question." (italics added)).

10. A.M. ex rel. J.M.K. v. Luzerne Cnty. Juvenile Det. Ctr., 372 F.3d 572, 586 (3d Cir. 2004).

11. Id.

12. See Karen M. Blum, Section 1983: Litigation: Post-Pearson and Post-Iqbal, 26 TOURO L. REV. 458–62 (2010).

13. Iqbal, 556 U.S. at 677.

14. Id.

15. Id. at 693–94 (Souter, J., dissenting).

16. Id.; see also Whitfield v. Melendez-Rivera, 431 F.3d 1, 14 (1st Cir. 2005) (discussing the difference between respondeat superior and supervisory liability in constitutional tort actions); Bennett v. Eastpointe, 410 F.3d 810, 818 (6th Cir. 2005) (same); Richardson v. Goord, 347 F.3d 431, 435 (2d Cir. 2003) (same); Lee v. City of L.A., 250 F.3d 668, 681 (9th Cir. 2001) (same); Hall v. Lombardi, 996 F.2d 954, 961 (8th Cir. 1993) (same).

Against that backdrop, this Note suggests that the Court's decision in Connick v. Thompson[17] strengthens the proposition that supervisors should not be able to dodge liability for the conduct of their subordinates. Furthering that discussion in favor of a pre-Iqbal understanding of supervisory liability while moving beyond Connick, the Note proceeds by demonstrating that Iqbal's remarks on the issue are doctrinally unsound; indeed, a supervisor's deliberate indifference to his subordinate's constitutional torts is functionally equivalent to intentional conduct. To establish that functional equivalence, this Note looks to the Supreme Court's interpretation of § 1983, its legislative history, and corresponding circuit court precedent. This Note concludes that a pre-Iqbal understanding of supervisory liability is appropriate because it fits comfortably within § 1983's outer limits and remains faithful to the congressional intent evidenced during its original passage.

I. ESTABLISHING THE SUPERVISORY LIABILITY DOCTRINE: DISCUSSING ITS UNDERPINNINGS AND DEFINING ITS CONTOURS

A. Introducing § 1983's Strict Causational Requirement

Section 1983 establishes a private right of action that enables plaintiffs to secure the protection and redress the deprivation of rights established under our nation's laws and Constitution.[18] It provides that,

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[19]

Despite its seemingly plain language, vigorous debate regarding § 1983's outer limits has circumscribed its corrective powers.[20] Much of that discourse was predicated upon the statute's "subjects, or causes to be subjected" clause, which forces constitutional tort plaintiffs to satisfy a heightened scienter requirement and

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17. 131 S. Ct. 1350 (2011).

18. See Baker v. McCollan, 443 U.S. 137, 140, 144 n.3 (1979). It should also be noted that the Supreme Court recognized an implied private right of action akin to § 1983 in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). In Bivens, the Court held that federal officers acting under the color of law are liable for damages caused by Fourth Amendment violations. Id. at 389, 397. Although appellate precedents throughout the circuits view Bivens actions outside the context of the Fourth Amendment with a jaundiced eye, see, e.g., Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009); Holly v. Scott, 434 F.3d 287 (4th Cir. 2006); Peoples v. CCA Det. Ctrs., 422 F.3d 1090 (10th Cir. 2005), plaintiffs generally establish a prima facie complaint by pleading that: (1) the defendant violated a plaintiff's federal constitutional right; (2) that right was clearly established; (3) the defendant was a federal actor by virtue of acting with the imprimatur of the federal government; and (4) the defendant was a moving force in the constitutional injury. Bivens, 403 U.S. at 392–98.

19. 42 U.S.C. § 1983 (2012).

20. See Ashcroft v. Iqbal, 556 U.S. 662, 677 (2009); City of Canton v. Harris, 489 U.S. 378, 385–92 (1989); Monell v. Dept. of Soc. Servs. of the City of N.Y., 436 U.S. 658, 664–701 (1978), overruling Monroe v. Pape, 365 U.S. 167 (1961).

saddles them with a heavy evidentiary burden.[21] Today, recovery for constitutional torts under § 1983 is, generally speaking, only appropriate when plaintiffs establish that they were deprived of a right secured by the Constitution or the laws of the United States and that the defendant acted under color of state law when the deprivation occurred.[22] Nevertheless, certain jurisprudential exceptions established by the Supreme Court have broadened § 1983's scope.[23] Like the controversies that delineated § 1983's corrective powers, the post-Iqbal debate regarding supervisory liability is predicated upon an issue of causation.[24]

Because governmental officials are not vicariously liable for the misconduct of their subordinates under § 1983, recovery under a theory of respondeat superior is barred.[25] But this does not mean that a supervisor is immune from liability stemming from actions taken by subordinates.[26] Supervisors may be liable if their conduct condones, promotes, or gives way to a constitutional injury.[27] And the logic animating the Supreme Court's holdings in Monell v. Deptartment of Social Services of the City of New York[28] and City of Canton v. Harris[29] gives this understanding doctrinal legitimacy.[30]

B. If a Supervisor–Defendant Had Notice of, Intentionally Disregarded, or Tacitly Permitted a Constitutional Violation, § 1983's Strict Causation Requirement Is Satisfied

Even though the Supreme Court has not squarely evaluated the supervisory liability doctrine, its decisions in Monell and City of Canton solidify its viability as a matter of law.[31] In Monell, the Supreme Court defined § 1983's outer limits and held that the statute provided a private right of action against municipalities despite the statute's facial clarity limiting its applicability to defendants who are natural persons.[32] In doing so, the Monell Court recognized that cabining a plaintiff's ability to redress her constitutional injuries against "persons," and not "municipalities,"

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21. See Monell, 436 U.S. at 664–701.

22. West v. Atkins, 487 U.S. 42, 48 (1988); Gomez v. Toledo, 446 U.S. 635, 640 (1980).

23. See, e.g., City of Canton, 489 U.S. at 380; Monell, 436 U.S. at 701.

24. Iqbal, 556 U.S. at 677. See also MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES, § 7.19[D] (4th ed. 2010).

25. Pembaur v. City of Cincinnati, 475 U.S. 469, 479 (1986).

26. See City of Canton, 489 U.S. at 385–92.

27. See Rizzo v. Goode, 423 U.S. 362, 371 (1976).

28. Monell, 436 U.S. at 701.

29. City of Canton, 489 U.S. at 380.

30. See Evans, supra note 9, at 1412–14.

31. See Sample v. Diecks, 885 F.2d 1099, 1117–18 (3d Cir. 1989) ("Although the issue here is one of individual liability rather than of the liability of a political subdivision, we are confident that, absent official immunity, the standard of individual liability for supervisory public officials will be found to be no less stringent than the standard of liability for the public entities that they serve. In either case, a 'person' is not the 'moving force [behind] the constitutional violation' of a subordinate unless that 'person'—whether a natural one or a municipality—has exhibited deliberate indifference to the plight of the person deprived."). (citations omitted, brackets in original).

32. See Monell, 436 U.S. at 701.

would create absurd results given § 1983's legislative history and Congress's intent during the Reconstruction Era.[33] Eleven years later, the Court affirmed that decision in City of Canton when it delineated the contours of § 1983 liability and recognized that a municipality's inaction is actionable if it amounts to deliberate indifference.[34]

Although the Court's opinions in Monell and City of Canton recognize that a form of conduct that is qualitatively less than an affirmative or overt act—namely, deliberate indifference—can be redressed under § 1983, the Court's holdings remain faithful to the statute's "subjects, or causes to be subjected,"[35] requirement.[36] Therefore, under the deliberate indifference standard, inaction can be redressed pursuant to § 1983 so long as that inaction amounts to a clear constitutional violation.[37] Stated otherwise, the Court's opinion in City of Canton demands that litigants establish that a defendant's deliberate indifference was the moving force behind their constitutional injury.[38]

The supervisory liability doctrine builds upon the Court's discussion regarding causation in Monell and City of Canton.[39] Guided by those precedents, the circuit courts of appeal recognized that liability under § 1983 should extend to supervisor–defendants so long as the conduct alleged is the proximate cause—or the moving force behind the proximate cause—of a constitutional injury. Based on that understanding, precedents throughout the circuits conclude that supervisory liability "is not premised upon respondeat superior but upon a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries" inflicted upon a plaintiff.[40] Therefore, courts have acknowledged that supervisors may be liable for the foreseeable consequences of their subordinates' conduct if they would have known of it but for their deliberate indifference or willful blindness.[41] Recognizing the doctrine's breadth, courts have held that supervisory liability extends "to the highest levels of state government"[42] but note, "liability ultimately is determined by pinpointing the persons in the

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33. Id. at 700–01.
34. 489 U.S. at 380.
35. 42 U.S.C. § 1983 (2012).
36. See Evans, supra note 9, at 1412–14.
37. City of Canton, 489 U.S. at 391–92.
38. See id.
39. See Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 453 (5th Cir. 1994), cert. denied sub nom., Lankford v. Doe, 513 U.S. 815 (1994) ("The most important difference between City of Canton and this case is that the former dealt with a municipality's liability whereas the latter deals with an individual supervisor's liability. The legal elements of an individual's supervisory liability and a political subdivision's liability, however, are similar enough that the same standards of fault and causation should govern."); Sample v. Diecks, 885 F.2d 1099, 1117–18 (3d Cir. 1989); see also Slakan v. Porter, 737 F.2d 368, 373 (4th Cir. 1984), cert. denied, 470 U.S. 1035 (1985).
40. Shaw v. Stroud, 13 F.3d 791, 798 (4th Cir. 1994), cert. denied, 115 S. Ct. 68513 U.S. 814 (1994) (internal quotation marks omitted).
41. Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 582 (1st Cir. 1994); accord Shaw, 13 F.3d at 798.
42. Slakan, 737 F.2d at 373.6

decisionmaking chain whose deliberate indifference permitted the constitutional abuses to continue unchecked."[43]

To reduce these causation principles into a workable framework, the circuit courts of appeal established a three-pronged test—or subtle variants thereof—to determine whether a litigant's allegations state a claim under the supervisory liability doctrine.[44] Plaintiffs must establish: (1) the supervisor had actual or constructive knowledge that their subordinate was engaged in conduct that presented an unreasonable risk of constitutional injury to citizens like the plaintiff; (2) "the supervisor's response to that knowledge was so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices"; and (3) an affirmative or causal link existed to support the conclusion that the supervisor's inaction was the proximate cause of the injury suffered.[45]

II. *IQBAL*'S EFFECTS IN CONSTITUTIONAL TORT LITIGATION UNDER THE SUPERVISORY LIABILITY DOCTRINE

A. Iqbal's Doctrinal Effects Under § 1983 and Bivens

"But then, as the saying will surely go, came Iqbal."[46] Shortly after September 11, 2001, federal officials arrested and indefinitely detained Javid Iqbal.[47] Filed in the Eastern District of New York, his twenty-one-claim complaint challenged the constitutionality of the discriminatory treatment he experienced during his extended detention.[48] Through his Bivens action, Iqbal demanded money damages from 19 John Doe federal corrections officers and 34 current and former federal officials, including former U.S. Attorney General John D. Ashcroft and former Federal Bureau of Investigation Director Robert Mueller.[49]

Writing for the Iqbal majority, Justice Kennedy explained that government supervisors are not liable for the unconstitutional conduct of their subordinates in constitutional tort litigation so long as a supervisor–defendant did not contribute to the injury or lacked the requisite discriminatory animus.[50] Although this added nothing new to the supervisor liability doctrine,[51] the Iqbal majority declared that "[t]he factors necessary to establish a Bivens violation"—and presumably a § 1983

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43. Shaw, 13 F.3d at 798 (internal quotation marks and citation omitted); accord Avery v. Cnty. of Burke, 660 F.23d 111, 114 (4th Cir. 1981); see also City of Canton v. Harris, 489 U.S. 378, 385–92 (1989); Brown v. Crawford, 906 F.2d 667, 671 (11th Cir. 1990); Brown v. Crawford, 906 F.2d 667, 671 (11th Cir. 1990).

44. See Miltier v. Beorn, 896 F.2d 848, 854 (4th Cir. 1990), overruled in part on other grounds by Farmer v. Brennan, 511 U.S. 825, 837 (1994).

45. Shaw v. Stroud, 13 F.3d 791, 799 (4th Cir. 1994), cert. denied, 513 U.S. 814 (1994); see generally Rizzo v. Goode, 423 U.S. 362 (1976).

46. Dodds v. Richardson, 614 F.3d 1185, 1197 (10th Cir. 2010), cert. denied, 131 S. Ct. 2150 (2011).

47. Ashcroft v. Iqbal, 556 U.S. 662, 666–70 (2009).

48. First Amended Complaint & Jury Demand at 20–22, Ashcroft v. Iqbal, No. 07–1015 (E.D.N.Y. Sept. 30, 2004), ECF No. 35.

49. Ashcroft v. Iqbal, 556 U.S. 662, 667–69 (2009).

50. Id. at 676–77.

51. Dodds, 614 F.3d at 1197–98.

violation—must "vary with the constitutional provision at issue."[52] Therefore, when plaintiffs bring an action for "invidious discrimination in contravention of the First and Fifth Amendments"—and presumably the Fourteenth Amendment—they "must plead and prove that the defendant [including the supervisor–defendants,] acted with discriminatory purpose."[53] As a result, the Court concluded that Iqbal could not redress his constitutional injuries under the supervisory liability doctrine because the term "'supervisory liability' is a misnomer."[54]

B. Iqbal's Effect Throughout the Circuits

"Much has been made about this aspect of Iqbal, but consensus as to its meaning remains elusive."[55] Because Iqbal left lower courts without substantive explanation, instruction, or guidance regarding supervisory liability, its ramifications have been far reaching and a circuit split now exists. Seventh and Tenth Circuit litigants are bound by Iqbal's express language, which abrogates all preexisting supervisory liability jurisprudence within those jurisdictions.[56] Other circuits, such as the Third and Eighth Circuits, recognize that Iqbal may have modified supervisory liability, but have not ruled on the matter, and skirt the issue by purposefully and explicitly deciding cases on other grounds.[57] In the Ninth and Eleventh Circuits, supervisory liability claims seem to remain unaffected.[58] Plaintiffs in the First Circuit, like those in the Seventh and Tenth Circuits, are bound by Iqbal's express language in Bivens actions. The First Circuit construes Iqbal narrowly, however, and does not apply Iqbal's "rule" regarding supervisory liability to actions brought under § 1983.[59]

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52. Iqbal, 556 U.S. at 676.

53. Dodds, 614 F.3d at 1198 (discussing Iqbal); see also, Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 540–41 (1993) (First Amendment); Personnel Admin. of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (Fourteenth Amendment); Washington v. Davis, 426 U.S. 229, 240 (1976) (Fifth Amendment).

54. Iqbal, 556 U.S. at 677.

55. Dodds, 614 F.3d at 1198.

56. See T.E. v. Grindle, 599 F.3d 583, 588 (7th Cir. 2010); Dodds v. Richardson, 614 F.3d 1185, 1197–1203 (10th Cir. 2010), cert. denied, 131 S. Ct. 2150.

57. See Argueta v. U.S. Immigration & Customs Enforcement, 643 F.3d 60, 70 (3d Cir. 2011); Santiago v. Warminster Twp., 629 F.3d 121, 130 n.8 (3d Cir. 2010); Parrish v. Ball, 594 F.3d 993, 1001 n.1 (8th Cir. 2010); Bayer v. Monroe Cnty. Children & Youth Servs., 577 F.3d 186, 190 n.5 (3d Cir. 2009).

58. See Moss v. U.S. Secret Serv., 675 F.3d 1213, 1231 n.6 (9th Cir. 2012), *reh'g* denied, 711 F.3d 941 (9th Cir. 2012); Starr v. Baca, 652 F.3d 1202, 1205–09 (9th Cir. 2011), cert. denied, 132 S. Ct. 2101 (2012), *reh'g denied sub. nom* Starr v. Cnty. of L.A., 659 F.3d 850, 851 (9th Cir. 2011) (O'Scannlain, J.); AFL-CIO v. City of Miami, 637 F.3d 1178, 1190 (11th Cir. 2011); Doe v. Sch. Bd. of Broward Cnty., 604 F.3d 1248, 1266–67 (11th Cir. 2010); Keating v. City of Miami, 598 F.3d 753, 763–65 (11th Cir. 2010); Harper v. Lawrence Cnty., 592 F.3d 1227, 1236–37 (11th Cir. 2010), *reh'g denied*, 401 Fed. Appx. 520 (11th Cir. 2010); al-Kidd v. Ashcroft, 580 F.3d 949, 965 (9th Cir. 2009), *rev'd on other grounds sub nom.*, Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011). But see Simmons v. Navajo Cnty. 609 F.3d 1011, 1020–21 (9th Cir. 2010).

59. See Sanchez v. Pereira-Castillo, 590 F.3d 31, 49 (1st Cir. 2009); Maldonado v. Fontanes, 568 F.3d 263, 275 n.7 (1st Cir. 2009).

The effects of this circuit split cannot be understated. In circuits that have eliminated supervisory liability, supervisors are free to turn a blind eye to their subordinates' constitutionally tortious conduct because their deliberate indifference is not actionable. As a result, plaintiffs throughout many jurisdictions have had the courthouse doors shut on their claims long before they have reached the courthouse steps.[60] And recent filings throughout the federal courts establish that supervisors across the Nation are trying to use Iqbal to foreclose recovery under the supervisory liability doctrine altogether.[61]

III. A SUPERVISOR'S RELIANCE ON *IQBAL* IN THE SUPERVISORY LIABILITY CONTEXT IS MISPLACED GIVEN THE COURT'S DECISION IN *CONNICK*

Because numerous jurisdictions have not decided whether the supervisory liability doctrine exists post-Iqbal, an increasing number of supervisor–defendants have asked courts to jettison the doctrine.[62] The Supreme Court's decision in Iqbal, they claim, requires plaintiffs to establish "that each Government-official defendant, through the official's own individual actions, has violated the Constitution."[63] They argue that this is the unmistakable conclusion that must be reached because the Court mentioned that in "a § 1983 suit or a Bivens action—where masters do not answer for the torts of their servants—the term 'supervisory liability' is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct."[64] And supervisor–defendants assert that the dissenting justices recognized as much by acknowledging that the majority's holding did "away with supervisory liability under Bivens" altogether.[65]

Because Supreme Court precedents recognize that defendants are not liable in constitutional tort litigation under a theory of respondeat superior, supervisor–defendants conclude that their interpretation of Iqbal remains faithful to

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60. See 155 CONG. REC. 18, 756–57 (2009) (statement of Sen. Arlen Specter).

61. See, e.g., Brief for Council on Ed. & Five Other Higher Ed.. Orgs. as Amici Curiae Supporting Petitioners, Ray v. OSU Student Alliance, 134 S. Ct. 70 (2013) (No. 12–1296), 2013 WL 2366262 [hereinafter OSU Student Alliance Brief]; Reply Brief of Appellant Curry, 738 F.3d 1246 (11th Cir. 2013) (No. 13–10129), 2013 WL 1543125 [hereinafter Reply Brief of Appellant Curry]; Brief for Eric Holder, Harley G. Lappin, Karen Edenfield, and the United States of America, Appellees, Mills v. United States of America, (5th Cir. No. 12–10844), 2013 WL 7790631 [hereinafter Brief for Appellee Holder]; Brief for Appellant, Pahls v. Sheehan, 718 F.3d 1210 (10th Cir. 2013) (Nos. 11–2055, 11–2059), 2011 WL 4350125 [hereinafter Brief for Appellant Sheehan]

62. See, e.g., Randall v. Prince George's Cnty., 302 F.3d 188, 206 (4th Cir. 2002); see also OSU Student Alliance Brief, supra note 61; Reply Brief of Appellant Curry, supra note 61; Brief for Appellee Holder, supra note 61; Brief for Appellant Sheehan, supra note 61.

63. 556 U.S. at 676; see, e.g., OSU Student Alliance Brief, supra note 61; Reply Brief of Appellant Curry, supra note 61; Brief for Appellee Holder, supra note 61; Brief for Appellant Sheehan, supra note 61.

64. Iqbal, 556 U.S. at 677.

65. Id. at 688 (Souter, J., dissenting).

longstanding precedent.[66] The logic supporting this connection, as their argument goes, inheres from the plain language of § 1983.[67] They assert that the Supreme Court's decision in Rizzo v. Goode, as well as its precedents circumscribing municipality liability under § 1983, validate this position.[68] As discussed below, however, that is simply not the case.

A. Challenges to the Viability of the Supervisory Liability Doctrine Dispelled

In Rizzo, the Court flatly rejected the applicability of vicarious liability in constitutional tort proceedings because § 1983 imposes liability only against state actors who deprive individuals of a right secured by our nation's Constitution or its laws.[69] Holding for the supervisor–defendant, the Rizzo Court noted that without a showing of direct responsibility for his actions, an individual defendant's failure to terminate misconduct is not actionable.[70] To hold otherwise would "blur[] accepted usages and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in § 1983."[71] Against this backdrop, many supervisor–defendants argue that government officials are not liable under § 1983 unless they personally subject, or cause a person to be subjected to, constitutional injury through an overt action.[72] But this turns § 1983—and the Court's holding in Rizzo—on its head.

In Rizzo, the Supreme Court reversed a grant of equitable relief, enjoining police violence that harmed minorities in Philadelphia.[73] Salient to the Court's decision in that litigation was the fact that no causal chain directly linked the supervisor–defendant to the tortious action taken by his subordinates.[74] Instead, the plaintiff plead his claim under a theory akin to vicarious liability.[75] When holding for the supervisor, however, the Court unequivocally noted that a supervisor's immunity only extends to matters in which the supervisor did not play "an affirmative role in the deprivation of [a plaintiff's] rights."[76] Speaking for the majority and explicating that narrowly drawn conclusion, Chief Justice Rehnquist

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66. See Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 710 (1989); see also, OSU Student Alliance Brief, supra note 61, at 4.

67. See, e.g., OSU Student Alliance Brief, supra note 61, at 5.

68. Id.

69. 423 U.S. at 370–71 (quoting 42 U.S.C. § 1983); accord Connick v. Thompson, 131 S. Ct. 1350, 1359 (2011) ("[U]nder § 1983, local governments are responsible only for 'their own illegal acts.' They are not vicariously liable under § 1983 for their employees' actions." (quoting Pembaur v. Cincinnati, 475 U.S. 469, 479 (1986)).

70. See Rizzo, 423 U.S. at 376–80.

71. Id. at 370–71.

72. See, e.g., OSU Student Alliance Brief, supra note 61; Reply Brief of Appellant Curry, supra note 61; Brief for Appellee Holder, supra note 61; Brief for Appellant Sheehan, supra note 61.

73. Rizzo, 423 U.S. at 366–68.

74. Id. at 375–76.

75. Id.

76. Pennsylvania v. Porter, 659 F.2d 306, 336 (3d Cir. 1981), cert. denied, 458 U.S. 1121 (1982) (emphasis added); accord Black v. Stephens, 662 F.2d 181, 189 (3d Cir. 1981), cert. denied, 455 U.S. 1008 (1982); Lewis v. Hyland, 554 F.2d 93, 98 (3d Cir. 1977), cert. denied, 443 U.S. 931 (1977).

recognized that plaintiffs may sustain a constitutional tort action against supervisory officials so long as they satisfy two conditions.[77] First, a plaintiff must establish a clear instance of constitutional misconduct.[78] Second, the plaintiff must establish that his constitutional injury stems from the supervisor–defendant's action, deliberate inaction, or willful disregard of his duties.[79] And subsequent Supreme Court precedent regarding § 1983's corrective powers makes clear that attenuated conduct, in certain circumstances, satisfies Rizzo's second prong and is, therefore, actionable.[80]

B. Connick Extends Supervisory Liability's Doctrinal Legitimacy as Established by Monell and City of Canton

The Supreme Court's logic articulated in Monell and City of Canton makes clear that supervisory liability and § 1983's strict causation requirements are not mutually exclusive.[81] Because "[l]iability as a supervisor is similar to that of a municipality,"[82] the Court's determination that a city's deliberate indifference may fall within § 1983's corrective power applies with equal force in a supervisory context.[83] And Connick suggests that supervisory liability's deliberate indifference standard—the standard originally derived from the transitive relationship between municipal and supervisory liability—remains unscathed post-Iqbal.[84] By affirming the Court's previous holdings regarding municipal liability, the Connick majority recognized that the deliberate indifference standard does not offend § 1983's strict causational requirement.

In Connick, the Supreme Court ruled that a district attorney's office was not liable under § 1983 for it's "failure to train" based on a single Brady violation.[85] In that litigation, Thompson brought an action under § 1983 against the Orleans Parish District Attorney's office, District Attorney Harry F. Connick, and several Assistant District Attorneys in their official capacity because they caused his wrongful conviction for which he was ultimately sentenced to death.[86] At trial, the jury determined that Connick's deliberate indifference was the proximate cause of Thompson's constitutional injury and awarded him $14 million.[87]

Defending that judgment on appeal, Thompson claimed that the Brady violation leading to his conviction was (1) "caused by an unconstitutional policy"; and (2) "caused by Connick's deliberate indifference to an obvious need to train the

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77. Rizzo, 423 U.S. at 375 (citing Allee v. Medrano, 416 U.S. 802, 815–16 (1976)).
78. Id.
79. Id.
80. See supra Part I.B.
81. See id.
82. Carnaby v. City of Houston, 636 F.3d 183, 189 (5th Cir. 2011).
83. See St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988); see also Keating v. City of Miami, 598 F.3d 753, 764–65 (11th Cir. 2010); Christie v. Iopa, 176 F.3d 1231, 1236–37 (9th Cir. 1999) (citing Praprotnik, 485 U.S. at 127).
84. Connick v. Thompson, 131 S. Ct. 1350, 1359–60.
85. Id. at 1356.
86. Id. at 1357.
87. Id. at 1355–56.

prosecutors in his office."[88] Although he could not establish a pervasive pattern of similar Brady violations to illustrate the existence of an unconstitutional policy, Thompson argued that the verdict should be upheld because the need to train prosecutors was "obvious."[89] Nevertheless, the Supreme Court disagreed.[90] But in doing so, the Connick majority reiterated the elements required to establish liability for a municipality's deliberate indifference.[91] Because supervisory liability is a species of municipal liability,[92] it stands to reason that the doctrinal legitimacy supervisory liability enjoyed under Monell and City of Canton remains intact.

C. Interpreting Connick's Effect on the Doctrine of Supervisory Liability in a Different Light Would Create Absurd Results

Even though Iqbal's clear language appears to have "ruled that even deliberate indifference with actual knowledge [of a subordinate's] unconstitutional conduct may not be sufficient,"[93] discarding of the supervisory liability framework, as many supervisor–defendants request, would create nonsensical results. Supervisors would be free to turn a blind eye to their subordinates' constitutional violations knowing that they are immune from civil liability for injuries that result from their deliberate indifference. Given the federal courts' longstanding commitment to protecting individual constitutional rights, accepting the legal arguments promulgated by supervisor–defendants regarding this issue throughout the circuits would be ill-advised. Courts should resolve claims against supervisors on their merits.

Although supervisor–defendants claim that knowledge and acquiescence or deliberate indifference are such "low" standards that innocent officials will be haled into court for their subordinates' smallest constitutional violations,[94] their cause for concern is of no moment. It is highly unlikely that a supervisor would be held responsible for his subordinate's constitutional harm if the supervisor did not have knowledge of a violation or allow further violations to go unchecked. Because a supervisor's conscious failure to address a subordinate's constitutional violation promotes or tacitly approves the violation, the chance that an innocent supervisor will be forced into litigation is, at best, minimal. But even if it were not, ample procedures exist to protect innocent supervisors. Affirming the applicability of the deliberate indifference standard does not prevent supervisors from availing themselves under Rules 12(b)(6) or 12(c) of the Federal Rules of Civil Procedure. Nor does it prevent supervisors from seeking relief under Rule 11 if they are

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88. Id. at 1357 (emphasis added).
89. Id.
90. Id. at 1366.
91. Id. at 1357–60.
92. See Canell v. Lightner, 143 F.3d 1210, 1213 (9th Cir. 1998); Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 453 (5th Cir. 1994), cert. denied sub nom., Lankford v. Doe, 513 U.S. 815 (1994); Sample v. Diecks, 885 F.2d 1099, 1117–18 (3d Cir. 1989).
93. 1 SHELDON NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 3:100 (4th ed. 1997, Supp. 2009).
94. See OSU Student Alliance Brief, supra note 61, at 9–10.

burdened by frivolous litigation. And then, of course, if all else fails, supervisors can invoke the robust qualified immunity doctrine as a protective shield.[95]

IV. *IQBAL*'S UNQUALIFIED REFERENCE TO SUPERVISORY LIABILITY IS FUNDAMENTALLY UNSOUND BECAUSE § 1983'S LEGISLATIVE HISTORY ESTABLISHES THAT DELIBERATE INDIFFERENCE IS FUNCTIONALLY EQUIVALENT TO INTENTIONAL CONDUCT

A. Establishing the Relevance of § 1983's Legislative History

Even if courts were to accept the interpretation of Iqbal's that is popular among supervisor–defendants, a supervisor's deliberate indifference nonetheless remains the functional equivalent of "intentional conduct." The fact that the Supreme Court previously determined that § 1983 was enacted to redress a wide range of events suggests that its corrective powers should be interpreted broadly.[96] The proposition that deliberate indifference may subject supervisors to liability for their subordinates' constitutional torts should therefore come as little surprise.[97]

In Adickes v. S.H. Kress & Co., the Supreme Court recognized that "Congress undertook to provide broad federal civil remedies against interference with the exercise and actual enjoyment of constitutional rights, particularly the right to equal protection" when it enacted § 1983.[98] And the Court did not narrow a plaintiff's ability to redress constitutional injuries when faced with arguments similar to those advanced by supervisors post-Iqbal.[99] Instead, it looked to § 1983's

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95. See generally Ashcroft v. al-Kidd, 131 S. Ct. 2074 (2011).

96. "'Section 1983 was originally enacted as § 1 of the Civil Rights Act of 1871,'" Ngiraingas v. Sanchez, 495 U.S. 182, 187 (1990) (quoting Qurern v. Jordan, 440 U.S. 332, 354 (1974) (Brennan, J., concurring)), in an effort "to combat the chaos that paralyzed the post-War South," *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 345–46 (1993) (O' Connor, J., dissenting), and enforce "'the provisions of the Fourteenth Amendment.'" Ngiraingas, 495 U.S. at 187 (quoting Qurern, 440 U.S. at 354 (Brennan, J., concurring)). Indeed, "the language of the Act, like that of many Reconstruction statutes, is more expansive than the historical circumstances that inspired it . . . [Indeed,] [t]he Court's approach to Reconstruction Era civil rights statutes has been to 'accord them a sweem as broad as their language.'" Bray, 506 U.S. at 345–46 (O' Connor, J., dissenting) (citations omitted); see also Lacey v. Maricopa Cnty, 693 F.3d 896, 935 (9th Cir. 2012) (en banc) ("Conspiracy is not itself a constitutional tort under § 1983. . . .[Nevertheless,] [c]onspiracy in § 1983 actions is usually alleged by plaintiffs to draw in private parties who would otherwise not be susceptible to a § 1983 action because of the state action doctrine, or to aid in proving claims against otherwise tenuously connected parties in a complex case.") (citations omitted).

97. See Lacey, 693 F.3d at 915–916 ("Culpability . . . is limited not only by the causal connection of the official to the complained-of violation, but also by his intent . . . to deprive another of that person's rights; both limitations on the nature of culpable conduct are critical. . ."); Alaska v. EEOC, 564 F.3d 1062, 1069 (9th Cir. 2009) (en banc) (Kozinski, C.J.) (reconzing that deliberate indifference is functionally equivalent to intentional conduct); Bohen v. City of E. Chi., Ind., 799 F.2d 1180, 1187 (7th Cir. 1986) (same).

98. 398 U.S. 144, 205 (1970) (Brennan, J., concurring and dissenting in part).

99. See Monell v. Dept. of Soc. Servs. of City of N.Y., 436 U.S. 658, 662–64, 700–01 (1978).

legislative history and concluded that Congress wanted the statute to redress a wide range of constitutional violations.[100]

Careful analysis of the statute's legislative history reveals that Congress desired for plaintiffs to redress their constitutional injuries against tortfeasors and their supervisors under § 1983, so long as the supervisor's act or omission existed as a proximate cause—or moving force behind the proximate cause—of a constitutional injury. Because § 1983's legislative history establishes that "deliberate indifference" satisfies the statute's heightened scienter requirements, courts should embrace the viability of the supervisory liability doctrine post-Iqbal.

B. The Ku Klux Klan Act of 1871: Ending Conspiratorial Violence Was Just the Beginning

The modern form of § 1983 derives from Section One of the Ku Klux Klan Act of April 20, 1871,[101] which was enacted to "secure life, liberty and property, and the enforcement of law in all parts of the United States" due to the "condition of affairs" present in the Southern "States of the Union [which] render[ed] life and property insecure" following the Civil War.[102] The fact that Section One was "clearly corrective in its character" cannot be understated.[103] As the "legislative history makes absolutely clear," Congress ratified Section One to correct the "outrages committed by the Klan in many parts of the South," but did not restrict its application "to [those] evil[s]."[104] Nor was the Act designed to remedy only overtly intentional conduct, despite Iqbal's proclamation to the contrary. When it ratified the Act, Congress "intended to counteract and furnish redress against state laws and proceedings, and customs having the force of law, which sanction[ed] the wrongful acts" occurring in the South by protecting recently emancipated African Americans and their white sympathizers.[105]

The selected excerpts from the congressional record cited within Justice Brennan's partial concurrence in Adickes confirm this conclusion and make clear that Congress sought to do much more than simply extinguish intentional Klan

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100. See Id. at 700–01; City of Canton v. Harris, 489 U.S. 378, 390–93 (1989); see also Doe v. Taylor Indep. Sch. Dist., 15 F.3d 443, 453 (5th Cir. 1994) cert. denied sub nom., Lankford v. Doe, 513 U.S. 815 (1994); Sample v. Diecks, 885 F.2d 1099, 1117–18 (3d Cir. 1989)

101. Pub. L. 42–22 § 1, 117 Stat. 13.

102. CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871); see also Monell, 436 U.S. at 664–702 (recognizing that the legislative history of the Ku Klux Klan Act directly informs the Court's interpretation of § 1983's purposes and effects).

103. Adickes, 398 U.S. at 162–63 (quoting The Civil Rights Cases, 109 U.S. 3, 16 (1883)).

104. Id. at 203–04 (Brennan, J., concurring in part and dissenting in part) (citing Monroe v. Pape, 365 U.S. 167, 183 (1961), overruled on other grounds by Monell, 436 U.S. at 701) (emphasis added).

105. The Civil Rights Cases, 109 U.S. at 16; see Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237 (1979); Monroe, 365 U.S. at 171; Barrows v. Jackson, 346 U.S. 249, 259 (1953).

conspiratorial violence.[106] The Reconstruction Congress's ultimate goal through the Act was to entrench respect for individual constitutional rights "in the daily habits of the American people."[107] Indeed, the "mischief that [§ 1983] was intended to remedy derived not from state action, but from concerted 'private' action that the States were unwilling or unable to cope with."[108] Specifically, Congress aimed to eradicate the "more subtle but potentially more virulent customary infringements of constitutional rights" present in daily life.[109] As Justice Brennan noted, "[i]n view of the purposes these remedies were designed to achieve, § 1983 would be read too narrowly if it were restricted to acts of state officials and those acting in concert with" them.[110] If Congress wanted to narrowly circumscribe the conduct § 1983 could redress, it should have said "every state official and others acting in concert with him."[111] It is not unreasonable to assume that Congress would have explicitly limited § 1983's broad and unqualified language if that was its intended goal.[112]

C. Section 1983's Breadth Is Derived from The Ku Klux Klan Act's Form and Purpose

The fact that Congress engineered § 1983 to be broadly and liberally construed is also evident when Section One is compared to other portions of the Ku Klux Klan Act.[113] As originally drafted, Sections Two through Six of the bill were specifically directed against private acts of violence perpetuated by the Klan;[114] nevertheless, great controversy surrounded those sections in their proposed form.[115] Section Two's broad scope,[116] for example, created fierce debate, which caused it to undergo significant revision.[117] The fact that Section Two's ultimate form, as enacted, jealously constrains its scope—when compared to its initial draft—is a testament to the particular attention Congress gave the Ku Klux Klan Act and

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106. Adickes, 398 U.S. at 222 (Brennan, J., concurring in part and dissenting in part); see also CONG. GLOBE, 42d Cong., 1st Sess. 458–59 (remarks of Rep. Coburn).

107. CONG. GLOBE, 42d Cong., 1st Sess., 339 (remarks of Rep. Kelley).

108. Adickes, 398 U.S. at 218 (Brennan, J., concurring in part and dissenting in part).

109. Id. at 222.

110. Id. at 220 (emphasis added).

111. Id. at 220–21.

112. See id.

113. Compare Ku Klux Klan Act of 1871, Pub. L. 42–22 § 1, 17 Stat. 13, 13 with id. §§ 2–6, 17 Stat at 13–15.

114. Id. §§ 2–6, 17 Stat. at 13–15.

115. See id.; see also Chapman v. Houston Welfare Rights Org. 441 U.S. 600, 610 n.25 (1979); Adickes, 398 U.S. at 220–21, 230 (discussing the development of §§ 2–6 in their modern form).

116. See Ku Klux Klan Act of 1871, Pub. L. 42–22 § 2, 17 Stat. at 13–14.

117. Chapman, 441 U.S. at 610 n.25.

illustrates that the discourse surrounding the Act had meaningful effects.[118] Sections Three through Six also received similar revision and congressional attention.[119]

Notwithstanding significant congressional debate regarding the various provisions of the Ku Klux Klan Act, Section One, "the section with which we are here concerned - - was not changed as [sic] respect[] [to] any feature with which we are presently concerned."[120] Nor was its breadth jealously drawn or narrowly circumscribed.[121] In fact, "[s]ection 1 of the [1871] Act generated the least concern; it merely added civil remedies to the criminal penalties imposed by [its predecessor,] the 1866 Civil Rights Act."[122] The natural interpretation of Section One, given its expansive language and juxtaposition to Sections Two through Six (which were subjected to vigorous debate and substantive modification), is that Congress wanted to provide the courts with broad powers to redress constitutional violations. And the Supreme Court has formally acknowledged this conclusion regarding § 1983's broad powers.[123]

D. Congress's Rejection of the Sherman Amendment Establishes a Floor for Actionable Conduct Under § 1983's Strict Causation Requirement

The Court's opinion in Jett v. Dallas Independent School District sheds significant light on the contours of § 1983's causational requirements.[124] There, the Court noted that "[t]he final aspect of history behind the adoption of present day § 1983 relevant to [our attempt to divine § 1983's outer limits] is the rejection by the 42d Congress of the Sherman Amendment, which specifically proposed the imposition of a form of vicarious liability on municipal governments."[125] As introduced by Senator Sherman, the Amendment allowed courts to apportion liability against municipalities for constitutional injuries inflicted upon persons or property under a theory similar to respondeat superior.

Although the Sherman Amendment successfully navigated senatorial debate, the bill did not make it out of the House of Representatives.[126] In the House, "[o]pposition to the amendment in" its proposed "form was vehement, and ran across party lines, extending to many Republicans who had voted for § 1 of the 1871 [Ku Klux Klan] Act, as well as earlier Reconstruction legislation, including the Civil

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118. See CONG. GLOBE 42d Cong., 1st Sess. 579 (comments of Sen. Trumbull); see also Monroe v. Pape, 365 U.S. 167, 181 (1961), overruled on other grounds by Monell v. Dept. of Soc. Servs. of City of N.Y., 436 U.S. 658, 663 (1978).

119. CONG. GLOBE, 42d Cong., 1st Sess., App. 220 (1871) (remarks of Sen. Thurman); see Chapman, 441 U.S. at 610 n.25; Monroe, 365 U.S. at 172–81; see generally Developments in the Law—Section 1983 and Federalism: II The Background of Section 1983, 90 HARV. L. REV. 1137, 1153–56 (1977).

120. Monroe, 365 U.S. at 181.

121. See Ku Klux Klan Act of 1871, Pub. L. 42–22 § 1, 17 Stat. 13, 13.

122. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 610–11 n.25 (1979); see also CONG. GLOBE, 42d Cong., 1st Sess. 568 (1871) (remarks of Sen. Edmunds).

123. Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 720–32 (1989).

124. Id.

125. Id. at 726; accord Monell v. Dept. of Soc. Servs. of City of N.Y., 436 U.S. 658, 664–90 (1978).

126. Jett, 491 U.S. at 726.

Rights Act of 1866."[127] As noted in Jett, Monell, and City of Canton, the aspects of vicarious liability central to the Sherman Amendment clearly foreclosed the bill's passage.[128] In fact, the overwhelming "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" any claim that the Ku Klux Klan Act contemplated "a form of vicarious liability against municipal governments."[129] Because "[t]he Supreme Court of the United States has decided repeatedly that Congress can impose no duty on a state officer,"[130] the opposition in the House concluded that "creation of a federal law [allowing recovery under a theory] of respondeat superior" would have raised serious federalism concerns.[131] Agreeing with that interpretation, the Court noted that its former precedents "compel[] the conclusion" that the "language of § 1983, [when read against the background of . . . its] legislative history" requires affirmative conduct to preserve the continuity of § 1983's causation requirement.[132] It is for this reason that Justice Brennan concluded for the Monell and City of Canton majorities that Congress did not intend for liability to be apportioned under § 1983 unless a municipality, or its agents, were the driving force of the constitutional injury.[133]

Notwithstanding the Court's interpretation of § 1983's legislative history, its holdings in Jett, Monell, and City of Canton do not limit a plaintiff's ability to redress constitutional injuries against only those state actors who—through their own overt actions—commited a constitutional injury. Properly read, § 1983's legislative history, together with Jett, Monell, and City of Canton, establish a baseline delineating the lowest scienter requirement a plaintiff must establish to satisfy § 1983's strict causal requirements. Although it is not clear whether something "less" than a supervisor's deliberate indifference would fall "above" that baseline, the Court has recognized that deliberate indifference exists well above that floor. Allowing recovery under a pre-Iqbal understanding of supervisory liability does not create an end-run around the rule barring recovery under a theory of respondeat superior.[134] And the Supreme Court recently recognized as much, despite its opinion in Iqbal, when it decided Connick.

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127. Id. at 727 (citation omitted).

128. Id.; City of Canton v. Harris, 489 U.S. 394–95 (1989) (O'Connor, J., concurring and dissenting in part); Monell, 436 U.S. at 674–79.

129. Jett, 491 U.S. at 727–28.

130. CONG. GLOBE, 42d Cong., 1st Sess. 799 (1871).

131. Monell, 436 U.S. at 693.

132. Id. at 691.

133. Id.; City of Canton, 489 U.S. at 392.

134. See City of Canton, 489 U.S. at 392. Establishing that a supervisor's deliberate indifference was the proximate cause—or moving force behind the proximate cause—of a constitutional injury saddles plaintiffs with heavy evidentiary burdens. *Bd. of Cnty. Comm'rs* of Bryan Cnty. v. Brown, 520 U.S. 397, 407–10 (1997).

E. Supervisory Liability Fits Comfortably Within § *1983's Outer Limits* Because Appellate Precedent Establishes That Deliberate Indifference Is Functionally Equivalent to Intentional Conduct

Writing for the Connick majority, Justice Thomas noted that "[d]eliberate indifference is a stringent standard of fault, requiring proof that . . . [an] actor disregarded a known or obvious consequence of his action."[135] Therefore, when an official's act or omission enables a subordinate to violate a citizen's constitutional rights, the official may be "deemed deliberately indifferent."[136] That "policy of inaction"—created by a supervisor's knowledge that inaction will enable constitutional violations to continue—"is the functional equivalent of a decision by the [supervisor] to violate the Constitution."[137] But this is not a new revelation; appellate precedents applying this logic under the Equal Protection Clause in sexual harassment litigation illustrate this point clearly.[138] In Alaska v. EEOC, for example, the Ninth Circuit recognized that the Governor's office "violated the Equal Protection Clause by intentionally refusing to redress the sexual harassment of [the plaintiff] by another employee."[139] And the logic enunciated by the Ninth Circuit in Alaska is not an anomaly.[140] Opinions throughout the circuit courts of appeal recognize that employees may successfully plead "a claim of sexual harassment under the equal protection clause" by "showing that the conscious failure of the employer to protect the plaintiff from the abusive conditions created by fellow employees amount[s] to intentional discrimination."[141] Affirming the validity of supervisory liability would, therefore, neither extend § 1983's outer limits beyond boundaries contemplated by its framers nor ignore the Court's instruction pronounced in Iqbal because deliberate indifference is the "functional equivalent" of "intentional conduct."

F. Arguments in Favor of Iqbal's Understanding of Supervisory Liability Are Unworkable Because They Seek to Overturn Decades of Constitutional Tort Precedent

Although supervisor–defendants argue that Iqbal merely "clarifies" § 1983's capacious boundaries by narrowly defining the parameters of "actionable conduct," that argument is unworkable. Resolving the issue of supervisory liability

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135. Connick v. Thompson, 131 S. Ct. 1350, 1360 (2011) (quoting Bryan Cnty., 520 U.S. at 410).

136. Id.

137. City of Canton, 489 U.S. at 395 (O'Connor, J., concurring and dissenting in part) (emphasis added).

138 See, e.g., Murrell v. Sch. Dist. No. 1, Denver, Colo., 186 F.3d 1238, 1251–52 (10th Cir. 1999); Bohen v. City of E. Chi., Ind., 799 F.2d 1180, 1186–87 (7th Cir. 1986).

139. 564 F.3d 1062, 1069 (9th Cir. 2009) (en banc) (Kozinski, C.J.).

140. Cf. Estate of Davis ex rel. McCully v. City of N. Richland Hills, 406 F.3d 375, 381 (5th Cir. 2005) ("Actions and decisions by officials that are merely inept, erroneous, ineffective, or negligent do not amount to deliberate indifference . . . ."); Robinson v. City of Pittsburgh, 120 F.3d 1286, 1294 (3d Cir. 1997) (Alito, J.), abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 43, 75–76 (2006).

141. Bohen, 799 F.2d at 1187; accord City of Canton, 489 U.S. at 392. Cf. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 & n.14 (1977).

against plaintiffs would effectively overturn scores of Supreme Court precedent—beginning with Monell—central to our nation's civil rights jurisprudence.[142] That is strong medicine.

In support of their position, supervisor–defendants claim that the Equal Protection Clause "cannot be read apart from the original understanding at Philadelphia: The Civil War Amendments did not make th[e] [c]ourt[s] into council[s] of revision, and they did not confer . . . any authority to nullify state laws [or punish actions taken by state officials] which were merely felt to be inimical to the [c]ourt[]s' notion of the public interest."[143] Indeed, "[a]s members of a tripartite institution of government which is responsible to no constituency, and which is held back only by its own sense of self-restraint," courts must refrain from holding that a state actor's conduct "denies equal protection simply because . . . it could have [been] fairer."[144] Framed in this context, the task for the judiciary—according to the arguments embodied within the position taken by supervisor–defendants—becomes "one of sorting the legislative distinctions which are acceptable from those which involve invidiously unequal treatment."[145] Notwithstanding its opinion in Iqbal, however, that is an exercise the Supreme Court already completed through Monell and its progeny.

Although stare decisis is not an inexorable command, it is "of fundamental importance to the rule of law"[146] and carries "such persuasive force that [the Supreme Court] ha[s] always required a departure from precedent to be supported by some 'special justification.'"[147] The fact that Iqbal does not provide the special justification required to overrule its precedents is plainly obvious. It neither "gauge[d] the respective costs of reaffirming" Monell and City of Canton, nor did it determine whether: (1) the holdings articulated through those opinions are unworkable;[148] (2) the rules presented in those opinions are subject to special reliance that would cause a undue hardship if overruled;[149] (3) related opinions have abandoned the doctrine established under those opinions;[150] or (4) the circumstances supporting those decisions have significantly changed, or are now interpreted so differently that their application or justification is meaningless.[151] To accept the arguments proffered by supervisor–defendants would, therefore, require courts to

142. See OSU Student Alliance v. Ray, 699 F.3d 1053, 1073 n.15 (2012), cert. denied, 134 S. Ct. 70 (2013).

143. Trimble v. Gordon, 430 U.S. 762, 778 (1977) (Rehnquist, J., dissenting).

144. Id. at 779 (citing United States v. Butler, 297 U.S. 1, 79 (1936) (Stone, J., dissenting)).

145. Id.

146. Welch v. Tex. Dept. of Highways & Pub. Transp., 483 U.S. 468, 494 (1987).

147. Payne v. Tennessee, 501 U.S. 808, 842 (1991) (quoting Arizona v. Rumsey, 467 U.S. 203, 212 (1984)).

148. Planned Parenthood of Se. Penn. v. Casey, 505 U.S. 833, 854–55 (1992) (citing Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965)).

149. See, e.g., United States v. Title Ins. & Trust Co., 265 U.S. 472, 486 (1924).

150. Casey, 505 U.S. at 855 (citing Patterson v. McLean Credit Union, 491 U.S. 164, 173–74 (1989)).

151. See, e.g., Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting), overruled in part on other grounds by Helvering v. Mountain Producers Corp., 303 U.S. 376 (1938).

acknowledge that the Court's opinion in Iqbal overruled—or significantly abrogated—Monell and its progeny. To date, no court has accepted such a bold interpretation, and no court should.

CONCLUSION

While it may be misconceived, supervisory liability is by no means a "misnomer." The fact that the doctrine enables plaintiffs to redress constitutional injuries well within § 1983's corrective powers underscores this proposition. Despite Iqbal's conclusory remarks to the contrary, prior decisions issued by the Supreme Court establish that § 1983's strict causation requirement is satisfied so long as a supervisor's conduct exists as the proximate cause—or the moving force behind the proximate cause—of a constitutional injury. And the Court's opinions in Monell and City of Canton, as well as § 1983's legislative history, make clear that a supervisor's deliberate indifference satisfies that requirement. Any notion that Iqbal abrogated this principle is belied by the holding in Connick, wherein the Court recognized that deliberate indifference is functionally equivalent to intentional conduct.

"Whatever else can be said about Iqbal, and certainly much can be said,"[152] courts should conclude that constitutional tort plaintiffs may proceed against supervisors who—through their affirmative conduct or deliberate indifference—create, promulgate, implement, or in some other way possess responsibility for a policy or practice that forms the proximate cause of a plaintiff's injury. Because the "means of establishing deliberate indifference will vary given the facts of the case," courts "need not rely on any particular factual showing."[153] They should view allegations in light of the totality of the circumstances: "The operative inquiry is whether the facts suggest that the policymaker's inaction was the result of a 'conscious choice' rather than mere negligence."[154] To hold otherwise would Balkanize the Supreme Court's constitutional tort precedent and undoubtedly foster unaccountable government supervisors.

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152. Dodds v. Richardson, 614 F.3d 1185, 1199 (10th Cir. 2010).

153. Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 128 (2d Cir. 2004) (Sotomayor, J.).

154. Id. (citing City of Canton v. Harris, 489 U.S. 378, 389 (1989)).