

A Fresh Look at a Stale Doctrine: How Public Policy and the Tenets of Piercing the Corporate Veil Dictate the Inapplicability of the Intracorporate Conspiracy Doctrine to the Civil Rights Arena

By Barry Horwitz*

I. INTRODUCTION

¶1 The Reconstruction period immediately following the Civil War was a trying time for our nation. The Confederate states paid a price for their secession, largely in lost political power. They were forced to submit to the will of the Union on issues such as the adoption of the Civil War Amendments. The white people of the South struggled to maintain their way of life; many joined the Ku Klux Klan, which used violent tactics to repress the newly freed slaves.¹ In response to this threat, Congress passed the Ku Klux Klan Act, also known as the Civil Rights Act of 1871 (the 1871 Act). The 1871 Act aimed to thwart those who would deprive former slaves of their newly created federal rights.²

¶2 Section 2 of the 1871 Act comprised two provisions, one creating criminal penalties and the other establishing civil remedies for conspiracies to deprive others of their rights. In 1883, the Supreme Court struck down the criminal provision of section 2, holding it unconstitutional as applied to private entities³ (where state action is not alleged) because “the Fourteenth Amendment does not provide [Congress with] authority to proscribe exclusively private conspiracies.”⁴ After this decision, the civil conspiracy provision of the 1871 Act “lay dormant for [70 years] since people simply assumed it was unconstitutional as well.”⁵ The civil provision was revived in 1971, however, when the Supreme Court held private conspiracies actionable if they are motivated by a “class-based, invidiously discriminatory animus.”⁶ A swarm of litigation followed, in which plaintiffs sought damages under the civil conspiracy section⁷ for injuries arising from

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¹ ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863-1877, at 425 (1988).

² See *Harrison v. KVAT Food Mgmt.*, 766 F.2d 155, 157-58 (4th Cir. 1985); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 164 (1970).

³ *United States v. Harris*, 106 U.S. 629, 639-40 (1883).

⁴ *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 833 (1983).

⁵ Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1017-18 (2002).

⁶ *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971).

⁷ This section is now codified at 42 U.S.C. § 1985. See *Novotny v. Great Am. Fed. Sav. & Loan Ass’n*, 442 U.S. 366, 370 (1979).

rights deprivations by purely private entities. Many of the defendants in these cases were corporations.⁸

¶13 Most of the cases against corporate defendants could have been dismissed due to a lack of state action because the 1871 Act does not cover wholly private conspiracies.⁹ Despite this avenue for dismissal, a large number of cases were disposed of by resorting to a policy only recently introduced to civil rights law: the intracorporate conspiracy doctrine. The doctrine holds that agents and employees of a corporation are acting on its behalf when engaging in business decisions; thus, since a conspiracy requires “a meeting of the minds,”¹⁰ and since the acts of the separate people are attributed to the single corporate entity, there is but a single legal actor.¹¹ No conspiracy can exist.

¶14 The intracorporate conspiracy doctrine was originally used in the field of antitrust law to shield a corporation from liability for its agents and officers “conspiring” to fix prices under section 1 of the Sherman Antitrust Act.¹² In a seminal antitrust case, the Fifth Circuit Court of Appeals reasoned that since the agents all work for the same entity, they could hardly be accused of conspiring for debating their own pricing policy. Addressing the need for open policy discussions within corporate bodies, the court created the intracorporate conspiracy doctrine by holding that the agents and officers of a corporation cannot be said to conspire under section 1 of the Sherman Act.¹³ While the court never used the term “intracorporate,” it recognized that a basic requirement in conspiracy law is “two [or more] persons or entities” and that “[a] corporation cannot conspire with itself any more than a private individual can.”¹⁴ The intracorporate conspiracy doctrine’s extension to the civil rights context has been heavily criticized in law review literature¹⁵ because, when applied to agents of municipal entities, the doctrine immunizes such agents from liability for discriminatory conspiracies aimed at depriving others of their constitutional rights.¹⁶

¶15 Little attention, however, has been paid to the culprit behind the doctrine: the corporate entity itself.¹⁷ This artificial “person” serves an important purpose: it allows us

⁸ See, e.g., *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66, 70 (2d Cir. 1976); *Doherty v. Am. Motors Corp.*, 728 F.2d 334, 339-40 (6th Cir. 1984); *Dombrowski v. Dowling*, 459 F.2d 190, 196 (7th Cir. 1972); *Baker v. Stuart Broad. Co.*, 505 F.2d 181, 183 (8th Cir. 1974).

⁹ There is a caveat to this: wholly private conduct is covered, but only when the deprived rights are protected against private infringement. See *infra* notes 71-75 and accompanying text. However, this caveat almost never applies to corporations because a corporation would never realistically seek to deprive people of those few rights protected against private infringement, such as the right to be free from “the badges and incidents of slavery” and the right to interstate travel. *Griffin*, 403 U.S. at 105-06.

¹⁰ *Ameen v. Merck & Co.*, 226 Fed. App’x 363, 371 (2007).

¹¹ See *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952).

¹² See *id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See, e.g., Geoff Lundeen Carter, *Agreements Within Government Entities and Conspiracies Under Section 1985(3) - A New Exception to the Intracorporate Conspiracy Doctrine?*, 63 U. CHI. L. REV. 1139 (1996) (arguing that the legislative history of the 1871 Act dictates the doctrine’s inapplicability to § 1985(3)); Catherine E. Smith, *(Un)Masking Race-Based Intracorporate Conspiracies Under the Ku Klux Klan Act*, 11 VA. J. SOC. POL’Y & L. 129 (2004) (arguing that the text of the 1871 Act includes conspiracies by agents of both private and municipal corporations).

¹⁶ See *Rebel Van Lines v. Compton*, 663 F. Supp. 786, 793-94 (C.D. Cal. 1987).

¹⁷ It has been mentioned before briefly. See *Cole v. Univ. of Hartford*, 391 F. Supp. 888, 893 (D. Conn. 1975); Note, *Intracorporate Conspiracies Under 42 U.S.C. § 1985(c): The Impact of Novotny v. Great American Federal Savings & Loan Association*, 13 GA. L. REV. 591, 616-17 (1979).

to attribute the actions of the officers and agents of a corporation to the single corporate entity.¹⁸ The corporate entity also enables the bedrock principle of corporate law: limited liability.¹⁹

¶6 In the early days of corporate law, a common law doctrine evolved to combat abuse of the corporate entity. This doctrine allowed plaintiffs to hold shareholders directly liable for the actions of the corporation where it was shown that the corporate entity was used for unjust ends. Since it directs courts to disregard the corporate entity, legal scholars have long referred to the doctrine as “piercing the corporate veil.”²⁰

¶7 This Comment contends that the intracorporate conspiracy doctrine should never have been applied in the civil rights arena in light of the tenets of the veil-piercing doctrine, which holds that the corporate entity should be disregarded when it is abused or asserted for unjust ends.²¹ Consequently, this Comment argues that no justification exists for extending the doctrine to agents of municipal corporate entities, who were, in fact, one of the intended targets of the 1871 Act. In most civil rights cases where the intracorporate conspiracy doctrine is now applied, the municipal corporate entity is asserted to shield its agents from liability for alleged conspiracies aimed at depriving plaintiffs of their rights.²² The entity is thus asserted for the unjust end of negating liability before a court can even hear the facts of a case. The veil-piercing doctrine should negate the intracorporate conspiracy doctrine with regard to civil rights claims because Congress never intended to allow an intracorporate exception to the 1871 Act.²³

¶8 Part II of this Comment examines the history of civil rights conspiracy law, including the impetus for the Civil Rights Act of 1871 and the case law that has engendered this imbroglio.²⁴ Part III outlines the concept of the artificial corporate entity.²⁵ Part IV describes the intracorporate conspiracy doctrine, beginning with its origins in antitrust law and continuing to its improper application to corporations under civil rights conspiracy claims.²⁶ Part IV then notes the doctrine’s exceptions and subsequent extension to municipal corporate entities.²⁷ Lastly, Part IV discusses a trend among the district courts of applying the intracorporate conspiracy doctrine to claims under 42 U.S.C. § 1983.²⁸ Part V explains the doctrine known as “piercing the corporate

¹⁸ See RESTATEMENT (SECOND) OF AGENCY § 1 (1958). This is a basic principle of agency law. The acts of the agent bind the entity so that the principal may be liable for an agent’s unlawful act. *Id.*

¹⁹ See *infra* notes 95-96 and accompanying text.

²⁰ WILLIAM MEADE FLETCHER ET AL., CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 41 (perm. ed., rev. vol. 1999). See *infra* Part V.

²¹ See *infra* Part V.

²² See, e.g., *Lieberman v. Gant*, 474 F. Supp. 848, 875 (D. Conn. 1979), *aff’d*, 630 F.2d 60 (2d Cir. 1980); *Buschi v. Kirven*, 775 F.2d 1240 (4th Cir. 1985); *Hilliard v. Ferguson*, 30 F.3d 649, 653 (5th Cir. 1994); *Hull v. Cuyahoga Valley Bd. of Educ.*, 926 F.2d 505, 509-10 (6th Cir. 1991); *Wright v. Ill. Dep’t of Children & Family Servs.*, 40 F.3d 1492, 1508-09 (7th Cir. 1994); *Runs After v. United States*, 766 F.2d 347, 354 (8th Cir. 1985); *Dickerson v. Alachua County Comm’n*, 200 F.3d 761, 768-70 (11th Cir. 2000); *Gladden v. Barry*, 558 F. Supp. 676, 679 (D.D.C. 1983); *Shaw v. Klinkhamer*, No. 03-6748, 2005 U.S. Dist. LEXIS 14483 (N.D. Ill. July 1, 2005); see also *infra* Part VI.A.2 (discussing *Dickerson* and *Shaw* in depth).

²³ See *infra* Part VI.A.1.

²⁴ See *infra* Part II.

²⁵ See *infra* Part III.

²⁶ See *infra* Part IV.A & B.

²⁷ See *infra* Part IV.C & D.

²⁸ See *infra* Part IV.E.

veil” and analyzes its general premise: disregarding the corporate entity in order to uphold public policy and achieve justice.²⁹ Part VI then notes the dissonance between the veil-piercing doctrine and the intracorporate conspiracy doctrine and argues that Congress did not contemplate the latter in passing the 1871 Act because such an exception would negate its purpose.³⁰ Finally, Part VI suggests that the intracorporate conspiracy doctrine is inconsistent with civil rights law and ends by proposing a limited standard by which courts might apply the intracorporate exception in civil rights cases to ensure that its reach is not broader than Congress intended.³¹

II. THE HISTORY OF CIVIL RIGHTS CONSPIRACY LAW

A. *The Civil Rights Act of 1871*

1. Reconstruction and the Rise of the Ku Klux Klan

¶9 In the South, the end of the Civil War gave rise to an equally tumultuous era, especially for former slaves.³² While many white Southerners were willing to acquiesce³³ to the passage of the Thirteenth,³⁴ Fourteenth³⁵ and Fifteenth Amendments,³⁶ they were determined “to define in their own way the meaning of freedom.”³⁷

¶10 In 1866, six white men established the Ku Klux Klan (Klan); although its founders claimed the group was for their own amusement and “purely social,”³⁸ it became much more. The Klan transitioned “from pranks to systematic brutality by 1867 [and] members routinely resorted to violence.”³⁹ While it had no organized structure, the Klan and kindred organizations were “deeply entrenched in nearly every Southern State” by 1870.⁴⁰ As the Klan’s message of white supremacy spread across the South, its membership escalated to immense proportions.⁴¹

²⁹ See *infra* Part V.

³⁰ See *infra* Part VI.A.

³¹ See *infra* Part VI.B & C.

³² FONER, *supra* note 1, at 119-23.

³³ *Id.* at 189.

³⁴ The Thirteenth Amendment prohibited slavery. U.S. CONST. amend. XIII, § 1.

³⁵ The Fourteenth Amendment furthered many objectives; section 1 is arguably the most important and most litigated law in the nation’s history. Sanford Levinson, *Why It’s Smart to Think About Constitutional Stupidities*, 17 GA. ST. U. L. REV. 359, 364 (2000). Section 1 extended the Due Process clause to individual state action and prohibited states from passing or enforcing laws that (1) “abridge the privileges or immunities of citizens,” or (2) “deny any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1. Section 5 of the Fourteenth Amendment is important to our discussion because it gave Congress the power to enforce the Amendment through appropriate legislation. *Id.* § 5.

³⁶ The Fifteenth Amendment granted suffrage to all males regardless of “race, color, or previous condition of servitude.” U.S. CONST. amend. XV, § 1.

³⁷ FONER, *supra* note 1, at 120. Foner quotes a Freedman’s Bureau agent: “‘Southern whites . . . are quite indignant if they are not treated with the same deference that they were accustomed to’ under slavery.” *Id.* While white Southerners accepted the federal government’s decrees of new rights for former slaves, they actively sought to thwart and deny these rights, ensuring that non-whites were treated as second-class citizens. *Id.* at 429-30.

³⁸ WYN CRAIG WADE, *THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA* 31-34 (1987). The original members maintained that the Klan was created merely “to have fun, make mischief, and play pranks on the public.” *Id.*

³⁹ SALLY HADDEN, *SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS* 207 (2001).

⁴⁰ See FONER, *supra* note 1, at 425.

⁴¹ *Collins v. Hardyman*, 341 U.S. 651, 662 (1951) (noting the Reconstruction-era Klan had a membership of roughly 550,000, which, at the time, included nearly all Southern white males).

2. The Klan's Terrorist Tactics

¶11 The Klan became one of the nation's earliest terrorist groups⁴² by engaging in brutal acts of violence in order to intimidate its victims into submission.⁴³ Ruling by fear, the Klan assaulted and murdered blacks and anyone who supported their freedom;⁴⁴ the Klan ultimately "aimed to regulate blacks' 'status in society.'"⁴⁵ Despite the patent illegality of their actions, Klan members were rarely subject to criminal prosecution.⁴⁶ Not only was the public unwilling to cooperate with authorities, but local authorities were often members of the Klan themselves.⁴⁷ Given this backdrop of lawlessness, Congress decided to take action.⁴⁸

3. Congress Seeks to Limit the Klan's Effectiveness

¶12 In response to the Klan's riotous tactics, Congress passed the 1871 Act, commonly known as the Ku Klux Klan Act.⁴⁹ Section 1 of the 1871 Act is now codified at 42 U.S.C. § 1983⁵⁰ and section 2 is codified at 42 U.S.C. § 1985.⁵¹ Section 2 created criminal penalties and provided civil remedies against conspiracies to: (1) prevent public officials from performing their duties; (2) obstruct justice; or (3) deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."⁵²

⁴² SOUTHERN POVERTY LAW CENTER, *KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE* 6 (5th ed. 1997).

⁴³ See FONER, *supra* note 1, at 426 (noting that the Klan "aimed to . . . restore racial subordination in every aspect of Southern life").

⁴⁴ *Id.* at 428. Some acts included the assault of a crippled Northerner who taught blacks, the lynching of an Irish teacher from a black school (along with four black men), and the murder of a freedman for his size and ability to read and write. *Id.*

⁴⁵ *Id.* at 430. The violence was most commonly directed at blacks who refused to adhere to the social caste formerly assigned to them as slaves. For example, "victims included blacks accused of speaking disrespectfully to whites, [or those] who did not yield the sidewalk to white passersby." *Id.*

⁴⁶ See *id.* at 434-35.

⁴⁷ *Id.*

⁴⁸ While Congress sought to help those attacked by the Klan and to end the Klan's reign of terror, the passage of the 1871 Act could not have been entirely altruistic. A primary purpose of the 1871 Act was to prevent "[c]onspiracies to deprive citizens of the right to vote." See FONER, *supra* note 1, at 454; see *infra* notes 170-172 and accompanying text. Citizens who were typically attacked by the Klan and denied their voting rights included blacks and their white sympathizers—both of whom were loyal to the Republican Party, which held the majority in Congress at the time. See *The Ku-Klux Bill*, HARPER'S WEEKLY, Apr. 15, 1871, at 330.

⁴⁹ Civil Rights Act of April 20, 1871, ch. 22, 17 Stat. 13 (1871) (current version at 42 U.S.C. §§ 1983-1986 (2000)).

⁵⁰ *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 164 (1970). Section 1983 provides, in pertinent part:

Every person who, under color of [law], subjects, or causes to be subjected, any [person within the jurisdiction of the United States] to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . .

42 U.S.C. § 1983 (2000).

⁵¹ *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 442 U.S. 366, 370 (1979).

⁵² 42 U.S.C. § 1985 (2000). The most widely used provision of § 1985—subsection 3—provides that if two or more persons . . . conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws [and] if one or more of the persons engaged [in the conspiracy] do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured . . . or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured

B. *Judicial Decisions Limiting the Scope of the 1871 Act*

¶13 The 1871 Act did not go unchallenged for long. In 1883, the Supreme Court struck down the criminal provisions, holding them unconstitutional in *United States v. Harris*.⁵³ After conceding that Congress had the authority to enforce the Fourteenth Amendment through appropriate legislation, the Court held that Congress exceeded its authority in proscribing private conspiracies since the Fourteenth Amendment protects only against state action.⁵⁴ While the civil provision remained, it fell into virtual disuse because it, too, was presumed to be constitutionally deficient.⁵⁵ Thus, the Supreme Court did not hear a case arising under the civil provision until 1951. There, the Court expressly held that successful claims under § 1985 require a showing of state action.⁵⁶ The civil provision was thereafter considered devoid of practical purpose because “few if any plaintiffs can allege or prove [a state action] causal chain.”⁵⁷

C. *Griffin v. Breckenridge and § 1985’s Applicability to Private Conspiracies*

¶14 In 1971, the Court in *Griffin v. Breckenridge* revived civil rights conspiracy jurisprudence when it broadly declared private conspiracies actionable. When presented with *Griffin’s* facts, the Court found *Collins v. Hardyman* unduly restrictive⁵⁸ because some federal rights are protected from private infringement.

¶15 The plaintiffs in *Griffin*—black citizens—were driving along the highway in Mississippi when they were stopped by the white defendants, who assaulted the plaintiffs, held them at gunpoint and threatened to kill them.⁵⁹ The plaintiffs sued, claiming the defendants deprived them of the right to be free from “the badges and incidents of slavery” and of the right to interstate travel.⁶⁰ Believing this was just the type of conduct the 1871 Act intended to prohibit, the Court overruled *Collins* and held that § 1985(3) can reach private action.⁶¹ However, to allay fears that it would be interpreted “as a general

or deprived may have an action for the recovery of damages . . . against any one or more of the conspirators.

Id.

⁵³ *United States v. Harris*, 106 U.S. 629, 637-38 (1883).

⁵⁴ *Id.* at 637-39. The Court reinforced this holding in 1887. *Baldwin v. Franks*, 120 U.S. 678, 689-90 (1887).

⁵⁵ Beermann, *supra* note 5, at 1017-18.

⁵⁶ *Collins v. Hardyman*, 341 U.S. 651, 655 (1951).

⁵⁷ Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1356 (1952). This limited interpretation would not have allowed claims against members of the Klan for their riotous conspiratorial tactics, which were often effectuated without state involvement. See FONER, *supra* note 1, at 430 (noting the Klan engaged in vigilante justice). Thus, one of the original purposes of the statute was frustrated. However, the other purpose of preventing those with state authority from abusing their power was still valid. In Part VI, I argue that the statute also targeted Klan members and sympathizers who held state office and used their authority to deprive blacks of their federal rights. See *infra* Part VI.A.1. Today, the majority of defendants in § 1985(3) claims are agents and officers of state entities in employment discrimination cases. See, e.g., cases cited *supra* note 22.

⁵⁸ *Griffin v. Breckenridge*, 403 U.S. 88, 95-96 (1971).

⁵⁹ *Id.* at 90-91.

⁶⁰ *Id.* at 105-06.

⁶¹ *Id.* at 95-96. The Court stated that to recover under § 1985:

[A] complaint must allege that the defendants did (1) “conspire . . .” (2) “for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws.” It must then assert that one

federal tort law,” the Court held that the section’s use of the term “equal protection” requires that the conspiracy be motivated by “some racial, or perhaps otherwise class-based, invidiously discriminatory animus.”⁶²

¶16

In concluding that the private conduct was actionable, the Court noted that the plaintiffs’ deprived rights—the right to be free from the “badges and incidents of slavery” and the right to interstate travel—are protected against private infringement as a “privilege[] of national citizenship” and by the Thirteenth Amendment, respectively.⁶³ Thus, while the Court stated that its inquiry must simply identify “a source of congressional power to reach the private conspiracy alleged by the complaint,”⁶⁴ it did not expressly hold that the deprived rights’ protection against private infringement is essential for recovery. Thus, *Griffin* incorrectly led many to believe that § 1985 covered all forms of purely private conduct.⁶⁵ After *Griffin*, numerous lawsuits were brought against corporations under § 1985 in which no state action was alleged. While these cases had no merit and should have been dismissed for want of state action, inventive lawyers successfully asserted intracorporate immunity instead.⁶⁶

D. Later Judicial Decisions Limiting the Scope of § 1985: Novotny, Scott, and Bray Provide Clarification

¶17

While *Griffin* expanded § 1985 to include private conduct, the Court gradually limited the section’s scope over the next few decades. After *Griffin*, the Court considered § 1985 in a 1979 case where the plaintiff claimed to have been deprived of rights created by Title VII of the Civil Rights Act of 1964 (Title VII).⁶⁷ Here, the Court held that § 1985 could not be used to vindicate rights found in Title VII, for allowing plaintiffs to do so would alter the “short and precise time limitations of Title VII.”⁶⁸ This might

or more of the conspirators (3) did, or caused to be done, “any act in furtherance of the object of [the] conspiracy,” whereby another was (4a) “injured in his person or property” or (4b) “deprived of having and exercising any right or privilege of a citizen of the United States.”

Id. at 102-03.

⁶² *Id.* at 102.

⁶³ *Id.* at 105-06.

⁶⁴ *Id.* at 104.

⁶⁵ See, e.g., *Eggleston v. Prince Edward Volunteer Rescue Squad, Inc.*, 569 F. Supp. 1344, 1352 (E.D. Va. 1983) (noting, in a suit against a private corporate defendant, that state action is not necessary to state a claim under § 1985). As will be shown, however, § 1985 protects against private conduct only when the deprived rights are so protected. See *infra* notes 71-75 and accompanying text.

⁶⁶ See cases cited *supra* note 8.

⁶⁷ *Novotny v. Great Am. Fed. Sav. & Loan Ass’n*, 442 U.S. 366, 372 (1979). The plaintiff alleged that his termination was due to his opposition to the Association’s unspoken policy of subverting the opportunities of female employees. *Id.* at 368-369. In this case, the Supreme Court expressly reserved the question of whether the intracorporate conspiracy doctrine extends to § 1985. *Id.* (stating “[for] the purposes of this question, we assume but certainly do not decide that the directors of a single corporation can form a conspiracy within the meaning of § 1985(3)”).

⁶⁸ *Id.* at 375-76. The Court noted that § 1985 “provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates.” *Id.* at 372. The majority reserved judgment on whether the deprived rights must stem from the Constitution. *Id.* at 370 n.6. Since this issue is not resolved and is beyond the scope of this discussion, this Comment assumes that rights claimed to be deprived under § 1985 can only be found in the Constitution.

allow plaintiffs to “completely bypass the administrative process, which plays such a crucial role in the scheme established by Congress.”⁶⁹

¶18

In 1983, the Court considered the section’s applicability to a conspiracy by union members to deprive non-members of their freedom of association.⁷⁰ The Court held such a conspiracy is not actionable under § 1985 because a deprivation of First Amendment rights can only be accomplished through state action.⁷¹ This holding demonstrates that § 1985 was never meant to reach all forms of private conspiracy. Recovery under the section for private conspiracies depends on the nature of the underlying deprived rights: if the right is constitutionally protected from infringement by private actors, then the private conspiracy is actionable.⁷² If the right is only protected against state infringement, such as the freedoms of speech and religion or equal protection rights, then private conspiracies are not actionable since Congress lacks the authority to pass such broad legislation.⁷³ Section 1985’s basis in the Fourteenth Amendment⁷⁴ supports the notion that the conduct it covers is generally state-sponsored.⁷⁵ This state action requirement allows us to frame the dispute; this Comment argues against applying the intracorporate conspiracy doctrine to claims under § 1985 and to conspiracy claims under § 1983.⁷⁶ Claims under § 1983 require action “under color of [law],”⁷⁷ while claims under § 1985, as we have just seen, require state action unless the underlying deprived right is protected against private conduct. In passing the 1871 Act, Congress aimed to prevent the Klan’s conspiratorial deprivations in any way possible. In Part VI, I argue that one of the Klan’s most effective tactics was using the power of the state to deprive freedmen of their rights by obstruction of justice or simple inaction by Klan members and sympathizers who held state office; thus, applying the intracorporate conspiracy doctrine

⁶⁹ *Id.* at 376. This was a sound decision given the detailed system Congress established to handle Title VII claims. Allowing such claims under § 1985 would obfuscate the distinctions between the statutes, making it difficult for lower courts to correctly apply the law. *See id.* at 373-75 (noting the distinctions).

⁷⁰ *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 833 (1983). In *Scott*, the plaintiffs—non-union workers—were assaulted and beaten by a group of union workers over their non-union status. *Id.* at 827-28.

⁷¹ *Id.* at 830 (stating “an alleged conspiracy to infringe First Amendment [or equal protection] rights is not a violation of § 1985(3) unless it is proved that the State is involved” or affected).

⁷² *See Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). For example, the Klan’s violence towards blacks who refused to adhere to their former subordinate caste would be actionable because the blacks’ right to be free from the badges of slavery is protected from private action under the Thirteenth Amendment. *Id.* at 105; *see supra* note 45 and accompanying text.

⁷³ *See supra* note 4 and accompanying text.

⁷⁴ *District of Columbia v. Carter*, 409 U.S. 418, 423 (1973) (noting that “the primary purpose of the 1871 Act was ‘to enforce the Provisions of the Fourteenth Amendment’” (quoting the title of the 1871 Act itself)).

⁷⁵ *Id.* (noting that “the Fourteenth Amendment itself ‘erects no shield against merely private conduct, however discriminatory or wrongful’” (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948))).

⁷⁶ While the term conspiracy is not in the text of § 1983 and proving a conspiracy is not required under § 1983 as it is with § 1985, courts have recognized § 1983 conspiracy claims as a “legal mechanism through which to impose liability on each and all of the [d]efendants without regard to the person doing the particular act.” *Nesmith v. Alford*, 318 F.2d 110, 126 (5th Cir. 1963). To prove a conspiracy claim under § 1983, plaintiffs “must establish (1) the existence of a conspiracy involving state action and (2) a deprivation of civil rights in furtherance of the conspiracy.” *Pfannstiel v. Marion*, 918 F.2d 1178, 1187 (5th Cir. 1990). *See supra* note 50 for the text of section 1983.

⁷⁷ 42 U.S.C. § 1983 (2000).

in cases under these sections will prevent claims Congress intended to permit against defendants who conspired to abuse their state power.⁷⁸

¶19 The Court affirmed this interpretation of the section’s coverage in its most recent § 1985 case.⁷⁹ The plaintiffs in that case were abortion clinics and “organizations that support legalized abortion,” who sued to enjoin the defendants—members of Operation Rescue who organized antiabortion protests—from “trespass[ing] on, and obstruct[ing] general access to, the premises of abortion clinics.”⁸⁰ While the claim failed for lack of state action,⁸¹ the Court held that “women seeking abortion” are not a protected class under § 1985.⁸² Before discussing the intracorporate conspiracy doctrine, it is prudent to summarize the doctrine’s basis: the nature of the corporate entity.

III. THE ARTIFICIAL CORPORATE ENTITY: THE ENTITY AS A “PERSON”

¶20 The traditional theory of corporate law holds “that a corporation is a fictitious, artificial, legal person or juristic entity created by proper authority.”⁸³ This statement should be broken down for the sake of understanding.

¶21 For the basics of corporate personality, I rely on Arthur Machen’s 1911 article of the same name⁸⁴ because it is one of the earliest “influential” treatises arguing that corporate entities are real and not fictions.⁸⁵ The first premise of corporate personality is “that a corporation is an entity distinct from the sum of the members that compose it.”⁸⁶ The second premise is “that this entity is a person.”⁸⁷ Machen, however, concludes that “the essence of juristic personality does not lie in the possession of rights but in subjection to liabilities.”⁸⁸ This is true because the law can only enforce or protect rights

⁷⁸ FONER, *supra* note 1, at 434-35 (stating “Much Klan activity took place in those Democratic counties where local officials either belonged to the organization or refused to take action against it”); *see infra* Part VI.A.1.

⁷⁹ *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 274 (1993).

⁸⁰ *Id.* at 266.

⁸¹ *Id.* at 278 (noting that the right to an abortion is not protected against private infringement).

⁸² *Id.* at 269. The *Scott* Court was unsure if any class other than “Negroes and those who championed their cause” would qualify as protected. *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 836 (1983) (noting “it is a close question”). Despite the Court’s uncertainty, however, lower courts have extended protection to race, gender, “religion, ethnicity [and] political loyalty.” *Volk v. Coler*, 845 F.2d 1422, 1434 (7th Cir. 1988).

⁸³ H. HENN & J. ALEXANDER, *LAW OF CORPORATIONS* § 78 (3d ed. 1983). The act of incorporation was originally understood as a privilege granted by the government. *See Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 637-38 (1819). In discussing this point, Chief Justice Marshall noted that “[t]he objects for which a corporation is created are universally such as the government wishes to promote.” *Id.* at 637. The Chief Justice might be surprised to find that the corporate entity may now be used to shield from liability those who conspire to deprive others of their civil rights.

⁸⁴ Arthur Machen Jr., *Corporate Personality (I)*, 24 HARV. L. REV. 253 (1911).

⁸⁵ Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 220 (1986). Also, Machen was an accomplished corporate law professor who published a widely cited treatise on the subject in 1908. Alfred F. Conrad, *Cook and the Corporate Shareholder: A Belated Review of William W. Cook’s Publications on Corporations*, 93 MICH. L. REV. 1724, 1733 n.61 (1995).

⁸⁶ Machen, *supra* note 84, at 258. This premise is basic to modern corporate law. *Id.* at 259. The corporation, therefore, functions as a distinct legal entity under the law, with its own rights and responsibilities apart from those of the employees and officers who are essential to its existence.

⁸⁷ *Id.* at 258.

⁸⁸ *Id.* at 263-64 (noting “Those beings are ‘persons’ in law to whom the law both can and does address its commands. . . . The essential prerogative of man does not lie in rights, but in duties. Every system of law, from the Decalogue down, is founded upon thou-shalt-not’s, addressed to beings capable of understanding the command, of feeling the penalty, and of exercising a will to act accordingly.”).

by punishing the “person” who violates those rights—“an idle proceeding unless the violator is a moral being capable of being deterred by the threat of punishment.”⁸⁹

¶22 For this reason, Machen argues that society regards the corporate entity “as having rights and liabilities for the sake of convenience; but . . . men of flesh and blood [must] bear the burdens attributed by the law to the corporate entity.”⁹⁰ Thus, Machen concludes that corporate personhood—the idea of the corporation as comparable to a real person—“is either a mere metaphor or is a fiction of law.”⁹¹ Machen later notes that this “fiction” of corporate personhood also applies to the state as a municipal corporation.⁹²

¶23 It is important, then, to distinguish between the corporate entity and the corporate “person”—the former being real, while the latter is “fictitious” or, more aptly, artificial.⁹³ There is a danger, however, in writing off the corporate entity as a mere fiction because it serves the essential purpose of separating the corporate investors from their investment.⁹⁴ This separateness allows the doctrine of limited liability—the fundamental principle of modern corporate law⁹⁵—to protect investors from the corporation’s liabilities.⁹⁶ In the case of municipal corporations, the entity allows states to act on its citizens’ behalf by isolating and delegating state functions to the appropriate departments and agencies. In addition, the municipal entity is currently used to immunize conspirators from liability for civil rights deprivations.

IV. THE INTRACORPORATE CONSPIRACY DOCTRINE AND CIVIL RIGHTS

A. *The Origins of the Intracorporate Conspiracy Doctrine*

¶24 The intracorporate conspiracy doctrine emerged in 1952 in *Nelson Radio & Supply Co. v. Motorola, Inc.*,⁹⁷ a case brought under section 1 of the Sherman Antitrust Act.⁹⁸

⁸⁹ *Id.* Thus, “the law can speak only to the human beings who compose [the corporation] or who manage and control its destinies.” *Id.* at 265.

⁹⁰ *Id.* at 266. This emphasizes the importance of looking to the acts of individual corporate agents rather than the corporate entity.

⁹¹ *Id.*

⁹² Arthur Machen Jr., *Corporate Personality (II)*, 24 HARV. L. REV. 347, 348 (1911).

⁹³ The corporate entity is real in that it exists. However, a corporation cannot exist as a real person because it lacks the independent will of human beings, the only natural legal entities. Thus, the corporate entity is artificial because, while it exists, it is a man-made conception that lacks the inherent traits of human beings.

⁹⁴ For this reason, I do not refer to corporate or municipal entities as “fictions.” When using the word fiction, it becomes too easy to write off the entity as non-existent. But it is beyond dispute that the entity exists. Instead, I refer to these entities as “artificial” for the reasons noted *supra* note 93. However, it is clear that many scholars refer to the corporate entity as a fiction; in deference to their expertise, I will not alter their terminology of choice.

⁹⁵ See Phillip I. Blumberg, *Limited Liability and Corporate Groups*, 11 J. CORP. L. 573, 574-75 (1986).

Due to its enabling power of amassing vast amounts of wealth while limiting investors’ risk, limited liability has been labeled “the greatest single discovery of modern times.” Quoted by I. MAURICE WORMSER, *Disregard of the Corporate Fiction—When and Why*, in DISREGARD OF THE CORPORATE FICTION AND ALLIED CORPORATE PROBLEMS 1, 2 (1927) (noting “even steam and electricity are far less important than the limited liability corporation, and they would be reduced to comparative impotence without it”).

⁹⁶ The principle of limited liability restricts an investor’s liability to the amount invested in the corporation. Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89-90 (1985) (stating “no one risks more than he invests”). Investors can thus contribute capital to corporations assured that their personal assets will not be lost if the corporation becomes insolvent or suffers an adverse civil judgment.

⁹⁷ 200 F.2d 911, 914 (5th Cir. 1952).

⁹⁸ Section 1 outlaws “every contract combination in the form of trust or otherwise, or conspiracy, in

The complaint alleged that Motorola coerced the plaintiff into an exclusive franchise agreement by which the plaintiff could no longer sell products made by Motorola's competitors.⁹⁹ The Fifth Circuit Court of Appeals held that there could be no conspiracy because the defendant was a corporation and could only act through its agents (whose acts are attributed to the corporation itself).¹⁰⁰

¶25 The Supreme Court endorsed the Fifth Circuit's *Nelson Radio* holding in *Copperweld Corp. v. Independence Tube Corp.*, noting that an internal agreement among firm members to implement the firm's policy "does not raise the antitrust dangers that § 1 was designed to police."¹⁰¹ The intracorporate conspiracy doctrine is thus settled law in the antitrust field. However, this holding does not implicate the doctrine's applicability to civil rights cases because it was limited to section 1 of the Sherman Act. Even by analogy, this holding cannot affect the doctrine's applicability to civil rights cases because agreements among municipal agents to deprive citizens of their legal rights were, I argue, exactly the type of "dangers that [the 1871 Act] was designed to police."¹⁰²

B. *Advent of the Intracorporate Conspiracy Doctrine in Civil Rights Claims Against Corporate Employees*

¶26 *Dombrowski v. Dowling* introduced the intracorporate conspiracy doctrine to the civil rights arena.¹⁰³ Dombrowski was a white criminal lawyer who sought to rent office space from the corporate defendant and its agent, Jack Dowling. According to Dombrowski, when Dowling learned that "a substantial number of [Dombrowski's] clients were of the Black race or of Latin origin," Dowling ended the negotiations and refused to rent the office to Dombrowski.¹⁰⁴ On appeal, the Seventh Circuit held private conspiracies are not actionable under § 1985 if the underlying right stems from section 1 of the Fourteenth Amendment because that section only protects against state action.¹⁰⁵ The court continued, however, noting in dicta that the existence of a conspiracy cannot be "satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm."¹⁰⁶

restraint of trade of commerce among the several States, or with foreign nations." Sherman Act, 15 U.S.C. § 1 (1890) (current version at 15 U.S.C. § 1 (2000)).

⁹⁹ *Nelson Radio*, 200 F.2d at 912.

¹⁰⁰ *Id.* at 914. This assumes the agents acted in their official capacity. *Id.* The court framed the claim as alleging that the "defendant [corporation], through its officers and agents, conspired with itself to restrain trade." *Id.* The problem in civil rights conspiracies is that a municipal entity's agents are the sole conspirators, yet the entity shields them from liability.

¹⁰¹ 467 U.S. 752, 769 (1984) (stating "officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy").

¹⁰² *Id.*; see *infra* Part VI.A.1.

¹⁰³ 459 F.2d 190, 196 (7th Cir. 1972).

¹⁰⁴ *Id.* at 191.

¹⁰⁵ *Id.* at 196 (holding "the right secured by the Equal Protection clause . . . is a right to protection against unequal treatment by a state"); see *supra* notes 71-75 and accompanying text.

¹⁰⁶ *Dombrowski*, 459 F.2d at 196. The court further noted that if the act "is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision . . . will normally not constitute the conspiracy contemplated by" § 1985. *Id.* Some district courts have characterized this as a rationale for the doctrine, holding the doctrine "was created to shield corporations and their employees from conspiracy liability for routine, collaborative business decisions that are later alleged to be discriminatory." *Newsome v. James*, No. 96-7680, 2000 U.S. Dist. LEXIS 5678, at *46 (N.D. Ill. Apr. 25, 2000). Courts of Appeals justify the doctrine more vaguely, holding that corporate agents jointly pursuing a corporation's "lawful business do not become 'conspirators' when acts within the scope

¶27 Many courts found this language irresistible. Over the next decade, the majority of § 1985 lawsuits that complained of conduct by purely private actors¹⁰⁷ were promptly dismissed under the intracorporate conspiracy doctrine.¹⁰⁸ The circuits are now split on whether the doctrine should be applied to civil rights cases: the majority of circuits—the Second, Fourth, Fifth, Sixth, Seventh, Eighth, and Eleventh—have applied the doctrine, whereas the First and Third Circuits have rejected it.¹⁰⁹ The Supreme Court has not yet resolved the split.¹¹⁰ In side-stepping the doctrine, the First and Third Circuits factually distinguished their cases from those of the majority, paving the way for other courts—even courts in the majority—to find exceptions to the doctrine in the civil rights context.

C. *Exceptions to the Rule*

¶28 Many courts have been reluctant to uphold the doctrine in circumstances that call to mind Congress’s intent in passing the 1871 Act. Their reluctance derives from the indiscriminate reach of the intracorporate exception to civil conspiracies. The doctrine broadly dismisses lawsuits even in cases where such dismissal contradicts the intentions of the 1871 Act. As a result, courts have created exceptions to the doctrine where justice requires.

¶29 One exception to the doctrine originated from the “single act of discrimination” dictum in *Dombrowski*.¹¹¹ Courts applying this exception have found that a series of acts or instances of discrimination can negate the doctrine because the existence of persistent, recurring discrimination is strong evidence that the defendants conspired.¹¹² Courts also allow an exception where the conduct alleged is criminal because the “fiction of [the] corporate entity [has] never been applied as a shield against criminal prosecutions.”¹¹³

¶30 Another exception arose in cases where plaintiffs alleged police misconduct.¹¹⁴ This exception may stem from Seventh Circuit Court of Appeals cases in which the court found police officers liable for conspiracy without ever mentioning the intracorporate

of their employment are said to be discriminatory or retaliatory.” *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 110 (7th Cir. 1990).

¹⁰⁷ See cases cited *supra* note 8.

¹⁰⁸ See, e.g., *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66, 70-72 (2d Cir. 1976) (having just dismissed the plaintiff’s § 1983 claim for lacking the requisite state involvement, the court engaged in a full analysis of the intracorporate conspiracy doctrine and dismissed the § 1985(3) claim on that basis); *Baker v. Stuart Broad. Co.*, 505 F.2d 181, 183 (8th Cir. 1974) (despite citing *Dombrowski*, the court—in a two-page opinion—dismissed a § 1985(3) claim against a private corporation under the intracorporate conspiracy doctrine without discussing the state action requirement).

¹⁰⁹ *Hoefler v. Fluor Daniel, Inc.*, 92 F. Supp. 2d 1055, 1057-58 (C.D. Cal. 2000) (stating “[the] Second, Fourth, Sixth and Eighth Circuits have followed the Seventh Circuit’s extension of the doctrine to § 1985 [whereas] the First and Third Circuits have refused to apply” the doctrine to §1985); see also *Hilliard v. Ferguson*, 30 F.3d 649, 653 (5th Cir. 1994); *Dickerson v. Alachua County Comm’n*, 200 F.3d 761, 768-70 (11th Cir. 2000). The Ninth Circuit expressly declined to decide the issue. *Hoefler*, 92 F. Supp. 2d at 1058 (citing *Portman v. County of Santa Clara*, 995 F.2d 898, 910 (9th Cir.1993)).

¹¹⁰ See *supra* note 67 and *infra* note 133 and accompanying text.

¹¹¹ *Dombrowski*, 459 F.2d at 196.

¹¹² See *Stathos v. Bowden*, 728 F.2d 15, 21 (1st Cir. 1984); *Novotny v. Great Am. Fed. Sav. & Loan Ass’n*, 584 F.2d 1235, 1259 n.125 (3d Cir. 1978); *Rackin v. Univ. of Pa.*, 386 F. Supp. 992, 1006 (E.D. Pa. 1974).

¹¹³ *United States v. Hartley*, 678 F.2d 961, 971-72 (11th Cir. 1982) (quoting *United States v. Wise*, 370 U.S. 405, 417 (1962) (Harlan, J. concurring)).

¹¹⁴ See *Schmittling v. City of Belleville*, No. 05-572, 2006 U.S. Dist. LEXIS 28594, at *12 (S.D. Ill. May 10, 2006) (listing cases in Seventh Circuit district courts).

conspiracy doctrine.¹¹⁵ The exception—limited to police officers—is based on the idea that police misconduct is an abuse of power that occurs outside the scope of employment.¹¹⁶ This is an extension of the argument that the intracorporate conspiracy doctrine is meant to shield corporate employees for “routine, collaborative business decisions.”¹¹⁷ Where courts find a police action causing a plaintiff’s injury was not routine, the action is held to be outside the scope of employment and, thus, within a doctrinal exception, rendering the plaintiff’s claim actionable.¹¹⁸

¶31 Some courts have found doctrinal immunity by holding the wrongful act outside the scope of employment when personal reasons motivated the agents. One such exception occurs when the agents have “an independent personal stake in achieving” the illicit objective.¹¹⁹ This exception stems from dicta in *Nelson Radio*, where the court noted the plaintiff did not allege that the agents “were actuated by any motives personal to themselves.”¹²⁰ The court intimated that if the plaintiff had joined the alleged conspirators as defendants in the lawsuit and alleged that those defendants did not act “only for the defendant corporation,” it might have ruled otherwise.¹²¹

¶32 In *Hartman v. Board of Trustees of Community College District Number 508*, the plaintiff asserted that the doctrine did not apply because the conspirators acted with “personal racial animus” and, therefore, had independent stakes in the conspiracy’s objective.¹²² The court noted the similarity between “personal racial animus,” the “independent personal stake” exception, and the “invidiously discriminatory animus” required in *Griffin*.¹²³ The *Hartman* court found that allowing a “personal racial animus” to negate the doctrine would permit the exception to swallow the rule; thus, the court concluded that the “personal stake” exception applies only where the agents acted *solely* because of personal bias or motive.¹²⁴ Other courts have similarly limited the exception.¹²⁵

D. Extension to Municipal Corporate Entities

¶33 By the mid-1980s, many courts extended the intracorporate conspiracy doctrine to cover the acts of agents of municipal entities. The extension was prompted by the similarities between public and private educational institutions. In *Cole v. University of Hartford*, a Connecticut district court found that the intracorporate conspiracy doctrine applied to agents of a private university, shielding them from liability.¹²⁶ A year later, a

¹¹⁵ *Jones v. City of Chi.*, 856 F.2d 985, 992-94 (7th Cir. 1988); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1253-64 (7th Cir. 1984), *overruled on other grounds by* *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005).

¹¹⁶ *Schmittling*, 2006 U.S. Dist. LEXIS 28594, at *14.

¹¹⁷ *Newsome v. James*, No. 96-7680, 2000 U.S. Dist. LEXIS 5678, at *46 (N.D. Ill. Apr. 25, 2000).

¹¹⁸ *Schmittling*, 2006 U.S. Dist. LEXIS 28594, at *14.

¹¹⁹ *Greenville Publ’g Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399 (4th Cir. 1974).

¹²⁰ *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952). A similar exception applies where conspirators act “on their own behalf.” *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 n.15 (1984).

¹²¹ *Nelson Radio*, 200 F.2d at 914.

¹²² 4 F.3d 465, 469 (7th Cir. 1993).

¹²³ *Id.* at 470.

¹²⁴ *Id.*

¹²⁵ *Johnson v. Hills & Dales Gen. Hosp.*, 40 F.3d 837, 840 (6th Cir. 1994); *Salgado v. City of N.Y.*, No. 00-3667, 2001 U.S. Dist. LEXIS 3196, at *26 (S.D.N.Y. Mar. 21, 2001).

¹²⁶ 391 F. Supp. 888, 892-93 (D. Conn. 1975); *accord* *Herrmann v. Moore*, 576 F.2d 453, 459 (2d Cir.

Louisiana district court, citing *Cole*, extended the doctrine in a case against the University of New Orleans.¹²⁷ Within a few years, a Connecticut district court extended the doctrine to agents of the state's university.¹²⁸ By the mid-1980s, district courts regularly applied the doctrine to bar § 1985 claims against agents of public entities.¹²⁹

¶34 In 1991, the Sixth Circuit Court of Appeals heard a § 1985 case against members of a board of education.¹³⁰ Citing its own precedent and the Second Circuit's application of the doctrine to "an educational corporation" in *Herrmann v. Moore*,¹³¹ the court found that the doctrine barred the plaintiff's claim.¹³² Soon after, the Supreme Court denied the plaintiff's petition for certiorari on the issue of the doctrine's applicability to § 1985(3) claims.¹³³

¶35 Finally, in 1994, the Seventh Circuit Court of Appeals, which introduced the doctrine to the civil rights arena, held explicitly that the doctrine applies to municipal agencies.¹³⁴ Such agencies, the court noted, "are functionally the equivalent of corporations in that their employees and officers jointly endeavor to provide a product or service and reach decisions pursuant to a unified, hierarchical structure."¹³⁵ In Part VI, I argue that Congress's intent in passing the 1871 Act was to put a stop to *all* rights deprivations and that the intended targets of the Act therefore included not only Klan members acting as private citizens but also agents of municipal entities, who are in a unique position to deprive others of their rights due to the state power they wield. Thus, if municipal agencies are indistinguishable from corporate entities based on hierarchical structures and joint endeavors, any argument that would negate the doctrine's applicability to agents and officers of corporate defendants in the civil rights arena would surely negate its applicability to agents of municipal entities.¹³⁶

E. Extension to § 1983 Conspiracies

¶36 A number of district courts have extended the doctrine to negate conspiracy claims under 42 U.S.C. § 1983.¹³⁷ The trend is unsettling because the purpose of § 1983 is to

1978) (holding that agents of a private law school were shielded from liability).

¹²⁷ *Chambliss v. Foote*, 421 F. Supp. 12, 15 (E.D. La. 1976) (stating: "the university and its officials are considered as constituting a single legal entity which cannot conspire with itself"), *aff'd*, 562 F.2d 1015 (5th Cir. 1977). The university is public and was established by the Louisiana legislature in 1956. University of New Orleans History, <http://www.uno.edu/history.asp> (last visited Jan. 10, 2008).

¹²⁸ *Lieberman v. Gant*, 474 F. Supp. 848, 875 (D. Conn. 1979), *aff'd*, 630 F.2d 60 (2d Cir. 1980) (stating "the present defendants were all acting in their capacities as [agents] of the University of Connecticut at the time of the alleged conspiracy") (citing *Cole*, 391 F. Supp. 888).

¹²⁹ *See, e.g., Zentgraf v. Tex. A & M Univ.*, 492 F. Supp. 265, 272-73 (S.D. Tex. 1980); *Gladden v. Barry*, 558 F. Supp. 676, 679 (D.D.C. 1983) (citing *Herrmann*, 576 F.2d 453).

¹³⁰ *Hull v. Cuyahoga Valley Bd. of Educ.*, 926 F.2d 505 (6th Cir. 1991).

¹³¹ *Doherty v. Am. Motors Corp.*, 728 F.2d 334, 339-40 (6th Cir. 1984); *Herrmann*, 576 F.2d at 459.

¹³² *Hull*, 926 F.2d at 510.

¹³³ *Hull v. Schuck*, 510 U.S. 1261 (1991). Justices White and Marshall strongly felt the Court needed to resolve the issue; both dissented to the denial of certiorari. *Id.*

¹³⁴ *Wright v. Ill. Dep't of Children & Family Servs.*, 40 F.3d 1492, 1508 (7th Cir. 1994).

¹³⁵ *Id.*

¹³⁶ *See infra* notes 188-192 and accompanying text.

¹³⁷ *See, e.g., Anemone v. Metro. Transp. Auth.*, 419 F. Supp. 2d 602, 604-605 (S.D.N.Y. 2006); *Jackson v. N.Y. State*, 381 F. Supp. 2d 80, 90 (N.D.N.Y. 2005); *Shaw v. Klinkhamer*, No. 03-6748, 2005 U.S. Dist. LEXIS 14483 (N.D. Ill. July 1, 2005); *Tabor v. City of Chi.*, 10 F. Supp. 2d 988, 993-94 (N.D. Ill. 1998); *Doe v. Bd. of Educ.*, 833 F. Supp. 1366, 1382 (N.D. Ill. 1993).

curb abuses of power perpetrated by those with state authority.¹³⁸ Section 1983 conspiracy claims cover a broader scope of conduct than those under § 1985 because plaintiffs need not establish class-based discrimination.¹³⁹ Extending the doctrine to § 1983 thus allows those with state power to freely conspire to deprive others of their rights. Disturbingly, courts may have extended the doctrine in this way due to a simple typographical error.

¶37 Several district courts have stated that, in *Buschi v. Kirven*,¹⁴⁰ the Fourth Circuit Court of Appeals applied the doctrine to bar a § 1983 conspiracy claim.¹⁴¹ Though the Fourth Circuit examined the doctrine's applicability in *Buschi*, it did so while explaining the court's holding below, in which the district court dismissed specific defendants from the lawsuit.¹⁴² In its analysis, the court stated that another case "held that 'unauthorized acts [of employees] in furtherance of a conspiracy may state a claim under § 1983(3).'"¹⁴³ This is clearly incorrect because § 1983(3) does not exist: § 1983 has no sub-sections.¹⁴⁴ The court must have intended to write "§ 1985(3)" as that is the only section that expressly involves civil rights conspiracies. A cursory glance at the quoted case verifies that the error is indeed typographical.¹⁴⁵ Even so, § 1983 conspiracy claims may now be barred by the doctrine. While it may seem logical to extend the doctrine from § 1985 to § 1983 given that both sections originated in the 1871 Act, I argue that the doctrine should generally not apply to claims under either section. I turn now to the

¹³⁸ See *Mitchum v. Foster*, 407 U.S. 225, 239 (1972) (stating "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation"); see also J. Harry Blackmun, *Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive Or Fade Away?*, 60 N.Y.U. L. REV. 1, 28 (1985) (noting that § 1983 today is meant "to protect the rights of those without power against oppression at the hands of the powerful").

¹³⁹ See *supra* note 76 for the elements of a § 1983 conspiracy claim.

¹⁴⁰ 775 F.2d 1240 (4th Cir. 1985).

¹⁴¹ *Anemone*, 419 F. Supp. 2d at 604 n.2; *Doe*, 833 F. Supp. at 1382; *Culver v. JBC Legal Group, P.C.*, No. 5:04-CV-389, 2005 U.S. Dist. LEXIS 45426, at *18 (E.D.N.C. June 26, 2005); *Lopez v. Maczko*, No. 07-1382, 2007 U.S. Dist LEXIS 63416, at *19 n.11 (E.D. Pa. Aug. 16, 2007).

¹⁴² *Id.* at 1248-54. In this discussion, the court noted that the plaintiffs asserted the conspiracy claim under § 1985, alleging that some defendants had independent personal stakes in the conspiracy. *Id.* at 1253. The court later engages in a full-scale discussion of the intracorporate conspiracy doctrine as applied to § 1985. *Id.* at 1257-59. The first two counts, which alleged First Amendment retaliation and a due process deprivation, respectively, were the only claims that could have been asserted under § 1983. *Id.* at 1242-43. However, the court never mentioned the intracorporate conspiracy doctrine when it addressed these claims. *Id.* at 1247-48, 1254-57.

¹⁴³ *Id.* at 1252-53 (misquoting *Hodgin v. Jefferson*, 447 F. Supp. 804, 807 (D. Md. 1978)).

¹⁴⁴ 42 U.S.C. § 1983 (2000).

¹⁴⁵ *Hodgin*, 447 F. Supp. at 807 (stating "unauthorized acts in furtherance of a conspiracy may state a claim under § 1985(3)") (second emphasis added). The *Buschi* court repeats the error later in the opinion when it notes that a commentator recently suggested that "the Supreme Court [in *Scott*] . . . intimated that the section [1983(3)] reaches only conspiracies motivated by racial bias." *Buschi*, 775 F.2d at 1258 n.10 (misquoting Brian J. Gai, *Section 1985(2) Clause One and Its Scope*, 70 CORNELL L. REV. 756, 764 (1985)). In fact, the *Buschi* court incorrectly cited this article as Volume 170 of the Cornell Law Review, which will not exist until 2085. *Id.* Thus, while the *Buschi* court never actually discussed the doctrine as it relates to § 1983, the *Buschi* opinion is thus rife with typographical errors that could result in the drastic effect of barring § 1983 conspiracy claims against agents of a single entity. *But see Kivanc v. Ramsey*, 407 F. Supp. 2d 270, 276 n.4 (D.D.C. 2006) (noting without reason that no Court of Appeals has applied the doctrine to § 1983 conspiracy claims).

piercing the corporate veil doctrine to assess its congruence with the intracorporate conspiracy doctrine.

V. THE TENETS OF THE PIERCING THE CORPORATE VEIL DOCTRINE

¶38 The concept of shielding constituents behind their shared entity is not unique to the intracorporate conspiracy doctrine. Limited liability is the basis of the corporate form; it allows us to conduct business effectively in the modern world. While incorporating “for the purpose of achieving limited liability” is permitted,¹⁴⁶ shareholders can abuse the corporate form and hide behind the corporate liability shield where, for example, they use the corporation for illegitimate purposes.¹⁴⁷ In such cases, courts will disregard the corporate entity—and, thus, the notion of limited liability—in the name of equity. In deference to the idea of disregarding the artificial corporate entity, legal scholars have long referred to this doctrine as “piercing the corporate veil.”¹⁴⁸

¶39 The doctrine is problematic, however, because limited liability is the “traditional cornerstone” of corporate law.¹⁴⁹ Courts are reluctant to pierce the veil because doing so forces a shareholder to suffer a liability greater than his or her original investment. Despite this reluctance, courts have held that piercing is appropriate in “egregious circumstances.”¹⁵⁰ However, between courts’ difficulty discerning such circumstances and their reluctance to enforce liabilities beyond a shareholder’s original investment, the veil-piercing doctrine has been applied inconsistently.¹⁵¹ However, the general concept of the doctrine—the disregard of the corporate entity—is entirely consistent with its premise: to uphold considerations of public policy and equity against the liability shield provided by the artificial corporate entity.

¶40 The general rule of the doctrine can be found in *United States v. Milwaukee Refrigerator Transit Co.*, where the court held:

[A] corporation will be looked upon as a legal entity as a general rule . . . but when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons.¹⁵²

¶41 One treatise explains that the veil should be pierced where the corporate form is “used to accomplish an improper or unlawful purpose.”¹⁵³ Further, the veil is commonly

¹⁴⁶ HENN, *supra* note 83, § 146.

¹⁴⁷ *Bergen v. F/V St. Patrick*, 816 F.2d 1345, 1351-52 n.4 (9th Cir. 1987) (affirming the piercing of the veil where “the corporation was an artifice and a sham designed to execute illegitimate purposes” because “the level of capitalization of the corporation was sufficiently low to constitute fraud”).

¹⁴⁸ FLETCHER, *supra* note 20, § 41.

¹⁴⁹ Blumberg, *supra* note 95, at 574.

¹⁵⁰ *See, e.g., C. F. Trust, Inc. v. First Flight, Ltd. P’ship*, 338 F.3d 316, 317 (4th Cir. 2003).

¹⁵¹ *Easterbrook & Fischel, supra* note 96, at 89 n.1 (stating “hundreds of decisions . . . are irreconcilable and not entirely comprehensible”). The doctrine has been called a “legal quagmire” due to the overwhelming number of conflicting cases. Henry W. Ballantine, *Separate Entity of Parent and Subsidiary Corporations*, 14 CAL. L. REV. 12, 15 (1925).

¹⁵² 142 F. 247, 255 (E.D. Wis. 1905) (emphasis added).

¹⁵³ FLETCHER, *supra* note 20, § 41.10; *see* HENN, *supra* note 83, § 146 (noting “the test is simply whether or not recognition of corporateness would produce unjust or undesirable consequences inconsistent with the purpose of the concept”).

pierced to prevent “the unjust raising of a defense.”¹⁵⁴ Finally, when individuals use the corporate entity “to shield personal wrongdoings, the court must look to substance rather than to form.”¹⁵⁵ Given this background in the veil-piercing doctrine, I now examine how the doctrines conflict.

VI. WHEN DOCTRINES COLLIDE: THE VEIL-PIERCING DOCTRINE NEGATES THE
INTRACORPORATE CONSPIRACY DOCTRINE IN THE CIVIL RIGHTS ARENA BECAUSE THE
LATTER CONTRAVENES CONGRESSIONAL INTENT AND CURRENT CIVIL RIGHTS
JURISPRUDENCE

A. *The Intent of Congress in Passing the 1871 Act is Negated by Applying the
Intracorporate Conspiracy Doctrine*

1. Intracorporate Conspiracies and Piercing the Veil: Public Policy and the Purposive
Intent of the 1871 Act

¶42 The general public policy of the United States is set by Congress through its power to legislate.¹⁵⁶ In 1871, Congress decided that civil conspiracies to deprive another of her rights are against public policy; the 1871 Act thus provided a remedy to victims of such conspiracies.¹⁵⁷ Conspiracies actuated through state action are now covered by §§ 1983 and 1985.

¶43 In a classic veil-piercing case, then-Judge Cardozo wrote: “The logical consistency of a juridical conception will indeed be sacrificed” when necessary to uphold or defend an accepted public policy.¹⁵⁸ In the civil rights field, the rights of individuals have been sacrificed to uphold the notion that agents of a principal corporate entity cannot conspire.¹⁵⁹ This trend thwarts Congress’s intent in passing the 1871 Act.

¶44 In drafting the 1871 Act, Congress sought to enforce the Due Process and Equal Protection clauses of the Fourteenth Amendment,¹⁶⁰ the fundamental principle of which was to guard against abuses of state power.¹⁶¹ The state can only act through its human agents,¹⁶² who are subject to the same whims and biases as all humans. Thus, these clauses afford protection against the reality that agents of the state will, at times, use state

¹⁵⁴ FLETCHER, *supra* note 20, § 41.20. Fletcher later notes that “[where] the corporate form is . . . asserted in an attempt to evade a statute,” the veil is likely to be pierced. *Id.* § 41.34.

¹⁵⁵ *Id.*; *accord* *Chi., Milwaukee & St. Paul Ry. Co. v. Minneapolis Civic & Commerce Ass’n*, 247 U.S. 490, 501 (1918) (holding that where the corporate entity is being abused as a shield, “the courts will not permit themselves to be blinded or deceived by mere forms [of] law but, regardless of fictions, will deal with the substance . . . as if the corporate agency did not exist and as the justice of the case may require”); *In re Rieger, Kapner & Altmak*, 157 F. 609, 613 (S.D. Ohio 1907) (holding the “corporate entity is not so sacred that a court of equity, looking through forms to the substance of things, may not . . . ignore it to preserve the rights of innocent parties”).

¹⁵⁶ *Bob Jones Univ. v. United States*, 461 U.S. 574, 612 (1983) (stating “[t]he contours of public policy should be determined by Congress, not by judges”).

¹⁵⁷ *See supra* notes 51-52 and accompanying text.

¹⁵⁸ *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 95 (1926). Judge Cardozo used as an example cases “where the attempted separation between parent and subsidiary [corporations] will work a fraud upon the law.” *Id.* (citing *Chi., Milwaukee & St. Paul Ry. Co.*, 247 U.S. 490).

¹⁵⁹ *See, e.g., infra* Part VI.A.2.a (discussing *Dickerson*) and Part VI.A.2.b (discussing *Shaw*).

¹⁶⁰ *See supra* notes 35 and 74.

¹⁶¹ *Deshaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 196 (1989). The Equal Protection clause was meant to prevent discrimination, an abuse of the government’s power to classify. *See Louisville & Nashville R.R. Co. v. Melton*, 218 U.S. 36, 52 (1910).

¹⁶² *See supra* notes 88-92 and accompanying text.

authority to further personal biases—whether against a class of people or a single individual. When such a biased decision is jointly made with the intention of depriving a person of her constitutional rights, the 1871 Act provides a remedy.¹⁶³ While the conspiracy sections of the 1871 Act were partially intended to restrain the private conduct of those who would deny blacks their rights to life, liberty and property,¹⁶⁴ I believe the provisions were also meant to curb conspiratorial abuses of power by state actors who sympathized with the Klan’s ideology.¹⁶⁵

¶45 There is little debate that the Klan’s purposes were almost entirely political.¹⁶⁶ “[President] Grant wrote that the Klan aimed ‘by force and terror to prevent all political action not in accord with the view of the members[and] to deprive colored citizens of the right to bear arms and of the right to a free ballot.’”¹⁶⁷ Thus, in the Klan’s view, the newly freed slaves did not deserve the rights bestowed upon them by the Thirteenth, Fourteenth, and Fifteenth Amendments.¹⁶⁸

¶46 Given this belief, Klan members and sympathizers¹⁶⁹ sought to deny blacks the rights enjoyed by whites.¹⁷⁰ A former member admitted that the Klan hoped to “gain[] control of the outcome of elections.”¹⁷¹ The group’s political objectives were clear: amass state and federal power in Klan members and sympathizers, who would use government power to restore white supremacy.¹⁷²

¶47 Klan members and sympathizers violated the Fourteenth Amendment by infiltrating the government to instill their unconstitutional racism into state agendas. More importantly, local government infiltrators who sympathized with the Klan—such as judges, sheriffs, and police deputies—could readily deny others their rights, such as the right to a fair trial, the right to be free from unreasonable searches and seizures, and the right to bear arms.¹⁷³ Where multiple sympathizers or members worked on behalf of one

¹⁶³ See *supra* notes 50-52 and accompanying text.

¹⁶⁴ See *supra* notes 58-62 and accompanying text.

¹⁶⁵ These days, however, discrimination is less conspicuous; it usually occurs in the context of employees’ rights. See, e.g., cases cited *supra* note 22. The fact that the deprived rights are economic in nature does not imply that the deprivation is less compelling or less worthy of remedy than the 1871 Act intended. See *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) (holding that the right to property, though economic in nature, is a basic civil right Congress recognized in passing the 1871 Act). There are non-economic harms associated with civil rights violations, such as humiliation and mental anguish. See *Sasaki v. Class*, 92 F.3d 232, 235 (4th Cir. 1996).

¹⁶⁶ Herbert Shapiro, *The Ku Klux Klan During Reconstruction: The South Carolina Episode*, 49 J. OF NEGRO HISTORY 34, 43 (1964).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 44 (stating “The Klan avowed its respect for the United States Constitution, but only for that version in effect before 1865”).

¹⁶⁹ Throughout this section, I use the term “Klan sympathizer” to indicate any post-Civil War white Southerner who believed that whites and blacks were inherently unequal and that the subjugation of blacks was the natural order.

¹⁷⁰ One of the Klan’s methods in reaching this goal was to suppress black suffrage through terror and intimidation. Shapiro, *supra* note 166, at 44.

¹⁷¹ *Id.*

¹⁷² As a corollary to this, the Klan also sought to keep out of power those who supported the Negro cause. In one town in South Carolina, the only black magistrate was murdered. *Id.* at 41. A white judge in the same town was assaulted “because he was supposed to have advocated social equality between the races.” *Id.* Suppressing black suffrage similarly furthered the goal of centralizing power in the hands of those who opposed black equality. *Id.*

¹⁷³ Indeed, once a Klan member or sympathizer gained a position in local government, he could embark on a reign of political terror.

state entity, their mutual plans to deprive others of their federal rights on account of race or party affiliation were undeniably contrary to the Equal Protection clause. Therefore, Congress enacted section 2 of the 1871 Act to both protect Klan victims from violence and provide a remedy for victims of unconstitutional rights deprivations achieved through conspiracies by agents of state entities.

¶48 State infiltration by members or supporters of the Klan is not as far-fetched as it may seem. Reconstruction-era South Carolina provides a prime example of state infiltration by Klan members. In one county, the “chief of the Klan [was a] member of the Legislature.”¹⁷⁴ Others identified as active Klan members included the county sheriff and a former magistrate.¹⁷⁵ Among those with substantial state power—and a kind ear bent toward Klan objectives—were “several of the key leaders of the [South Carolina] Democratic party [who] refused to use their influence to suppress the violence.”¹⁷⁶ This may explain why the state government’s response “to the resurgence of the Klan in 1870-71 was largely one of inaction and vacillation.”¹⁷⁷ The Klan’s goals and methods were no different in other Southern states.¹⁷⁸

¶49 Besides its obvious aim of preventing the Klan’s private conspiracies, the 1871 Act sought to limit joint abuses of power by those with state authority. The plain language of the 1871 Act supports this interpretation: under § 1985, the only express civil rights conspiracy section, conspiracy victims may sue “*any one or more of the conspirators*”—no exceptions are listed.¹⁷⁹

¶50 As one writer noted before the intracorporate conspiracy doctrine was commonly extended to agents of state entities, “When state officials are involved, the conspiracy necessarily will affect the ability or willingness of the authorities to accord equal protection of the laws.”¹⁸⁰ Thus, the commentator concluded, in cases “involving state officials as conspirators, [section 1985] is little different from section 1983.”¹⁸¹ This view accords with the canon of construction *in pari materia*, which provides that §§ 1983 and 1985 should be interpreted similarly.¹⁸²

¶51 In addition, the legislative history of the 1871 Act evinces Congress’s concern that “state instrumentalities could not protect [federally created] rights” and “that state

¹⁷⁴ *Id.* at 50.

¹⁷⁵ *Id.* at 50-51.

¹⁷⁶ *Id.* at 52.

¹⁷⁷ *Id.* at 44.

¹⁷⁸ See FONER, *supra* note 1, at 433 (stating that notable Klan members included a one-time North Carolina legislator and “Georgia’s Democratic candidate for governor in 1868”). Foner also notes that the governor of North Carolina “offer[ed] tacit approval to Klan activities” and that throughout the South, “prominent Democrats either minimized the Klan’s activities or offered thinly disguised rationalizations for them, [while some] denied the organization’s existence altogether.” *Id.* at 434. While it cannot be proved that all these politicians were members of the Klan, those who minimized or rationalized the Klan’s brutal acts of violence were likely Klan sympathizers who sought to benefit from the “potent appeal of white supremacy,” *id.* at 441, and who would therefore seek to deny blacks their rights.

¹⁷⁹ 42 U.S.C. § 1985 (2000) (emphasis added). The lack of exceptions connotes that Congress likely did not consider granting conspiratorial immunity to intracorporate agents—especially agents of state entities.

¹⁸⁰ Mark Fockele, *A Construction of Section 1985(c) in Light of Its Original Purpose*, 46 U. CHI. L. REV. 402, 437 (1979).

¹⁸¹ *Id.*

¹⁸² *Bramwell v. U.S. Bureau of Prisons*, 348 F.3d 804, 807 (9th Cir. 2003). If we interpret the two sections similarly, then the proper defendants under § 1985 would generally be agents of the state; in such a case, the fact that the agents work for the same state entity is entirely irrelevant, except that their shared principal facilitated the rights deprivation. See *supra* notes 50 and 52 for the text of §§ 1983 and 1985.

officers might [be unsympathetic] to the vindication of those rights.”¹⁸³ Representative Stevenson of Ohio noted the common belief that Klan members used their political influence to infiltrate state governments as “officers of the law.”¹⁸⁴ Further, Ohio Representative Perry “referred to state authorities [acting] ‘in complicity with’ the conspirators.”¹⁸⁵ While no one can know the extent to which the secrecy-driven Klan infiltrated state governments, we know Congress was aware of and sought to remedy conspiratorial deprivations of rights caused by state actors when passing the 1871 Act. Thus, in the case of civil rights conspiracies, the liability shield provided by the municipal entity should be sacrificed to uphold the wishes of Congress.

¶52 Furthermore, courts should not be reluctant to “pierce the corporate veil” in such cases because doing so would not require courts to expose shareholders to liability beyond their original investment. Since the defendants in §§ 1983 and 1985 conspiracy cases are agents of municipal corporate entities, the concept of limited liability does not apply.¹⁸⁶ Thus, courts are not forced to repudiate the most basic doctrine of corporate law in refusing to acknowledge the municipal corporate veil.¹⁸⁷ As such, the corporate law considerations that made courts reluctant to disregard the corporate entity simply do not apply to civil rights conspiracies perpetrated through municipal corporations.

¶53 It is again worthwhile to note that civil rights conspiracy litigation was virtually non-existent until 1971, when the Supreme Court extended § 1985(3) to private action.¹⁸⁸ However, due to the misconception that § 1985 covered all types of private conspiratorial deprivations rather than just those protected against private infringement, there were numerous suits brought against corporate defendants in which the intracorporate conspiracy doctrine was used to preclude liability.¹⁸⁹ By the mid-1980s, courts extended

¹⁸³ Blackmun, *supra* note 138, at 6. Ohio Representative (later President) Garfield complained that while the laws were “just and equal on their face,” states still deprived blacks of rights through “systematic maladministration of [the laws], or a neglect or refusal to enforce the[m].” Fockele, *supra* note 180, at 416 (quoting CONG. GLOBE, 42d Cong., 1st Sess. app. at 153, col. 3 (1871)).

¹⁸⁴ CONG. GLOBE, 42d Cong., 1st Sess. app. at 286, col. 1 (further stating: “Were all the Ku Klux arrested and brought to trial, among them would be found sheriffs, magistrates, jurors, and legislators, and it may be [sic] clerks and judges”).

¹⁸⁵ *Id.* (quoting CONG. GLOBE, 42d Cong., 1st Sess. app. at 79, col. 3). This language was copied into the 1871 Act itself. In section 4, Congress gave the President broad powers to use military force to quell insurrections where a state is overthrown or “the constituted authorities are in complicity with, or shall connive at the unlawful purposes of [the unlawful conspiracies of section 2].” Section 4 of the Civil Rights Act of April 20, 1871, ch. 22, 17 Stat. 13 (1871).

¹⁸⁶ *Adams v. Brickell Townhouse*, 388 So. 2d 1279, 1280 (Fla. App. 3d Dist. 1980) (noting that a “purpose of the corporate fiction is to insulate stockholders from liability for corporate acts,” but not officers or agents). The conspirators, but not the municipal corporate entity, would be liable for the injuries brought about by the conspiracy. See *infra* notes 266-270 and accompanying text.

¹⁸⁷ John A. Swain & Edwin E. Aguilar, *Piercing the Veil to Assert Personal Jurisdiction Over Corporate Affiliates: An Empirical Study of the Cannon Doctrine*, 84 B.U. L. REV. 445, 447 (noting that the notion of piercing the corporate veil might be more apt “when the principle of limited liability is not directly implicated”); see also WORMSER, *supra* note 95, at 10 (quoting Lord Mansfield, Chief Justice of England: “[it] is a certain rule . . . that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted”).

¹⁸⁸ See *supra* note 61 and accompanying text.

¹⁸⁹ See cases cited *supra* note 8. The intracorporate exception would never have been extended to municipal agents in civil rights conspiracy claims if these cases against private corporations had been properly dismissed due to a lack of state action.

the doctrine to municipal corporations without fully considering the implications of precluding liability for state actors engaged in conspiracies to abuse their power.¹⁹⁰

¶54 Veil-piercing does not apply to municipal entities because they have no stockholders upon whom to impose liability. But the tenets of the veil-piercing doctrine should have been considered when private corporate agents asserted that their conspiratorial liability was precluded by the existence of the corporate entity.¹⁹¹ Since recognizing the corporate entity for that purpose would allow an unjust result—immunizing from liability agents who conspire to deprive people of their rights—courts should have pierced the veil and disregarded the entity to reach the facts behind the rights deprivation. Municipal corporate agents with state authority are better able to deprive people of rights than private corporate agents, so the unjust result borders on the absurd. By applying the intracorporate conspiracy doctrine in the field of civil rights, courts effectively immunized the 1871 Act’s most pertinent contemporary conspiracy defendants based on adventitious precedent.¹⁹²

¶55 In *Travis v. Gary Community Mental Health Center, Inc.*, the court upheld the intracorporate conspiracy doctrine by asserting that in 1871, “it was understood that corporate employees acting to pursue the business of the firm could not be treated as conspirators.”¹⁹³ To support this claim, the court cited *Trustees of Dartmouth College v. Woodward*¹⁹⁴ and Fletcher’s Law of Corporations.¹⁹⁵ Neither of these sources, however, asserts anything of this nature.¹⁹⁶ In fact, Fletcher notes that corporations *may* be liable for civil conspiracy where agents conspire to “commit wrongs against another for the benefit of the corporation.”¹⁹⁷ Further, in the past, judges and commentators *were* hesitant to support the asserting of the corporate form as a defense.¹⁹⁸ Machen noted the “unfortunate tendency to regard the corporate fiction as a touchstone to be applied to all questions connected with corporations.”¹⁹⁹

¹⁹⁰ See Michael Finch, *Governmental Conspiracies to Violate Civil Rights: A Theory Reconsidered*, 57 MONT. L. REV. 1, 37-38 (1996) (noting that “in early conspiracy cases filed under section 1983 [where state action is required], intracorporate immunity was rarely mentioned. Instead, immunity doctrine appears to have entered into the law of governmental conspiracy through precedent under section 1985(3), almost all of which was forged in private sector litigation. Thus, [the municipal intracorporate conspiracy doctrine] is adventitious, or at best an unexamined by-product of precedent.”).

¹⁹¹ Before transplanting the intracorporate conspiracy doctrine into the civil rights arena, courts should have looked to other corporate law doctrines to ensure that extending the doctrine to civil rights conspiracies would be consistent with both civil rights and corporate law.

¹⁹² Finch, *supra* note 190, at 37-38.

¹⁹³ 921 F.2d 108, 110 (7th Cir. 1990).

¹⁹⁴ 17 U.S. 518, 637-38 (1819).

¹⁹⁵ FLETCHER, *supra* note 20, § 4884.

¹⁹⁶ In *Woodward*, the Court merely discussed the properties of the corporate entity and how it simplifies the complex intricacies of transmitting property between members of the corporation. *Woodward*, 17 U.S. at 636.

¹⁹⁷ FLETCHER, *supra* note 20, § 4884. Agents do not enjoy limited liability. See *supra* note 186. Thus, the agents would be equally liable.

¹⁹⁸ *First Nat’l Bank v. F.C. Trebein Co.*, 59 Ohio St. 316, 326 (1898) (noting that the artificial corporate entity is applied so often as “to induce the belief that it must be universal, and be in all cases adhered to, although the greatest frauds may thereby be perpetrated under the fiction as a shield”); see also WORMSER, *supra* note 95, at 10 (stating that the fiction must be applied with common sense “to promote the ends of justice. . . . There is always danger, when a fiction . . . becomes so deeply rooted in the case law, that judges no longer remember its [purpose] and apply the fiction to an extent where they [no longer] penetrate into the actual facts behind it.”).

¹⁹⁹ Machen, *supra* note 92, at 357. Machen concluded: “[the] subtlety of this temptation ought to serve as a

¶156 The *Travis* court then addressed *Dombrowski's* dictum²⁰⁰ that the “Klan could not avoid liability by incorporating . . . because the Klan meddled in the business of others.”²⁰¹ This very statement militates against applying the doctrine. The court reasoned that by incorporating, the Klan would still attempt to achieve its aims through “multiple centers of social or economic influence.”²⁰² However, the court overlooked that the Klan’s paramount objectives were *political*²⁰³ and that it therefore sought to achieve its goals through infiltrating governments.²⁰⁴ Indeed, the Klan attempted to meddle in the business of the state in order to achieve its goal of restoring white supremacy. Today, government officers meddle in state affairs when they wield their state authority in conspiring to deprive others—typically their subordinate employees—of their rights.²⁰⁵ It is fortunate that the modern version of the 1871 Act exists to remedy such abuses of authority.

¶157 After holding that the doctrine barred a plaintiff’s claim, one court suggested that the plaintiff “can still assert direct Section 1983 claims against [every agent] who participated in the deprivation in his or her individual capacity.”²⁰⁶ The court did not substantiate this proposition, however, because it is shortsighted. The purpose of conspiratorial liability in tort law is to expand both the scope of defendants and the scope of conduct by “rendering liable those persons who support [or formulate] unlawful conduct, but do not play an active role in its accomplishment.”²⁰⁷ Thus, conspiratorial liability allows plaintiffs to sue defendants who actively achieve the rights deprivations *and* all those who either supported or devised the deprivation because the act of conspiring is thought to be “a special evil to society” and, as such, deserves special recognition.²⁰⁸

¶158 One commentator argues that the doctrine should apply if the agents’ actions “are traditionally attributed to the entity.”²⁰⁹ The consequences of such a proposal are

warning against this dangerous error of overestimating the importance . . . of the conception of a corporation as a legal entity or person, *and of treating this doctrine as the decisive point in many cases with which it really has nothing to do.*” *Id.* at 358 (emphasis added).

²⁰⁰ See *infra* notes 273-274 and accompanying text.

²⁰¹ *Travis v. Gary Cmty. Mental Health Ctr.*, 921 F.2d 108, 110 (7th Cir. 1990).

²⁰² *Id.*

²⁰³ See *supra* notes 166-167 and 170-172 and accompanying text.

²⁰⁴ See *supra* notes 78, 174-178, and 183-185 and accompanying text.

²⁰⁵ Defendants in contemporary civil rights conspiracy cases often abuse their authority because the plaintiff threatens their positions of power. In the examples in Part VI.A.2, *infra*, the defendants conspired to harm the plaintiffs because the latter’s knowledge of the former’s improprieties placed the former in jeopardy. See *infra* notes 216 and 231 and accompanying text.

²⁰⁶ *Anemone v. Metro. Transp. Auth.*, 419 F. Supp. 2d 602, 604 (S.D.N.Y. 2006).

²⁰⁷ *Finch*, *supra* note 190, at 5; *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 62 (1994) (noting the purpose “of a conspiracy claim is to extend liability in tort beyond the active wrongdoer to those who have merely planned, assisted or encouraged [his] acts”) (citation omitted). Expanding liability to other defendants helps plaintiffs when some defendants may be insolvent.

²⁰⁸ Comment, *Reason by Analogy: Agency Principles Justify Conspirators’ Liability*, 12 STAN. L. REV. 476, 482 (1960); see Note, *Intracorporate Conspiracies Under 42 U.S.C. § 1985(c)*, 92 HARV. L. REV. 470, 478-79 (1978) (noting the traditional rationale for conspiracy liability is the presence of a special danger when “collective activity [is undertaken] for unlawful purposes” because of “the opportunity for deliberate plotting, efficient execution through separation of functions, mutual moral support, and generation of inertia decreasing the likelihood that any single participant will be able to prevent achievement of the group goal” (citations omitted)).

²⁰⁹ Douglas G. Smith, *The Intracorporate Conspiracy Doctrine and 42 U.S.C. § 1985(3): The Original Intent*, 90 NW. U. L. REV. 1125, 1152 (1996).

disturbing. Not only does it turn a blind eye to the abuse of state power, it negates Congress's intent to ensure that state actors comply with the Equal Protection Clause. The question cannot fall upon the traditional attributions of the act because the act furthering the conspiracy *cannot be achieved without abusing state power*.²¹⁰ The rule that should govern in these cases was well stated by the Supreme Court in *United States v. Classic*: “Misuse of power, possessed by virtue of state law and *made possible only because the wrongdoer is clothed with [state] authority* . . . is action taken ‘under color of’” state law.²¹¹ The question is whether the municipal agents’ acts should be attributed to their principal entity; the determination should be based on the factors taken into account when the decision to act was made.²¹² The illustrative cases below exemplify the conspiracies Congress intended to remedy with the 1871 Act.

2. Cases Where the Intracorporate Conspiracy Doctrine’s Application Negated Congressional Intent

i) *Dickerson v. Alachua County Commission*

¶59

A perfect example of how the doctrine is used unjustly to shield conspirators from § 1985 liability arises in *Dickerson v. Alachua County Commission*.²¹³ In March 1994, Alfred Dickerson, an African-American corrections officer at the county jail, was on-duty shift supervisor when a prisoner’s escape was discovered; it is undisputed that the escape actually occurred the previous night, when Dickerson was not on duty.²¹⁴ Charles King, William Krider, and Gary Brown began an investigation.²¹⁵ According to Dickerson, “conflicts of interest should have precluded [King and Krider] from participating in the investigation [since] Krider knew about [the] escape plan in advance and failed to file an incident report.”²¹⁶ Despite the officers’ dubious motives, they found that the jail broke a rule about the “posting [of] uncertified officers alone in housing units where inmates are confined.”²¹⁷ However, the report “only cited the jail for violations of the rule that occurred during Shift I—the shift supervised by Dickerson—not during Shift III, when

²¹⁰ *Tabor v. Chicago*, 10 F. Supp. 2d 988, 994 (N.D. Ill. 1998) (holding that “[w]here the defendants’ ability to injure a plaintiff derives solely from their positions within the entity for which they work, and the influence they wield therefrom, the [intracorporate conspiracy] doctrine” applies); accord *Williams v. Cook County*, No. 05-6351, 2006 U.S. Dist. LEXIS 44443, at *10 (N.D. Ill. June 29, 2006) (noting “if [the defendants] were not acting within the scope of their authority as Cook County employees, they could not have ‘harmed’ [the Plaintiff] as she alleges”).

²¹¹ 313 U.S. 299, 326 (1941) (emphasis added) (holding defendants guilty under what is now 18 U.S.C. § 241, section 1985’s sister criminal provision, of conspiring to deprive citizens of their constitutional right to vote).

²¹² See FLETCHER, *supra* note 20, § 4884 (noting “[the] test of the corporation’s liability in conspiracy cases is whether there was authority for doing the act in question by its officer or agent, and, if so, *whether the agent acted for the master*”) (emphasis added). If the agent did not act for the master, the corporation is not liable. However, this does not negate the agent’s liability. See *infra* notes 257-258 and accompanying text.

²¹³ 200 F.3d 761(11th Cir. 2000).

²¹⁴ *Id.* at 763.

²¹⁵ *Id.* at 764.

²¹⁶ *Id.* Dickerson’s knowledge that the employees were aware of the escape plan and did nothing to stop it jeopardized those employees’ jobs. Thus, they likely conspired to shift the blame to Dickerson in order to save their jobs.

²¹⁷ *Id.*

the escape actually occurred.”²¹⁸ The investigation found no violations before or during the escape and concluded that Dickerson and his minority subordinates were entirely at fault.²¹⁹ He and three subordinates were demoted promptly; the white officers on duty at the time of the escape “received only written warnings.”²²⁰

¶60 Dickerson sued, alleging that “Caucasian jail officers and managers, including Brown, King and Krider” conspired to blame him and his minority subordinates for the escape, which in fact occurred because of the negligence of the alleged conspirators.²²¹ A jury found the defendants liable under § 1985 for conspiring to deprive the plaintiff of due process and equal protection and awarded Dickerson \$50,000; the Eleventh Circuit vacated the judgment, however, holding that the intracorporate conspiracy doctrine precluded the § 1985 conspiracy claim.²²² The court reasoned that since Dickerson failed to include any defendants who were not county employees, all the defendants were acting under a single legal entity and were thus incapable of conspiring.²²³

¶61 The court also found that the doctrine’s exceptions were inapplicable.²²⁴ Despite the fact that the investigating officers had “independent personal stakes” in shifting the responsibility from themselves to Dickerson and his subordinates, the court noted without explanation that this exception did not apply.²²⁵ Thus, the doctrine barred a claim Congress intended to permit.

ii) *Shaw v. Klinkhamer*

¶62 *Shaw v. Klinkhamer* illustrates how the doctrine can be used to unjustly shield conspirators from liability in conspiracy claims under § 1983.²²⁶ In 1991, Susan Klinkhamer, mayor of St. Charles, Illinois, appointed Donald Shaw to chief of police; as chief, Shaw worked under Klinkhamer and her aide, Maholland.²²⁷

¶63 In the summer of 2002, one of Klinkhamer’s major campaign donors received a speeding citation.²²⁸ When she heard of the citation, Klinkhamer called Shaw, “telling him that she ‘didn’t like it’ and that she wanted him to ‘pull it.’”²²⁹ After the citation was nullified without the issuing officer’s permission, Shaw launched an investigation of the

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* It seems that once Dickerson constituted a threat to King, Krider, and Brown, these officers infused racism into their decision. Dickerson alone may not have been enough to prove that racism was a factor, but the fact that Dickerson and “[three] other African-American officers who worked on [his] shift,” were the only ones demoted, while the white officers at fault received only a slap on the wrist, implies that racism was a substantial factor in the decision. *Id.*

²²¹ *Id.* at 763-64.

²²² *Id.* at 765-70.

²²³ *Id.* at 768.

²²⁴ *Id.* at 769-70. The exception for criminal action did not apply “because Dickerson [did] not allege any criminal conduct or that the conduct here could give rise to criminal charges.” *Id.* at 770; *see supra* note 113 and accompanying text.

²²⁵ Dickerson, 200 F.3d at 768; *see supra* note 119 and accompanying text.

²²⁶ No. 03-6748, 2005 U.S. Dist. LEXIS 14483 (N.D. Ill. July 1, 2005).

²²⁷ *Id.* at *3.

²²⁸ *Id.*

²²⁹ *Id.* “Klinkhamer also informed Shaw that she was displeased with a liquor compliance investigation involving [McNally’s Pub], whose officers and part-owners had given Klinkhamer’s re-election campaign its largest cash donation in 2001. After McNally’s received its punishment, Shaw notified Maholland of what he perceived to be ‘extreme favoritism.’” *Id.* at *4.

unauthorized disposition of the citation on January 8, 2003.²³⁰ He informed the state police of his suspicions on February 3, requesting an official inquiry and later disclosed that he suspected political influence.²³¹ By February 18, Maholland informed Shaw that he would not be reappointed.”²³²

¶64 Shaw brought a conspiracy claim under § 1983, alleging that Maholland and Klinkhamer conspired not to reappoint him “in retaliation for Shaw’s having launched an investigation into the resolution of the [campaign donor’s] traffic citation and having reported perceived acts of favoritism.”²³³ The court held that Shaw’s claim failed because it was not clear that the “decision not to reappoint Shaw was [made] *solely* for personal reasons.”²³⁴ Again, the doctrine barred a claim Congress intended to allow.

3. A Notable Case Where Applying the Intracorporate Conspiracy Doctrine Would Negate Congressional Intent

¶65 In recent times, the most notable case to evoke application of the intracorporate conspiracy doctrine is *Wilson v. Libby, Rove & Cheney*.²³⁵ On July 6, 2003, Joseph Wilson IV, a former ambassador, published an op-ed in the *New York Times*²³⁶ in which he refuted President Bush’s primary rationale for invading Iraq.²³⁷ Wilson went to Niger on behalf of the CIA to investigate the rationale and found it implausible.²³⁸

¶66 At the time, Wilson’s wife, Valerie Plame, was a covert CIA operative.²³⁹ In an endeavor to discredit Wilson, White House officials—including Vice President Dick Cheney, his Chief of Staff, I. Lewis “Scooter” Libby and Karl Rove—allegedly conspired to leak Plame’s name to the press,²⁴⁰ asserting that Plame’s status at the CIA allowed her

²³⁰ *Id.*

²³¹ *Id.* at *5. Shaw’s knowledge that Klinkhamer was engaged in the impropriety of getting her campaign donors off the legal hook jeopardized her job as a public official. Thus, Klinkhamer and Maholland likely conspired to fire Shaw to maintain their positions of state power.

²³² *Id.* at *6.

²³³ *Id.* at *18-19.

²³⁴ *Id.* at *19 (emphasis added). This perfectly illustrates the inequity of the “solely personal motive” exception. See *infra* Part VI.B.2.

²³⁵ Complaint, *Wilson v. Libby*, 498 F. Supp. 2d 74 (D.D.C. 2007) (No. 06-1258).

²³⁶ Joseph C. Wilson IV, Op-Ed., *What I Didn’t Find in Africa*, N.Y. TIMES, July 6, 2003, Section 4 (Week in Review), at 9.

²³⁷ The rationale was that Saddam Hussein sought nuclear material from Africa. George W. Bush, U.S. President, State of the Union Address, 1 PUB. PAPERS 82 (Jan. 28, 2003), available at <http://www.whitehouse.gov/news/releases/2003/01/20030128-19.html>.

²³⁸ Wilson, *supra* note 236.

²³⁹ Patrick Fitzgerald, Press Conference, Special Counsel Patrick Fitzgerald On the Indictment of I. Lewis Libby (Oct. 28, 2005), available at http://www.usdoj.gov/usao/iln/osc/documents/2005_10_28_fitzgerald_press_conference.pdf [hereinafter “Fitzgerald Press Conference”]. While Plame was not undercover at the time, she had been in the past, and her employment with the CIA was classified. *Id.*

²⁴⁰ Complaint, *supra* note 235, ¶ 2. Libby was eventually convicted on four counts of perjury and obstruction of justice for lying to a federal grand jury about his role in the leak. Pierre Thomas, Jason Ryan & Theresa Cook, *Libby Found Guilty on Four Counts*, ABCNews.com, Mar. 6, 2007, <http://abcnews.go.com/Politics/story?id=2899477&page=1>. Karl Rove was a source for a reporter who published Valerie Plame’s name. Sydney Blumenthal, *Libby’s Cynical Defense*, Salon.com, Feb. 15, 2007, http://www.salon.com/opinion/blumenthal/2007/02/15/libby_trial/index.html. Libby discussed Plame’s CIA employment with multiple reporters. *Id.* Though Cheney was not a source, investigators may probe further to determine the extent of his participation because Libby’s defense may be a cover story to shield Cheney. See Murray Waas, *The Libby-Cheney Connection*, NAT’L JOURNAL, Feb. 19, 2007, <http://news.nationaljournal.com/articles/021907nj1.htm>.

to arrange Wilson's trip to Niger.²⁴¹ However, by leaking her name, the officials abused knowledge they obtained as state actors and allegedly deprived Joseph Wilson and Valerie Plame [hereinafter, "the Wilsons"] of their rights.

¶67 The Wilsons filed suit against Dick Cheney, Scooter Libby and Karl Rove, alleging that they violated the First Amendment by retaliating against Wilson²⁴² and deprived Plame of her Fifth Amendment equal protection and property rights.²⁴³ The Wilsons further alleged that these individuals conspired under § 1985²⁴⁴ with an "invidiously discriminatory animus towards those who had publicly criticized the administration's justifications for going to war with Iraq."²⁴⁵ However, in an amended complaint, the Wilsons dropped this claim and proceeded instead with several direct *Bivens* claims under the First and Fifth Amendments.²⁴⁶

¶68 On July 19, 2007, the Wilsons' suit was dismissed.²⁴⁷ Since the Wilsons dropped their conspiracy claim, the court did not discuss the intracorporate conspiracy doctrine.²⁴⁸ However, this example is academically illuminating for a few reasons. First, Cheney went to great lengths to discredit Wilson because he regarded Wilson's op-ed as a personal attack since it implied that Cheney knew the alleged connection between Niger and Iraq was spurious.²⁴⁹ Cheney could not be held directly liable under § 1983 or *Bivens* because he took no action. Cheney could be liable under a conspiracy theory, however, since he allegedly supported and devised the action.²⁵⁰ Second, this example illustrates how joining alleged conspirators can be beneficial for plaintiffs seeking extensive damages.²⁵¹ As such, this case shows how an act ordered by a wealthy executive but carried out by his inferiors implicates a § 1983 conspiracy and the practical abuse of power. It would be absurd to suggest that these men are incapable of conspiring

²⁴¹ Fitzgerald Press Conference, *supra* note 239.

²⁴² Complaint, *supra* note 235, ¶¶ 41-44.

²⁴³ *Id.* ¶¶ 45-49, 54-58.

²⁴⁴ *Id.* ¶¶ 59-63.

²⁴⁵ *Id.* ¶ 60.

²⁴⁶ Amended Complaint, *Wilson v. Libby*, 498 F. Supp. 2d 74 (D.D.C. 2007) (No. 06-1258). The Wilsons likely dropped their conspiracy claim because the proposed class (those who publicly criticized the Bush administration's rationales for war) would not qualify as protected. *See supra* note 82 and accompanying text. The Wilsons might have fared better by filing a § 1983 conspiracy claim since that section does not require intent to discriminate against a class and the Wilsons would only have needed to establish the deprivation and the existence of a conspiracy. *See supra* note 76. This would not be possible, however, since § 1983 claims cannot be brought against federal actors. *See Chavez v. U.S.*, 226 Fed. App'x 732, 734 n.1 (9th Cir. 2007). The Wilsons did not allege a conspiracy claim under *Bivens* in the amended complaint. *See* Amended Complaint.

²⁴⁷ *Wilson v. Libby*, 498 F.Supp.2d 74, 99 (D.D.C 2007).

²⁴⁸ *Id.*

²⁴⁹ Toni Locy, *Cheney May Be Called in CIA Leak Case*, ASSOCIATED PRESS (May 25, 2006), available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/05/25/AR2006052500083.html>. Though Cheney himself leaked no information to the press, it is strongly alleged that he discussed this course of action with Libby since Cheney himself informed Libby of Plame's CIA employment and marriage to Wilson. *Id.*

²⁵⁰ Thus, this case exemplifies the rationale for conspiracy liability under §§ 1983 and 1985: those who do not personally act to deprive people of rights, but who plan to do so through the acts of others, should be equally liable. *See supra* notes 207-208 and accompanying text.

²⁵¹ *See supra* note 207. Cheney obtained a \$37 million dollar retirement package when he left Halliburton to run for Vice President. Michael Kranish, *Cheney Faces Decision on Wyoming Drilling*, BOSTON GLOBE, May 6, 2001, at A1.

simply because they all worked for the White House.²⁵² While we may never know the truth about these events, it seems that in attempting to discredit their detractor, Cheney, Rove, and Libby conspired to abuse classified knowledge they obtained as federal actors to deprive the Wilsons of their rights.²⁵³

B. The Intracorporate Conspiracy Doctrine is Inconsistent with the State of the Law in the Civil Rights Arena

1. Torts and the Agency Relationship

¶69 The veil-piercing notion of “looking through” the agency relationship to reach the facts becomes common sense when one recognizes that a claim of civil conspiracy “is essentially a tort action.”²⁵⁴ Those with state authority have a duty not to deprive others of their legal rights, as originally determined by the 1871 Act, now codified at §§ 1983 and 1985.²⁵⁵ Victims of conspiracies under these sections must establish breach of that duty, an injury caused by the breach and damages.²⁵⁶ When viewed as a tort, the existence of an agency relationship is irrelevant because individuals are liable for their tortious actions, even if they were acting as agents.²⁵⁷ Thus, the “true basis of liability is the [agent’s breach of] duty owed to the third person” resulting in an injury to that person.²⁵⁸

¶70 Proponents of the intracorporate conspiracy doctrine argue that conspiracy is a special kind of tort in that it cannot be committed unless the defendants are “capable” of conspiring. Intracorporate agents, they argue, are “incapable of conspiring” since any injurious act originated from a “single legal actor.”²⁵⁹

²⁵² In fact, if anything, this employment relationship *motivated* the conspiracy because Wilson’s op-ed questioned the integrity of the White House and—though Libby and Rove were not named—of them and Cheney, specifically.

²⁵³ A legal analyst (formerly Timothy McVeigh’s trial lawyer) who covered Libby’s criminal trial suggested that the evidence supported a finding that Cheney and Libby conspired to leak classified information. Jeralyn Merritt, *Libby Trial: Missing the Forest for the Trees*, Huffingtonpost.com, Feb. 1, 2007, http://www.huffingtonpost.com/jeralyn-merritt/libby-trial-missing-the_b_41734.html.

²⁵⁴ *County Concrete Corp. v. Twp. of Roxbury*, 442 F.3d 159,174 (3d Cir. 2006).

²⁵⁵ See *supra* notes 49-52 and accompanying text.

²⁵⁶ See *supra* note 61 for the requisite elements to state a section 1985 claim. The first three elements establish the breach of duty, while the fourth lists two possible injuries that give rise to damages. See *supra* note 76 for the necessary elements to state a section 1983 claim. Here, the first element is the breach of duty and the second is the injury that gives rise to damages.

²⁵⁷ FLETCHER, *supra* note 20, § 1135 (explaining that “[t]his rule applies to torts committed by those acting in their official capacities as officers or agents of a corporation” (citing *Odell v. Signer*, 169 So. 2d 851, 854 (Fla. Dist. Ct. App.1964))). The agents of a corporation are “personally liable to any third person they injured by virtue of their tortious activity even if such acts were performed within the scope of their employment as corporate officers.” *Id.*

²⁵⁸ *Id.*; see also *id.* § 1160 (noting “[a] person cannot escape personal liability for malicious prosecution merely because he or she acted as an officer of a corporation and not as an individual”).

²⁵⁹ See, e.g., *Dickerson v. Alachua County Comm’n*, 200 F.3d 761, 767 (11th Cir. 2000). This proposition, more than any other, I believe, has fueled the widespread acceptance of the intracorporate conspiracy doctrine in the civil rights field due to its elementary reasoning. Unfortunately, its assertion is pure misdirection. Indeed, the *single-corporate-entity-cannot-conspire-with-itself* argument as applied in intracorporate immunity cases arose with the doctrine itself in *Nelson Radio*, where the court, considering whether a corporation could conspire with itself when no officers or agents were named as defendants, noted that a corporation cannot do so “any more than a private individual can.” *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952). That a corporation cannot conspire with itself is but a truism, though not for the reason stated in *Nelson Radio* (and repeated *ad nauseam* ever since). While

¶71 This argument has yet to receive the scrutiny it deserves. Civil conspiracy is defined as (1) an agreement by multiple persons (2) to jointly (3) accomplish some unlawful purpose.²⁶⁰ Agents of municipal entities are capable of conspiring since they, like any other group of human beings, can agree to mutually attain an unlawful purpose, i.e., the deprivation of another person’s legal rights. All three elements of a civil conspiracy are fulfilled. The difficulty arises in the fact that *carrying out the unlawful purpose* requires the conspirators to act in their official capacity as agents of the state. In doing so, their actions are attributed to the single municipal entity.

¶72 Among the elements necessary to state a claim of conspiracy under §§ 1983 and 1985 are the (1) existence of a conspiracy among the defendants and (2) an action taken in furtherance of that conspiracy resulting in a deprived right.²⁶¹ Most courts hold that the first element fails when intracorporate conspiracies are alleged.²⁶² This may be due, in part, to the fact that courts use unnecessarily broad language when applying the doctrine.²⁶³

¶73 However, the conspiracy element does not fail on account of impossibility.²⁶⁴ Instead, it is the *act depriving the plaintiff of a right*—the second element—that fails, because, according to the doctrine, the act is attributed to the state entity and not the alleged conspirators. The plaintiff, therefore, cannot show that the alleged conspirators performed an act furthering the object of the conspiracy because the single state actor is the only “person” who acted. While the state’s act furthered the conspiracy, the state itself was not a conspirator; thus neither the state nor the conspirators—lacking the first and second elements, respectively—may be held liable.

¶74 Despite the “single actor,” however, when the municipal corporate action results in a deprivation of rights, Congress intended the 1871 Act to permit recovery. Therefore, the agency relationship is irrelevant when the plaintiff can establish the civil rights

it is true that a single entity cannot conspire alone, no entity can conspire without a brain that allows it to think and act independently because conspiracies require “a meeting of the minds.” *Ameen v. Merck & Co.*, 226 Fed. App’x 363, 371 (5th Cir. 2007). Thus, a corporation cannot conspire because it has no independent will capable of agreeing to an illicit goal. It would therefore be equally proper to assert that a “corporation cannot conspire with itself any more than a” rock can. *Nelson Radio*, 200 F.2d at 914.

This conclusion is not dictated by the first premise of corporate personality, that a corporation is a single legal entity apart from its constituents, but by the second premise, that a corporation is an artificial person without an independent will. *See supra* notes 86-93 and accompanying text. In contrast, intracorporate agents have independent wills because they are human beings. Thus, they are and always have been capable of conspiring. *See infra* note 263. That intracorporate agents now enjoy virtual immunity to conspiracy charges is partly due to the shortsightedness of plaintiffs lawyers. *See infra* note 270.

²⁶⁰ *Ahlers v. Schebil*, 188 F.3d 365, 374 (6th Cir. 1999).

²⁶¹ *See supra* notes 61 and 76 for the elements necessary to state a claim under sections 1985 and 1983, respectively.

²⁶² *See, e.g., Dickerson*, 200 F.3d at 768.

²⁶³ In the civil rights context, courts appear to interpret or regard the corporate entity too broadly, so as to include every act of each one of its agents, contrary to agency principles. For example, in one case in the Fourth Circuit, the court wrote: “Because the defendants are all agents of [the defendant medical school], they constitute a single legal entity. They are thus legally incapable of conspiracy.” *Lewin v. Cooke*, 28 Fed. App’x 186, 195 (4th Cir. 2002); *accord Chambliss v. Foote*, 421 F. Supp. 12 (E.D. La. 1976). This holding is overbroad and does not accurately reflect the doctrine because the agents do not constitute a single entity; rather, *their acts are attributed to a single entity*. Furthermore, the agents *are* capable of conspiracy, for if they conspired purely as individuals outside the scope of employment or with a third party, the conspiracy is actionable. *FLETCHER, supra* note 20, § 4884.

²⁶⁴ *See supra* note 263.

conspiracy due to the defendants' breach of their duty not to deprive others of their rights. This notion is supported by *Rebel Van Lines v. Compton*, which noted that applying "the intra-corporate conspiracy [doctrine] to public entities and officials would immunize official policies of discrimination. This result would contravene the law as it now exists."²⁶⁵

¶75 Permitting recovery would have broad implications if not for the Supreme Court's holding in *Monell v. Department of Social Services*.²⁶⁶ There, the Court held that "a municipality cannot be held liable solely because it employs a tortfeasor."²⁶⁷ It may be held liable, however, "when execution of a [state] policy or custom, [set by] those whose edicts or acts may fairly be said to represent official policy, inflicts the injury . . . under § 1983."²⁶⁸ Absent a showing of official policy, only the conspirators may be held liable.²⁶⁹ As such, the scope of this article is limited to the intracorporate conspiracy doctrine's effect of barring claims against individual conspirators and not against their principal municipal corporate entities.²⁷⁰

2. Analyzing Exceptions to the Doctrine

¶76 The nature and number of exceptions to the intracorporate conspiracy doctrine demonstrate that, in the civil rights field, its reach is overbroad. The *Dombrowski*

²⁶⁵ 663 F. Supp. 786, 793-94 (C.D. Cal. 1987). This statement was made before the intracorporate conspiracy doctrine was a widely accepted defense to conspiracy claims against municipal agents. In cases before 1980, the doctrine is never mentioned when agents were held liable. *See Nesmith v. Alford*, 318 F.2d 110, 124-26 (5th Cir. 1963) (holding, with no discussion of the intracorporate exception, that the plaintiff's § 1983 conspiracy claim should, at trial, be submitted to the jury where two white plaintiffs sued three police officers for denying their First Amendment right to "associate with Negroes in a public restaurant"); *Simpson v. Weeks*, 570 F.2d 240, 243 (8th Cir. 1978) (affirming a jury's finding that the chief of police and his assistant conspired to deprive the plaintiff of his right to free speech); *see also Lenzer v. Flaherty*, 106 N.C. App. 496, 511-12 (1992) (refusing to apply the intracorporate exception to civil conspiracy cases where an employee sued under § 1983 claiming several state agents terminated her employment and deprived her of free speech rights after she reported patient abuse at the defendants' rehabilitation center); *Jones v. City of Chi.*, 856 F.2d 985, 992-94 (7th Cir. 1988); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1253-64 (7th Cir. 1984), *overruled on other grounds by Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005).

²⁶⁶ 436 U.S. 658 (1978).

²⁶⁷ *Id.* at 691 (continuing: "in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory").

²⁶⁸ *Id.* at 694.

²⁶⁹ The municipality would not be liable in civil rights conspiracy cases as it could not be alleged as a conspirator. *See supra* note 259. This would not, however, preclude the municipality from indemnifying the conspirators for their actions.

²⁷⁰ Given the holding of *Monell*, it seems municipal corporations will rarely be liable for conspiratorial rights deprivations because the motives for such actions cannot be attributed to official policy. By the same token, private corporations would rarely be liable, not only because they cannot execute state action, but because the corporate principal (i.e., the board of directors) would likely never authorize conspiratorial deprivations. Without authorization, the corporate principal is not liable. *See supra* note 212. It is clear that plaintiffs' lawyers sued the principal corporations in civil rights conspiracy cases to reach the deep pockets of those entities. However, given the statements above, this course of action was likely more harmful than helpful. By including corporations as defendants, these lawyers only reinforced the idea that a corporation and its agents cannot conspire. However, I believe civil rights conspiracy plaintiffs should be allowed to recover under §§ 1983 and 1985 if they do not sue the principal entity and instead sue only the individual conspirators in both their individual and official capacities. This method of suing defendants is proper because the act of conspiring implicates the former capacity while the act furthering the object of the conspiracy implicates the latter. *See infra* Part VI.C.

decision was correct because the plaintiff alleged that one agent conspired with his corporate principal.²⁷¹ However, the rule does not accord with Congress's intent when there are multiple human conspirators. Though the conspirators acted as agents of one entity, they agreed to a course of action which deprived another person of her legal rights; the fact that the conspirators accomplished the deprivation through an official action by a non-human entity should not negate their liability.²⁷²

¶77

One exception is particularly useless given that §§ 1983 and 1985 are generally violated by state actors. The *Dombrowski* court obliquely qualified its dicta on the doctrine, suggesting that, if the Klan were to incorporate, its agents "could not carry out acts of violence with impunity simply because they were acting under orders from the Grand Dragon."²⁷³ Courts construed this to mean "conspirators may not create a principal for whom they are agents in order to make their acts all the acts of a single legal person that cannot be charged with conspiring with itself."²⁷⁴ This exception benefits no one, since state actors never create the municipal entities through which they act.²⁷⁵ While the defendants in *Dickerson* and *Shaw* did not *create* the state entity through which they deprived the plaintiffs of constitutional rights, they *utilized the entity* to shield themselves from liability for their wrongful acts. In this way, conspirators are using their state authority to divest individuals of their constitutional rights "with impunity."²⁷⁶

²⁷¹ *Dombrowski v. Dowling*, 459 F.2d 190, 192 n.4 (7th Cir. 1972). This is how I believe the doctrine should work: in such cases, there is truly one legal actor, not because the agent and principal are the *same* actor, but because a conspiracy requires a "meeting of the minds," *Ameen v. Merck & Co.*, 226 Fed. App'x 363, 371 (2007), and corporate entities have no mind. See *supra* note 259. The First and Third Circuits apply the doctrine correctly by denying claims against a single corporate entity or an agent and his corporate principal. *Rice v. President & Fellows of Harvard Coll.*, 663 F.2d 336, 338 (1st Cir. 1981) (holding a § 1985 conspiracy claim fails where the plaintiff sued only a single corporate entity and "named no individual faculty members as defendants"); *Robison v. Canterbury Village, Inc.*, 848 F.2d 424, 430 (3d Cir. 1988) (holding a § 1985 conspiracy claim fails because "a corporation cannot conspire with its president"). These circuits allow conspiracy claims, however, when the individual conspirators are named as defendants. *Stathos v. Bowden*, 728 F.2d 15, 20-21 (1st Cir. 1984); *Novotny v. Great Am. Fed. Sav. & Loan Ass'n*, 584 F.2d 1235, 1257-58 (3d Cir. 1978). Thus, the First and Third Circuits correctly apply the principles of the intracorporate conspiracy doctrine to the civil rights context whereas the majority of circuits refuse to allow claims against individual defendants who conspired to deprive plaintiffs of their civil rights. It is only fair to note that the lawyers in these cases may be equally at fault where they failed to join or retain the alleged individual conspirators as defendants.

²⁷² In contrast, the doctrine is appropriate in antitrust law because "the evil at which the 'conspiracy' section of the Sherman Act is aimed is an evil that exists only when two different business *enterprises join* to make a decision, such as fixing a price, that in a competitive world each would" make on its own. *Stathos*, 728 F.2d at 21. Further, when such a price-fixing decision is made by a single enterprise, the decision "is not only legitimately socially useful but also may often require joint decision-making by managers within" that single enterprise. *Id.* The *Stathos* court contested the doctrine's applicability in the civil rights context by noting that "one cannot readily distinguish in terms of harm between the individual conduct of one enterprise and the joint conduct of several, [nor] can one readily identify desirable social conduct as typically engaged in jointly by the officers of a single enterprise." *Id.*; see also *O.H. v. Oakland Unified Sch. Dist.*, No. C-99-5123, 2000 U.S. Dist. LEXIS 21725, at *10-*27 (N.D. Cal. Apr. 14, 2000).

²⁷³ *Dombrowski*, 459 F.2d at 196.

²⁷⁴ *Cole v. Univ. of Hartford*, 391 F. Supp. 888, 893 (D. Conn. 1975).

²⁷⁵ I have been unable to find a single case in which a court applied this exception to hold defendants liable, which demonstrates the exception's utter uselessness. The only reason for discussing this exception is to show the scant reasoning courts employ when deciding issues that involve corporate entities and conspiracies. See *supra* notes 198-199 and accompanying text.

²⁷⁶ *Dombrowski*, 459 F.2d at 196; see *supra* note 265 and accompanying text.

¶178 Moreover, the police misconduct exception—whereby police officers are held liable for conspiring because their acts are clearly outside the scope of employment²⁷⁷—is myopic. Non-police government employees abuse power and engage in the same type of bad behavior as police officers. The only difference is that police misconduct is salient, highly visible to ordinary people, and clearly outside the scope of employment, while the misconduct of government agents and officials is inconspicuous and difficult to trace.²⁷⁸

¶179 Furthermore, the exception based on a series of actions or continuing instances of discrimination²⁷⁹ demonstrates the logical fallacy of the doctrine. The exception disavows the notion that corporate agents are incapable of conspiring where courts find ample evidence of a conspiracy through multiple acts.²⁸⁰ Thus, the exception holds that corporate agents *can* conspire, and intimates that, in other cases, there is simply not sufficient evidence of a conspiracy.

¶180 Finally, the “solely personal stake/motive”²⁸¹ standard is inequitable and inconsistent with the intent of the 1871 Act and other civil rights jurisprudence.²⁸² The standard does not take into account the fact that the majority of injuries leading to viable conspiracy claims under §§ 1983 and 1985 are perpetrated by those cloaked in state power.²⁸³ Conspiracies alleged under these sections tend to injure the powerless, so requiring plaintiffs to show that the action was accomplished *without a single official reason* would negate claims Congress intended to permit.²⁸⁴ In addition, this standard is inconsistent with other civil rights cases. In discrimination cases, the Supreme Court has held that plaintiffs only need show that an improper purpose was a “motivating” or a “substantial” factor in the decision.²⁸⁵ As such, discriminatory acts taken in an official capacity should be viewed as outside the scope of employment if personal motives played a motivating or substantial role in the decision leading to the injurious act.²⁸⁶ Thus,

²⁷⁷ See *supra* notes 114-118 and accompanying text.

²⁷⁸ For example, the conspiracies alleged in Shaw, *supra* Part VI.A.2.b, where the mayor and her aide conspired to fire the chief of police to prevent him from publicizing the mayor’s impropriety, and in *Wilson v. Libby*, *supra* Part VI.A.3, where White House officials allegedly conspired to deprive their detractors of their legal rights, are outside the scope of employment, but difficult to uncover.

²⁷⁹ See *supra* notes 111-112 and accompanying text.

²⁸⁰ See, e.g., *Stathos v. Bowden*, 728 F.2d 15, 21 (1st Cir. 1984).

²⁸¹ See *supra* notes 122-125 and accompanying text.

²⁸² One commentator asserts that this exception is useless because government agents are liable for their unlawful actions regardless of motive. Finch, *supra* note 190, at 46.

²⁸³ See *supra* notes 71-78 and accompanying text.

²⁸⁴ Klan members who held state office (and today, state agents who engage in conspiracies to deprive others of rights) would undoubtedly be able to assert an official reason for the deprivation, even if the reason is mere pretext. For example, the defendants in Shaw, *supra* Part VI.A.2.b, might assert that Shaw, the chief of police, was fired because his job performance had been slipping. They might even find a few pieces of evidence to support this contention well after he was fired. Nevertheless, his firing would not be justified in this manner after the fact if the real reason for his termination was due to his speaking out against the mayor’s acts of political impropriety.

²⁸⁵ *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977), *superseded by statute on other grounds*, *Rivera v. United States*, 924 F.2d 948, 954 (9th Cir. 1991). In a law to protect whistleblowers such as Shaw, *supra* Part VI.A.2.b, from employment discrimination, Congress chose a “contributing factor” standard. 5 U.S.C. § 1221(e)(1) (2000).

²⁸⁶ *Garza v. City of Omaha*, 814 F.2d 553, 556 (8th Cir. 1987) (holding that where the defendants acted “to further their personal bias,” or, in other words, for substantially personal reasons, they acted “outside the scope of their employment” and were thus liable); see also RESTATEMENT (SECOND) OF AGENCY § 228

rather than the broad holding that agents of a single entity cannot conspire to deprive people of their civil rights, courts should adopt this standard, which jibes with the wishes of Congress and by which §§ 1983 and 1985 conspiracies may be remedied equitably.

C. *A Standard in Accordance with the Congressional Purpose*

¶81 I argue that the determination of whether a conspiracy existed should draw upon the motive of the act furthering the conspiracy.²⁸⁷ It is not always clear whether the motive for the act was possessed by the principal or the alleged conspirators. If the principal had a legitimate motive, it is likely no conspiracy existed. If, however, the state actors had a substantial, discriminatory motive²⁸⁸ for the official action while the principal had no motive, then both parties should be afforded an opportunity to present their evidence. Thus, courts should employ a burden-shifting framework in deciding whether the plaintiff proved the existence of the conspiracy. Further, courts should consider granting qualified immunity to the state actors.

1. The Motive of the Injurious Act is Determinative

¶82 The question should not be whether the decision was made solely for personal reasons, but whether personal reasons played a substantial role in the final determination.²⁸⁹ The latter standard is consistent with the intent of Congress. The former would bar, for example, Dickerson's claim, due to the principal's motive to hold someone accountable for the escape. While this motive is legitimate, it would be unjust to hold Dickerson and his subordinates responsible for the escape when they played no part in it. Thus, if personal reasons played a substantial role in the decision that caused the plaintiffs' injuries, the act—while executed in an official capacity—was undertaken for a dubious official reason. As such, the lack of a legitimate official reason must mean the act was outside the scope of employment.²⁹⁰ Even though the defendant acted while wearing her "official hat," her decision to act was made while wearing her "individual hat."²⁹¹ Therefore, plaintiffs should recover if they show that a "discriminatory purpose was a motivating [or, in other words, a substantial] factor" in the injurious decision.²⁹²

(conduct is outside the scope of employment when it is "too little actuated by a purpose to serve the master").

²⁸⁷ While the intracorporate conspiracy doctrine's proponents argue this act is a single act of the corporation, it must be remembered "that the metaphysical entity has no thought or will of its own [and] that every act ascribed to it[] emanates from and is the act of the individuals personated by it." *State ex rel. Attorney Gen. v. Standard Oil Co.*, 49 Ohio St. 137, 184 (1892).

²⁸⁸ In this sense, the term "discriminatory" does not relate specifically to claims under § 1985 in which an invidiously discriminatory animus is necessary. Rather, it is used more generally to denote a personal animus towards the plaintiff, such as one that would motivate a state actor to abuse his power to deprive the plaintiff of rights actionable under §§ 1983 or 1985.

²⁸⁹ *Mt. Healthy*, 429 U.S. at 287.

²⁹⁰ See *supra* note 286.

²⁹¹ *Cole v. Univ. of Hartford*, 391 F. Supp. 888, 893 (D. Conn. 1975).

²⁹² See *supra* note 285 and accompanying text. Given that in other contexts, courts have never required a discrimination plaintiff to show that her injuries were caused solely by personal motives, it is interesting to note the difference between the standards of *Nelson Radio* and *Hartman*. The *Nelson Radio* court implied that any personal motive might negate the doctrine. *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952). In contrast, the *Hartman* court held that the doctrine is only negated when the act was prompted *solely* by personal motives. *Hartman v. Bd. of Trs. of Cmty. Coll. Dist. No. 508*, 4 F.3d 465, 470 (7th Cir. 1993). The *Nelson Radio* court reasoned that if the conspirators acted to further

This standard is optimal because when an improper purpose is a substantial factor in the action, applying the intracorporate conspiracy doctrine to agents of state entities empowers them to jointly abuse their authority.

¶83

In *Garza v. City of Omaha*, the Eighth Circuit found an exception to the doctrine when the individual defendants are named and are alleged to have acted “outside the scope of their employment for personal reasons.”²⁹³ The Eighth Circuit held the § 1985 claim actionable based on evidence that the defendants “were acting to further their personal bias.”²⁹⁴ While “furthering personal bias” would be an overly broad rule because many state actions arguably could fulfill this purpose, the “substantial factor” test is consistent with Congress’s intent when applied correctly. One court framed the standard by applying the personal motive exception “where the conspirator gained a direct personal benefit . . . wholly separable from” the entity’s benefit.²⁹⁵ This standard accords with Congress’s intent because the motive for the act determines whether a conspiracy existed.²⁹⁶

their own purposes, the act could not be attributed directly to the corporate entity. *Nelson Radio*, 200 F.2d at 914. However, by the time of *Hartman*, § 1985 required plaintiffs to establish a personal motive in the form of an “invidiously discriminatory animus.” Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). Thus, the intracorporate conspiracy doctrine is unsuitably broad in the civil rights arena because a significant exception to the doctrine in its original (antitrust) field is a requirement under § 1985. The *Hartman* court was forced to revise the exception in order to save an ill-suited rule. The revision, however, limits the section’s reach by denying recovery where Congress intended it.

The *Hartman* court supported its “solely personal reasons” standard by citing Fletcher’s Law of Corporations § 4877. *Hartman*, 4 F.3d at 470. This section, however, does not govern the liabilities of agents; it regulates the liability of the corporation itself. FLETCHER, *supra* note 20, § 4877. Further, Fletcher’s language in a later section contradicts the holding of *Hartman* explicitly, noting that no conspiracy exists when agents “are acting solely for the corporation.” *Id.* § 4884. In other words, agents may be held liable when their acts are motivated by *anything other than* the welfare of the corporation. This interpretation is further cemented when Fletcher notes that agents “will not be held personally liable [where they acted] on behalf of the corporation and *maintained no independent personal stakes* in the object of the conspiracy.” *Id.* (emphasis added). Thus, a conspirator can be held personally liable if he has *any* independent personal stake in the conspiracy’s unlawful objective. This position accords with a substantial number of precedents, including *Greenville Publishing*, *Nelson Radio*, and *Garza v. City of Omaha*. See *supra* notes 119-121 and accompanying text; *Garza v. City of Omaha*, 814 F.2d 553, 556 (8th Cir. 1987).

²⁹³ *Garza*, 814 F.2d at 556.

²⁹⁴ *Id.*

²⁹⁵ *Selman v. Am. Sports Underwriters, Inc.*, 697 F. Supp. 225, 239 (W.D. Va. 1988).

²⁹⁶ For Title VII employment discrimination, Congress and the Supreme Court settled on but-for causation to determine whether a plaintiff may recover compensatory damages. See Russell D. Covey, *The Unbearable Lightness of Batson: Mixed Motives and Discrimination in Jury Selection*, 66 MD. L. REV. 279, 290-94 (2007) (explaining how Congress passed the Civil Rights Act of 1991 to overturn a Supreme Court holding that but-for causation is necessary for plaintiffs to recover and that Congress limited recovery to declaratory and injunctive relief, attorneys’ fees and costs when but-for causation is not established). However, there are several reasons courts should not require the heightened standard of the but-for test and instead should apply the substantial factor test to decide whether a conspiracy existed (and thus, whether a conspiracy plaintiff may recover compensatory damages). First, the rights in conspiracy cases are generally constitutional rather than statutory and, as such, courts should vindicate these rights whenever possible. Mark Neal Aaronson, *Ideas Matter: A Review of John Denvir’s Democracy’s Constitution*, 36 U.S.F. L. REV. 937, 953 (2002) (noting that “constitutional rights are due greater deference than statutory rights”). Second, the substantial factor test will protect plaintiffs’ rights better than the but-for test because it would allow recovery whenever discriminatory motives improperly contributed to the deprivation. In contrast, applying the but-for test to decide whether an improper personal motive caused an allegedly conspiratorial deprivation would be akin to endorsing the “solely personal motive” standard, because for both standards, the plaintiff can recover only when the state actors have a clear personal motive that saliently influences state action. Thus, the but-for test suffers the same flaw as the “solely personal motive”

¶84 To be clear, I am not advocating a total rejection of the intracorporate conspiracy doctrine in the civil rights arena. In cases where it is alleged that one agent conspired with his municipal corporate principal, the doctrine should apply.²⁹⁷ The doctrine should also bar liability “for routine, collaborative business decisions that are later alleged to be discriminatory”²⁹⁸ since there is no legal injury where no discrimination existed. This, however, requires a determination of whether the action was in fact discriminatory.

2. Limits on the Proposed Scheme: A Burden-Shifting Framework and Qualified Immunity

¶85 Under the proposed standard, courts should determine the motive behind the act furthering the conspiracy. Since conspiracies are, by definition, undertaken for illegitimate purposes, a legitimate and nondiscriminatory motive will prove that no conspiracy existed. Our society is keen to seek out and uncover conspiracies, but perhaps too keen: human nature leads some to believe that conspiracies exist when there are far simpler answers.²⁹⁹ When alleged conspirators can readily articulate valid and justifiable reasons for the action giving rise to the plaintiff’s injury, it must be assumed that the conspiracy exists only in the mind of the plaintiff. As such, there is truly no legal injury. The question, then, is how one determines the legitimacy of an injurious action.

¶86 The answer is a tool used in similar discrimination cases to determine the legitimacy of an employer’s adverse actions: the *McDonnell Douglas* framework. While the framework was originally developed in the context of Title VII, courts have applied it to Reconstruction-era civil rights legislation, including the 1871 Act.³⁰⁰

¶87 To begin, the plaintiff must prove “by the preponderance of the evidence a prima facie case of discrimination.”³⁰¹ Then, the defendant must assert a “legitimate,

standard: it is inequitable because the state agents can almost always assert a pretext for the deprivation. *See supra* notes 233-234, 281-286 and 289-290 and accompanying text. Third, conspiracy liability is a useful tool to fight the “special evil” of conspiracies. *See supra* note 208 and accompanying text. Thus, to deter state actors from jointly abusing power, conspiracy liability should be enforced when improper motives substantially caused a deprivation of rights. Fourth, while the Third Restatement of Torts abandoned the substantial factor test, this was done for the purpose of determining act causation (whether an act caused an injury). RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM (BASIC PRINCIPLES) 26 cmt. j (tentative draft no. 2, 2002). For civil rights conspiracies, the test would be used to determine motive causation (whether a motive caused an act). Given that the majority of civil rights conspiracy claims involve employment discrimination, *see, e.g.*, cases cited *supra* note 22, the substantial factor test is better suited to that field of law, “in which actor’s motives are paramount in determining liability.” *See* Carissa Byrne Hessick, *Motive’s Role in Criminal Punishment*, 80 S. CAL. L. REV. 89, 148 (2006). Finally, the test will prevent insubstantial motives from giving rise to liability, and there will be no potential for jury confusion because the decision will be a question of law.

²⁹⁷ *See supra* note 271 and accompanying text.

²⁹⁸ *See supra* note 106.

²⁹⁹ *See* Ted Goertzel, *Belief in Conspiracy Theories*, 15 POLITICAL PSYCHOLOGY 731, 739 (1994) (noting that believing in conspiracies provides people with “a tangible enemy to blame for problems which otherwise seem too abstract” and that conspiracies “provide ready answers for unanswered questions and help to resolve contradictions”). Interestingly, the study on which the paper was based found a tendency to believe in conspiracies “more common among black and [Hispanic] respondents than among white respondents.” *Id.*

³⁰⁰ *Reese v. City of Southfield*, No. 97-1670, 1998 U.S. App. LEXIS 20527, at *11 (6th Cir. Aug. 13, 1998) (noting that the Supreme Court applied the framework to a § 1981 claim and that courts in several circuits have applied it to § 1983 claims).

³⁰¹ *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981).

nondiscriminatory reason for” the allegedly unconstitutional deprivation.³⁰² Finally, the plaintiff is given the “opportunity to prove by a preponderance of the evidence that the . . . reasons offered by the defendant” are mere pretexts.³⁰³

¶88

With this framework extended to § 1983 conspiracy claims, the plaintiff would establish her own case and the defendant’s personal motive. Similarly, in § 1985 claims, the plaintiff must establish an invidiously discriminatory animus.³⁰⁴ For both, plaintiffs must prove the act was illegitimately discriminatory, meaning it was substantially prompted by personal motives.

¶89

With this framework in place, plaintiffs like Dickerson and Shaw would have a fair chance to recover for the deprivation of their rights. Dickerson could have proven by a preponderance of the evidence that he was demoted to protect the integrity of the white officers truly responsible for the prisoner’s escape.³⁰⁵ Shaw could have proven by a preponderance of the evidence that he was fired for exercising his First Amendment right to speak out against the mayor’s acts of favoritism, which illegitimately obstructed justice.³⁰⁶ In countless other cases, plaintiffs would be given the chance to establish a conspiracy-fueled rights deprivation without having their claim virtually disqualified before it is filed. Only after hearing both sides of the issue and determining the legitimacy of an action should a court rule on the applicability of the intracorporate conspiracy doctrine. Even then, courts may negate a defendant’s liability, if appropriate, through qualified immunity.³⁰⁷

³⁰² *Id.* at 253.

³⁰³ *Id.*

³⁰⁴ See Finch, *supra*, note 190, at 46 (noting that because § 1985(3) requires an invidious discriminatory animus, it “bespeaks a personal motive”). By definition, this standard requires establishing that the defendants acted so intolerably and deplorably that the discrimination is self-evident.

³⁰⁵ See Dickerson v. Alachua County Comm’n, 200 F.3d 761, 764 (11th Cir. 2000).

³⁰⁶ See Shaw v. Klinkhamer, No. 03-6748, 2005 U.S. Dist. LEXIS 14483, at *18-*19 (N.D. Ill. July 1, 2005).

³⁰⁷ Qualified immunity should be applied on a case-by-case basis to conspiracy claims under §§ 1983 and 1985. Under this doctrine, public officials are immune from liability if “the state of the law [at the time did not give them] fair warning that their [treatment of the plaintiff] was unconstitutional.” Hope v. Pelzer, 536 U.S. 730, 741 (2002). Since depriving others of their constitutional rights is obviously unconstitutional, qualified immunity should still be extended if its underlying rationales would be furthered:

- (1) the injustice . . . of subjecting to liability an officer who is required . . . to exercise discretion;
- (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good; [and (3)] the fear that the threat of personal liability might deter citizens from holding public office.

Owen v. City of Independence, Mo., 445 U.S. 622, 654 (1980). The existence of a conspiracy and, thus, the legitimacy of an injurious action, should be threshold issues to reaching the question of qualified immunity. While the existence of qualified immunity should generally be resolved early in a lawsuit, resolution of such a claim must await a full trial where there are disputed issues of material fact—in this case, whether a conspiracy existed. Saucier v. Katz, 533 U.S. 194, 200-01 (2001); Mitchell v. Randolph, 215 F.3d 753, 755 (7th Cir. 2000). Therefore, if an action is adjudged to be illegitimate and injurious, the first rationale for qualified immunity does not apply because the actor willingly engaged in a conspiracy, negating any claim of merely exercising discretion. The second and third rationales, however, are reasonable considerations that should be balanced against the facts of the case. If the act is entirely illegitimate, qualified immunity should not apply since the rationales are not implicated. Citizens would not be deterred from holding public office or executing such office with decisiveness by a denial of qualified immunity where the facts surrounding the denial portrayed an illegitimate and unjust conspiracy. If, however, the act was arguably legitimate, and imposing liability may threaten the willingness of citizens (1) to work in public office or (2) to execute their office with decisiveness, a court should extend immunity. In making this determination, courts should consider how the public might view the act and resolve doubts

VII. CONCLUSION

¶90 The intracorporate conspiracy doctrine should not negate civil rights conspiracy liability against individual defendants where plaintiffs can establish a conspiratorial deprivation of their rights that was substantially driven by a personal motive. The substantial factor test and the *McDonnell Douglas* burden-shifting framework—both of which are already used in employment discrimination cases—will serve the purpose of aiding courts in determining whether the acts alleged were, in fact, precipitated by a conspiracy. In cases where a conspiracy existed, courts should disregard the artificial municipal entity to reach the facts because applying the intracorporate conspiracy doctrine to immunize state agents who would deprive others of their rights is contrary to the intent of the 1871 Act and age-old civil rights conspiracy law. In passing the 1871 Act, Congress provided remedial measures for those conspiracies that it believed violated public policy. The artificial corporate entity must not be used to sanction violations of that policy.

¶91 When the courts first created the piercing the corporate veil doctrine, it was understood that the artificial entity was a tool not to be abused. Sadly, decades of jurisprudence have deserted this conception to the benefit of government agents and to the detriment of individuals. While the Constitution set forth the principles by which our government functions, our true founding principles are manifest in the Bill of Rights and the Declaration of Independence, where the sanctity of individual dignity pervades. The intracorporate conspiracy doctrine's application in the civil rights arena subverts this dignity. Thus, courts should recognize that the need to rectify unjust conspiracies that deprive individuals of their rights is far more important than protecting state actors from liability for joint wrongs realized through the abuse of their state power.