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GOVERNMENTAL CONSPIRACIES TO VIOLATE CIVIL RIGHTS: A THEORY RECONSIDERED

Michael Finch*

I. INTRODUCTION

The notion that government might be "conspiring" to violate the rights of citizens is more apt to invite derision than concern. From Oswald to Elvis, from Ollie to O.J., allegations of conspiracy have become the stuff of tabloid journalism and have the ring of a slug coin. The history of conspiracy, it has been observed, evidences the "tendency of a principle to expand itself to the limit of its logic."1

Yet, when conspiracy is understood simply as an agreement to do wrong, the possibility that government might conspire against citizens is not only plausible but likely. Contemporary government often operates through bureaucratic consensus, which necessarily involves the joint actions of multiple parties. By its nature then, governmental decision-making that goes awry is often amenable to characterization as a "conspiracy."

Most practitioners recognize that federal law authorizes civil actions against persons who, acting under color of law, directly violate the civil rights of others.2 These suits are typically brought

* Professor of Law, Stetson University College of Law. The author would like to thank Mark Brown and Michael Swygert for their comments on this Article, and Lori Tomaselli for her valuable research assistance. The author would also like to thank Rebecca Steele, who identified the general problem addressed by this article.


2. "Every person who, under color of any statute . . . causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ." 42 U.S.C. § 1983
under the now-familiar section 1983 of title 42 (hereinafter "section 1983"). However, a companion statute, which renders liable any party who "conspires" to deprive others of their civil rights, has received much less attention. Many times, officials inspire or support unlawful actions behind the scenes without taking a direct participatory role in the wrongdoing. Civil conspiracy laws provide a valuable remedy against those whose support for civil rights violations may not be clearly Remediable under statutes like section 1983.

In 1871, the Reconstruction Congress anticipated the possibility that government might conspire to violate newly-recognized civil rights, and enacted both civil and criminal statutes to discourage such activity. The sole federal statute that expressly creates conspiracy liability for civil rights violations is 42 U.S.C. § 1985 (hereinafter also "the Conspiracy Statute"). This statute was part of the Civil Rights Act of 1871, a piece of Reconstruction legislation that also included 42 U.S.C. § 1983. In its most pertinent provision, part (3), section 1985 provides that:

If two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws . . . ; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of the conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of

(1988).
3. See infra notes 36, 39-43 and accompanying text.
4. 42 U.S.C. § 1985(3) (1988). A companion statute to § 1985 is § 1986, which provides as follows:

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured . . . for all his damages caused by such wrongful act, which such person by his reasonable diligence could have prevented . . .


5. See generally Mark Fockele, Comment, A Construction of Section 1985(3) in Light of Its Original Purpose, 46 U. CHI. L. REV. 402, 404-20 (1979) (discussing the origin of § 1983); see also supra note 4, for a discussion of the statutory predecessors to § 1985(3).
damages occasioned by such injury or deprivation, against any one or more of the conspirators.\textsuperscript{6}

Although section 1985(3) was part of an ambitiously-styled "Act to Enforce the Provisions of the Fourteenth Amendment,"\textsuperscript{7} it was seldom used in the century following its enactment.\textsuperscript{8} Like its companion statute, 42 U.S.C. § 1983, section 1985(3) (the Conspiracy Statute) was enervated by restrictive interpretations of "state action"\textsuperscript{9} and the constitutional protection afforded by the Fourteenth Amendment. However, in the latter part of the 20th century, the Warren Court increased the legal significance of both statutes by dramatically expanding the realm of constitutional duties owed by governmental actors.

While section 1983 was transforming the operations of state and local government, section 1985(3) veered on an unexpected tack. Reversing precedent of recent vintage, the Supreme Court announced in Griffin v. Breckenridge\textsuperscript{10} that 42 U.S.C. § 1985(3) might be employed to regulate private conspiracies to violate civil rights. Since the Court's decision in Griffin, legal scholars have shifted much of their attention to discussion of private-actor liability under section 1985\textsuperscript{11}—even though suits alleging gov-

\textbf{6.} 42 U.S.C. § 1985(3) (1988). A variety of conspiracies are proscribed in section 1985, including conspiracies to interfere with federal officers, 42 U.S.C. § 1985(1), conspiracies to influence or injure a juror, 42 U.S.C. § 1985(2), and conspiracies to obstruct the "due course of justice," 42 U.S.C. § 1985(2). The conspiracy provisions of section 1985(3) have the broadest application and have been the subject of the most extensive litigation and commentary.

Section 1985(3) has been codified in various sections of the United States Code during its history, including Rev. Stat. § 1980(3), 8 U.S.C. § 47(3), and 42 U.S.C. § 1985(c). Throughout this Article, the conspiracy provisions of section 1985(3) will be referred to by the statute's contemporary reference, even when discussing those provisions at a date when they were codified in different sections of the United States Code. The only exception will occur when section 1985(3) is referred to more generally as part of the Civil Rights Act of 1871, which included the statutory predecessors of 42 U.S.C. §§ 1983, 1985, 1986 (1988).

In addition to civil liability, section 1985 originally contained criminal penalties for the violation of these rights. However, the criminal penalties under section 1985 were later repealed by Congress. See infra note 43. In the criminal context, these acts are now largely addressed in other broadly drafted criminal conspiracy sections of the Federal Code. Even though the principles of criminal conspiracy are addressed in this Article for purposes of comparison, the focus of the Article remains on civil liability.


\textbf{8.} See infra notes 47-52 and accompanying text.


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ernmental conspiracy remain far more numerous than suits against private actors.\textsuperscript{12}

As a result of the Warren Court expansions, the law of governmental conspiracy is currently characterized by a clutter of liability pronouncements.\textsuperscript{13} The reported decisions reveal conflicting holdings, ranging from the position that governmental actors lack capacity to conspire among themselves\textsuperscript{14} to the position that conspiracy liability exists even for governmental violations of rights falling outside the "equal protection" interests explicitly protected by section 1985(3).\textsuperscript{15} Much remains unsettled concerning fundamental issues such as the source of authority to regulate governmental conspiracy, the scope of rights protected from conspiracy, and even whether conspiracy liability exists at all. As one federal judge observed, "[c]hanging interpretation has been the only constant about section 1985(3)."\textsuperscript{16}

This Article addresses the disarray found in the law of governmental conspiracy and offers a new rationalization of liability principles. As maintained in subsequent discussion, most of the confusion in governmental conspiracy law results from a failure to identify what, precisely, is intended by the "conspiracy" liability found in reconstruction legislation. Additionally, the courts have failed to reconcile conspiracy liability with principles of governmental accountability developed under section 1983.

Part II of this Article provides an introduction to classical governmental conspiracy law, including the types of conduct


\textsuperscript{13} There appears to be no law review commentary addressing the subject of governmental conspiracy liability, other than in a passing reference. See, e.g., Fockele \textit{supra} note 5, at 437-38. Commentary from past decades appears to have assumed that governmental liability for civil rights conspiracies was axiomatic, and that possible immunities extended to private actors by the courts would have no consequence for governmental institutions. See Note, Intracorporate Conspiracies Under 42 U.S.C. § 1985(c), 92 HARV. L. REV. 470, 482 (1978). As discussed later, most courts today fail to distinguish between the conspiracy liability of governmental and private actors, and accord governmental actors the same immunities conferred on private actors. See infra notes 209-210 and accompanying text.

\textsuperscript{14} The confused state of conspiracy doctrine under § 1985 is not limited to issues of governmental liability. See, e.g., Janis L. McDonald, Starting From Scratch: A Revisionist View of 42 U.S.C. § 1985(3) and Class-Based Animus, 19 CONN. L. REV. 471, 471 (1987) ("[T]here is probably no other federal statute in such complete disarray, distortion, and confusion . . . .")

\textsuperscript{15} See infra notes 160-161 and accompanying text.

\textsuperscript{16} See infra notes 77-80 and accompanying text.

proscribed by the civil law and the underlying purposes of the proscription. As will be discussed, a critical distinction exists regarding the meaning of conspiracy law, depending on whether it is applied in criminal law or tort law. In particular, the tort model of conspiracy liability does not actually prohibit conspiracies in themselves—as does criminal law—but serves the more limited purpose of rendering liable those persons who support unlawful conduct, but do not play an active role in its accomplishment. The tort model is incorporated into section 1985, which constitutes the sole statute expressly imposing liability for conspiracies to violate civil rights.

Part III of this Article discusses the advent of conspiracy actions under 42 U.S.C. § 1983. This part of the Article maintains that section 1983 provides an independent, although implied basis for asserting conspiracy claims against governmental actors. The implication of a conspiracy remedy under section 1983 is supported by common law precedent and contemporary notions of causation recognized under that statute. A conspiracy action under section 1983, moreover, is not subject to the limitations of section 1985(3), which fails to address the violation of statutory rights and arguably is restricted to claims of racial discrimination.

Following this analysis of conspiracy liability under sections 1983 and 1985(3), the remainder of the Article addresses the principal hurdle to using governmental conspiracy law to regulate the behavior of governmental actors: the doctrine of "intracorporate immunity." Most federal circuits have denied application of civil conspiracy law to governmental entities and officials by applying immunity rules developed in the context of private corporate conspiracies. This Article will examine both the formal legal theory underlying the intracorporate immunity doctrine in suits against governmental actors, as well as the policy rationale offered for its defense.

As will be demonstrated, whatever the validity of intracorporate immunity doctrine in the context of private conspiracies, it has no place in suits against government and governmental officials. Both as a matter of corporate-agency theory and as a matter of governmental accountability, the doctrine of intracorporate immunity is singularly inapplicable to governmental conspiracies. For these reasons, contemporary court decisions that apply immunity rules in suits against governmental actors are clearly in error.

Moreover, even the more compelling rationale for the widespread acceptance of governmental immunity—the suggestion that
liability might induce litigation that interferes with legitimate governmental activity—is exaggerated. Provided conspiracy law is properly integrated with existing principles of governmental liability under section 1983, there are adequate safeguards to insure that governmental actors need not continually operate under the shadowy suspicion that collective decision-making will be interpreted as conspiracy.

II. AN OVERVIEW OF CONSPIRACY DOCTRINE

A. Forms of Conspiracy

To appreciate the import of civil rights conspiracy liability, it is vital to distinguish two separate, though related, forms of conspiracy theory. One form of conspiracy theory is most often associated with criminal law. The criminal law approach to conspiracy typically prohibits unlawful agreements per se, and provides that conspirators may be punished separate from, and even in the absence of, the commission of wrongful conduct.

In the context of criminal law, commentators have observed that "[c]onspiracy is usually defined as an agreement between two or more persons to achieve an unlawful object or to achieve a lawful object by unlawful means. The gist of the crime is the agreement itself rather than the action pursuant to it."17

The criminalization of conspiracy agreements dates back to the 17th century and the infamous Star Chamber, when that body announced that an unlawful agreement would be punishable even prior to its implementation.18 Since that time, the criminal laws of England and America have proscribed illegal conspiracy agreements, although many authorities—including Congress—usually require the commission of some "overt act" in furtherance of the conspiracy.19 This act requirement, while requiring a de minimus showing of conduct beyond a mere agreement, nonetheless imposes liability regardless of whether the agreement culminates in the commission of a legally-cognizable wrong.20

17. See Developments in the Law, Criminal Conspiracy, 72 HARV. L. REV. 920, 922 (1958) [hereinafter Developments] (emphasis added) (footnote omitted) (citing, e.g., Commonwealth v. Hunt, 45 Mass. (4 Met.) 111, 123 (1842)). See also P. MARCUS, PROSECUTION AND DEFENSE OF CRIMINAL CONSPIRACY CASES 2-2 (1983) ("The crime in conspiracy is the illegitimate agreement, and the agreement is the crime.").


20. See Developments, supra note 17, at 946.
The criminalization of conspiracy agreements per se serves special purposes that may not be addressed when conspiracy laws require ultimate commission of illegal conduct. First, when it is difficult to establish judicially that unlawful conduct has occurred, pure conspiracy laws facilitate the punishment of suspected wrongdoers. Second, pure conspiracy laws permit early intervention by government so as to preempt the implementation of unlawful schemes.21

The use of conspiracy doctrine to punish those who have merely discussed the commission of suspect activity has prompted criticism of that doctrine.22 Such use has the potential to punish or chill discussion that merits protection under the First Amendment,23 and may interfere with organizational conversation that otherwise serves a useful societal purpose.24

An alternative application of conspiracy doctrine premises culpability upon the actual commission of an unlawful act. It is still not necessary that the charged conspirator has personally engaged in wrongful conduct, but at least one of his co-conspirators must have. This form of conspiracy liability is more typical of European penal laws,25 which generally consider the existence of a conspiracy as the basis for increasing the punishment of completed criminal acts. More important for purposes of the present discussion, this variation on conspiracy doctrine has assumed an important role for civil-law liability in American courts,26 particularly in the field of torts.

Conspiracy theory in the tort context frequently passes under another name. In contemporary torts nomenclature, the civil liability that results from mutual agreement among defendants is often described as "concerted action" rather than conspiracy.27 As

24. See, e.g., infra notes 167-69 and accompanying text (discussing antitrust doctrine that immunizes organizational discussions of business policy).
25. See Developments, supra note 17, at 923.
27. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts 322 (5th ed. 1984); William L. Prosser, Joint Torts and Several Liability, 25 Cal. L. Rev. 413, 429-30 (1937); see also RESTATEMENT (SECOND) OF TORTS § 876 (1977) (liability for "persons acting in concert").
described by Professor Prosser, "[a]ll persons who act[] in concert . . . in pursuance of a common design [are] liable for the entire result." Thus, conspiracy or concerted-action liability in the civil law imposes a form of vicarious liability whereby all persons "who actively participate in the wrongful act, by cooperation or request, or who lend aid, encouragement or countenance to the wrongdoer, or approval to his acts done for their benefit, are equally liable with him."

The tortious form of conspiracy has common origins with the criminal form, but differs from its criminal counterpart in one significant respect: "it is clear that the mere agreement to do a wrongful act can never alone amount to a tort, whether or not it may be a crime; and that some act must be committed by one of the parties in pursuance of the agreement, which is itself a tort." Stated alternatively, "[t]he gist of the action is not the conspiracy charged, but the tort working damage to the plaintiff."

Criminal conspiracy doctrine criminalizes behavior that would otherwise be permissible, as a comparison of criminal and tort conspiracy law reveals. Both the conspiracy and its unlawful object are punishable wrongs, which may be found independent of each other. Tort conspiracy doctrine, on the other hand, builds upon existing legal rights and duties rather than creating them. Conspiracy liability is totally derivative of the underlying cause of action in tort. In the absence of a compensable tort, conspiracy liability does not exist.

This is not to suggest, however, that tortious conspiracies necessarily entail less serious consequences for the conspirators. The tortious conspirator appoints his co-conspirator agent for purposes of all unlawful conduct carried out pursuant to the conspiracy. Although he will not incur liability if the tortious purpose of the conspiracy remains unfulfilled, the conspirator becomes vicariously liable for all torts actually committed pursuant to the conspiracy, regardless of his degree of participation in the tortious conduct. This is in contrast to criminal

30. See Keeton et al., supra note 27, § 46, at 324.
31. Keeton et al., supra note 27, § 46, at 324.
32. James v. Evans, 149 F. 136, 140 (3d Cir. 1906) (emphasis added).
33. The common law doctrine of "merger"—whereby the crime of conspiracy was merged into the underlying conviction for illegal conduct—has long been abandoned. The conspiracy and the intended conduct are separate offenses, and may even be punished separately. See Developments, supra note 17, at 968-69.
34. See Keeton et al., supra note 27, § 46, at 323-24; see also infra notes 58-60.

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conspiracy doctrine, where a conspirator is rarely found vicariously liable for the substantive offenses of his co-conspirator.35

B. Conspiracy Under 42 U.S.C. § 1985(3)

Although section 1985(3) (the Conspiracy Statute) addresses the issue of civil liability, in its originally-proposed form that section would have provided for criminal liability alone.36 The proposed law would have punished conspiracies interfering with the enforcement of all rights granted by the “Constitution and laws” of the United States, and would have substantially increased the federal government’s jurisdiction over specified common-law crimes.37

Although Congress widely agreed that federal legislation was necessary to curb Klan violence in the South, moderate Republicans expressed grave doubts about the constitutional and political propriety of federalizing so broad an area of criminal law, particularly as it applied to private conduct.38 On the other hand, there was little argument concerning the propriety of some form of federal regulation of state action, as is most graphically evidenced by the contemporaneous enactment of section 1983, which is premised on the commission of acts “under color of state law.”39

Congress ultimately compromised on a bill that extended liability to all “persons”—regardless of whether they acted under color of state law—who conspired to deprive others of “equal protection” or “equal privileges and immunities” under the law.40

and accompanying text.

35. See Developments, supra note 17, at 993.
36. In original form, the proposed conspiracy statute provided:
   [I]f two or more persons shall . . . conspire, or combine together to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which . . . would . . . constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny . . . all the parties to or engaged in said conspiracy . . . shall be deemed guilty of a felony . . .

CONG. GLOBE, 42d Cong., 1st Sess. 317 (1871); see also 1 JOSEPH G. COOK & JOHN L. SOBIESKI, JR., CIVIL RIGHTS ACTIONS ¶ 1.28, at 1-335 (1995).
37. See CONG. GLOBE, supra note 36; 1 COOK & SOBIESKI, supra note 36, ¶ 1.28, at 1-333 to 1-340.
38. See 1 COOK & SOBIESKI, supra note 36, ¶ 1.28, at 1-335 to 1-359. See also Fockele, supra note 5, at 411-17.
The compromise limited criminal conspiracy application to rights set forth in the recently-adopted Fourteenth Amendment; this limitation was thought sufficient to preclude later challenges to the law's constitutionality. Interestingly, almost as an afterthought the compromise bill added a civil remedy for conspiracy, which provoked no discussion or debate.41

Within a decade of the law's passage, the Court ruled that the criminal conspiracy provisions of section 1985 were unconstitutional, based on a narrow interpretation of Congress' constitutional power to regulate private conduct that would not be revised by the Court for almost a century.42 Today, the criminal prohibition of section 1985, since repealed by Congress,43 has been practically supplanted by a more broad-reaching criminal conspiracy statute, 18 U.S.C. § 241. That statute criminalizes conspiracies intended to injure any person in his "free exercise [and] enjoyment of any right . . . secured to him by the Constitution or laws of the United States . . . ."44 Like other federal criminal conspiracy statutes, section 241 punishes the conspiracy agreement per se and does not require an actual violation of the victim's federal rights.45 Furthermore, section 241 reaches private action.46

Although the Court did not expressly invalidate section 1985's civil conspiracy provisions, such provisions were largely ineffective well into the 20th century. In fact, no decision under section

41. See 1 Cook & Sobieski, supra note 36, ¶ 1.28, at 1-364; Fockele, supra note 5, at 417.
42. The criminal provisions were ruled unconstitutional in United States v. Harris, 106 U.S. 629 (1882), based on the position that the law exceeded the power Congress has power to regulate private activity. To the extent that Harris restricted Congress' power to regulate private conduct that denied persons "equal protection" of the laws, it was effectively overruled in Griffin v. Breckenridge, 403 U.S. 88 (1971). See infra note 51 and accompanying text.
44. 19 U.S.C. § 241 (1994) (emphasis added). Ironically, § 241 pre-existed (by one year) the criminal provisions of the predecessor to § 1985(3), and literally addresses a broader range of conspiratorial purposes. Taken literally, § 241 would seem to render redundant the "equal protection" coverage of criminal conspiracies under § 1985(3)'s predecessor statute. It appears, however, that members of Congress questioned whether the vague language and enactment context of § 241 might limit its effectiveness. Hence, the criminal conspiracy provisions of § 1985(3) were proposed to address the potential deficiencies of § 241. See 1 Cook & Sobieski, supra note 36.
45. See, e.g., United States v. Skillman, 922 F.2d 1370 (9th Cir. 1990) (holding that § 241 does not require an overt act by defendant); Williams v. United States, 179 F.2d 644 (6th Cir.), aff'd, 341 U.S. 70 (1970) (clarifying that a crime of conspiracy is completed by agreement; no overt act is required). But see United States v. Callahan, 659 F. Supp. 80 (E.D. Pa. 1987) (requiring an overt act in addition to agreement).
1985(3) was reported prior to the year 1920.\textsuperscript{47} The relative uselessness of section 1985(3) is attributable largely to the facts that the statute was thought inapplicable to purely private conduct,\textsuperscript{48} and both the scope of constitutional rights applicable to state and local government and the meaning of state action were highly limited throughout the first half of the 20th century.\textsuperscript{49} The revival of section 1985(3) commenced in 1971 with the United States Supreme Court’s ruling in Griffin v. Breckenridge.\textsuperscript{50} The Court reversed precedent and concluded that section 1985(3) addressed private conspiracies, even those which lacked governmental involvement. In the wake of Griffin, litigants increasingly used section 1985(3) to redress discrimination by private parties and organizations. In particular, parties employed section 1985(3) as a remedy where other federal law prohibiting discrimination by private actors was either lacking or deficient.\textsuperscript{51}

The resurgence of conspiracy actions under section 1985(3) was not limited to private actors. Within a decade of the decision in Griffin, conspiracy claims became commonplace in civil rights actions against governmental actors.\textsuperscript{52} In most cases, section 1985(3) was used in conjunction with other remedial statutes, especially actions under 42 U.S.C. section 1983.\textsuperscript{53}

The civil conspiracy provisions of section 1985(3) follow the tort analogue of conspiracy law. In order to recover from conspirators, a plaintiff must be "injured in his person or property" or "deprived" of a "right" conferred upon citizens of the United States. Moreover, the plaintiff’s remedy is limited to "the recovery of damages occasioned by such injury or deprivation."\textsuperscript{54} As the Court has noted, "[s]ection 1985(3) provides no substantive rights itself; it merely provides a remedy for violation of the rights it desig-


\textsuperscript{48} Although the Supreme Court did not expressly require some form of state action in civil conspiracies until its 1951 decision in Collins v. Hardyman, 341 U.S. 651 (1951), the criminal law precedent of United States v. Harris, 106 U.S. 629 (1882), would have conveyed the same message to the lower courts.

\textsuperscript{49} See supra notes 11-15 and accompanying text.

\textsuperscript{50} 403 U.S. 88 (1971).


\textsuperscript{53} See, e.g., Keddie, 412 F. Supp. at 1267.

nates.  

Assuming that the violation of a right protected by section 1985(3) is found, liability extends to any "one or more of the conspirators" provided at least "one" of the conspirators does, "or cause[s] to be done, any act in furtherance of the object of the conspiracy whereby another is injured . . . or deprived of . . . any right." Note that the requirement of an "act" in furtherance of the conspiracy does not merely duplicate the "overt act" requirement of criminal law conspiracy. The act required for civil conspiracy must cause the plaintiff's injury or the violation of her rights. A conspiratorial agreement itself, even when accompanied by an overt act, does not result in liability unless the conspiracy and act ripen into an independent legal injury.

Section 1985(3) thus creates a form of "concerted-action" or vicarious liability, like that created by the common law of tortious conspiracy. Because section 1985(3) does not create substantive rights and does not proscribe conspiracies per se, it serves two principal functions in suits against governmental actors. First, it provides the means of inculpating governmental officials who have supported, encouraged or concealed a violation of civil rights, but whose causal role in the actual commission of wrongful conduct is more attenuated. Second, conspiracy liability provides the basis

55. Great Am. Fed. Sav. & Loan, 442 U.S. at 372; see also Volk v. Coler, 845 F.2d 1422, 1436 (7th Cir. 1988) ("The conspiracy itself does not give rise to further damages.").


57. See supra notes 19-21 and accompanying text.

58. See, e.g., Volk, 845 F.2d at 1436.

59. Id.

60. A companion statute to § 1985(3), 42 U.S.C. § 1986 (1988), further extends the web of liability to persons aware of an ongoing conspiracy. In particular, § 1986 renders liable any "person" who: (1) has knowledge that the wrongs intended by a § 1985 conspiracy are "about to be committed"; (2) has "power" to prevent or assist others in preventing such wrongs; and (3) through refusal or neglect to act, permits the commission of wrongs which that person "could have prevented." As with § 1985(3), § 1986 creates liability only for "damages caused by [the] wrongful acts."

Although § 1986 also addresses liability in the context of conspiracies, it does not create an independent remedy for conspiracies as such. Rather, § 1986 expressly premises the liability of persons who knowingly fail to exercise their power to prevent conspiracies upon the existence of a conspiracy as defined in § 1985. See Runs After v. United States, 766 F.2d 347, 355 (8th Cir. 1985).

61. See generally Volk v. Coler, 845 F.2d 1422 (7th Cir. 1988). As noted later, the precise contours of liability for those who have a smaller participatory role in civil rights violations are yet unsettled. See infra notes 113-117 and accompanying text. Allegations of conspiracy will reduce the uncertainty insofar as the named defendants have engaged in some behavior that would support an inference that they agreed—tacitly or expressly—to the commission of the wrong. Such behavior might
for assessing punitive damages against the wrongdoers, since the intentional nature of conspiratorial activity suggests a higher degree of culpability.\textsuperscript{62}

A significant aspect of the current debate concerning interpretation of section 1985(3) centers on the type of motive that conspirators must possess to establish liability.\textsuperscript{63} The Court has teased the legal community for some two decades concerning what wrongful motives are actionable under section 1985. In \textit{Griffin v. Breckenridge}, the Court stated that "some racial, or perhaps otherwise class-based, invidiously discriminatory animus" must underlie the conspirators' conduct.\textsuperscript{64} Since \textit{Griffin}, the Court has not expressly extended section 1985 beyond the regulation of race-based discrimination, and has scrupulously avoided deciding the issue.\textsuperscript{65} Nonetheless, some commentators read in the Court's more recent avoidance an indication that the Court will ultimately limit section 1985(3) to racially-motivated conspiracies.\textsuperscript{66}

Another issue that continually arises under section 1985(3) concerns the scope of rights protected. Section 1985(3) regulates conspiracies entered into "for the purpose of depriving . . . any person . . . of the equal protection of the laws . . .", and the Court has concluded that the conspiracy must be "aimed at" the impairment of a federal right enjoyed by the plaintiff against interference by the conspirators. For example, in its 1993 decision

\begin{itemize}
  \item include: knowingly permitting another official to take wrongful action; discussing proposed wrongful action with another official; taking incremental action that, in concert with the wrongful actions of other officials, produces the larger wrong; and concealing wrongful conduct. \textit{See, e.g., Volk}, 845 F.2d at 1422; \textit{Stathos v. Bowden}, 728 F.2d 15 (1st Cir. 1984); \textit{Hampton v. City of Chicago}, 484 F.2d 602 (7th Cir. 1973); \textit{Wahad v. F.B.I.}, 813 F. Supp. 224 (S.D.N.Y. 1993); \textit{Snell v. Asbury}, 792 F. Supp. 718 (W.D. Okla. 1991). Particularly important in conspiracy actions is that the conspiracy may be proved by circumstantial evidence, thus permitting a jury to find liability notwithstanding the lack of direct proof of the defendant's involvement in wrongful conduct. \textit{See Developments, supra} note 17, at 984; \textit{infra} notes 109-110 and accompanying text.

  \item \textit{See, e.g., Bell v. City of Milwaukee}, 746 F.2d 1205 (7th Cir. 1984); \textit{Stathos v. Bowden}, 728 F.2d 15 (1st Cir. 1984); \textit{see generally Smith v. Wade}, 461 U.S. 30, 56 (1983) (authorizing the recovery of punitive damages for reckless or intentional violations of civil rights).


  \item \textit{Griffin v. Breckenbridge}, 403 U.S. 88, 102 (1971).

  \item \textit{See, e.g., Bray v. Alexandria Women's Health Clinic}, 506 U.S. 263, 269 (1993) ("We have not yet had occasion to resolve the 'perhaps'; only in \textit{Griffin} itself have we addressed and upheld a claim under § 1985(3), and that case involved race discrimination.").

  \item \textit{See, e.g., 2 RODNEY SMOLLA, FEDERAL CIVIL RIGHTS ACTS 15-8 (3d ed. 1994).}
\end{itemize}
of Bray v. Alexandria Women’s Health Clinic, the Court refused to find an actionable conspiracy when private protestors attempted to interfere with the plaintiffs’ efforts to obtain an abortion. As noted by the Court, the right to an abortion is not protected against private action, any more than the right to free speech. Thus, the Court found that the defendants in Bray did not interfere with rights owed the plaintiff, given the absence of related governmental action.

The decision in Bray obviously has little effect on conspiracy actions against governmental actors, although its effect on private actors may be dramatic. In civil rights litigation arising under the Constitution, local and state governmental officials clearly owe duties to aggrieved persons, as do local governmental entities themselves. Furthermore, most contemporary civil rights statutes also confer rights against local and state governmental actors, although the Court has not yet decided whether federal statutory rights come within the coverage of section 1985(3).

In any event, there looms a realistic threat to civil rights enforcement against governmental defendants if the conspiracy provisions of section 1985(3) are ultimately limited to racially-motivated violations of rights, or if the scope of protectable rights is restricted to constitutional claims. This threat, however, presupposes that section 1985(3) is the only authorized means of civilly challenging governmental conspiracies. According to several courts, there is an alternative.

III. CONSPIRACY UNDER 42 U.S.C. SECTION 1983

In 1871, Congress enacted a civil rights bill that included both section 1983 and section 1985(3). Section 1983 broadly subjects local and state governmental actors, as well as local governmental entities, to liability for the violation of rights “secured by the Constitution and laws” of the United States. Such liability is not limited to laws that secure “equal protection,” and thus encom-

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68. Bray, 506 U.S. at 274.
69. Id.
70. State governmental entities enjoy sovereign immunity from damage awards absent a proper abrogation of that immunity by Congress, even when constitutional rights arise under the Fourteenth Amendment. See, e.g., Edelman v. Jordan, 415 U.S. 651 (1974).
71. See Great Am. Fed. Sav. & Loan, 442 U.S. at 370 n.6 (finding it unnecessary to decide “whether § 1985(3) creates a remedy for statutory rights other than those fundamental rights derived from the Constitution”).
passes constitutional violations outside the discrimination arena. Furthermore, section 1983 is presumptively available to remedy violations of federal statutory law.\(^{72}\)

Section 1983 does not, however, contain language rendering conspirators liable for federal law violations. The predicate of section 1983 liability is action that "subjects, or causes to be subjected" any person to violation of her rights.\(^{73}\) No mention is made of liability for concerted activity per se or of liability for those who merely support unlawful conduct.

Many civil-rights attorneys, as well as numerous federal judges, appear to have assumed that section 1985(3) is the only basis for imputing conspirator liability. This is evidenced by a variety of cases where:

1. section 1985(3) was alleged as the sole basis for governmental conspiracy liability in constitutional litigation,\(^{74}\)
2. claims under section 1985(3) to enforce established constitutional rights were rejected based on the lack of "class-based animus",\(^{75}\) and
3. courts have salvaged conspiracy claims to enforce various civil liberties by linking them to some invidious motive within the coverage of section 1985(3).\(^{76}\)

The last two responses, in particular, would be unnecessary if conspiracy liability extended to the broad range of federal-law violations encompassed by section 1983.

On the other hand, numerous courts have entertained claims against governmental conspiracies based solely on section 1983.\(^{77}\) Virtually all of these decisions assume the viability of section 1983 conspiracy claims without explaining their foundation, and further fail to rationalize such assumptions with section 1985(3). At most,

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74. See, e.g., Hilliard v. Ferguson, 30 F.3d 649 (5th Cir. 1994); Stathos v. Bowden, 728 F.2d 15 (1st Cir. 1984).
77. See, e.g., Earle v. Benoit, 850 F.2d 836 (1st Cir. 1988). One of the earliest cases to recognize § 1983 as a basis for conspiracy liability in suits involving governmental action is Nesmith v. Alford, 318 F.2d 110, 126 (5th Cir. 1963).
a few courts have summarily distinguished section 1985(3) conspiracy claims as applying only to suits alleging racial or class-based animus.78 Illustrative is the decision by the Tenth Circuit Court of Appeals in Dixon v. City of Lawton,79 where the court granted the governmental defendants’ motion for directed verdict on conspiracy claims under section 1985(3), based on the plaintiff’s failure to allege racial animus. At a hearing on the motion to dismiss, the trial judge granted the plaintiff leave to conform the pleadings to the proof alleged at trial, namely a conspiracy under section 1983.80

If the courts are correct in recognizing conspiracy claims under section 1983, that section would provide an important contribution to the law of conspiracy. First, conspiracy liability would apply in governmental litigation to enforce claims that require no allegation of class-based discrimination—in First and Fourth Amendment claims, for example. As well, section 1983 would shore up conspiracy law for claims of non-racial discrimination in the event that the Court eventually limits section 1985(3) to race-based violations.81 As also noted previously, conspiracies based on section 1983 would presumptively extend to federal statutory violations, a coverage courts have yet to establish under section 1985(3).82

A. Implied Conspiracy Liability Under Section 1983

At the outset, it should be emphasized that the conspiracy liability developed by courts under section 1983 is indistinguishable from liability under section 1985(3), but for the broader range of legal duties encompassed by section 1983. As discussed concerning the tortious form of conspiracy, the mere existence of a conspiracy is not itself actionable.83 In order to recover damages from an alleged conspirator under section 1983, the plaintiff must first establish that some right conferred independently by federal

78. See, e.g., Klingele v. Eikenberry, 849 F.2d 409, 413 (9th Cir. 1988); Helton v. Clements, 832 F.2d 332, 338 (5th Cir. 1988).
79. 898 F.2d 1443 (10th Cir. 1990).
80. Dixon 898 F.2d at 1449.
81. Gender discrimination claims, for example, have prompted an appreciable number of conspiracy suits under section 1985(3). See, e.g., Volk v. Coler, 845 F.2d 1422 (7th Cir. 1988); Statkis v. Bowden, 728 F.2d 15 (1st Cir. 1984).
82. See supra note 72 and accompanying text.
83. See, e.g., Snell v. Tunnell, 920 F.2d 673, 701 (10th Cir. 1990); see also United Bhd. of Carpenters & Joiners of Am. v. Scott, 463 U.S. 825, 833 (1983) ("The rights, privileges, and immunities that § 1985(3) vindicates must be found elsewhere . . .").
law has been violated.84 Furthermore, the conspiracy itself does not constitute a compensable form of damages.85 Damages are assessed based on the injuries suffered by plaintiff as the result of a violation of her federal rights. The conspiracy allegation provides a means of forcing less actively involved conspirators to share the damages. As Judge Posner has observed regarding conspiracy liability under section 1983, "the function of conspiracy doctrine is merely to yoke particular individuals to the specific torts charged in the complaint."86

The nature of conspiracy liability under section 1983 reveals its fundamental remedial character. Unlike criminal conspiracy doctrine, which creates a new substantive wrong in the form of conspiracy, civil conspiracy law elaborates a theory of causation to extend liability for the violation of independently-existing rights.

The characterization of conspiracy rules as "remedial" is important, for the Supreme Court has repeatedly emphasized that section 1983 is solely a remedial device that may not be used to create "substantive" rights.87 While it is true that the Court has consciously interjected substantive policy into the interpretation of section 1983 on several occasions,88 the argument for recognizing conspiracy liability under section 1983 is measurably strengthened by the fact that the exercise is portrayed as "remedial."

The foundation for developing conspiracy liability under section 1983 need not rest solely on the literal characterization of the task. On numerous occasions, both the Supreme Court and lower courts have "interpreted" section 1983 so as to develop rules governing causation and the liability of persons with lesser

84. See, e.g., Andree v. Ashland County, 818 F.2d 1306, 1311 (7th Cir. 1987); Villanueva v. McInnis, 723 F.2d 414, 418 (5th Cir. 1984).
85. See, e.g., Andree, 818 F.2d at 1311 ("Section 1983 does not . . . punish conspiracy; an actual denial of a civil right is necessary before a cause of action arises . . .") (quoting Goldschmidt v. Patchett, 686 F.2d 582, 585 (7th Cir. 1982)); Villanueva, 723 F.2d at 418 ("[I]t remains necessary to prove an actual deprivation of a constitutional right; a conspiracy to deprive is insufficient.").
86. Jones v. City of Chicago, 856 F.2d 985, 992 (7th Cir. 1988).
87. See, e.g., Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617-18 (1979) (Section 1983 acts "only to ensure that an individual has a cause of action for violations of the Constitution . . . . No matter how broad the [section 1983] cause of action may be, the breadth of its coverage does not alter its procedural character."); Baker v. McCollan, 443 U.S. 137, 144 n.3 (1979) (Section 1983 "is not itself a source of substantive rights but a method for vindicating federal rights elsewhere conferred by those parts of the United States Constitution and federal statutes that it describes.").
88. See, e.g., ERWIN CHEMERINSKY, FEDERAL JURISDICTION 474 (2d. ed. 1994) (arguing that "neither the existence of qualified immunity nor the legal test devised by the Court has any support in the common law.").
participatory roles. Thus, the Court has announced rules governing such matters as:

(1) the liability of municipalities whose policies have allegedly "caused" the violation of federal rights;\(^9\)
(2) the causal role of unconstitutional motives in assessing the liability of governmental officials;\(^9\)
(3) the liability of officials whose conduct constitutes a "remote" causal factor in the deprivation of life;\(^9\) and
(4) the liability of supervisors for the constitutional wrongs of their subordinates.\(^9\)

Courts have looked to a variety of sources in developing principles of liability under section 1983. These include legislative history and common-law precedent, as well as contemporary policy and precedent in the field of civil rights.

As previously observed, section 1983 and section 1985(3) were related parts of the Civil Rights Act of 1871.\(^9\) The history of neither provision, regretfully, provides guidance as to specific contours of civil liability for conspiracy, as the addition of civil liability provoked no explanatory comment in Congress.\(^9\) We know that both private and governmental wrongdoing were of concern to Congress, and that the safeguarding of "equal protection" interests presented the surest foundation for exercise of Congress' authority over misdeeds in the South. But this legislative history does not suggest even remotely whether Congress sought to extend conspirator liability under the general causation language of section 1983.

More helpful is the state of common-law liability principles that serve as a backdrop to section 1983 liability. Section 1983, as has been observed, is effectively a "constitutional tort" remedy.\(^9\) It is not surprising, then, that the Court has expressly endorsed the utility of tort compensation principles in developing the section 1983 remedy, particularly where there is a common law analogue


\(9\) See supra note 5 and accompanying text.

\(9\) See supra note 41 and accompanying text.

to the claim being asserted. 96

The case law of the latter 19th century confirms that some form of tortious conspiracy liability existed during this period. Indeed, precedent recognizing liability for "concerted action" extends well back into that period, 97 as do cases recognizing legal liability for conspiratorial actions. 98

At the turn of the century, there was considerable controversy concerning whether "conspiracy" itself was a separate "tort", 99 that issue arose infrequently, however, as most litigated conspiracies had culminated in wrongful acts constituting recognized torts. 100 In such cases, the existence of a conspiracy affected only the scope of the remedy available to the injured party. 101 Thus, the concept that a conspiracy might expand the remedy available in a conventional tort action—as occurs in a conspiracy action under either section 1983 or section 1985(3)—appears uncontroversial.

Concerning actions by government officials, there is strong evidence that, as a general principle, vicarious liability was not imposed on officials for the wrongs actually committed by other governmental officials. 102 Yet, the principle of vicarious liability should not be confused with conspiracy or "concerted activity" liability. The repudiation of vicarious liability for governmental officials—primarily supervisory officials—was a repudiation of strict liability derived solely from the doctrine of "respondeat superior." 103 By comparison, an official could be held liable when he had "directed, authorized or co-operated in the wrong." 104

In contrast, the common law requirement of cooperation or

97. Bird v. Lynn, 49 Ky. (10 B. Mon.) 422, 423 (1850); Brown v. Perkins, 83 Mass. (1 Allen) 89, 92-95 (1861); Daingerfield v. Thompson, 74 Va. (33 Gratt.) 136 (1880).
98. Hood v. Palm, 8 Pa. 237 (1848) (conspiracy to defame); Mott v. Danforth, 6 Watts 304 (Pa. 1837).
99. Compare J. Charlesworth, Conspiracy as a Ground of Liability in Tort, 36 L.Q. Rev. 38 (1920) (arguing that separate tort or not, conspiracy is an aggravating circumstance that raises amount of damages) with Francis Burdick, The Tort of Conspiracy, 8 COLUM. L. Rev. 117 (1908) (arguing against conspiracy as a separate tort).
101. See id. at 52 (stating "if the plaintiff can prove himself the victim of a conspiracy, the damages recoverable will be very much greater . . . .").
103. See KERTON ET AL., supra note 27, at 1067.
104. See FLOYD MECHEM, A TREATISE ON THE LAW OF PUBLIC OFFICES AND OFFICERS § 790 (1890).
"encouragement" would seem to readily encompass the acts of a conspirator. The formation of an agreement to do wrong by its nature encourages the commission of the wrong. Indeed, the criminal punishment of conspiracy agreements per se is founded on the rationale that the formation of a conspiracy materially increases the likelihood that wrongful conduct will occur, and that the resulting harm will be magnified. To the extent that common law recognized the liability of those abetting or encouraging a tort, the actions of a conspirator come within the parameters of that liability.

Accordingly, the recognition of conspiracy liability in section 1983 actions is supported by common law precedent. The recognition of a principle of liability extending to governmental defendants who conspire to aid unlawful action does not unduly extend the causation requirement of section 1983.

There is also support for conspiracy liability in contemporary Court precedent and policy. To begin with, the Court has incorporated conspiracy theory into section 1983 actions as a means of finding the required "color of state law." The leading case is Adickes v. S.H. Kress & Co., where the Court determined that private persons cooperating with public officials might be acting under color of state law so as to render them liable in a section 1983 action. In Adickes, a white woman who was denied service in a restaurant because she was accompanied by blacks, brought suit for deprivation of her rights. According to the Court in Adickes, the circumstances of the allegedly wrongful arrest created a reasonable inference that there might have been a "meeting of the minds" between governmental and private actors. Provided such a conspiracy existed, the private action would be transformed into state action.

The decision in Adickes, admittedly, does not constitute direct precedent for recognizing liability under section 1983 for defendants who have merely conspired and have not affirmatively acted. The defendants in Adickes engaged in substantial conduct contributing to the violation of federal law, and thus conspiracy

105. See id.
106. See Welling, supra note 21, at 1198; Developments, supra note 17, at 924.
109. See id. at 158.
110. A similar decision was reached in Stump v. Sparkman, 435 U.S. 349 (1978), in which the Court decided that collaborative action between a private litigant and a state judge might constitute a conspiracy sufficient to find state action. See id. at 354.
doctrine was employed primarily to draw their conduct into the coverage of federal duties.

Nonetheless, Adickes does signal the Court's solicititude for the theory of "concerted action" as a means of yoking defendants for purposes of liability. But for the defendants' alleged conspiracy with governmental officials, no liability would have existed. Furthermore, Adickes endorses the notion that a finding of conspiracy need not be premised on the finding of an express agreement among defendants; there was no direct evidence in Adickes of either an agreement or communication among the defendants.\(^{111}\) Consistent with traditional principles of concerted action and conspiracy liability, the Court permitted the inference of an agreement from circumstantial evidence.\(^{112}\)

Perhaps the more important precedent regarding conspirator liability is found in discussions of "derivative liability" for governmental supervisors,\(^{113}\) in which the defendant has not directly committed the wrongful conduct leading to the plaintiff's injury. This precedent presents the most analogous setting to that of conspirator liability, insofar as supervisors are frequently sued based on their complicity in the wrongful conduct of others.\(^{114}\)

There is widespread agreement that governmental supervisors cannot be held liable based on the theory of respondeat superior.\(^{115}\) Beyond rejecting respondeat liability, however, case precedent is subject to differing interpretations. According to one commentator, liability must be based on an official's "supercarelessness"\(^{116}\) or "conscious awareness" of the subordinate's wrongdoing. Other commentators suggest that case precedent requires more than knowledge of a subordinate's wrongdoing, such as acquiescence in or approval of the subordinate's

\(^{111}\) Adickes, 398 U.S. at 157-58.

\(^{112}\) Id.; see also KEETON ET AL., supra note 27, at 323 (stating that tacit understanding will suffice to show concerted plan).

\(^{113}\) See generally Brown, supra note 102, at 61 ("Derivative liability includes those cases where a supervisor does not actively and purposely engage in constitutional wrongdoing. In other words, it includes those cases where the supervisor either acts only carelessly, or fails to act at all.").

\(^{114}\) Many, and perhaps most, claims of conspiracy liability are filed against persons in a supervisory capacity over the alleged wrongful actor. See, e.g., Bell v. City of Milwaukee, 746 F.2d 1205, 1256-58 (7th Cir. 1984); Santiago v. City of Philadelphia, 435 F. Supp. 136, 156 (E.D. Pa. 1977). To the extent that conspiracy liability is premised on the increased likelihood and magnitude of harm occasioned by wrongful agreement, supervisory conspirators would seem to present the most compelling case for liability.

\(^{115}\) See Brown, supra note 102, at 72; 2 COOK & SOBIESKI, supra note 36, ¶ 7.09, at 7-47 to 7-48.

\(^{116}\) See Brown, supra note 102, at 67.
conduct.\textsuperscript{117}

It is not necessary to reconcile the varying interpretations of case precedent to arrive at a conclusion that illuminates the issue of conspiracy liability. All courts, it appears, would find liability where an official has consented to and encouraged a plan of unlawful conduct. Conspiracy liability requires not only that the conspiring official "know" of the wrongful conduct intended, but that he agree—expressly or tacitly—to the achievement of that conduct.\textsuperscript{118} Stated alternatively, conspiracy doctrine creates specific-intent liability,\textsuperscript{119} and demands a higher level of culpability than has been required even by the most conservative courts.

The primary Supreme Court precedent on supervisory liability is fully consistent with, and supports this result. The Court's decision in \textit{Rizzo v. Goode}\textsuperscript{120} has generally been interpreted to require some "affirmative link" between an official and the wrongful conduct, and has been viewed as a restriction on supervisory liability.\textsuperscript{121} Yet, the affirmative link suggested by the Court would seem to encompass the act of conspiring. In refusing to find the officials in \textit{Rizzo} legally responsible for the alleged wrongdoing, the Court observed: "[T]here was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners express or otherwise showing their authorization or approval of such misconduct."\textsuperscript{122} As noted by one critic of \textit{Rizzo}, officials are "clearly liable if they encourage, direct or participate in the unconstitutional conduct."\textsuperscript{123}

In summary, both common law history and contemporary precedent strongly support the implication of conspirator liability under section 1983. Conspiracy liability constitutes but a modest step in filling out the "cause" requirement of section 1983. It is based upon intentional conduct that, by its nature, encourages wrongful conduct in such a manner as to make its occurrence more likely and its consequences more harmful.

\begin{itemize}
\item \textsuperscript{117} See C\textit{ook \& Sobieski, supra} note 36, ¶ 7.09, at 7-46 to 7-50.
\item \textsuperscript{118} See \textit{Developments, supra} note 17, at 933-935 (noting that the agreement must be usually established by circumstantial evidence, given the clandestine nature of conspiracies).
\item \textsuperscript{119} See generally \textit{Developments, supra} note 17, at 935.
\item \textsuperscript{120} 423 U.S. 362 (1976).
\item \textsuperscript{122} \textit{Rizzo}, 423 U.S. at 371 (emphasis added).
\end{itemize}
B. Reconciling Section 1983 with Section 1985(3)

Although a conspiracy remedy under section 1983 can be reasonably inferred from history and precedent, there remains the issue of whether section 1985(3) has preempted such a remedy. There is certainly basis for an argument that section 1985(3) already addresses conspiracies involving governmental defendants. Section 1985(3) literally applies to all "persons" who conspire, a term which has been read by the Court to include governmental actors and local governmental entities. In this respect, section 1985(3) targets a segment of the defendant class also targeted by section 1983 ("persons" acting under color of state law), but creates a form of liability not set forth in section 1983 (conspiracy).

The legislative history of section 1985(3) is also replete with references to the involvement or complicity of governmental officials in civil rights violations committed in the reconstruction South. As one commentator has observed, the gravamen of conspiracy liability under section 1985(3) is the deprivation of civil rights "through the channels of government." Although private actions of conspirators like the Klan are referred to liberally in the legislative history of section 1985(3), so too are the actions of governmental officials acting in complicity with private actors.

Indeed, prior to the Court's 1971 decision in Griffin v. Breckenridge, section 1985(3) was thought limited to conspiracies involving some form of governmental action. Although section 1985(3) has become more commonly associated with private conspiracies since the ruling in Griffin, this is a contemporary development. During the first century of jurisprudence under section 1985(3), the Court adopted a view of conspiracy liability under section 1985(3) that would have rendered the statute

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125. This is best illustrated by congressional debate over the Sherman Amendment, which would have authorized suits against local government that failed to prevent injuries relating to the deprivation of federal rights. See 1 COOK & SOBIESKI, supra note 36, ¶ 1.30, at 1-389 to 1-405.
126. See Fockele, supra note 5, at 418-19.
127. This is best illustrated by the proposed Sherman Amendment, which would have rendered local governments liable for violations of civil rights. See infra notes 183-85 and accompanying text.
129. See, e.g., Collins v. Hardyman, 341 U.S. 651, 661 (1951) (explaining that conspiracy to deprive person of equal protection requires "manipulation of the law or its agencies to give sanction or sanctuary for doing so").
superfluous if such liability already existed under section 1983.

As a matter of statutory construction, one could also argue that Congress has demonstrated the capacity to draft encompassing conspiracy laws when it so intends. In 18 U.S.C. § 241, for example, Congress proscribed as criminal any conspiracy committed by two or more persons which has the purpose of depriving another of any "right . . . secured to him by the Constitution or laws."130 This broad-ranging language, extending beyond the "equal protection" tenor of section 1985(3), is the same language contained in section 1983.131 Yet section 1983 contains no reference to conspiracy. Consequently, section 241 might manifest congressional intent to fully secure all federal rights from the threat of conspiracies, but only through criminal sanction and not the civil sanction of section 1983.

At this late date in the interpretation of legislative intent from the reconstruction era, it is difficult to establish convincingly what Congress might have intended on issues of such subtlety as the interrelationship of conspiracy liability under sections 1983 and 1985(3).132 The Court has shifted radically in its own views of history regarding such fundamental matters as the nature of rights protected by reconstruction laws and the forms of governmental activity regulated.133 Moreover, the Court has often ruled by the narrowest of margins, sometimes against the more studied advice of legal historians.134 As one Justice has commented, there inevitably seems to be ample historical evidence to support

131. See supra note 73 and accompanying text.
132. Stevens v. Tillman, 855 F.2d 394 (7th Cir. 1988) provides as follows: [The Court's interpretation of § 1985] has included declarations of unconstitutionality, revivals, and reinterpretations. It is hard to come up with an enduring interpretation of such an opaque statute, when the Court tries on the one hand to avoid turning all state torts into federal offenses and on the other to give some content to a statute that if read naturally speaks only to state action and therefore duplicates § 1983.

Id. at 404.
133. See, e.g., Monroe v. Pape, 365 U.S. 167 (1961) (redefining the meaning of "under color of state law" to include unauthorized governmental actions); Monell v. Dep't of Social Servs., 436 U.S. 658 (1978) (redefining the meaning of "persons" to include local governmental entities); see also McDonald, supra note 13, at 476 ("The lengthy and dusty Congressional Globe, the official record of the Forty-Second Congress, offers a wealth of oratory, which if selectively used, can muster an argument for . . . [numerous] propositions.").
conflicting views of congressional intent.\footnote{135}{See, e.g., Smith v. Wade, 461 U.S. 30, 92 (1983) (O'Connor, J, dissenting) ("Although both the Court and Justice Rehnquist display admirable skills in legal research and analysis of great numbers of musty cases, the results do not significantly further the goal of the inquiry . . .").}

At best, one can offer an interpretation of section 1983 and section 1985(3) that reconciles the two statutes within the Court's own revisionist history of the Civil Rights Act of 1871. The most important interpretive clues are found in \textit{Griffin v. Breckenridge}.\footnote{136}{403 U.S. 88 (1971).}

The conclusion that private action was the primary focus of the debate over conspiracy provisions in the 1871 Act seems indisputable. The historical annals are filled with illustrations of Klan and similar clandestine action in the reconstruction South, and the task for Congress was to devise a regulatory statute that would not exceed its constitutional authority to regulate private behavior.\footnote{137}{See supra note 39 and accompanying text.} These efforts proved an immediate failure, as evidenced by the Court's invalidation of Congress' criminal conspiracy provisions within a decade of their passage.\footnote{138}{See supra note 43 and accompanying text.}

The will of Congress would ultimately be vindicated in \textit{Griffin}, however, as the Court redefined the forms of activity governed by the conspiracy provisions of section 1985(3).\footnote{139}{As previously observed, the criminal provisions of § 1985 were repealed by Congress prior to the decision in \textit{Griffin}. See supra note 43 and accompanying text. Thus, an irony of \textit{Griffin} is that it privatized the coverage of § 1985(3) in the realm of civil liability, even though such liability was clearly a secondary concern to the statute's original criminal law purposes. See supra note 41 and accompanying text.}

In rejecting a "state action" requirement under section 1985(3), the Court in \textit{Griffin} observed that state action might take three forms: (1) action "under color of state law," (2) interference with state authorities, or (3) massive private action that effectively supplanted state authorities.\footnote{140}{\textit{Griffin}, 403 U.S. at 98.} According to the Court, the last two forms of state action were covered by other conspiracy provisions of section 1985, and the first form of governmental conspiracy — action taken "under color of state law" — was already regulated by section 1983.\footnote{141}{Id. at 99.} To require state action when enforcing section 1985(3), the Court observed, would "deprive that section of all independent effect."\footnote{142}{Id.}

The Court's opinion in \textit{Griffin} clearly implies that some form
of protection against governmental conspiracies is already encompassed by section 1983. If governmental conspirators were not already regulated by section 1983, then section 1985(3) would have an "independent effect," and the interpretation offered in Griffin would not have been needed to preserve some utility for the latter statute. Taken at face value, then, Griffin does not merely expand conspiracy liability to private actors under section 1985(3); it reaffirms quite distinctive roles for sections 1983 and 1985(3) in the law of conspiracy.143 Admittedly, section 1985(3)'s coverage of all "persons" overlaps with section 1983 insofar as conspiracies are proscribed,144 but that is a far different conclusion from the one which suggests that section 1985(3) repeals section 1983 pro tanto.

Nor is the existence of a broad-reaching criminal conspiracy provision, 18 U.S.C. § 241, inconsistent with the view that section 1983 covers a similar reach of civil conspiracies by implication. As previously discussed, criminal conspiracy is qualitatively different from civil conspiracy, in that it establishes a punishable wrong independent of existing legal duties.145 Furthermore, the fact that the common law plays no part in the development of federal criminal law,146 as it unquestionably does in civil actions under section 1983,147 requires that criminal conspiracy rules be clearly expressed by statute. The Court has never required such a clear statement of remedial detail when construing section 1983.

Consequently, while the issue is not totally free of doubt,148

143. This view has been expressly stated by at least one member of the Court. See Great Am. Fed. Sav. & Loan, 442 U.S. at 382-83 (Stevens, J., concurring) (explaining how conspiracies by government are actionable under § 1983, while private conspiracies are actionable under § 1985(3)).
144. See supra note 73 and accompanying text.
145. See supra notes 17-24 and accompanying text.
146. See Developments, supra note 17, at 944.
147. See supra notes 96-97 and accompanying text.
148. Yet another interpretation of § 1985(3), and its relationship to § 1983, has been offered. See THEODORE EISENBERG, CIVIL RIGHTS LEGISLATION 647 (3d ed., Michie Co. 1981). Professor Eisenberg has suggested that § 1985(3) might have been intended as the principal means of policing governmental violations of civil rights—even by comparison to § 1983. As argued (perhaps hermeneutically) by Professor Eisenberg, the Court in Monroe v. Pape, 365 U.S. 167 (1961), was mistaken when it concluded that officials may act under "color of state law" even when their actions are not specifically authorized by state law. Id. Rather, as the phrase "color of state law" was used in § 1983 it was intended to regulate only officially-sanctioned action. Id. Section 1985(3), by comparison, was intended to regulate the bulk of civil-rights violations committed by governmental actors who lacked official sanction for their wrongdoing. That is, governmental wrongdoing involving more than one person would be actionable as a "conspiracy" under § 1985(3). Id.

Whatever the historical support for Professor Eisenberg's interpretation of legislative history, it is premised on a view of "color of state law" that conflicts with
there appears to be ample justification for inferring civil conspiracy liability under section 1983. In so doing, the courts may affirm the independent status of section 1985(3) as a protection against private conspiracies, while rounding out the principles of liability for governmental action under section 1983 through the common law tradition to which they are accustomed.\footnote{149}{See Oklahoma City v. Tuttle, 471 U.S. 808, 838 (1985) (Stevens, J., dissenting) ("[W]e have repeatedly held that section 1983 should be construed to incorporate common-law doctrine 'absent specific provisions to the contrary.' We have consistently applied this principle of construction to federal legislation enacted in the 19th century."); see also Waller v. Butkovich, 584 F. Supp. 909, 940 (M.D.N.C. 1984) (recognizing implied remedy for conspiracy in Bivens action against federal officers). It is also useful to note that the courts have willingly inferred conspiracy liability under other federal statutes creating tort-like liability for improper conduct. See generally David Wakeman, Causation Concerns in Civil Conspiracies To Violate Rule 10b-5, 66 N.Y.U. L. REV. 1505 (1991).}

IV. THE INTRACORPORATE IMMUNITY DOCTRINE

Section 1985(3) broadly subjects to civil liability all "persons" who conspire to violate certain civil rights. Section 1983 similarly extends liability to all "persons" who violate civil rights under color of state law. The term "person" as used in these statutes has been construed by the courts to include natural persons, corporate entities and local governmental entities.\footnote{150}{See supra note 124 and accompanying text; see also Comtronics v. Puerto Rico Tel. Co., 409 F. Supp. 800, 804-06 (D.P.R. 1975), aff'd, 553 F.2d 701 (1st Cir. 1977); Croy v. Skinner, 410 F. Supp. 117-23 (N.D. Ga. 1976) (finding that corporations are subject to suit under \$ 1983). Corporations would have to act under color of state law to be subject to \$ 1983 remedies. See generally Wyatt v. Cole, 504 U.S. 158 (1992).}


The formal foundation for intracorporate immunity is based on the uncontroverted requirement that there be a "meeting of the

more than three decades of Court precedent. Moreover, there is no indication that the contemporary Court is willing to revisit its decision in \textit{Monroe}. 

\footnote{149}{See Oklahoma City v. Tuttle, 471 U.S. 808, 838 (1985) (Stevens, J., dissenting) ("[W]e have repeatedly held that section 1983 should be construed to incorporate common-law doctrine 'absent specific provisions to the contrary.' We have consistently applied this principle of construction to federal legislation enacted in the 19th century."); see also Waller v. Butkovich, 584 F. Supp. 909, 940 (M.D.N.C. 1984) (recognizing implied remedy for conspiracy in Bivens action against federal officers). It is also useful to note that the courts have willingly inferred conspiracy liability under other federal statutes creating tort-like liability for improper conduct. See generally David Wakeman, Causation Concerns in Civil Conspiracies To Violate Rule 10b-5, 66 N.Y.U. L. REV. 1505 (1991).}

\footnote{150}{See supra note 124 and accompanying text; see also Comtronics v. Puerto Rico Tel. Co., 409 F. Supp. 800, 804-06 (D.P.R. 1975), aff'd, 553 F.2d 701 (1st Cir. 1977); Croy v. Skinner, 410 F. Supp. 117-23 (N.D. Ga. 1976) (finding that corporations are subject to suit under \$ 1983). Corporations would have to act under color of state law to be subject to \$ 1983 remedies. See generally Wyatt v. Cole, 504 U.S. 158 (1992).}

minds” in order to establish a conspiracy.\textsuperscript{152} The doctrine of intracorporate immunity holds that the required “plurality” of minds is lacking when agents within a single corporation act on its behalf. Based on agency theory, it is said that the conspiratorial acts of agent-employees are attributable to the principal-corporation under the common law principle of \textit{respondeat superior}. While this much of the syllogism is correct, the doctrine of intracorporate immunity takes the additional step of concluding that, upon attribution of liability to the corporation, the agents’ plural identities meld into a single corporate entity. Consequently, there is no “meeting of the minds” because a single person cannot “conspire with himself.”\textsuperscript{153}

The theoretical foundation of immunity in agency law is plainly mistaken, insofar as it suggests that the individual agents’ responsibility is extinguished upon attribution of their acts to the corporation. To the contrary, agents remain \textit{individually} liable for their wrongdoing even if their principals also assume derivative liability.\textsuperscript{154} Nonetheless, this distortion of agency principles has received the endorsement of distinguished jurists, who have affirmed intracorporate immunity based on the “single entity” fiction.\textsuperscript{155}

The single entity theory does retain validity in one situation. Where a single corporate agent has acted wrongfully but without involvement of other corporate personnel, and the plaintiff alleges a conspiracy between the agent and her corporation, there can be no conspiratorial agreement since there is but one “mind” at work.\textsuperscript{156} But where there is literally a conspiring of several

\textsuperscript{152} See Developments, supra note 17, at 926.

\textsuperscript{153} Id.

\textsuperscript{154} See KEETON ET AL., supra note 27, at 341; Welling, supra note 21, at 1176 (“The individual agent remains personally liable for the crime, notwithstanding the imposition of liability upon the corporation.”). But see Developments, supra note 17, at 953 (citing a precedent from criminal law immunizing an agent from prosecution). The view that agents are relieved of liability when their principals assume derivative liability seems particularly inappropriate when the agent has engaged in bad-faith or intentional conduct. As discussed later, bad-faith or intentional misconduct is a prerequisite to agent liability for most civil rights violations. See infra notes 215-22 and accompanying text.

\textsuperscript{155} See, e.g., Travis v. Gary Community Mental Health Ctr., Inc., 921 F.2d 108, 110 (7th Cir. 1990) (Easterbrook, J.), cert. denied, 502 U.S. 812 (1991). The quixotic nature of intracorporate immunity is illustrated by the haphazard way in which it appears in reported decisions. For example, in Stevens v. Tillman, Judge Easterbrook discussed extensively the liability of public officials within a single school district, and yet made no mention of intracorporate immunity. 855 F.2d 394 (7th Cir. 1988), cert. denied, 489 U.S. 1065 (1989). The dispute in Tillman was equally amenable to resolution under the intracorporate immunity doctrine as was the dispute in Travis.

\textsuperscript{156} See, e.g., Zombro v. Baltimore Police Dep’t, 868 F.2d 1364 (4th Cir.), cert
human minds, the traditional requirement of plurality has been met.\textsuperscript{157}

The intracorporate immunity doctrine has been uniformly reproached by the law review literature,\textsuperscript{158} although such criticism has had little discernible effect on the doctrine's resiliency in the courts. But not even the critics of intracorporate immunity doctrine apprehended its extension to governmental entities. In fact, the lack of immunity for governmental actors was often noted as a point of critical comparison in discussions of private corporate immunity.\textsuperscript{159}

Later case development has roughly dispelled any notion that intracorporate immunity doctrine might be limited to the conspiracies of private actors. As of 1995, the majority of federal trial and appellate courts considering the issue have extended immunity to governmental actors,\textsuperscript{160} in conspiracy cases filed under both section 1985(3) and section 1983.\textsuperscript{161} Indeed, the most recent opportunity presented to the Supreme Court to rule on the viability of intracorporate immunity arose in governmental litigation.\textsuperscript{162} A divided Court declined that opportunity.

\textsuperscript{157} See supra note 21; note note 17, at 951.

\textsuperscript{158} See, e.g., Welling, supra note 21; Note, supra note 12, at 470; see also John T. Prisbe, The Intracorporate Conspiracy Doctrine, 16 U. BALTIMORE L. REV. 538 (1987) (describing various forms of intracorporate conspiracy doctrine).

\textsuperscript{159} See, e.g., Welling, supra note 21, at 1170 n.80 (noting that "[i]n the context of government bureaucracies, there is no comparable rule . . . ."); Note, supra note 12, at 482 (noting the "absence of an effective immunity for discriminatory decisions within governmental bureaucracies in section 1985(c) cases . . . .").

\textsuperscript{160} The following circuits approve of intracorporate immunity for governmental actors: Wright v. Illinois Dep't of Children & Family Servs., 40 F.3d 1492 (7th Cir. 1994); Hilliard v. Ferguson, 30 F.3d 649 (5th Cir. 1994); Richmond v. Board of Regents, 957 F.2d 395 (8th Cir. 1992); Hull v. Cuyahoga Valley Sch. Dist. Bd. of Educ., 926 F.2d 505 (6th Cir.), cert. denied, 501 U.S. 1261 (1991); Buschi v. Kirven, 775 F.2d 1240 (4th Cir. 1985). The First Circuit has rejected the doctrine of intracorporate immunity. See Stathos v. Bowden, 728 F.2d 15 (1st Cir. 1984). The Ninth Circuit has declined to decide the issue. See Portman v. County of Santa Clara, 995 F.2d 898 (9th Cir. 1993). In addition, there are more than four dozen district court opinions addressing the issue of intracorporate immunity, most of which have upheld immunity. See, e.g., Brace v. Ohio State Univ., 866 F. Supp. 1069 (S.D. Ohio 1994); Rabkin v. Dean, 856 F. Supp. 543 (N.D. Cal. 1994).


\textsuperscript{162} See Hull v. Cuyahoga Valley Sch. Dist., 926 F.2d 505 (6th Cir.), cert. denied, 501 U.S. 1261 (1991). The lower court in Hull applied the intracorporate immunity doctrine to deny recovery for conspiracy against several public school officials. The denial of the writ of certiorari by the Supreme Court prompted a dissent by Justices White and Marshall. See id.
The extension of intracorporate immunity to governmental officials and entities is a disturbing development. For one thing, recognition of governmental immunity has occurred with virtually no discussion of immunity doctrine under section 1983, where the Court has already struck a painstaking balance between governmental accountability and operational freedom. Moreover, carried to its logical extent—as has often occurred in the case law—the judicially-crafted immunity doctrine effectively repeals governmental conspiracy liability. Thus, since the 1951 decision in Collins v. Hardyman, conspiracy law has shifted from the position that only governmental actors are subject to civil liability to the position that virtually none is.

The leading precedent for intracorporate immunity is found in antitrust law, where this doctrine appears to have its most substantive foundation. In the oft-cited decision of Nelson Radio & Supply Co. v. Motorola, Inc., the Fifth Circuit examined antitrust policy and concluded that Congress did not intend to regulate intracorporate conspiracies under section I of the Sherman Act. Rather, two corporate entities are needed to violate the conspiracy prohibitions of that section.

The unique legal circumstances of Nelson Radio make it surprising that this case has been relied on outside the antitrust field to support intracorporate immunity. In Nelson Radio, the court emphasized that the corporate agents were engaged in the formulation of legitimate corporate policy, and that the plaintiff premised its conspiracy claim on the contention that "what . . . would not be illegal for a corporation to do alone would be illegal as a conspiracy when done with another legally separate person or entity." The court found that the plaintiff had suffered no legal injury within the meaning of antitrust legislation.

As has been suggested by then-Judge Breyer of the First Circuit, the decision in Nelson Radio is best understood as an interpretation of congressional intent expressed in antitrust

164. See Note, supra note 12, at 479-80.
165. 200 F.2d 911 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953).
166. The decision in Nelson Radio has been described as a major departure from precedent because prior conspiracy theory in antitrust law, criminal law and tort law recognized the liability of both corporate actors and the corporation itself. Note, supra note 12, at 479-80.
168. See id. at 915-16. Moreover, the plaintiff in Nelson Radio did not name the individual agents as defendants to the conspiracy action, and so at most the case supports an immunity for the corporate entity itself. See id. at 914.
The intracorporate immunity doctrine of Nelson Radio is founded on antitrust policy underlying the regulation of corporate business, rather than on formal theory of conspiracy liability. Consequently, the immunity doctrine announced in Nelson Radio should have no substantive bearing on issues of immunity arising under other federal statutes or in other fields of law. Nonetheless, Nelson Radio has been the font of pronouncements that agents within a corporation lack the capacity to conspire.

One searches the legislative history of section 1985(3) and section 1983 in vain for any congressional intent regarding the issue of corporate immunity. To the contrary, the Dictionary Act enacted by Congress shortly before passage of section 1985(3) expressly defines "person" to include "bodies politic and corporate . . . ." Given the location of section 1985(3) in part 2 of the "Ku Klux Klan Act of 1871," it seems anomalous to impute a broad rule of organizational immunity to Congress.

Because the doctrine of intracorporate immunity has no identifiable support in statutory language or history, it must be justified, if at all, on substantive policy grounds applicable to suits against governmental actors. This inquiry need not occur in a vacuum, however, as the Civil Rights Act of 1871 has elicited the

169. See Note, supra note 12, at 480-81.
170. In Travis v. Gary Community Mental Health Ctr., Inc., 921 F.2d 108 (7th Cir. 1990), the court concluded that "[w]hen Congress drafted section 1985 it was understood that corporate employees acting to pursue the business of the firm could not be treated as conspirators. Courts looked past the individual acts to concentrate on the collective decision." Id. at 110. Yet the only court precedent cited by the court, Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 518, 636 (1819), contains no discussion of either the liability of corporate employees or immunity doctrine.

172. This fact has troubled several courts, which have scrupulously avowed that organizations like the Klan could not avoid conspiracy liability by the act of incorporating. See, e.g., Travis, 921 F.2d at 110 (7th Cir. 1990). One is puzzled, however, by the negative implication of the court's caution, i.e., that organizations like the Klan could avoid conspiracy liability provided they originally organized for legal purposes. Id. As a matter of historical record, the Klan formally disbanded in 1869, practically dissolved by the year 1872, and was refounded in 1915. See DAVID M. CHALMERS, HOODED AMERICANISM 19, 29 (1965).
173. For a previous attempt to construct policy justifications for intracorporate immunity in the area of private conspiracies, see Note, supra note 12, at 480-485; see also Phillip Areeda, Intraenterprise Conspiracy in Decline, 97 HARV. L. REV. 451, 453 (1983) (arguing for a policy-based approach to intraenterprise liability under antitrust law).
Court's most concentrated effort to work out an accommodation of governmental liability and governmental autonomy.

V. INTRACORPORATE IMMUNITY DOCTRINE AND GOVERNMENTAL ACTORS

A. Conspiracy Claims Against Governmental Entities

For the most part, lower courts have not analyzed the issue of governmental liability differently from that of private corporate liability, and as a result government has consistently enjoyed an immunity from claims of conspiracy. Yet, Supreme Court precedent under section 1983 makes clear that governmental entities are not fungible with private corporations when determining liability under civil rights law.

In Monell v. Department of Social Services, female employees of the city of New York claimed that official policies which compelled pregnant employees to take an unpaid leave were actionable under section 1983. The Court in Monell affirmed that local governmental entities constitute "persons" within the meaning of the Civil Rights Act of 1871. But the Court expressly rejected the view that governmental entities could be held liable based on common law principles of respondeat superior. Instead, the "cause" language in section 1983 requires that governmental liability be limited to injuries resulting from the government's "own" wrongdoing. More specifically, the Court concluded that "the language of section 1983, read against the background of . . . legislative history, compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." At the outset, it might be asked whether the holding in Monell

174. See, e.g., Hilliard v. Ferguson, 30 F.3d 649, 651, 653 (5th Cir. 1994); Portman v. County of Santa Clara, 995 F.2d 898 (9th Cir. 1993); Richmond v. Board of Regents, 957 F.2d 595, 598 (8th Cir. 1992). But see Rebel Van Lines v. City of Compton, 663 F. Supp. 786, 792-93 (C.D. Cal. 1987); Scott v. City of Overland Park, 595 F. Supp. 520 (D. Kan. 1984) (holding that upon proper proof at trial, the governmental defendants might be liable for conspiracy). Rebel Van Lines is an exceptional case insofar as the court expressly distinguishes intracorporate immunity precedent as applicable to private business entities. Rebel Van Lines, 663 F. Supp. at 792.
177. Id. at 688-89.
178. Id. at 691.
179. Id. at 691-92.
180. Id. at 691 (emphasis added).
applies to conspiracy claims under section 1985(3). Based on the simple fact that both section 1983 and section 1985 are part of the same legislative enactment, there is a strong argument that the scope of municipal liability is co-extensive under both sections.\textsuperscript{181} The decision in \textit{Monell}, moreover, expressly supports this interpretation.

In developing a liability standard for governmental entities, the Court in \textit{Monell} placed considerable emphasis on Congress' rejection of the Sherman Amendment to the Civil Rights Act of 1871, which would have imposed an affirmative duty on local governments to prevent the violation of civil rights within their jurisdiction.\textsuperscript{182} The Sherman Amendment, significantly, was a proposed amendment to section two of the 1871 Act, which contained the current conspiracy provisions of section 1985(3).\textsuperscript{183} Indeed, the ultimate legislative compromise that resulted in replacement of the Sherman Amendment is contained in current section 1986, which complements the conspiracy remedies of section 1985.\textsuperscript{184} Thus, the legislative history of section 1983 and section 1985 make clear that governmental liability was treated as a unitary concept throughout the 1871 Act.\textsuperscript{185}

Consequently, conspiracies under sections 1983 and 1985(3) cannot be imputed to governmental entities through the doctrine of \textit{respondeat superior}. In this respect, there is a clear divergence in private and public liability under the conspiracy laws. Moreover, the fact that there is no \textit{respondeat} liability for governmental action would seem to eliminate the theoretical basis for the


\textsuperscript{182} \textit{See} \textit{Monell}, 436 U.S. at 683, 693-94.

\textsuperscript{183} \textit{See}, \textit{e.g.}, 1 COOK \& SOBIESKI, supra note 36, ¶ 1.30, at 1-389 to 1-405.

\textsuperscript{184} 1 COOK \& SOBIESKI, supra note 36, ¶ 1.30, at 1-401.

\textsuperscript{185} The counter-argument is that § 1985(3), unlike § 1983, does not require that each conspirator "cause" the plaintiff's injury ("if one or more persons engaged [in the conspiracy] do, or cause to be done, any act in furtherance of the object of the conspiracy," the victim may recover damages from "any one or more of the conspirators"). However, the Court's reliance on the Sherman Amendment in elaborating on a theory of governmental liability signifies that the 1871 Congress' position on such liability admits no exception. Also suggestive is the Court's insistence on interpreting governmental liability under other Reconstruction-era statutes in the same manner as it has construed section 1983. \textit{See} Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 728-29 (1989) (construing 42 U.S.C. § 1981 consistently with \textit{Monell} so as to preclude \textit{respondeat} liability).
intracorporate immunity doctrine. Specifically, if the actions of governmental employees are not generally attributed to the entity, those employees remain autonomous actors whose conspiracies will satisfy the requirement of a "plurality" of minds. Thus, purely as a matter of formal doctrine, the "single actor" rational of intracorporate immunity would seem to have no application to claims against governmental actors.

Governmental entities are potentially liable for conspiracies if some form of "policy" can be established under Monell. Among the forms of policy recognized under Court precedent are: (1) decisions of a government's legislative body; (2) decisions of governmental officials having "final authority" in the matter decided; and (3) customs within the governmental entity.

Those courts that have properly required a finding of governmental policy as a predicate to conspiracy liability have nonetheless reached conflicting results. Some courts have recognized the possibility of governmental liability where one of the conspirators has "policymaking" authority under local law or where there is otherwise some "policy or custom" linked to the plaintiff's injury. Others, however, have invoked the doctrine of intracorporate immunity and flatly prohibited the assertion of conspiracy claims against governmental entities.

Upon closer examination, the potential liability of governmental entities under conspiracy law is probably a moot issue—although not because of the existence of intracorporate

186. See Welling, supra note 21, at 1197 ("A corporation is liable only vicariously; it does not act on its own. Thus, the question . . . is whether the corporation is vicariously liable for the conspiracy among the several employees.").
187. See supra notes 155-56 and accompanying text; see, e.g., Snell v. Asbury, 792 F. Supp. 718, 720-21 (W.D. Okla. 1991) (refusing to extend intracorporate immunity to individually named conspirators, and observing that an official acting in an unconstitutional manner is stripped of the liability shield of official status).
193. See, e.g., Rabkin v. Dean, 856 F. Supp. 543, 551-52 (N.D. Cal. 1994); Chambliss v. Foote, 421 F. Supp. 12, 15 (E.D. La. 1976). It is difficult to comprehend the position of these courts when one reflects on the established liability of government for policymaking under § 1983. If governmental entities are otherwise liable for their announced policies in violation of federal law, it seems odd to immunize them because those policies have been made pursuant to more clandestine agreements of conspiracy.
immunity. The role of civil conspiracy doctrine, as previously noted, is to extend liability to persons with lesser participatory roles in the violation of civil rights, or provide a predicate for the awarding of additional, punitive damages. As to punitive damages, the Court has unequivocally rejected their recovery from governmental entities. The sole role of conspiracy claims against governmental entities, therefore, is that of imputing liability to an entity that has not otherwise “caused” the plaintiff’s injury.

It is difficult to imagine a situation where a governmental entity might authorize, as a matter of policy, the violation of civil rights, and yet escape liability in the absence of an allegation of conspiracy. For governmental liability to attach, there must be some link between official policy and the ultimate commission of a legal injury. This is basic to the requirement of “causation” recognized in Monell. Where government has adopted an official policy that is unlawful, or permits the existence of an unlawful custom or practice, the causal connection should be apparent regardless of whether some tacit “agreement” can be found between a governmental policy-maker and the actual wrongdoer.

If, on the other hand, conspiracy liability is premised on a single act or decision of a policy-maker, that act or decision should also inculpate government, irrespective of the existence of a conspiratorial agreement. Consider the leading case on single-act

194. See supra text accompanying notes 60-62.
195. See, e.g., Volk, 845 F.2d at 1436 (concluding that the existence of a conspiracy itself “does not give rise to further damages”). This conclusion is sound. First, civil conspiracy laws do not create compensable wrongs (like criminal law), but instead extend the class of defendants liable for independently-existing wrongs. See supra text accompanying notes 61-63. Second, the language of § 1985(3) appears to specifically link conspirator liability to damages “occasioned by” the violation of the plaintiff’s existing rights. 42 U.S.C. § 1985(3) (1988). Third, the Court has repeatedly emphasized that, under § 1983, the plaintiff may only be compensated for actual injuries flowing from the violation of civil rights. See, e.g., Memphis Sch. Dist. v. Stachura, 477 U.S. 299 (1986); Carey v. Piphus, 435 U.S. 247 (1978). At the same time, the Court has endorsed the recovery of punitive damages from individual governmental officials whose conduct evidences “reckless or callous indifference to the federally protected rights of others,” or whose conduct is motivated by evil intent. Smith v. Wade, 461 U.S. 30, 56 (1983).
policy-making, *Pembaur v. City of Cincinnati.* Governmental policy liability was found in *Pembaur* based on a single order given by a county prosecutor to law enforcement agents, resulting in an unlawful search of the plaintiff's office. The causal link between the policy-maker (the prosecutor) and the constitutional wrong was the communication of the policy-maker's decision to the acting officers.

One is hard pressed to imagine how an official could make *ad hoc* policy without communicating that policy. Given the fact that such *ad hoc* communication would constitute participation in, or direction of, the violation of civil rights, liability would exist apart from any alleged conspiracy. As recognized by the Court in *Rizzo v. Goode,* the adoption of a plan or policy—express or otherwise—is a sufficient basis for attribution of liability to a superior officer, and hence to the governmental entity he or she officially represents.

Therefore, while governmental entities can conspire to violate civil rights, the existence of the conspiracy will likely add nothing to the plaintiff's cause of action against the entity. If governmental conspiracy law is to have significance, it must contribute to remedies available against individual officials.

**B. Conspiracy Claims Against Governmental Officials**

Most civil conspiracy claims are asserted against governmental officials, who are typically sued in their individual capacities. As indicated earlier, the value of conspiracy claims is that

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200. See supra text accompanying notes 115-17.
203. The reported cases uniformly confirm this conclusion. Thus, courts have recognized that governmental liability for policymaking might be found under § 1983 notwithstanding the government's immunity from conspiracy liability. See, e.g., *Rabin v. Dean,* 856 F. Supp. 543, 551-52 (N.D. Cal. 1994); *Cromley v. Board of Educ. of Lockport Township High Sch. Dist. 205,* 699 F. Supp. 1283, 1290-92 (N.D. Ill. 1988); *Johnson v. Brelje,* 482 F. Supp. 125, 130 (N.D. Ill. 1979). And in other decisions, the courts have confirmed policymaking liability in circumstances that appear to essentially duplicate the conspiracy claim alleged against the governmental entity. See, e.g., *Garza v. City of Omaha,* 814 F.2d 553, 556 (8th Cir. 1987); *Gomez v. City of W. Chicago,* 506 F. Supp. 1241, 1244-46 (N.D. Ill. 1981).
204. When plaintiffs assert conspiracy claims against governmental officials in their "official" capacity, any monetary relief recovered is assessed against the governmental entity. See *Chemerinsky,* supra note 88, at 463. Thus, in "official capacity" suits, it is necessary to allege that the conspiracy was entered into pursuant to governmental policy, in which case the governmental entity can be sued directly. See supra note 191-
they may confer liability over defendants who have a lesser participatory role in the wrongdoing, and they may provide an additional basis for assessing punitive damages against the defendants.

In the main, the conspiracy claims dismissed pursuant to the intracorporate immunity doctrine also involved claims against individual officials. As a consequence, the justification for intracorporate immunity will be found, if at all, by considering the impact of conspiracy liability on official action.

There is surprisingly little discussion of the rationale for governmental immunity in reported decisions. A review of these decisions suggests that intracorporate immunity has more or less crept into the law of governmental conspiracies based on private-conspiracy precedent, with little recognition that immunity doctrine might not be fungible between the public and private sectors. Perhaps it is telling that, in early conspiracy cases filed under section 1983, 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, it is not an exaggeration to say that govern-

96 and accompanying text. Accordingly, there is no reason to file official-capacity claims against governmental officials, as they add nothing to the plaintiff's case for governmental liability. See supra notes 194-202 and accompanying text.

Several courts have invoked intracorporate immunity based on the fact that governmental officials were named in their official capacities. See, e.g., Roybal v. City of Albuquerque, 653 F. Supp. 102, 107 (D.N.M. 1986); Barger v. Kansas., 620 F. Supp. 1432, 1435 (D. Kan. 1985). Apparently, the theory of these cases is that persons acting in their "official" capacities share the single identity of the government they serve, and so lack the required plurality to constitute a conspiracy. Despite a certain superficial appeal to this position, it tends to obscure the underlying issues. If several governmental employees actually conspire to violate civil rights, there is a plurality of minds regardless of how the plaintiff has styled the capacity of the defendants. At the same time, if the plaintiff is seeking damages for conspiracy from the governmental entity—as is the case in official capacity suits—the suit should be dismissed only if no governmental "policy" has been alleged and not because of a mistake in pleading.

205. Conspiracy claims may also assist where the plaintiff suspects but cannot prove that a defendant has participated in the wrongdoing. Under conspiracy doctrine, the fact-finder may infer from circumstantial evidence that the defendant has conspired with established participants, and thus impute liability to the defendant-conspirator.

206. See supra note 62 and accompanying text.

207. As previously discussed, conspiracy claims against governmental entities add nothing to the plaintiff's case that is not already recognized under conventional "policy" liability. See supra notes 194-202 and accompanying text. Thus, the validity of immunity doctrine for governmental entities is effectively a moot issue, as is any purported justification for entity immunity.

208. See, e.g., Nesmith v. Alcord, 318 F.2d 110, 112 (5th Cir. 1963).

209. See, e.g., supra note 158 and accompanying text. It is clear that the
mental immunity doctrine is adventitious, or at best an unexamined by-product of precedent.

Judicial explanation of the rationale for governmental immunity, when it can be found, is spare. The most lucid statement of a rationale is found in an opinion by Judge Easterbrook of the Seventh Circuit: "[Section] 1985 aims at preserving independent decisions by persons or business entities, free of the pressure that can be generated by conspiracies . . . ."210

As argued by Judge Easterbrook, the threat of conspiracy liability may interfere with the legitimate operations of government. Although not mentioned by the Judge, but a logical extension of his concern, is that public officials themselves may personally suffer under the threat of conspiracy liability.

Even an ardent advocate of conspiracy liability cannot overlook the propensity of some plaintiffs to draw into the web of conspiratorial allegations all persons remotely connected to a dispute.211 The dilemma of officials is a real one. Contemporary government, with its layers of bureaucracy and its system of checks and balances (often intended to preserve due process rights of constituents) necessitates that officials work in concert.212 Yet, to the suspicious mind, concerted decision-making suggests sinister conspiracy. Thus, there is an ever-present risk that blameless officials will be subjected to public accusation and the burden of litigation based on conscientious performance of their duties.213 As a consequence of this legal exposure, governmental

intragovernmental immunity doctrine has now been engrafted onto suits under § 1983. See, e.g., cases cited supra note 160-61.


It is also worth noting that Judge Easterbrook's justification for governmental immunity treats private and public sector conspiracies as a homogeneous phenomenon—thus his reference to "decisions by persons or business entities."


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officials may refrain from engaging in the deliberative and consultative processes of government that democratic systems endorse.

It is not necessary to further elaborate the policy concerns raised by the threat of conspiracy liability. They are obvious and plausible, and suggest the need for some form of limitation on liability. Yet, one might query whether judicial development of intracorporate immunity does not overlook the fact that the Supreme Court has already formulated protection for governmental officials and operations in civil rights litigation. This protection comes in the form of "qualified" immunity from suit, which defense extends to all officials sued in their individual capacities.

In Harlow v. Fitzgerald, 214 the Court announced a standard for qualified immunity under which officials performing discretionary functions are immune from personal liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 215 The Court indicated that inquiries into the subjective good faith of the particular defendant are generally inappropriate. 216 Deemed "objective" good-faith immunity, the Harlow standard is intended to strike a proper balance between official accountability and the functional needs of governmental activity. According to the Court:

By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct. The public interest in deterrence of unlawful conduct and in compensation of victims remains protected by a test that focuses on the objective reasonableness of an official's acts. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. But where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken "with independence and without fear of consequences." 217

The standard of qualified immunity announced in Harlow not only immunizes good-faith actors from liability, but helps immunize them from many of the more vexatious aspects of litigation, such as the trial itself. The Court has indicated that the issue of

216. Id. at 816-17.
217. Id. at 819 (citations omitted).
immunity should be determined as soon as possible (for example, by a challenge to the pleadings\textsuperscript{218} or by motion for summary judgment\textsuperscript{219}), and that pretrial discovery should proceed only so far as necessary to resolve the issue of immunity.\textsuperscript{220}

The objective good faith standard of \textit{Harlow} is subject to modification in one circumstance. Where the underlying federal claim is premised on proof of an impermissible intent, inquiry into the subjective impressions of an official cannot be avoided. Claims predicated on "bad" intent would include allegations of discriminatory motive or allegations of retaliatory action.\textsuperscript{221} Even regarding such claims of wrongful subjective motive, however, most courts have demonstrated a willingness to scrutinize unsupported allegations of improper motive, whether by requiring the allegation of more detailed facts or by reviewing the existing evidence closely on motion for summary judgment.\textsuperscript{222}

As indicated by the objective good-faith immunity standard of \textit{Harlow}, this qualified immunity doctrine serves several policies. Immunity helps preserve "independence" in governmental action and decision-making, and helps relieve public officials of the cost and vexation of the litigation process. In other words, qualified immunity serves purposes identical to those purportedly served by intracorporate immunity. At the same time, qualified immunity attempts some accommodation of the conflicting goals of civil-rights enforcement. Public officials may not violate the law with impunity, and will incur liability when their actions are clearly unlawful. This is in contrast to intracorporate immunity doctrine, which is often uncompromising in its sweep,\textsuperscript{223} and protects the guilty and the innocent alike.

Furthermore, the Court has separately addressed the need for "absolute" immunity, and has selectively identified governmental functions that must be carried out without apprehension of suit.\textsuperscript{224} When the Court has recognized this exceptional form of

\textsuperscript{218} See Anderson v. Creighton, 483 U.S. 635, 646 n.6 (1987).

\textsuperscript{219} See \textit{Harlow}, 457 U.S. at 818 (immunity permits the "resolution of many insubstantial claims on summary judgment").

\textsuperscript{220} See \textit{Anderson}, 483 U.S. at 646 n.6.

\textsuperscript{221} See \textit{1 COOK & SOBIESKI, supra} note 36, ¶ 2.06[B], at 2-78.28.


\textsuperscript{223} As discussed later, the supposed exceptions to intracorporate immunity do little to mitigate the impact of immunity. See infra notes 249-54 and accompanying text.

\textsuperscript{224} See generally CHEMERINSKY, supra note 88, at 463-73. Courts applying the conspiracy provisions of section 1985(3) have frequently invoked absolute immunities like that extended to the legislative function. See, e.g., \textit{Runs After}, 766 F.2d at 354; \textit{Rabkin}, 856 F. Supp. at 551.
absolute immunity, it has generally done so based on common-law precedent; constructive knowledge of this may be imputed to the Reconstruction Congress.\textsuperscript{225} As noted by the Court, "[t]he presumption is that qualified rather than absolute immunity is sufficient to protect governmental officials in the exercise of their duties."\textsuperscript{226} Significantly, there is no common-law precedent for intracorporate immunity, especially as applied to governmental actors.\textsuperscript{227}

On the sole occasion when the Court recognized absolute immunity in a governmental conspiracy case, it based its decision on traditional legislative immunity, rather than on a more sweeping intra-governmental immunity. In \textit{Tenney v. Brandhove},\textsuperscript{228} the Court considered a conspiracy action under section 1985(3) against members of a state legislative committee. The Court upheld the defendants' claim of absolute, legislative immunity, based on the fact that they were engaged in a function "where legislators traditionally have power to act . . . ."\textsuperscript{229} The Court's ruling relied on the inferred intent of the Congress that enacted the Civil Rights Act of 1871, which, as previously mentioned, included the original versions of section 1983 and section 1985.\textsuperscript{230} If anything in that Act supported a broader grant of immunity to officials based on the mere fact that they were employed by a single governmental entity, it went unmentioned by the Court.

Additionally, the lack of a counterpart to intracorporate immunity under federal criminal conspiracy law is suggestive. On several occasions, the Court has found actors within a single governmental entity criminally liable for civil rights violations.\textsuperscript{231} Given the greater sweep and sanction of criminal conspiracy law,\textsuperscript{232} it seems anomalous to craft a broad immunity when governmental officials face only civil sanctions.

The risk posed by unfounded conspiracy allegations against governmental officials is neither that exceptional, nor that invulnerable to recognized procedural devices for curtailing the

\textsuperscript{225} See, e.g., Pulliam v. Allen, 466 U.S. 522, 529 (1984) ("The starting point in our own analysis is the common law.").
\textsuperscript{227} See supra text accompanying notes 170-72.
\textsuperscript{228} 341 U.S. 367 (1951).
\textsuperscript{229} See Tenney, 341 U.S. at 379.
\textsuperscript{230} See supra note 4 and accompanying text.
\textsuperscript{232} See supra notes 18-25 and accompanying text.
risk. Under laws prohibiting class-based discrimination, for example, officials continually run the risk that adverse actions taken against members of a protected class may invite unfounded charges of discrimination. If sued, such officials are subjected to discovery that scrutinizes both conduct and motive, and they are subject to findings of liability even when discrimination is based on circumstantial evidence.233

The risk of unfounded claims can be constrained in part by conventional rules governing pretrial disposition of litigation. In numerous actions where plaintiffs have asserted conspiracy counts without substantial evidentiary support, courts have entered summary judgment dismissing those counts.234 Close judicial scrutiny of conspiracy claims is also evidenced by recurring attacks on the pleadings in conspiracy cases. When conspiracy allegations lack specific detail concerning the circumstances of the conspiracy, numerous courts have dismissed those allegations.235

It remains unclear whether the heightened pleading requirements in conspiracy cases are consistent with the "notice" pleading requirements of the rules of civil procedure. In Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit,236 the Court overturned the lower court's requirement that section 1983 claims against governmental entities be pleaded with factual detail. However, the Court expressly withheld opinion regarding the propriety of such pleading requirements in suits against individual governmental officials, particularly when a defense of good faith immunity is asserted.237 As noted by the Court, qualified immunity for individual officials encompasses suit immunity, which is not available in suits against governmental

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233. See, e.g., Rebel Van Lines, 663 F. Supp. at 790 ("It is not necessary to show direct evidence of discriminatory intent to prove a § 1983 claim; circumstantial evidence alone can suffice.").
237. See Leatherman, 507 U.S. at 166-69.
entities. Thus, it is altogether possible that the Court will sustain more rigorous pleading requirements in liability actions against individuals.

The value of the defense of objective good-faith immunity should not be overlooked in conspiracy actions. To the extent that alleged conspirators are sued based on legal violations that would not be "clear" to a "reasonable" official, they may assert the same qualified immunity defense available to the actual wrongdoers. As emphasized throughout this Article, conspiracy in itself is not actionable in civil rights actions, but is instead a means of establishing a causal connection between the alleged conspirator and an independently-existing legal violation. It follows that a conspirator can no more be liable for supporting action of unclear legality than can the person who ultimately takes that action.

Good faith immunity will not lie, of course, where the defendant is alleged to have entered into a conspiracy to violate laws forbidding discrimination or retaliation. Bad-motive cases present issues of fact that are not usually amenable to pretrial disposition, assuming there is credible factual support for an ultimate finding of improper motive. On the other hand, if alleged conspirators have acted without knowledge of the wrongful motives of others, the fact that they may have knowledge of, or even concurred in, the action taken by others will not subject them to liability.

238. See id. at 166-67.
240. See, e.g., Mylett v. Mullican, 992 F.2d 1347 (5th Cir. 1993); Auriemma v. Rice, 895 F.2d 338 (7th Cir. 1990); Tate v. Alexander, 527 F. Supp. 796 (M.D. Tenn. 1981).
241. See supra notes 222-23 and accompanying text. This position has been taken by several courts adjudicating conspiracy claims. See, e.g., Statos v. Bowden, 728 F.2d 15, 19-20 (1st Cir. 1984); Yeadon v. New York City Transit Auth., 719 F. Supp. 204, 212 (S.D.N.Y. 1989).
242. See supra notes 221-22 and accompanying text; see also Burrell v. Board of Trustees of Ga. Military College, 970 F.2d 785, 794 (11th Cir. 1992); Weise v. Syracuse Univ., 522 F.2d 397, 408 (2d Cir. 1975). As illustrated by Burrell, conspiracy actions based on section 1985(3), with its requirement of a discriminatory motive, seem particularly unsuited to dismissal under the qualified immunity defense. Burrell, 970 F.2d at 792-94.

Judicial efforts to weed out speculative lawsuits alleging wrongful motives nonetheless persist. Many courts attempt to screen such cases through motions for summary judgment, where they require some "direct" evidence of wrongful motive and refuse to perpetuate litigation based on circumstantial evidence. It remains unclear whether such strategies will ultimately be affirmed by the Court. See, e.g., Kimberlin v. Quinlan, 6 F.3d 789, 794-795 (D.C. Cir. 1993), vacated on other grounds, 115 S. Ct. 2552 (1995).

243. See, e.g., Allen v. City of Chicago, 828 F. Supp. 543, 562-63 (N.D. Ill. 1993); Yeadon, 719 F. Supp. at 213; Scott, 595 F. Supp. at 524; see also Trautvetter v. Quick,
Thus, the concern that conspiracy liability might deter officials from engaging in the type of discussion and consultation that is a part of healthy governmental operation is a valid one, but does not distinguish conspiracy cases from other types of civil rights actions where officials are limited to qualified immunity. The same concern is raised when officials are asked to review the work of subordinates, or to give advice and direction to other governmental employees. In both instances, there is potential exposure for the officials, and if they are “policymaking” officials, for the governmental entity as well. Nonetheless, officials receive only qualified immunity, and governmental entities receive no immunity at all.

In summary, the intracorporate immunity doctrine attempts to provide a more absolute protection for governmental officials than legislative history or Court precedent support. Moreover, it merits reemphasis that the extension of intracorporate immunity to governmental officials has not been accomplished through careful elaboration of the policy justification for such immunity. Intracorporate immunity for government is largely the product of precedential creep.

A discussion of intracorporate immunity would not be complete without some consideration of judicial efforts to corral immunity doctrine. Notwithstanding the widespread acceptance of intracorporate immunity, courts have never been totally comfortable with the doctrine. Thus, one finds within the reported decisions a variety of “exceptions” to immunity, in which the courts have at least acknowledged (albeit usually through dictum) that entities and their agents may sometimes incur liability for conspiring to violate civil rights. As is true of the fundamentals of immunity doctrine, the exceptions are overwhelmingly the product of private-actor precedent, and so must be rethought in the context of governmental liability.

The principal exceptions to application of the intracorporate immunity doctrine include: (1) denying immunity when the conspirators engage in multiple, or egregious acts of wrongdoing;

916 F.2d 1140, 1149 (7th Cir. 1990) (holding that supervisors must act with discriminatory motive to be liable for discharge of subordinate).
244. See generally Brown, supra note 102, at 68 (explaining that supervisors are generally liable for the wrongful conduct of others when they are aware of the wrongful conduct, authorize it, or acquiesce to it).
247. See, e.g., supra notes 208-09 and accompanying text.
(2) denying immunity when "personal" motives play an exclusive or dominant role in the conspirators’ actions; and (3) denying immunity when the conspirators act outside the "scope" of their employment.

First, several courts have suggested that intracorporate immunity might be lost when the conspirators engage in multiple acts, or "egregious" conduct. The basis for this exception is unclear. No support for this exception exists in the language of section 1985(3), as it confers liability for "any act" committed by the conspiracy. Nor is there precedential support for this exception. To the contrary, the Court has recognized an actionable conspiracy under section 1985(3) in several cases involving a single act or occurrence, including the seminal case of Griffin v. Breckenridge. Furthermore, the Court has refused to excuse single-act violations of civil rights under section 1983. While multiple acts or violations might strengthen the argument that a conspiracy exists, such multiplicity of acts should have nothing to do with the plaintiff's right vel non to seek redress for compensable injuries.

Even more questionable is the limitation of conspiracy liability to "egregious" misconduct. As previously discussed, liability under contemporary "good faith" immunity standards requires either that an official have violated "clearly established" law, or that the official have acted with unlawful intent—most commonly, the intent to discriminate. By definition, the failure of the good faith defense would strongly suggest that official behavior has been "egregious"—thus rendering the exception redundant. If this exception is construed to require some culpability beyond the "bad faith" recognized by the Court, one encounters again the problem of squaring intracorporate immunity with existing Court precedent.

248. See, e.g., Hartman v. Board. of Trustees, 4 F.3d 465, 470 (7th Cir. 1993); Volk v. Coler, 846 F.2d 1422, 1435 (7th Cir. 1988); Rabkin v. Dean, 856 F. Supp. 543, 551-52; Yeadon, 719 F. Supp. at 212.

249. See Wright v. Illinois Dept of Children & Family Serv., 40 F.3d 1492, 1508-09 (7th Cir. 1994).


251. The Court has repeatedly affirmed, for example, that there is no "first injury" immunity for municipal violations of civil rights; see, e.g., Pembaur, 475 U.S. at 478; Oklahoma City v. Tuttle, 471 U.S. 808, 822 (1985).

252. See supra note 215 and accompanying text.

253. See supra notes 221-22 and accompanying text.
A second exception to intracorporate immunity has been recognized when the conspirators act solely, or predominantly, out of "personal" motive or bias.254 The rationale of this exception appears to be that conspirators acting primarily out of personal motives are independent actors, whose acts cannot be attributed to the entity. Thus, as independent actors, they may have the requisite "plurality" to satisfy traditional conspiracy requirements.255

It has already been demonstrated that, regardless of motive, governmental officials are personally responsible for their actions in violation of established law, and that their government does not assume respondeat liability for their wrongs.256 Thus, the personal-motive exception solves a problem that does not exist, and restores a "plurality" to conspiratorial conduct in government that is already present under conventional civil rights doctrine.

The personal-motive exception might also be construed as a variation on the "egregious" misconduct exception, to the extent that personal motive implies bad faith. As previously suggested, any exception for bad faith appears to either recapitulate, or impermissibly enlarge, immunity doctrine already developed by the Court. Moreover, one astute court has noted that the personal-motive exception would negate the intracorporate immunity rule in the entire class of cases filed under section 1985(3). As observed by the Seventh Circuit, section 1985(3) is premised on the existence of class-based animus and "invidiously discriminatory motivation."257 By its nature, then, a conspiracy claim under section 1985(3) bespeaks a personal motive.258

254. See, e.g., Brever v. Rockwell Int'l Corp., 40 F.3d 1119 (10th Cir. 1994) (private actor liability); Garza v. City of Omaha, 814 F.2d 553, 556-57 (8th Cir. 1987); Buschi, 775 F.2d at 1252.
255. See supra notes 152-53 and accompanying text.
256. See supra notes 176-81 and accompanying text.
257. See Hartman, 4 F.3d at 470 (quoting Griffin, 403 U.S. at 102).
258. Id. Unfortunately, the court goes on to suggest that an exception might exist if the entity's interests played "no part" in the conspirators' actions. Id. While this exception is theoretically possible, the reported cases suggest no fact pattern where the alleged conspirators have acted in the total absence of some potentially articulated entity interest.

The personal-motive exception also undermines immunity doctrine insofar as it ostensibly calls for an examination of the subjective intent of the governmental official. As noted previously, issues of motive and intent are generally unsuited for pre-trial disposition, and thus expose defendants to the burdens of litigation—consequently undermining one of the principal rationales for immunity. See supra notes 221-22 and accompanying text. The same is true if the personal-motive exception is limited to defendants whose sole motive for acting is personal. See supra note 254 and accompanying text. Furthermore, it is questionable whether such an exception has any
A final exception to intracorporate immunity is the "scope-of-employment" exception. Several courts have recognized that immunity might be denied when conspirators engage in "unauthorized" action beyond the scope of their employment.259

Perhaps tellingly, none of the courts recognizing a scope-of-employment exception has actually found one in a litigated case.260 As construed by the courts, a conspirator literally would have to be off the job to fulfill the exception. Virtually any action taken by an official while exercising governmental authority—even blatantly unlawful action—would appear to be within the "scope" of employment. While this expansive view of the scope of employment is consistent with modern civil rights theory—which has long held that officials engaged in random, unauthorized wrongdoing are nonetheless engaged in "state action"261 or action "under color of state law"262—it renders the "scope-of-employment" exception inconsequential.

In conclusion, the exceptions to intracorporate immunity recognized by the courts are either insubstantial, or violate existing principles of governmental liability. Indeed, one often senses that the exceptions are not exceptions at all, but rather expressions of misgiving about the unilateral nature of immunity doctrine. It is suggested, then, that if the doctrine of intracorporate immunity is to stand, it must stand unsupported by exceptions.

The doctrine of intracorporate immunity has no place in conspiracy theory regarding the enforcement of civil rights. It has been fashioned out of inapplicable precedent, it is inconsistent with the language and history of the Civil Rights Act from which it is derived, and it attempts to serve policy concerns already addressed by the doctrine of qualified immunity. Examined from


260. It is not clear that the scope-of-employment exception actually differs from the personal-motive exception. In Hartman, for example, the court appears to conclude that the existence of some institutional motive for the defendant's action places that action within the scope of employment; see Hartman, 4 F.3d at 470. A similar construction of the scope-of-employment exception is found in Johnson v. Hills & Dales Gen. Hosp., 40 F.3d 837, 840-41 (6th Cir. 1994).

261. See cases cited supra note 259.

all perspectives, it is a doctrine that draws its sustenance from nothing more that its continued recital by the courts.

VI. CONCLUSION

Perhaps it would have been better for the contemporary history of civil rights had “conspiracy” renamed itself. The term still suggests something more diabolical, or more risible, than the rule of causation it represents.

When conspiracy law inconspicuously entered into civil-rights enforcement merely as a theory of causation under section 1983, it seldom provoked strong response. It was only when “conspiracy” entered civil-rights law as a seemingly autonomous cause of action under section 1985(3) that it prompted concerted judicial effort to stifle its growth. Thus, the spontaneously-generated doctrine of intracorporate immunity has all but strangled conspiracy actions against governmental actors, and has done a fair job of suppressing private ones.

Conspiracy law offers a valuable, if limited contribution to the enforcement of civil rights. It helps snare those who artfully encourage violations of law while leaving the task of violating to others. Moreover, conspiracy law adds to the sanction of those who swell their strength and influence through collaborative efforts.

If, as judicial critics fear, civil conspiracy is easy to allege, it is also difficult to prove. More often than not, conspiracy claims fall to the wayside during the course of litigation, or lose their practical significance as plaintiffs close in on the more easily-detected perpetrators of constitutional wrongs. Conspiracy is distinctly a secondary remedy. But it is still a remedy with a purpose.

When the Supreme Court eventually re-examines conspiracy law in the context of civil actions against government, it should recall that the Reconstruction Congress had governmental conspiracies in mind even as it labored over its power to regulate private ones. It would be a dispiriting turn of fate if conspiracy law loses its historical connection to governmental action at the very time when government’s capacity to conspire has increased to dimensions beyond the imagination of the 19th century mind.

263. This is apparently occurring over time in the field of torts. See Prosser, supra note 27, at 324.

264. Although the intracorporate immunity doctrine is now recognized in conspiracy actions under section 1983, that doctrine is clearly a product of private litigation under section 1985(3). See supra notes 174, 208-09 and accompanying text.