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The Problems with Alleging Federal Government Conspiracies Under 42 U.S.C. § 1985(3)

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THE PROBLEMS WITH ALLEGING FEDERAL GOVERNMENT CONSPIRACIES UNDER 42 U.S.C. § 1985(3)

ABSTRACT

The conspiracy theories about government involvement in the 9/11 terrorist attacks have been deservedly rebuked. But less well-known—and much more credible—are the allegations that federal government officials conspired to detain and abuse noncitizen Arab and Muslim men in direct response to the attacks, even though the individuals had no connections to the terrorists. This conspiracy was alleged in lawsuits by the individuals who were detained. Fifteen years after the initial complaint, the Supreme Court dismissed the detainees' claim under 42 U.S.C. § 1985(3), a Reconstruction-era conspiracy statute, in a case called Ziglar v. Abbasi. *That provision—less familiar than its companion, § 1983—seeks to remedy injuries and rights violations resulting from any "two or more persons" who "conspire" for the purpose of depriving another's civil rights.*

The Court's dismissal centered on confusion around how the element of conspiracy ought to apply. For nearly forty years, the lower courts have interpreted the statute's requirement of "two or more persons" in divergent ways. On one hand, some circuits apply the intracorporate conspiracy doctrine, which says that two people within an organization cannot conspire with one another in the normal course of business because they act as a single legal entity. On the other hand are the circuits that reject the intracorporate conspiracy doctrine, joined by a small but unified chorus of academics, who challenge the doctrine's common law origins. A handful of scholars have added that, for government conspiracies, the doctrine's application presents additional problems.

However, rather than resolve the decades-old split, the Court in Abbasi *ruled on the basis of qualified immunity, relying on the confusion surrounding the intracorporate conspiracy doctrine's applicability as proof that the law was not clearly established. Instead of clarifying the issue, the Court's approach doubled down on the confusion about what it means to "conspire." Indeed, with respect to claims against federal officials, the Court superimposed the procedural barrier of qualified immunity atop the thorny intracorporate conspiracy doctrine, which is itself an artificial creation of some lower courts that has been superimposed over the required elements of the statute. To get to the merits of a § 1985(3) claim, a court will now have to wade through both.*

This Comment argues that neither barrier ought to prevent claimants from pleading or proving a conspiracy by officers of the federal government under § 1985(3). The intracorporate conspiracy doctrine has persisted almost entirely through repeated reliance on precedent, but a review of its historical development and an analysis of the common law principles upon which it purports to rest reveal that its justifications fail. Qualified immunity, on the other hand, has a place in the claims. But that place is within the analysis of the rights violation element, not the conspiracy element. Both barriers needlessly supplant the substantial limitation the Court has already identified in the text of the statute—namely, a need for the plaintiff to show that the defendants acted with invidious discriminatory animus.

INTRODUCTION

In the wake of 9/11, conspiracy theories alleging government involvement in the attacks circulated around the Internet. The government debunked these claims,[1] as did the scientific community.[2] But other, more credible allegations emerged, which focused on the activity of the federal government *in response to* the attacks. According to these allegations—which were largely confirmed by the government's own investigation[3]—federal government officials conspired to detain and abuse Arab and Muslim men without any evidence of connections to terrorism. Some of those detainees sued, claiming their rights had been violated.[4] There was little doubt about the basic truth of the allegations.[5] Instead, the issue was whether—assuming the allegations to be true—the federal officers did anything unlawful.[6]

In *Ziglar v. Abbasi*, as in prior cases arising from these or similar facts, the Supreme Court answered that question in the negative.[7] The *Abbasi* plaintiffs had sued various high-ranking federal officials, including the FBI Director, the Attorney General, and the warden of the prison where they had been detained and allegedly abused.[8] When the case arrived at the Supreme Court, some fifteen years after its commencement, it still had not made it past the pleadings stage. And it never would. The Court expressed grave concerns over the defendants' conduct as alleged by the plaintiffs, which included solitary confinement, strip searches, and both physical and emotional abuse.[9] "If the facts alleged in the

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[1] NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004).

[2] *9/11 Debunking the Myths*, POPULAR MECHANICS, Mar. 2005, at 71.

[3] OFFICE OF THE INSPECTOR GEN., THE SEPTEMBER 11 DETAINEES: A REVIEW OF THE TREATMENT OF ALIENS HELD ON IMMIGRATION CHARGES IN CONNECTION WITH THE INVESTIGATION OF THE SEPTEMBER 11 ATTACKS (2003) [hereinafter OIG REPORT].

[4] Ziglar v. Abbasi, 137 S. Ct. 1843, 1843 (2017).

[5] *See* OIG REPORT, *supra* note 3.

[6] *Abbasi*, 137 S. Ct. at 1843.

[7] *Id.* at 1869. Prior cases involving post-9/11 detentions include *Ashcroft v. al-Kidd*, 563 U.S. 731 (2011), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

[8] *Abbasi*, 137 S. Ct. at 1853.

[9] The Court described the treatment in more detail:

> [D]etainees were held in tiny cells for over 23 hours a day. Lights in the cells were left on 24 hours. Detainees had little opportunity for exercise or recreation. They were forbidden to keep anything in their cells, even basic hygiene products such as soap or a toothbrush. When removed from the cells for any reason, they were shackled and escorted by four guards. They were denied access to most forms of communication with the outside world. And they were strip searched often—any time they were moved, as well as at random in their cells. . . . [P]rison guards engaged in a pattern of physical and verbal abuse. Guards allegedly slammed detainees into walls; twisted their arms, wrists, and fingers; broke their bones; referred to them as terrorists; threatened them with violence; subjected them to humiliating sexual comments; and insulted their religion.

complaint are true," it noted, "then what happened to respondents in the days following September 11 was tragic. Nothing in this opinion should be read to condone the treatment to which they contend they were subjected."[10] Nevertheless, in a 4-to-2 ruling, it denied the claimants any legal remedy.[11]

In the final part of the opinion,[12] the Court discussed and dismissed the plaintiffs' claim brought under 42 U.S.C. § 1985(3), a Reconstruction-era statute that seeks to remedy injuries and rights violations resulting from any "two or more persons" who "conspire" for the purpose of depriving the claimant's civil rights.[13] To state a claim under § 1985(3), a plaintiff must plead facts showing that "two or more persons" were involved in the alleged conspiracy.[14] This plurality requirement is typical of any conspiracy statute.[15]

But, for nearly forty years, the lower courts have split over how to interpret "two or more persons" in this context. Some say that multiple individuals within a single organization cannot conspire because they act as the organization, a proposition known as the *intracorporate conspiracy doctrine*.[16] Others reject that contention, challenging the validity of the doctrine's basis in the common law.[17] The debate surrounding the intracorporate conspiracy doctrine gets hazier when instead of individuals within a corporation—thus, intra*corporate*—the conspiracy alleged involves government officials.[18]

Instead of resolving that decades-old split of authority, the Court in *Abbasi* relied on a procedural immunity reserved for government defendants, applying a doctrine known as *qualified immunity*.[19] The purpose of qualified immunity is to give government officials "breathing room to make reasonable but mistaken judgments about open legal questions" by shielding them from liability unless it

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Id.

[10] *Id.* at 1869.

[11] *Id.* Justices Sotomayor, Kagan, and Gorsuch did not take part in the decision. *Id.*

[12] Most of the opinion is dedicated to the respondents' claims under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), which allows a plaintiff to sue a federal official for damages due to violation of constitutional rights. *Abbasi*, 137 S. Ct at 1851–65.

[13] 42 U.S.C. § 1985(3) (2012); *Abbasi*, 137 S. Ct at 1865–69.

[14] 42 U.S.C. § 1985(3).

[15] *E.g.*, 18 U.S.C. § 371 (2012) (criminal conspiracy to defraud the United States).

[16] *See Abbasi*, 137 S. Ct. at 1867–68 (describing the doctrine).

[17] *See* Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1258–59 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979).

[18] Most courts do not distinguish between private and government conspiracies when discussing the intracorporate conspiracy doctrine. *See* Michael Finch, *Governmental Conspiracies to Violate Civil Rights: A Theory Reconsidered*, 57 MONT. L. REV. 1, 37 (1996) (noting that "[t]here is surprisingly little discussion of the rationale for governmental immunity in reported decisions").

[19] *Abbasi*, 137 S. Ct. at 1867.

is shown they violated "clearly established" law.[20] In *Abbasi*, the open question was whether and how the intracorporate conspiracy doctrine ought to apply.[21] Since the circuit courts were split, the Court concluded, the law was not "clearly established"—no "reasonable official" in their circumstances could have known what the law really was.[22]

But this disposition poses something of a Catch-22—a peculiar procedural puzzle. It implies that the only real way a reasonable federal official *could* have clarity is if the Supreme Court itself resolved the circuit split and addressed the issue on the merits. And yet, the Court explicitly declined to do just that, deciding instead to avoid the merits of the issue precisely because it was unclear.[23] Instead, it allowed long-standing uncertainty about the conspiracy question not only to dispose of the claim, but to persist as an open question. In fact, the Court went further. Not only did it leave the substantive question open, it insulated the problems of the substantive doctrine underneath a new procedural layer.

The Court's approach, simply put, is problematic. First, it is based on—and perpetuates—bad law. Rather than eliminate an artificial doctrinal barrier devoid of any reference to the text of the statute, it doubled down on the confusion about what it means to "conspire." And its application of qualified immunity to the conspiracy element goes against the principles upon which qualified immunity purportedly rests. Second, by focusing entirely on the conspiracy element, it ignored other elements of the § 1985(3) claim that cut more to the heart of the defendants' alleged conduct. The Court was no doubt concerned with the possibility of subjecting high-ranking federal officials like the Attorney General to damages liability, particularly given the need for national security in the wake of the attacks.[24] Perhaps there are good reasons not to do so. But discussing the merits of the alleged rights violations and discriminatory purpose—both key elements of the claim—would arguably have allowed for a much more meaningful analysis of those issues.

This Comment argues that neither the intracorporate conspiracy doctrine nor qualified immunity should apply to preclude a plaintiff from alleging a conspiracy under § 1985(3). As to the former, the courts are split over the intracorporate conspiracy doctrine's application in civil rights cases, but

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[20] *Id.* at 1866.

[21] *Id.* at 1867–68.

[22] *Id.* at 1867.

[23] *Id.* at 1868 ("Whether that contention [that officials in the same organization cannot conspire] should prevail need not be decided here.").

[24] This concern is not immediately apparent from the opinion itself but is evident from Justice Kennedy's concurring opinion in *Ashcroft v. al-Kidd*, 563 U.S. 731, 745–47 (2011). *See* discussion *infra* Section II.C.

scholars are not, and for good reason.[25] Its justifications do not stand up to close scrutiny. Thus, this Comment serves in part to revive an important discussion that has largely failed to generate changes in the majority of courts.

As to the latter, while qualified immunity may be appropriate in assessing other elements of the claim—particularly the injury sustained by a violation of the plaintiff's rights—it ought not apply to determine whether a conspiracy occurred because the conspiracy element has no inherent connection to the rights of the plaintiff. Only a handful of courts have analyzed qualified immunity separately under § 1985(3), and until now, none appears to have made a meaningful distinction between its application to the different elements of the claim.[26]

In drawing these conclusions, this Comment proceeds in three parts. Part I traces the interpretation of § 1985(3) prior to *Abbasi* in both the Supreme Court and lower court cases applying it to federal officers. Part II examines the substance of the intracorporate conspiracy doctrine, concluding that it ought not apply to § 1985(3) cases at all, much less those brought against government actors. And Part III reviews the Court's application of qualified immunity in *Abbasi*, contending that qualified immunity ought not to apply to the conspiracy element.

I. SECTION 1985(3): THE REMEDY FOR CONSPIRACIES TO VIOLATE CIVIL RIGHTS

As the sections below demonstrate, there is now no doubt that § 1985(3) applies to federal officials. On its face, the statute—enacted as part of the Ku Klux Klan Act of 1871—provides a damages remedy for those whose rights were violated as a result of a discriminatory conspiracy involving *any* two or more persons:

> If two or more persons in any State or Territory conspire . . . for the purpose of depriving . . . any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws . . . if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such 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

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[25] *But see* Douglas G. Smith, *The Intracorporate Conspiracy Doctrine and 42 U.S.C. § 1985(3): The Original Intent*, 90 NW. U. L. REV. 1125 (1996) (supporting the doctrine). Smith appears to be the only commentator in favor of the doctrine.

[26] *See infra* Part III.

> party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.[27]

However, the twisting history of the statute's application shows just how much courts have labored to interpret its meaning.

After its initial passage, the provision was widely believed to be unconstitutional because it lacked a limitation for state action.[28] As a result, there was no reported decision applying § 1985(3) prior to 1920, almost fifty years after its passage.[29] In the 1951 case of *Collins v. Hardyman*, the Court construed the statute to avoid these perceived constitutional problems.[30] It determined that the statute reached only state actors.[31] Because the allegations involved a private conspiracy carried out against a political club, the Court held that the case did not fall within the meaning of the statute.[32] But *Collins* remained the law for only twenty years. This Part traces the modern history of the statute's application, culminating with the plaintiffs' claims in *Abbasi*.

A. Griffin*: A Remedy for Private Conspiracies*

In 1971, a full hundred years after the law's passage, the Court overruled *Collins* in the landmark decision of *Griffin v. Breckenridge*, holding that § 1985(3) allowed for a remedy against *private* conspiracies in addition to those by state actors.[33] In *Griffin*, the black plaintiffs alleged that the two white defendants stopped their car on a public highway, held them up at gunpoint, and beat them.[34] The defendants allegedly acted under the mistaken belief that the car driver "was a worker for Civil Rights."[35]

The Court laid out the elements required to establish a claim under the statute: (1) a conspiracy, (2) a purpose to deprive any person or class of persons

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[27] 42 U.S.C. § 1985(3) (2012).

[28] The reason for this belief stemmed from the Supreme Court's decision in *United States v. Harris*, 106 U.S. 629 (1883). At the time of its passage, the statute containing § 1985(3) also included a provision—nearly identical to the civil remedy—that allowed for criminal enforcement of the same conspiracies. *See id.* The Court struck down that passage in *Harris* because it lacked a provision limiting its applicability to state action. *Id.*

[29] Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 IND. L.J. 361, 363 (1951).

[30] 341 U.S. 651, 659 (1951) ("[I]f this complaint meets the requirements of this Act, it raises constitutional problems of the first magnitude that, in the light of history, are not without difficulty.").

[31] *Id.* at 661.

[32] *Id.*

[33] 403 U.S. 88, 102–04 (1971).

[34] *Id.* at 90–91.

[35] *Id.* at 90.

of equal protection of the laws, or of equal privileges and immunities under the laws, (3) an act by one of the conspirators in furtherance of the conspiracy, and (4) a personal injury, injury to property, or a deprivation of any right or privilege of a citizen of the United States.[36]

The Court also addressed the scope of the statute's applicability to private actors along two key dimensions. First, the Court held that the private conduct must exhibit an "invidiously discriminatory motivation."[37] In particular, to state a claim, a plaintiff must show that the conspiracy was motivated by "some racial, or perhaps otherwise class-based . . . animus."[38] Thus, the Court limited the availability of the remedy to cases of discrimination against particular classes. Here, a claim of race-based animus clearly exhibited such a discriminatory motivation.[39]

Second, the Court limited the statute's reach by tying it to grants of congressional authority to regulate private conduct. Only in those circumstances in which Congress had the authority to regulate private conduct could the statute be applied constitutionally.[40] In the case at hand, the Court characterized the conspiracy as involving discrimination against African-Americans under the Thirteenth Amendment[41] and deprivation of the right to travel across state lines.[42] In both instances, Congress had the authority to regulate private conduct.[43] Thus, the Court concluded that the plaintiff had stated a viable claim.[44]

B. Griffin*'s Progeny: The Remedy's Reach*

On three occasions prior to *Abbasi*, the Supreme Court revisited *Griffin* to clarify the reach of § 1985(3) in the private sphere. In *Great American Federal Savings & Loan Association v. Novotny*, the Court rejected the application of a

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[36] *Id.* at 102–03.

[37] *Id.* at 102.

[38] *Id.*

[39] *Id.* at 103.

[40] *Id.* at 104.

[41] *Id.* at 105 ("Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation.").

[42] *Id.* at 106 ("The right to pass freely from [s]tate to [s]tate has been explicitly recognized as among the rights and privileges of [n]ational citizenship. That right, like other rights of national citizenship, is within the power of Congress to protect by appropriate legislation." (citation omitted)).

[43] The Court specifically noted that this list was not necessarily exhaustive. *Id.* at 107 ("In identifying these two constitutional sources of congressional power, we do not imply the absence of any other.").

[44] *Id.*

§ 1985(3) remedy for a Title VII employment discrimination claim.[45] It emphasized that § 1985(3) merely created a remedy, not a substantive right of its own.[46] It reasoned that to allow the extra remedy would undermine the comprehensive remedial scheme enacted by Congress under Title VII.[47] Thus, it concluded that a "deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(3)."[48]

In *Union Brotherhood of Carpenters & Joiners of America, Local 610, AFL–CIO v. Scott*, the Court addressed the two requirements added by *Griffin*: whether Congress could legislate the conduct alleged and whether the conspiracy was driven by animus targeted at a particular class.[49] In *Union Brotherhood*, members of a local union assaulted nonunion workers and destroyed property on a construction site.[50] The Court held that three of the four elements of § 1985(3) were met—there was a conspiracy, an overt act, and an injury.[51] However, the plaintiffs failed to establish *Griffin*'s two requirements.[52] First, it addressed the requisite link between the conspiracy and a grant of legislative authority: here, the plaintiffs had alleged a private conspiracy designed to violate their First Amendment rights.[53] The Court held that § 1985(3) could not remedy private conspiracies under the First Amendment because the Amendment's protections were limited to government actors.[54] Next, the Court held that conspiracies based in economic or commercial animus failed to satisfy *Griffin*'s requirement that the alleged conspiracy must involve some "some racial, or perhaps otherwise class-based . . . animus."[55] For both reasons, the claim could not go forward.[56]

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45 442 U.S. 366, 378 (1979).

46 *Id.* at 372.

47 *Id.* at 378.

48 *Id.* Notably, the Third Circuit's decision below had included a determination about the applicability of the intracorporate conspiracy doctrine. Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1257 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979). The Supreme Court assumed without deciding that "the directors of a single corporation can form a conspiracy." *Id.* at 372 n.11.

49 463 U.S. 825, 829–30 (1983).

50 *Id.* at 828.

51 *Id.* at 830.

52 *Id.* at 839. Notably, the Court explicitly situated these requirements under the second element of the statute which requires that the conspiracy be "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." *Id.* at 829.

53 *Id.* at 830.

54 *Id.* at 833.

55 *Id.* at 834 (citing Griffin v. Breckenridge, 403 U.S. 88, 102 (1971)).

56 *Id.*

A decade later, the Court again addressed both requirements in *Bray v. Alexandria Women's Health Clinic*.[57] In *Bray*, an abortion clinic sought an injunction against protestors who blocked access to women seeking an abortion at the clinic, alleging that the protestors violated the women's right to interstate travel.[58] The Court again held that § 1985(3) did not apply.[59] First, it noted that § 1985(3) did not protect against conspiracies directed at "women seeking [an] abortion" because that was not a recognized class and because the conspiracy could not be said to target women in general solely "by reason of their sex."[60] Next, the Court held that preventing access to an abortion clinic did not implicate the right to interstate travel just because some individuals seeking access came from another state.[61]

To summarize: after *Griffin* and its progeny in the Supreme Court, a suit alleging a private conspiracy under § 1985(3) can go forward if it meets two key requirements.[62] First, the conspiracy must exhibit racial (or perhaps other class-based) animus. Second, the right must be one for which the Constitution gives Congress authority to regulate private actors. These requirements severely limit the types of claims that can be successfully brought against private actors.[63]

C. Section 1985(3) Claims Against Federal Officials

Unsurprisingly, in light of *Griffin* and its progeny, much of the commentary around § 1985(3) has centered on its applicability to private actors.[64] But the statute's applicability to private actors by no means precludes its applicability to government conspiracies.[65] Indeed, even *Collins* contemplated that § 1985(3), like § 1983, would apply to state actors.[66] Perhaps because suits against

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[57] 506 U.S. 263, 267–68 (1993).

[58] *Id.* at 266–67.

[59] *Id.* at 269.

[60] *Id.* at 269–70 ("Whatever may be the precise meaning of a 'class' for purposes of *Griffin*'s speculative extension of § 1985(3) beyond race, the term unquestionably connotes something more than a group of individuals who share a desire to engage in conduct that the § 1985(3) defendant disfavors.").

[61] *Id.* at 277. Rather, the right of interstate travel protects travelers only from actual barriers to cross state lines or from being treated separately from those within the state. *Id.*

[62] Of course, the plaintiffs must also properly allege the elements of a conspiracy, an overt act, and an injury.

[63] Some commentators suggest that these requirements effectively impose a state action limitation. *See* Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1020 (2002) (noting that the additional limitation "basically means that in the vast majority of cases, *Collins v. Hardyman* might as well have never been overruled"). This is probably an overly cynical view, given that *Griffin* itself allowed recovery for private, race-based violations.

[64] *See, e.g.*, *id.* at 1017–20.

[65] *See* Finch, *supra* note 18, at 11 (discussing the application to government actors).

[66] Collins v. Hardyman, 341 U.S. 651, 661 (1951).

government actors did not pose the same sorts of constitutional concerns, the Supreme Court did not hear any cases brought against government officials, at least until *Abbasi*.[67]

Before *Abbasi*, however, lower courts had to decide cases against federal officials who challenged whether the statute applied to them at all. A "delphic" pre-*Griffin* decision penned by the renowned Judge Learned Hand, *Gregoire v. Biddle*, was interpreted by some lower courts to mean that the statute did not reach conspiracies involving federal actors.[68]

It was an important question—if upheld, § 1985(3) would provide plaintiffs with another basis from which to challenge unconstitutional acts by the government, particularly the federal government.[69] By comparison, the related § 1983 does not apply to federal actors unless they are acting under the color of state law.[70] And the federal common law remedy created by the Court in *Bivens* has been severely limited by subsequent opinions, in large part because it has no statutory footing upon which to stand.[71] Additionally, as a "concerted-action" statute, § 1985(3) would allow plaintiffs to reach actors who facilitate civil rights violations without carrying them out.[72]

In *Hobson v. Wilson*, the D.C. Circuit rejected the federal officials' challenge, holding that *Gregoire* did not apply.[73] In affirming a jury verdict under § 1985(3) against FBI officer defendants, the court noted that the confusion over *Gregoire* was misplaced: that the "antiquated decision" had "repeatedly been read out of context" and in any case "has now effectively been

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[67] *Cf.* Hobson v. Wilson, 737 F.2d 1, 55 (D.C. Cir. 1984) (upholding a § 1985(3) verdict against federal officials).

[68] *Hobson*, 737 F.2d at 19.

[69] *See* Finch, *supra* note 18, at 48 ("Conspiracy law offers a valuable, if limited contribution to the enforcement of civil rights.").

[70] *E.g.*, Bibicheff v. Holder, 55 F. Supp. 3d 254, 266 (E.D.N.Y. 2014).

[71] In recent decades, the Court has begun to more or less constrain *Bivens* to the facts of the few cases in which such a remedy had previously been upheld, refusing to allow a remedy in any new context, a trend continued by the Court's denial of the remedy in *Abbasi*. Ziglar v. Abbasi, 137 S. Ct. 1843, 1857 (2017). One recent commentator suggests that the Court's decision in *Abbasi* signals *Bivens*' death knell. Christian Patrick Woo, Comment, *The "Final Blow" to* Bivens*? An Analysis of Prior Supreme Court Precedent and the* Ziglar v. Abassi [sic] *Decision*, 43 OHIO N.U. L. REV. 511, 549 (2017) ("[I]t is hard to imagine any plaintiff succeeding in a *Bivens* suit . . . without alleging the *exact* same set of facts as the early decisions of *Bivens*, *Davis*, or *Carlson*."). Others had pondered whether its extinction was imminent even before *Abbasi*. *See, e.g.*, T. Ward Frampton, Comment, Bivens*'s Revisions: Constitutional Torts After* Minneci v. Pollard, 100 CALIF. L. REV. 1711, 1714 (2012) (noting that the Court's reasoning may "undermine the viability of the *Bivens* doctrine as a whole").

[72] Finch, *supra* note 18, at 12.

[73] 737 F.2d at 19–20.

overruled" by *Griffin*.[74] There is now general acceptance that the statute's plain language encompasses claims against federal officials as well as private and state actors.[75]

But the basic scope was only the preliminary question. The lower courts also had to determine how the additional requirements established in *Griffin*—class-based animus and congressional authority over the conduct—applied in a government claim. It is not immediately apparent from the logic of *Griffin* and its progeny that the two requirements would be necessary in government cases because they were arguably included to avoid the constitutional problems specifically associated with attempts to regulate private conduct. Consider the Supreme Court's explanation of the animus requirement in *Griffin*:

> That the statute was meant to reach *private action* does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. . . . The constitutional shoals that would lie in the path of interpreting § 1985(3) as a *general federal tort law* can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment.[76]

Based on this passage, one might reasonably assume that the Court included the class-based animus requirement so as to avoid the "constitutional shoals" of a "general federal tort law" that would cover "private action." Such a limitation would therefore be unnecessary in a claim against government actors, where, given the ambits of the Fifth and Fourteenth Amendments, there would be no "constitutional shoals" upon which to founder.

But that is not at all how the lower courts have approached the issue. For example, in *Aulson v. Blanchard*, the First Circuit forcefully rejected the plaintiff's argument that the animus requirement was inapplicable just because the defendant was a federal government official.[77] It looked to other circuits that had reached the same answer[78] before concluding that there was no principled basis, either from the statute or the Court's decision in *Griffin*, from which to distinguish between public and private conspiracies.[79] Including animus as a

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[74] *Id.* at 19.

[75] *See* Iqbal v. Hasty, 490 F.3d 143, 176 (2d Cir. 2007) ("[N]umerous courts of appeals, applying *Griffin*, have concluded that section 1985(3) applies to federal officials.").

[76] Griffin v. Breckenridge, 403 U.S. 88, 101–02 (1971) (emphasis added).

[77] 83 F.3d 1, 3–4 (1st Cir. 1996).

[78] *Id.* at 3 ("This gambit has been tried in several other circuits and has uniformly been found wanting.").

[79] *Id.* at 3–4.

separate element—one which must be met regardless of whether the case challenges private or official conduct—appears now to be the consensus position among the lower courts.[80]

On the other hand, the congressional authority requirement is easily met in a government case. This conclusion is the flipside of the logic of the decision in *Union Brotherhood*, in which the Court dismissed claims in part because the rights asserted by the plaintiffs—the First Amendment and right to an abortion, respectively—could *only* be violated by government actors under the Constitution.[81] Indeed, that is exactly what happened in *Hobson*, in which the plaintiff successfully pleaded and proved a race-based conspiracy by FBI officials that violated the plaintiffs' First Amendment right of association.[82] The animus requirement was clearly met: the court pointed to "shocking" internal memos that described a program designed to disrupt anti-war and civil rights protest groups.[83] As for the rights deprivation, the Court noted that, unlike with private conspiracies, where the rights are quite limited, "when state action is involved, the whole spectrum of rights against state encroachment that the Constitution sets forth comes into play."[84] The Court concluded that it was "absolutely clear that the actions defendants were alleged to have taken violated well-established rights."[85] Thus, it upheld the jury's damage award.

D. The Plaintiffs' Claims in Abbasi

The plaintiffs in *Abbasi* were not so fortunate. The complaint in the case that would eventually become *Abbasi* was first filed in April 2002, some fifteen years before the Supreme Court's ultimate ruling.[86] In all that time, the case never made it past the pleadings stage. The plaintiffs amended their complaint[87] four

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[80] *See, e.g.,* Munson v. Friske, 754 F.2d 683, 694–95 (7th Cir. 1985) ("Although the Court in *Griffin* focused on a private conspiracy, this circuit has held that the element of proof of an invidious discriminatory motivation enunciated in *Griffin* also must be proved to sustain a cause of action involving a public conspiracy.").

[81] *See supra* text accompanying notes 53–54.

[82] Hobson v. Wilson, 737 F.2d 1, 13 (D.C. Cir. 1984).

[83] *Id.* at 23–24. For example, in one such memo, the FBI discussed a leaflet it wanted to anonymously distribute with the express aim of driving a wedge between the various groups. The court described the leaflet: "As distributed, it was titled, 'Give Them Bananas!', was 'decorated' with a drawing of a monkey, and contained a string of profane, racist and degrading remarks that our senses of propriety and revulsion prevent us from reprinting in full." *Id.* Thus, the court concluded: "We believe the foregoing amply discloses that the FBI actions were sufficiently related to matters of race to place the FBI conspiracy solidly within even the narrowest reading of section 1985(3)." *Id.*

[84] *Id.* at 15.

[85] *Id.* at 29.

[86] *See* Turkmen v. Ashcroft, 915 F. Supp. 2d 314, 331 (E.D.N.Y. 2013) (discussing the complaint).

[87] Ziglar v. Abbasi, 137 S. Ct. 1843, 1852 (2017).

separate times in response to the *OIG Report* regarding the treatment of post-9/11 detainees[88] as well as the Supreme Court's 2009 decision to raise the pleading standard in *Ashcroft v. Iqbal*.[89] When the dust had finally settled, the plaintiffs' amended complaint alleged seven claims against eight defendants.[90] The defendants were generally grouped into two categories: the Department of Justice (DOJ) defendants[91] and the Metropolitan Detention Center (MDC) defendants.[92] Six of the seven claims were brought under *Bivens*, alleging violations of the plaintiffs' First, Fourth, and Fifth Amendment rights.[93] The seventh was the § 1985(3) claim, newly added, which alleged that those rights violations were the result of a conspiracy driven by animus.[94] The allegations underlying that claim are presented below.[95]

In the wake of the 9/11 terrorist attacks, the FBI and INS[96] implemented a policy of detaining noncitizen Arab or Muslim men who had violated immigration laws and holding those who were "of interest" or whose status could not be determined until they were affirmatively cleared of suspicion of terrorism.[97] Many of the men were held without individual suspicion of any connection to terrorism; some may have been categorized "of interest" and subject to the policy only because the FBI could not confirm whether they were, in fact, of interest.[98] Anyone detained in New York for immigration violations was deemed "of interest."[99] The Court estimated that more than 700 men were

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88 *See* OIG REPORT, *supra* note 3.

89 556 U.S. 662 (2009).

90 *Turkmen v. Ashcroft*, 915 F. Supp. 2d at 324.

91 These included John Ashcroft, the former Attorney General, Robert Mueller, then-Director of the FBI, and James Ziglar, the former Commissioner of the INS. *Id.* at 325.

92 These included "Dennis Hasty and Michael Zenk, both former wardens of the MDC;" as well as "James Sherman, Salvatore Lopresti, and Joseph Cuciti, all former MDC officials of a rank below warden." *Id.* Lopretis and Cuciti were not included in the Second Circuit case. Turkmen v. Hasty, 789 F.3d 218, 224 (2d Cir. 2015). Zenk was not included in *Abbasi*. 137 S. Ct. at 1853.

93 *Turkmen v. Ashcroft*, 915 F. Supp. 2d at 324, 332.

94 *Id.* at 358.

95 Just as the Court adopted them as true based on the procedural posture of the case, so too does this Comment. *See Abbasi*, 137 S. Ct. at 1852 (discussing the procedural posture). Notably, the court of appeals related the allegations more fully than did the Supreme Court (or does this Comment), and so a reader seeking more detail regarding the allegations ought to refer to that decision. *See Turkmen v. Hasty*, 789 F.3d at 225–32.

96 The INS, when it still existed, fell under the umbrella of the DOJ. *Our History*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://www.uscis.gov/about-us/our-history. It has now been dismantled and divided into three separate agencies. *Id.*

97 *Abbasi*, 137 S. Ct. at 1852.

98 Shirin Sinnar, *The Lost Story of* Iqbal, 105 GEO. L.J. 379, 422 (2017) (citing OIG REPORT, *supra* note 3, at 42).

99 *Id.*

detained as part of the investigation.[100] Of these, "not a single person subjected to detention in the United States after September 11 was charged with any connection to the September 11 attacks."[101]

During the investigation, eighty-four of the men, including the *Abbasi* plaintiffs, were taken to the MDC in Brooklyn.[102] There, they were subjected to extraordinarily harsh treatment throughout their extended detention, including solitary confinement and strip searches as well as physical and emotional abuse.[103] The Court related the allegations in detail, and explicitly expressed its concerns with the allegations.[104] Still, there was no remedy to be had.

Abbasi was very different from the Court's prior § 1985(3) cases, which focused entirely on private conspiracies and the requirements laid down by the Court in *Griffin* that are associated with the purpose element. Here, the focus was not on those requirements at all. Rather, the Court looked only at the conspiracy element, where it identified two limiting doctrines: the intracorporate conspiracy doctrine and qualified immunity. It combined these two to powerful effect, more or less foreclosing the possibility of any § 1985(3) claim against a high-ranking federal official. The analysis of these two limiting principles is taken up in the remaining sections.

II. REJECTING THE INTRACORPORATE CONSPIRACY DOCTRINE

Abbasi was significant primarily because of the high-stakes claims at issue. But, in the § 1985(3) context, it also offered the Court an opportunity to resolve—or at least address—a knotted strain of jurisprudence that had divided lower courts for nearly four decades. Yet the Court declined to address the intracorporate conspiracy doctrine head-on.[105] Part III analyzes how the Court

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[100] *Abbasi*, 137 S. Ct. at 1852. The dissent likened this detention to policy to the one at issue in the infamous *Korematsu* case. *Id.* at 1884 (Breyer, J., dissenting) (citing Korematsu v. United States, 323 U.S. 214 (1944)). In fact, the children of the *Korematsu* plaintiffs submitted an amicus brief on behalf of the plaintiffs. *See* Brief of Karen Korematsu et al. as Amici Curiae in Support of Respondents, Ziglar v. Abbasi, 137 S. Ct. 1843 (2017) (No. 15-1358).

[101] Sinnar, *supra* note 98, at 423.

[102] *Abbasi*, 137 S. Ct. at 1852–53.

[103] *Id.* at 1853; *see supra* text accompanying note 9.

[104] *Abbasi*, 137 S. Ct. at 1853. The Supreme Court's recitation of the allegations is notable when compared with its opinion in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), a case based on the same underlying allegations. *Iqbal* is well known for establishing the Court's new pleading standard—and is among the most cited cases of all time—but, because of its procedurally based holding, the treatment of those allegations and the associated legal issues was significantly diminished. Sinnar, *supra* note 98, at 381–82. In *Iqbal*, the Court did not consider the § 1985(3) claim at all, despite the fact that the lower court had allowed it to go forward. 556 U.S. 662; Iqbal v. Hasty, 490 F.3d 143, 176–77 (2d Cir. 2007).

[105] *Abbasi*, 137 S. Ct. at 1868 (discussing the split but declining to address the underlying issue).

managed to avoid the issue. Before getting there, however, this Part argues that the intracorporate conspiracy doctrine ought to be rejected entirely, particularly when the conspiracy alleged is a governmental one.[106]

The intracorporate conspiracy doctrine developed to reconcile perceived tension between conspiracy law and corporate law. On one hand, § 1985(3), as a conspiracy statute, requires a plurality of actors: without "two or more persons" who "conspire," the elements of the claim cannot be met.[107] On the other hand, basic principles of corporate law dictate that a corporation exists as a single legal entity which acts through agents, typically its managers or employees.[108] The tension arises when the only alleged actors are those within the same corporate entity.

The doctrine, broadly stated, stands for the idea that two individuals within an organization, acting within the scope of employment, do not meet this plurality requirement because they act as a single legal entity.[109] At times, confusion arises over whether the alleged plurality comprises the agents, the corporation, or both, but the standard fact pattern—and the one discussed here—involves both the activity and potential liability of the individual agents, not the entity. The doctrine emerged in antitrust law, where it has generally been applied without significant criticism.[110] On the other hand, it has largely been rejected

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[106] Others have made similar arguments throughout the doctrine's history—indeed, some criticism stretches back nearly to its inception. *See* Note, *Intracorporate Conspiracies Under 42 U.S.C. § 1985(c)*, 92 HARV. L. REV. 470 (1978) [hereinafter *Harvard Note*]. However, as one commentator aptly noted, while the doctrine has been "uniformly reproached" by scholars, such criticisms have had "little discernable effect on the doctrine's resiliency in the courts." Finch, *supra* note 18, at 29. That may be because the chorus of commentators has been relatively small: § 1985(3) is often overlooked compared to other related causes of action. *See, e.g.*, Note, *Government Tort Liability*, 111 HARV. L. REV. 2009 (1998) (discussing the "variety of remedial options" available to "victims of government lawlessness" but neglecting to mention § 1985(3)). In particular, only two scholars appear to have discussed the doctrine's application in the government context, and both of those were from over twenty years ago. *See* Geoff Lundeen Carter, *Agreements Within Government Entities and Conspiracies Under § 1985(3)—A New Exception to the Intracorporate Conspiracy Doctrine?*, 63 U. CHI. L. REV. 1139 (1996); Finch, *supra* note 18. Thus, the purpose of this Part is less to break new ground than to revive an important discussion that otherwise has lain mostly dormant.

[107] 42 U.S.C § 1985(3) (2012).

[108] RICHARD D. FREER & DOUGLAS K. MOLL, PRINCIPLES OF BUSINESS ORGANIZATIONS 142 (2013).

[109] *E.g.*, Note, *Intracorporate Conspiracies Under 42 U.S.C. 1985(c): The Impact of* Novotny v. Great American Federal Savings & Loan Association, 13 GA. L. REV. 591, 599–600 (1979) [hereinafter *Georgia Note*].

[110] *See* Sarah N. Welling, *Intracorporate Plurality in Criminal Conspiracy Law*, 33 HASTINGS L.J. 1155, 1162 (1982) (discussing the origin of the doctrine in antitrust law).

in cases of criminal conspiracy.[111] In the civil rights context, the outcome often turns on which of these areas the deciding court finds more analogous.[112]

The majority of courts approve of the doctrine.[113] By contrast, the academic literature has "uniformly reproached" its application, joining the minority of courts that reject it.[114] The Supreme Court, however, has repeatedly declined to rule on the substance of the doctrine.[115] As a result, the split in authority has persisted for some forty years,[116] which has left open the door for the problems associated with the doctrine to metastasize. The sections below trace the doctrine's development, critiques of its justifications, and additional problems specific to its application in the government context.

A. "Precedential Creep": Tracing the Doctrine's Development at Common Law

The intracorporate conspiracy doctrine is truly a creature of the common law. It emerged in an antitrust case, subsequently appeared in cases alleging conspiracies under § 1985(3) against private corporations, then, with little fanfare, it migrated into cases against government actors. One of the only commentators to study the intracorporate conspiracy doctrine in the government context argued that the extension to government conspiracies was "*not* . . . accomplished through careful elaboration of the policy justification for such immunity."[117] Instead, "[i]ntracorporate immunity for government [actors] is largely the product of precedential creep."[118] The sections below trace that "creep" through the leading cases.

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111 Catherine E. Smith, *(Un)Masking Race-Based Intracorporate Conspiracies Under the Ku Klux Klan Act,* 11 VA. J. SOC. POL'Y & L. 129, 148 (2004).

112 *Compare* Travis v. Gary Cmty. Mental Health Ctr., Inc., 921 F.2d 108, 110 (7th Cir. 1990) (antitrust), *with* Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1258 (3d Cir. 1978) (criminal law), *vacated on other grounds*, 442 U.S. 366 (1979).

113 *See* Bowie v. Maddox, 642 F.3d 1122, 1130 (D.C. Cir. 2011) (discussing the split).

114 Finch, *supra* note 18, at 29.

115 Ziglar v. Abbasi, 137 S. Ct. 1843, 1868 (2017) (declining to address); Hull v. Shuck, 501 U.S. 1261, 1262–63 (1991) (White, J., dissenting) (dissenting from denial of cert.); *Novotny*, 442 U.S. at 372 n.11 (assumed without deciding).

116 The Third Circuit in *Novotny* was the first court to reject the doctrine, leading to a split beginning in 1978. 584 F.2d at 1259.

117 Finch, *supra* note 18, at 44 (emphasis added). In addition to tracing the case law of § 1985, Finch finds support for this idea in the fact that prior cases under § 1983, which does not allow for private conspiracies, have no mention of the intracorporate conspiracy doctrine. *Id.* at 37.

118 *Id.* at 44.

1. Nelson Radio*: Antitrust Origins*

The intracorporate conspiracy doctrine originated in a Fifth Circuit case, *Nelson Radio & Supply Co. v. Motorola, Inc.*, which arose under the Sherman Antitrust Act.[119] It was a profound shift in the development of the law, emerging more or less fully fledged yet without obvious precedent.[120] The court announced the doctrine by drawing upon two "basic" premises of agency and conspiracy law: First, any act by the agent within the scope of business was imputed to the corporation.[121] Second, the corporation, as a single legal "person," could not conspire by itself.[122] Taking the two together, the court concluded that agents of the corporation could not be said to conspire because they would be acting as a single entity rather than as the "two persons or entities" required for any conspiracy.[123] Eventually, the Supreme Court would offer a different rationale for the doctrine in antitrust cases,[124] but not before the doctrine appeared in the civil rights context.

2. Dombrowski*: Introduction to Civil Rights*

The Seventh Circuit introduced the intracorporate conspiracy doctrine to § 1985(3) in *Dombrowski v. Dowling*,[125] which followed shortly after the Supreme Court's 1971 ruling in *Griffin*. In *Dombrowski*, the court dismissed a claim alleging a private conspiracy by a corporation and its employee to violate the Fourteenth Amendment in part for lack of state action.[126] The court need not have ruled on any other issue but nevertheless offered an additional reason for dismissal[127]: the element of plurality necessary to show a conspiracy, it said, could not be "satisfied by proof that a discriminatory business decision reflects

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[119] 200 F.2d 911, 913 (5th Cir. 1952).

[120] *Harvard Note*, *supra* note 106, at 479–80 ("Prior to *Nelson Radio*, courts routinely held that intracorporate agreements and actions could constitute a conspiracy rendering both the corporation and its officials liable. This rule prevailed in the antitrust as well as the criminal and tort contexts, and was generally not debated.").

[121] *Nelson Radio*, 200 F.2d at 914 (noting that "it is the general rule that the acts of the agent are the acts of the corporation").

[122] *Id.* ("A corporation cannot conspire with itself any more than a private individual can . . . .").

[123] *Id.*

[124] *See infra* Section II.C.2.

[125] 459 F.2d 190 (7th Cir. 1972).

[126] This holding comports with *Griffin* because Congress cannot regulate purely private action under the Fourteenth Amendment.

[127] Some scholars refer to this alternative explanation as dicta. Barry Horwitz, *A Fresh Look at a Stale Doctrine: How Public Policy and the Tenets of Piercing the Corporate Veil Dictate the Inapplicability of the Intracorporate Conspiracy Doctrine to the Civil Rights Arena*, 3 NW. J.L. & SOC. POL'Y 131, 141 (2008). However, it is more appropriately characterized as an additional sufficient basis for the court's decision.

the collective judgment of two or more executives of the same firm."[128] Instead, "if the challenged conduct is essentially *a single act of discrimination by a single business entity*, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this statute."[129]

The court offered no meaningful rationale or authority for its conclusion.[130] It did not cite *Nelson Radio* or rely on the precepts established by that case, despite reaching the same conclusion.[131] Nevertheless, the language of that brief passage proved "irresistible" to future courts, and it spawned an entirely new line of jurisprudence.[132] Indeed, some courts relying on *Dombrowski* "merely quote[d] that decision without offering any further explanation or justification."[133] And no wonder—after all, *Dombrowski* itself offered no explanation upon which to rely.[134]

Some courts developed various exceptions to *Dombrowski*'s broad rule of immunity.[135] These allowed for claims to go forward when alleging conspiracies of racial discrimination or acts of violence,[136] of multiple acts of discrimination,[137] or acts by corporate agents dominated by personal motives or

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[128] *Dombrowski*, 459 F.2d at 196.

[129] *Id.* (emphasis added).

[130] The court did cite (using the less forceful "*cf.*" signal) the decades-old Supreme Court case of *Morrison v. California*, 291 U.S. 82, 92 (1934). *Dombrowski*, 459 F.2d at 196. It presumably referred to that case's *bon mot*, "It is impossible in the nature of things for a man to conspire with himself." *Morrison*, 291 U.S. at 82.

[131] As other courts began to apply *Dombrowski*, they soon made the connection between the civil rights and antitrust cases and began to rely on *Nelson Radio* for additional authority. The first appellate court case to have made this link appears to be *Girard v. 94th Street & Fifth Avenue Corp.*, 530 F.2d 66, 70 (2d Cir. 1976).

[132] Horwitz, *supra* note 127, at 142 (emphasis added).

[133] Welling, *supra* note 110, at 1170 (citing *Girard*, 530 F.2d at 70).

[134] One early commentator, searching for some rationale underlying the courts' decisions, posited that "[t]he best explanation for the rule is judicial concern that section 1985(3) needs some limiting principle to preclude it from becoming a general federal tort law." *Id.* at 1170–71. This explanation makes sense. After all, *Griffin*, which the Court had laid down only a year earlier, represented a profound shift in how the statute was treated, opening the way for claims against private actors for the first time in a century. No doubt the lower courts were concerned that a potential wave of new litigation might be brought against private actors. Still, others criticized the use of what appeared to be an invented doctrine as a limiting principle instead of rigorous constitutional analysis. *See Harvard Note*, *supra* note 106, at 485–86 n.90 (noting that the intracorporate conspiracy doctrine "should be no substitute for a forthright address of the constitutional issue"). Now, of course, the Supreme Court has clarified that the text of statute, interpreted so as to avoid constitutional concerns, imposes significant limitations on plaintiffs bringing claims. *See supra* Section I.B.

[135] *See* Horwitz, *supra* note 127, at 142 (noting the exceptions were created because "[t]he doctrine broadly dismisses lawsuits even in cases where such dismissal contradicts the intentions of the 1871 Act").

[136] *Georgia Note*, *supra* note 109, at 606–07.

[137] *Id.* at 607–08.

otherwise acting outside the scope of their employment.[138] However, the actual relevance of these exceptions has been called into question.[139]

3. Novotny*: Rejecting the Doctrine*

In *Novotny v. Great American Federal Savings & Loan Ass'n*,[140] the Third Circuit completely rejected the intracorporate conspiracy doctrine in § 1985(3) cases alleging a conspiracy between individual agents. It noted first that the text and legislative history offered no indication of an intent to shield agents of the same corporation.[141] Then it held that the common law agency principles provided no real basis from which to justify the doctrine.[142] It did so by reframing the *Nelson Radio* agency analysis. Because the *Novotny* complaint did not allege a conspiracy by the entity corporation, but only by the individuals, the court said:

> There is thus *no occasion to evaluate the force of the proposition that a corporation cannot conspire with itself*. Rather, the sole issue before us, so far as the conspiracy element is concerned, is whether *concerted action* by officers and employees of a corporation, with the object of violating a federal statute, can be the basis of a § 1985(3) complaint.[143]

The court linked the single actor principle to the liability of the entity, thereby severing its connection to the liability of the individual agents.[144]

To determine the individuals' liability, the court looked to criminal law rather than antitrust law as a point of reference.[145] In the context of criminal conspiracies, unlike in antitrust cases, most circuits have consistently rejected the intracorporate conspiracy doctrine.[146] The court noted that a well-established line of precedent showed that "where a corporation commits a substantive crime, the officers and directors who cause it to so act may be guilty of criminal conspiracy."[147] Thus, the court dismissed the defendants' attempt to invoke the doctrine.[148]

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138 *Id.* at 608–09.

139 Finch, *supra* note 18, at 47 ("Indeed, one often senses that the exceptions are not exceptions at all, but rather expressions of misgiving about the unilateral nature of immunity doctrine.").

140 584 F.2d 1235 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979).

141 *Id.* at 1257.

142 *Id.*

143 *Id.* at 1257–58 (emphasis added).

144 *Id.* at 1258.

145 *Id.*

146 *Id.*; *see also* Smith, *supra* note 111 (citing United States v. Hartley, 678 F.2d 961, 972 (11th Cir. 1982)).

147 *Novotny*, 584 F.2d at 1258.

148 *Id.* at 1259.

4. Migration to Government Conspiracies

Before the intracorporate conspiracy doctrine was applied to private conspiracies, no one appeared to doubt that state actors within the same organization could legally conspire.[149] Indeed, early critics of the doctrine in the private sphere noted that no comparable rule existed for public conspiracies.[150] Yet, as discussed below, soon after the doctrine's introduction to the private sphere, courts began extending it to cases against municipal entities. After the shift occurred, one of the few commentators who considered § 1985(3) in the government context noted the irony: "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."[151]

The doctrine's migration to government cases can be traced to a single case, where a district court appeared to overlook the distinction between private and public universities. First, in *Cole v. University of Hartford*, a district court in Connecticut applied the doctrine to employees of a private university.[152] Then, in *Chambliss v. Foote*, a district court in New Orleans, citing *Cole*, applied the doctrine to employees of the University of New Orleans, a public university.[153] The court's analysis made no mention of the distinction between a private corporation and the public entity.[154] Instead, it relied only on the fact that *Cole* had applied the doctrine to a university of any kind.[155] However, subsequent courts cited *Chambliss* for the proposition that the doctrine could be applied to municipal entities.[156] By the early to mid-1990s, some circuit courts began to adopt the extension, first to a board of education,[157] then to other municipal agencies.[158] Save for a few who sought to justify the extension,[159] most courts

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[149] *Cf.* Finch, *supra* note 18, at 30 (noting that conspiracy law used to adopt the position that only government actors could be liable).

[150] *See* Welling, *supra* note 110, at 1170 n.80 (citing Hampton v. City of Chicago, 484 F.2d 602 (7th Cir. 1973) ("In the context of government bureaucracies, there is no comparable rule of no plurality.")).

[151] Finch, *supra* note 18, at 30.

[152] 391 F. Supp. 888 (D. Conn. 1975).

[153] 421 F. Supp. 12, 15 (E.D. La. 1976), *aff'd*, 562 F.2d 1015 (5th Cir. 1977). As with *Dombrowski*, this was an alternative sufficient basis for the holding. The court had already held that there was insufficient evidence to show a conspiracy in the case. *Id.*

[154] *Id.*; *see also* Horwitz, *supra* note 127, at 143–44.

[155] *See Chambliss*, 421 F. Supp. at 15.

[156] *See, e.g.*, Dickerson v. Alachua Cty. Comm'n, 200 F.3d 761, 767 (11th Cir. 2000) (holding that the case against a county commission fell directly under *Chambliss*).

[157] Hull v. Cuyahoga Valley Joint Vocational Sch. Bd. of Educ., 926 F.2d 505 (6th Cir. 1991).

[158] Wright v. Ill. Dep't of Children & Family Servs., 40 F.3d 1492, 1508 (7th Cir. 1994); *Dickerson*, 200 F.3d at 767.

[159] *Compare Wright*, 40 F.3d at 1508 (justifying the extension by noting that "large bureaucratic agencies such as the DCFS are functionally the equivalent of corporations in that their employees and officials jointly

simply followed precedent without explanation,[160] much as they had in cases of private conspiracies.[161] On the other hand, those that rejected it in private conspiracies would have no occasion to consider it anew. Thus, today, any distinction between the doctrine's application to private and government conspiracies has largely disappeared.

This extension ought not to be overlooked, however, because applying the intra*corporate* conspiracy doctrine to government conspiracies creates specific problems inherent in the doctrine's purported justifications. These are discussed in section II.C below. Before that, however, section II.B discusses the criticisms of the doctrine's existence more generally.

B. The Doctrine's Faulty Justifications

Scholars who have written about the intracorporate conspiracy doctrine have almost unanimously rejected its application in civil rights cases.[162] They decry its continued vitality as both "adventitious" and detrimental.[163] This section explains why this doctrine has been widely rejected in the scholarly community, reviewing its purported justifications and their critiques.

Before discussing these justifications, however, it is worth noting a more basic criticism—namely, that the intracorporate conspiracy doctrine simply *is not needed* to protect actors who deserve protection. The doctrine may well have emerged as a way to insulate private actors that, after *Griffin*, were suddenly subject to potential liability.[164] But, as discussed in Part I, following *Griffin*, the Supreme Court limited the scope of § 1985(3) liability to defendants who exhibited "invidiously discriminatory animus." Accordingly, the intracorporate conspiracy doctrine could only ever bar liability for actors who exhibited this animus, which contradicts the purpose of the statute and defies basic sensibilities. "A decision rooted in prejudice never can be a normal business

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endeavor to provide a product or service and reach decisions pursuant to a unified, hierarchical structure"), *with* Rebel Van Lines v. City of Compton, 663 F. Supp. 786, 792–93 (C.D. Cal. 1987) (criticizing the extension by noting that "[e]ven if *Dombrowski* were good law as applied to a conspiracy within a private business, it cannot apply to conspiracies within governmental entities such as those in this case" because such an extension "would immunize official policies of discrimination").

160 *See Dickerson*, 200 F.3d at 767 (citing *Nelson Radio*, 200 F.2d 911 (5th Cir. 1952), and *Chambliss*, 421 F. Supp. at 21, as primary authorities).

161 *See supra* note 133 and accompanying text.

162 *But see* Smith, *supra* note 25, at 1129, 1184 (arguing in favor of the doctrine).

163 Finch, *supra* note 18, at 37–38; Smith, *supra* note 111, at 132.

164 *See* discussion *supra* note 134.

decision because it serves no legitimate business or societal purpose, certainly not one Congress should respect."[165]

1. Text and Legislative History

Most courts and critics alike agree that the justifications for applying the intracorporate conspiracy doctrine to § 1985(3) must be found elsewhere than in the statute's plain language or legislative history. In *Novotny*, for example, the Third Circuit quickly dismissed the idea that either of these sources supported immunizing agents of the same corporation.[166] No one appears to dispute the plain language argument—on its face, "two or more persons" is not self-limiting. Additionally, as the Court noted in *Griffin*, its approach to the text of civil rights statutes is to "accord [them] a sweep as broad as [their] language."[167]

As for the one brave court that attempted to argue that the legislative history supports the intracorporate conspiracy doctrine, its reasoning has been severely criticized. In *Travis v. Gary Community Mental Health Center, Inc.*,[168] Judge Easterbrook of the Seventh Circuit stated that "[w]hen Congress drafted § 1985 it was understood that corporate employees acting to pursue the business of the firm could not be treated as conspirators."[169] But nowhere does the court explain or show how or why Congress "understood" that to be the case.[170] Indeed, nearly the entire section describing the legislation's passage is bereft of any citation to legislative or other historical materials.[171] And one early commentator argued that the exact opposite was true—that early interpretation *allowed* intracorporate liability.[172] Perhaps most problematic, multiple commentators have suggested

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[165] Jennifer Martin Christofferson, Note, *Obstacles to Civil Rights: The Intracorporate Conspiracy Doctrine Applied to 42 U.S.C. 1985(3)*, 1995 U. ILL. L. REV. 411, 437 (1995); *accord* Rebel Van Lines v. City of Compton, 663 F. Supp. 786, 792 (C.D. Cal. 1987) ("Racial discrimination can never further any business purpose of a governmental entity.").

[166] Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1259 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979).

[167] *Id.* at 1257 n.113 (citing Griffin v. Breckenridge, 403 U.S. 88, 97 (1971)).

[168] 921 F.2d 108 (7th Cir. 1990).

[169] *Id.* at 110.

[170] *Id.*

[171] That appears to be because those materials do not exist (or at least have not been found). *See* Finch, *supra* note 18, at 31 ("One searches the legislative history of section 1985(3) . . . in vain for any congressional intent regarding the issue of corporate immunity.").

[172] *See Harvard Note*, *supra* note 106, at 479–80 ("Prior to *Nelson Radio*, courts routinely held that intracorporate agreements and actions could constitute a conspiracy rendering both the corporation and its officials liable. This rule prevailed in the antitrust as well as the criminal and tort contexts, and was generally not debated.").

that the few sources relied upon by the court in this part of the opinion are miscited.[173]

2. Reliance on Precedent

Scholars have repeatedly criticized the reliance on the conclusion drawn by the courts in both *Dombrowski* and *Nelson Radio*.[174] Both of those cases, discussed in section II.A above, introduced a version of the single actor theory, but only *Nelson Radio*, the antitrust case, really explained it.[175] For courts that rely only on *Dombrowski*, there really is no explanation for the doctrine's continued existence except reliance on precedent.[176] This is not inherently problematic, but it becomes an issue when the relied-upon precedent itself has no real justification.

For those that apply *Nelson Radio*, a separate precedential problem arises: namely, that *Nelson Radio*, as it is commonly understood, is no longer—or should no longer be considered—the law. The Supreme Court's discussion in *Copperweld Corp. v. Independence Tube Corp.*[177] fundamentally changed the rationale for the doctrine's application in the antitrust context, effectively overruling *Nelson Radio*. Instead of relying on principles of agency and conspiracy law, the Court explained the doctrine with specific reference to antitrust polices underlying the Sherman Act, a far cry from the "basic" tenets of agency and conspiracy law referred to by the court in *Nelson Radio*.[178]

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173 Finch, *supra* note 18, at 31 n.170; Horwitz, *supra* note 127, at 151.

174 *E.g.*, Welling, *supra* note 110, at 1162–64, 1170.

175 *See supra* notes 121–23 and accompanying text.

176 *See supra* note 133 and accompanying text.

177 467 U.S. 752 (1984).

178 *Id.* at 769. The Court's explanation from *Copperweld* is sensible and instructive:

> [I]t is perfectly plain that an internal "agreement" to implement a single, unitary firm's policies does not raise *the antitrust dangers that § 1 was designed to police*. The *officers of a single firm are not separate economic actors* pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from *an effort to compete as from an effort to stifle competition*. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively.

Id. (emphasis added). In fact, some early commentators who sought to reconcile *Nelson Radio*'s holding with its "unpersuasive" explanation tried to situate its analysis in these same antitrust policies and thus more or less anticipated the Court's *Copperweld* decision. *Harvard Note*, *supra* note 106, at 480; Welling, *supra* note 110, at 1164. However, *Nelson Radio* only purports to apply generalized principles of agency and conspiracy law, not those of antitrust. *Id.* at 1162–64.

This presents a specific problem for courts relying on *Nelson Radio*—or *Copperweld*, for that matter—because the anticompetition policies of antitrust are not relevant to civil rights cases at all. Nevertheless, courts continue to cite *Nelson Radio* as authority, either overlooking or obscuring this fundamental distinction.[179] Because the *Nelson Radio* rationale has arguably been overruled, it should no longer be cited as good law.

3. Common Law Agency Principles: Single Actor Theory

Despite the Court's differing rationale in antitrust cases, one might imagine that the single actor theory articulated in *Nelson Radio* otherwise retains its validity and so could still apply in civil rights cases. After all, it relied only on "basic" principles of agency and corporate law. However, that reliance is misplaced. Although there is no doubt that corporate law exists primarily to limit liability for some individuals, there is likewise no doubt that the individuals protected are the corporation's *shareholders*, not its *agents*.[180] By contrast, using agency principles to construct corporate immunity flatly contradicts the basic underlying purpose of those principles, which was to *expand* corporate liability.[181]

Furthermore, although the two premises of the *Nelson Radio* single actor theory are generally accepted, the conclusion drawn from those premises is "plainly mistaken."[182] Assuming that an agent's action can be imputed to the corporation and that a corporate entity cannot be said to conspire with itself, it follows that an individual agent and an entity principal also cannot be said to conspire together because the corporation cannot "act" independently of the agent.[183] However, this does not mean that multiple individual agents within a single entity cannot constitute a plurality for the purposes of a conspiracy. Entity liability and individual agent liability are two distinct questions.[184] Agent

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[179] Even the courts that refer to *Copperweld* do not necessarily acknowledge the different rationale. *See* Ziglar v. Abbasi, 137 S. Ct. 1843, 1867 (2017) (citing *Copperweld*, 467 U.S. at 769–71). And academics too have also overlooked the distinction. *See* Shaun P. Martin, *Intracorporate Conspiracies*, 50 STAN. L. REV. 399, 428 (1998) ("*Nelson Radio*'s single entity view of intracorporate conduct was ultimately adopted by the Supreme Court in *Copperweld*.").

[180] *See, e.g.*, FREER & MOLL, *supra* note 108 (noting that the concept of limited liability for shareholders is "deeply ingrained").

[181] *See* Christofferson, *supra* note 165, at 427 (discussing the purpose of agency principles).

[182] Finch, *supra* note 18, at 28 ("While this much of the syllogism is correct, the doctrine . . . takes the additional step of concluding that . . . the agents' plural identities meld into a single corporate entity. . . . The theoretical foundation of immunity in agency law is plainly mistaken . . . .").

[183] *Id.* ("The single entity theory does retain validity in one situation. Where a single corporate agent has acted wrongfully . . . and the plaintiff alleges a conspiracy between the agent and her corporation . . . .").

[184] Christofferson, *supra* note 165, at 435.

activity is ascribed to the corporation for the purpose of determining the liability *of the entity*,[185] not for removing it from the agents themselves.[186] "Under traditional agency principles . . . an agent is not immune from tort liability simply because the principal also may be held liable."[187] For this reason, the court in *Novotny* held that the single actor theory could only apply to cases that alleged a conspiracy by the entity defendant.[188]

Courts applying the common law principles also tend to overlook the fact that this theory relies on the entity status of the corporation, which means its reach would be limited to corporations and other businesses which are treated as entities under the law.[189] Yet these courts have applied the doctrine more broadly than just to corporations,[190] an extension that becomes particularly problematic when considering alleged government conspiracies.[191]

4. Comparing Policies: Criminal and Antitrust Counterparts

If applying the intracorporate conspiracy doctrine to § 1985(3) is not supported by the statute's text, legislative history, precedent, or underlying principles, its validity must be justified by policy objectives.[192] The purpose of the statute is not disputed: "The central theme of the bill's proponents was that the Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power. The predominate purpose of § 1985(3) was to combat the prevalent animus against Negroes and their supporters."[193] Obviously, this does not say much one way or the other as to the liability of corporate actors, and, as mentioned above, the legislative history is silent on the issue.[194] Thus, courts and scholars have sought either to justify or criticize the doctrine by analogizing the policies underlying § 1985(3) to other conspiracy

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185 This form of entity liability is commonly known as respondeat superior. *E.g.*, RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. LAW. INST. 2006).

186 Christofferson, *supra* note 165, at 428.

187 *Id.* at 427 (citing RESTATEMENT (SECOND) OF AGENCY § 343 (AM. LAW INST. 1958)); *accord supra* RESTATEMENT (THIRD) OF AGENCY, at §7.01; Finch, *supra* note 18, at 28.

188 *See supra* text accompanying note 143.

189 *Cf.* Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1257 (3d Cir. 1978) (comparing a partnership and a corporation), *vacated on other grounds*, 442 U.S. 366 (1979).

190 *See supra* Section II.A.4.

191 *See infra* Section II.C.

192 Finch, *supra* note 18, at 31.

193 United Bhd. of Carpenters & Joiners of Am., Local 610, AFL–CIO v. Scott, 463 U.S. 825, 836 (1983).

194 *See supra* note 171.

statutes, either in antitrust law—which allows the intracorporate conspiracy doctrine—or criminal law—which rejects it.[195]

In *Travis*, the Seventh Circuit attempted to analogize the policies underlying the civil rights legislation with those of antitrust cases as described in *Copperweld*.[196] This comparison centered on the idea that both statutes intended to address conspiracies which could "unite disparate centers of influence."[197] The danger of the Klan, which § 1985 supposedly sought to suppress, was not primarily that it committed acts of violence or terror as a single organization, but rather that it attempted to "organize . . . multiple centers of social or economic influence."[198] Thus, the court concluded, this provision of the Ku Klux Klan Act was really "aim[ed] at preserving independent decisions by persons or business entities, free of the pressure that can be generated by conspiracies . . . ."[199]

As with the court's discussion of the legislative history,[200] commentators have severely criticized almost every aspect of this comparison.[201] The claims that the Klan's evil was primarily economic and that the Act was primarily aimed at "preserving" some types of agreements have drawn particular rebuke.[202] Still, the comparison to antitrust law persists: in *Abbasi*, the Supreme Court explicitly noted that "an analogous principle discussed in the context of antitrust law" was "instructive."[203] As has been noted throughout, however, the Court in *Abbasi* did not attempt to analyze the underlying policies or justify the merits of the doctrine's application.

If it had, it might have remembered that there is a better point of comparison than antitrust law—namely, criminal law. Indeed, as it noted in *Griffin* many years before, there had previously been an exact criminal counterpart to § 1985(3), and there still remained 18 U.S.C. § 241, a "close[] . . . criminal

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195 *Compare* Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 769 (1984) (discussing the antitrust principles), *with* United States v. Hartley, 678 F.2d 961, 970 (11th Cir. 1982) (noting that the purpose of the agency principles is "to expand corporate responsibility" and so should not immunize officials in criminal conspiracies).

196 Travis v. Gary Cmty. Mental Health Center, Inc., 921 F.2d 108, 110 (7th Cir. 1990).

197 *Id.*

198 *Id.*

199 *Id.*

200 *See supra* notes 168–74 and accompanying text.

201 *See* Christofferson, *supra* note 165, at 428 ("The Seventh Circuit's attempt to analogize the dangers of § 1985(3) conspiracies with the dangers of illegal antitrust conspiracies fails. Neither the congressional intent nor plain language of the two laws supports such an interpretation."); Smith, *supra* note 111, at 150 (calling the comparison "fundamentally flawed").

202 Smith, *supra* note 111, at 159.

203 Ziglar v. Abbasi, 137 S. Ct. 1843, 1867 (2017).

analogue."[204] Courts and commentators have thus looked to criminal conspiracy statutes, where the intracorporate conspiracy doctrine has been rejected as a "fiction without a purpose," as a better point of reference for the civil rights claim.[205] In *Novotny*, for example, the Third Circuit noted that there was a "well-established line of precedent holding that, at least outside of the area of antitrust law, where a corporation commits a substantive crime, the officers and directors who cause it to so act may be guilty of criminal conspiracy."[206]

An analogy to the criminal statute, which focuses on the right on the individuals affected, makes much more sense than an analogy to the antitrust statute, which focuses on market integrity. "In the civil rights context, conspirators do not seek to enhance the corporation's market power or competitive edge, but instead, conspire to violate federal laws that prohibit racial discrimination."[207] Thus, the decision to justify the acceptance of the intracorporate conspiracy doctrine as a matter of policy also fails to withstand close scrutiny.

In sum, upon close examination, no valid legal justification supports the intracorporate conspiracy doctrine in § 1985(3) cases. An analysis of the statute's plain language, its legislative history, the doctrine's precedent, the common law principles purportedly underlying that precedent, and related conspiracy statutes all show that to be the case. The conclusion is clear: the doctrine should be rejected outright in § 1985(3) cases.

C. Additional Problems with Government Conspiracies

Even assuming *arguendo* that the intracorporate conspiracy doctrine does apply to shield corporate officers, it does not necessarily follow that it should also apply to government officers. The vast majority of courts, however, fail to address this critical distinction. The handful of courts and commentators that have addressed it note that the extension to government conspiracies creates additional problems of both formal doctrine and policy.[208]

The doctrinal problems derive from the Supreme Court's distinct treatment of government entities for the purposes of liability for civil rights violations,

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[204] Griffin v. Breckenridge, 403 U.S. 88, 98 (1971) (citing 18 U.S.C. § 241 (1964)). Recall that this similarity was why early courts thought § 1985(3) was unconstitutional. *See supra* note 28.

[205] Smith, *supra* note 111, at 149 (citing United States v. Hartley, 678 F.2d 961, 972 (11th Cir. 1982)).

[206] Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1258 (3d Cir. 1978), *vacated on other grounds*, 442 U.S. 366 (1979).

[207] Smith, *supra* note 111, at 168.

[208] *See* Finch, supra note 18, at 33–34.

which comes from *Monell v. Department of Social Services of the City of New York*.[209] In particular, *Monell* eliminated respondeat superior as a basis of municipality liability.[210] The Court thus prohibited § 1983 suits against municipal entities, but for one exception: it allowed for claims in which the alleged violation occurred pursuant to an "official [municipal] policy."[211]

In cases in which the conspiracy alleged does *not* represent official policy, the Court's holding that respondeat superior does not apply to government actors undermines one of the foundational premises of the *Nelson Radio* single actor theory. Recall that the single actor theory depends upon the imputation to the corporation of the agent's act.[212] After *Monell*, that principle of legal imputation is completely eliminated, which means that the standard basis for the single actor intracorporate conspiracy doctrine falls apart.[213] At the very least, then, *Monell* suggests that the intracorporate conspiracy doctrine should only apply in cases alleging a conspiracy pursuant to official agency policy.[214]

But in cases that *do* allege a conspiracy undertaken pursuant to official policy, *Monell* creates a different problem. Because it contemplates potential liability for such a policy, an immunity, such as the intracorporate conspiracy doctrine, that prevents that liability would appear to contradict its command. This was the conclusion of the court in *Rebel Van Lines v. City of Compton*, one of the only cases to analyze the differences between public and private conspiracies under § 1985(3).[215] There, the court noted that applying the intracorporate conspiracy doctrine to shield government actors would work to

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[209] 436 U.S. 658, 688–90 (1978).

[210] *Id.* at 691. For a description of respondeat superior, see *supra* text accompanying note 185.

[211] *Monell*, 436 U.S. at 694. Notably, *Monell* applies with equal force to federal government agencies as to state government entities. Ashcroft v. Iqbal, 556 U.S. 662, 675–76 (2009). Furthermore, while *Monell* was a § 1983 case, commentators suggest there is no reason that its principles should not apply to § 1985 as well. Rebel Van Lines v. City of Compton, 663 F. Supp. 786, 793 n.14 (C.D. Cal. 1987); Finch, *supra* note 18, at 33. However, no one appears to have analyzed the nexus between a conspiracy and official policy. *See infra* text accompanying note 214.

[212] *See supra* note 121 and accompanying text.

[213] *See* Finch, *supra* note 18, at 33–34 ("[A]s a matter of formal doctrine, the 'single actor' rational[e] of intracorporate immunity would seem to have no application to claims against governmental actors.").

[214] This distinction actually raises an interesting question, which lies beyond the scope of this Comment: can agency officials, particularly high-ranking ones, conspire *without* acting pursuant to official policy? A line from *Abbasi* suggests that they perhaps cannot: the Court notes that "a § 1985(3) claim against federal officials by necessity implicates the substance of their official discussions." Ziglar v. Abbasi, 137 S. Ct. 1843, 1868 (2017); *see also* Hobson v. Wilson, 737 F.2d 1, 29 (D.C. Cir. 1984) (claim against federal officials for official policy decisions). On the other hand, one can imagine a scenario in which federal officials conspire to do something that directly violates not only the individual's rights, but also the agency's internal policies.

[215] 663 F. Supp. at 792–93.

"immunize official policies of discrimination."[216] Because *Monell* explicitly authorized such suits, the court said, to deny them under these circumstances would "contravene the law as it now exists."[217] Thus, regardless of the nature of the alleged government conspiracy, *Monell* creates additional issues for application of the intracorporate conspiracy doctrine specific to this context.

In addition to these formal problems, commentators point to basic policy issues that weigh against applying the doctrine to block § 1985(3) from reaching government actors. One commentator notes that discriminatory state action is generally monitored more closely than private discriminatory action.[218] The Ku Klux Klan Act "sought to enforce the Due Process and Equal Protection clauses of the Fourteenth Amendment, the fundamental principle of which was to guard against abuses of state power."[219] Although the Klan was a private organization, "state infiltration by Klan members" was not uncommon in southern states.[220] Thus, the Act clearly contemplated covering state actors, as the Court recognized in its early *Collins* decision.[221]

Second, government actors benefit from the added protection of qualified immunity.[222] The policy balance for the intracorporate conspiracy doctrine—which, after all, is just another form of immunity—weighs the threat of group danger against the need to protect business (and government) decisions and activity.[223] But the conspiracy element is not the only element of the claim; a rights violation must also occur, and this is where qualified immunity works a similar policy balancing.[224] Combining both of these scales upsets the overall balance, which is why, for example, most courts have *not* applied the intracorporate conspiracy doctrine to claims under § 1983, even though that statute also allows for conspiracy liability.[225]

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216 *Id.*

217 *Id.* at 793.

218 Carter, *supra* note 106, at 1149.

219 Horwitz, *supra* note 127, at 147 (footnote omitted).

220 *Id.* at 149–50.

221 Finch, *supra* note 18, at 30.

222 Note, Part III rejects qualified immunity *as applied to the conspiracy element*. This discussion contemplates that qualified immunity still requires that the violated right be clearly established.

223 Carter, *supra* note 106, at 1160.

224 *Id.* There is also the element of intent, which invokes the substantial limitations inherent in the *Griffin* animus requirement. The discussion above noted that the intracorporate conspiracy doctrine is probably already unnecessary because of that limitation. *See supra* text accompanying notes 164–66. For cases against government actors, the availability of qualified immunity only reinforces how superfluous the doctrine really is.

225 *E.g.*, Kinkus v. Vill. of Yorkville, 476 F. Supp. 2d 829, 840 (S.D. Ohio 2007), *rev'd on other grounds*, 289 F. App'x 86 (6th Cir. 2008); *see also* Finch, *supra* note 18 (noting that "in early conspiracy cases filed under section 1983, intracorporate immunity was rarely mentioned."). Similarly, it may also play a part in why at least one circuit rejects qualified immunity altogether in claims brought under § 1985(3). *See infra* note 243.

In sum, the application of the intracorporate conspiracy doctrine ought to be rejected. It ought to be rejected in private conspiracies and, even more so, it ought to be rejected in government conspiracies. It has persisted in confusing courts for nearly forty years, but careful analysis leads inexorably to the conclusion that it should do so no longer.

In all likelihood, the job falls to the Supreme Court to act. And, *Abbasi* gave the Court an opportunity to do just that—to resolve this longstanding jurisprudential imbroglio. But perhaps more importantly, eliminating this contrived barrier would have allowed the Court to meaningfully assess the more substantive elements of the claim: the intent of the officials and the violations suffered by the plaintiffs.[226] Instead of clarifying the issue, however, the Court doubled down on the confusion about what it means to "conspire." And it did so through a troubled—and troubling—incarnation of qualified immunity.

III. REJECTING QUALIFIED IMMUNITY TO ESTABLISH A CONSPIRACY

Part I of this Comment showed that § 1985(3) applies to federal officials. Part II showed that, notwithstanding the circuit split, the intracorporate conspiracy doctrine ought not to apply to § 1985(3) claims, especially in government cases. The proper conclusion, therefore, is that federal officials *can* conspire in violation of § 1985(3).[227]

Of course, establishing the conspiracy hardly makes the plaintiff's case. Not only must she properly allege such a conspiracy, she must show that one of those officials took an overt act in keeping with the conspiratorial agreement.[228] She must show that her rights were violated.[229] And, most significantly, without the benefit of discovery, she must also plead facts plausibly showing that the officials' conspiracy was "for the purpose" of depriving her of her Equal Protection rights.[230] Indeed, she must show that they conspired with "invidiously discriminatory animus" against her on the basis of her race or some other protected characteristic.[231]

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[226] Even when discussing the related *Bivens* claims, the Court never really got to the merits. Rather, it dismissed those claims because they failed to meet the *Bivens* standard: first, the facts presented a new context, and second, special factors counseled hesitation before providing a judicial remedy. Ziglar v. Abbasi, 137 S. Ct. 1843, 1860 (2017).

[227] *See* Hobson v. Wilson, 737 F.2d 1, 13 (D.C. Cir. 1984) (affirming judgment).

[228] 42 U.S.C. 1985(3) (2012).

[229] *Id.*

[230] *Id.*

[231] Griffin v. Breckenridge, 403 U.S. 88, 102 (1971).

In claims against government officials, however, the plaintiff faces yet another hurdle: qualified immunity. "Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, *and* (2) that the right was 'clearly established' at the time of the challenged conduct."[232] The first prong is merely the question of the merits. The second prong is the real basis of the immunity doctrine, and it focuses on the state of the law at the time of the alleged conduct. After the Supreme Court's decision in *Pearson v. Callahan*, courts have discretion in deciding which prong to address first.[233] Effectively, that means that in cases in which one prong is not met, the court gets to choose whether it wants to address the other prong as well.[234]

In *Abbasi*, the Court chose to address only the second prong, concluding that the question of a conspiracy under § 1985(3) was not clearly established in 2001 and 2002 when the detentions occurred.[235] It declined to address the substance of the claim—neither the facts of the specific case nor the jurisprudence of the intracorporate conspiracy doctrine.[236] And while that choice is lamentable, given the decades-old circuit split, and perhaps surprising, given the Court's approach in a prior case based on similar claims,[237] there is no real basis upon which to challenge the Court's discretion to ignore the merits prong. It was a valid approach under *Pearson*.

Strangely, however, when assessing whether the law was clearly established, the Court ignored what was perhaps the most obvious case on point: *Hobson v. Wilson*.[238] As noted above, in *Hobson*, the D.C. Circuit (with a panel including

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232 Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011) (emphasis added) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). Thus, there are four possible scenarios, only one of which allows for liability: (1) the right was neither clearly established nor violated (*no liability*); (2) the right was clearly established but not violated (*no liability*); (3) the right was violated but not clearly established (*no liability*); (4) the right was both clearly established and violated (*liability*).

233 *Id.* (citing Pearson v. Callahan, 555 U.S. 223, 236 (2009)).

234 This discretion was an attempt to solve the "procedural puzzle" of addressing the different case paradigms, discussed *supra* note 232, while balancing limited judicial resources on one hand and concerns over "constitutional stagnation" on the other. Aaron L. Nielson & Christopher J. Walker, *Strategic Immunity*, 66 EMORY L.J. 55, 61 (2016).

235 *Abbasi*, 137 S. Ct. at 1868–69 (noting that the question of whether the officials legally conspired "need not be decided here. It suffices to say that the question is sufficiently open . . . .").

236 *Id.* at 1868 ("Nothing in this opinion should be interpreted as either approving or disapproving the intracorporate-conspiracy doctrine's application in the context of an alleged § 1985(3) violation. The Court might determine, in some later case, that different considerations apply to a conspiracy respecting equal protection guarantees . . . .").

237 *al-Kidd*, 563 U.S. at 735 (addressing both prongs in turn).

238 737 F.2d 1, 29 (D.C. Cir. 1984).

then-Judge Scalia) upheld a verdict under § 1985(3) against FBI officers.[239] Not only did that court find that all of the elements of the statute were met, but it also addressed qualified immunity, concluding that the law of § 1985(3) was clearly established:

> It is therefore absolutely clear that the actions defendants were alleged to have taken violated well-established rights. . . . In a case such as this one, in which the pleadings and proof disclose a program that at its tamest violated the narrowly defined . . . rights expressly discussed in these cases, and which in fact extended beyond violations previously contemplated, the law was undoubtedly "well-established."[240]

Although it involved allegations of a program designed to disrupt civil rights groups' First Amendment right of association as opposed to one of unlawful detention, in the absence of any other law, the *Hobson* case ought to have been recognized as a source of available law for federal conspiracies under § 1985(3), at least under the Court's stated approach.[241]

However, this Part of the Comment raises a more fundamental issue—namely, that the Supreme Court should not have applied qualified immunity *at all* in deciding whether a conspiracy existed. Section III.A proposes a new framework for qualified immunity in claims under § 1985(3), while section III.B addresses the Court's underlying concern over liability for high-ranking officers and explains why that concern is misplaced.

A. Qualified Immunity in Section 1985(3) Claims

Under § 1985(3), the assessment and application of qualified immunity should be constrained to those elements that invoke the plaintiff's rights. This is not to say that qualified immunity should be generally rejected, though at least one commentator has staked out that position.[242] This is not even to say that qualified immunity should be rejected entirely in § 1985(3) claims, though that

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[239] *See supra* text accompanying notes 73–75, 82–85.

[240] *Hobson*, 737 F.2d at 29.

[241] Note that, under the framework proposed in the remainder of this Part (which focuses on the specific rights at issue), *Hobson* may not have been directly relevant to the analysis of rights in *Abbasi*. However, the Court in *Abbasi* did not follow this approach: it purported to look for clearly established law of any kind for § 1985(3), which makes this oversight particularly significant. 137 S. Ct. at 1868.

[242] William Baude, *Is Qualified Immunity Unlawful?*, 106 CALIF. L. REV. 45, 88 (2018). Justice Thomas commented on this development in his concurring opinion in *Abbasi*. *Abbasi*, 137 S. Ct. at 1870–71 (Thomas, J., concurring in part and concurring in the judgment) (describing his "growing concern with [the Court's] qualified immunity jurisprudence" and citing Professor Baude).

was the law of the Eleventh Circuit at the time of *Abbasi*.[243] But it does mean—in contrast to the *Abbasi* approach—that there should be no inquiry as to whether the law of the conspiracy element is clearly established.

Admittedly, it feels a bit strange to say that qualified immunity only applies to particular elements of the claim. That may be because § 1983, where qualified immunity developed, does not have elements in the same way as its companion.[244] Putting these two side by side, however, reveals why the element-specific approach makes sense.

1. Clearly Established: Right vs. Conduct

Even in the § 1983 (or *Bivens*) context, the Court is not always clear about exactly what must be clearly established. Sometimes, it says, it is the *right* that the plaintiff alleges has been violated.[245] In other cases, it says that the question is "whether the violative nature of particular *conduct* is clearly established."[246] Some of this may be attributed to the statute: § 1983, by its terms, presents no obvious boundary between officials' conduct and individuals' rights.[247]

What is apparent, however, is that the conduct must always be assessed with reference to the right of others: for the law to be clearly established, a "reasonable official would have understood that what he is doing violates that right."[248] Indeed, even the common law "good faith" defenses present at the time of the passage of the Ku Klux Klan Act—upon which the Court often relies on to justify qualified immunity—gave peace officers some leeway in their "duty of deciding *upon the rights of others*."[249] Regardless of how the standard is articulated, conduct alone—detached from the rights analysis—cannot be the basis for the analysis. In the § 1983 context, this is no issue. For § 1985(3), however, it becomes of critical importance.

In fact, the *Hobson* court made this point forcefully. It first noted that its task was "to measure the constitutionality of the acts alleged . . . by reference to

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243 *See* Burrell v. Bd. of Trs. of Ga. Military Coll., 970 F.2d 785, 794 (11th Cir. 1992) ("[P]ublic officials cannot raise a qualified immunity defense to a section 1985(3) claim."). *Abbasi* appears to now overrule *Burrell* by implication.

244 42 U.S.C. § 1983 (2012). It may also be a reaction to a new idea: no scholar appears to have analyzed qualified immunity in the § 1985(3) context specifically until now.

245 Ashcroft v. al-Kidd, 563 U.S. 731, 735 (2011).

246 Mullenix v. Luna, 136 S. Ct. 305, 308 (2015) (emphasis added).

247 42 U.S.C. § 1983.

248 *Mullenix*, 136 S. Ct. at 308.

249 Filarsky v. Delia, 132 S. Ct. 1657, 1661–62 (2012) (emphasis added) (citing Wasson v. Mitchell, 18 Iowa 153, 155–56 (Iowa 1864)).

clearly established rights at the time the acts occurred."[250] It then addressed the chief difficulties in proceeding. The first was to identify the sources of clearly established law.[251] The second—and more relevant point for this discussion—was determining whether it must identify "only the existence of a constitutional right" or instead "inquire more deeply into the constitutionality of the particular conduct of the Government actor."[252]

The court concluded that it "must consider . . . only whether the right that plaintiffs alleged to have been violated was well-established at the time the alleged acts occurred."[253] When it turned to the specific rights violations alleged (and proved), the case was "easy."[254] The Court noted that "the existence of a First Amendment right of association for lawful purposes was beyond dispute and its broad contours were quite clear."[255] Thus, qualified immunity did not bar the claim.[256]

Hobson's analysis came about under a different procedural posture than *Abbasi*—the court was reviewing a judgment based on a jury verdict—but its principles are sound. Still, the *Hobson* court did not lay out a comprehensive framework for how to approach qualified immunity in § 1985(3) claims. Keeping in mind the critical link between the conduct and the rights, this Comment now charts that course.

2. The Proper Application—Elements that Invoke Plaintiffs' Rights

Section 1985(3) creates a remedy; it does not create a substantive right.[257] But § 1983, where qualified immunity developed, does not create a new "right" either. Rather, it establishes liability for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws."[258] Thus, for a claim under § 1983 (or the analogous federal action under *Bivens*), the rights to which the court refers when discussing the qualified immunity standard are those preexisting, substantive rights which are mentioned in the statute.[259]

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250 Hobson v. Wilson, 737 F.2d 1, 25 (D.C. Cir. 1984).

251 *Id.* at 25–26.

252 *Id.* at 26.

253 *Id.* at 27.

254 *Id.*

255 *Id.*

256 *Id.* at 29.

257 United Bhd. of Carpenters & Joiners of Am., Local 610, AFL–CIO v. Scott, 463 U.S. 825, 833 (1983) (citing Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 372 (1979)).

258 42 U.S.C. § 1983 (2012).

259 *See, e.g.*, Ashcroft v. al-Kidd, 563 U.S. 731, 735–40 (2011) (assessing whether the Fourth Amendment was violated).

Similarly, two elements of § 1985(3) invoke substantive rights. Recall that, to state a claim under § 1985(3),

> the plaintiff must allege and prove four elements: (1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.[260]

The second element—essentially the *mens rea*—requires that the defendants intend to deprive the plaintiffs of their Equal Protection (or Privileges and Immunities) rights.[261] As with § 1983, this element presupposes that such a right actually exists. And, as such, qualified immunity should shield officers unless that right was clearly established at the time of the conspiracy.

That qualified immunity should apply here is a bit of a red herring, though. Given the substantive requirements that the Court attached to this element in *Griffin*,[262] it is hard to imagine when a case properly alleging animus would not also be said to invoke a clearly established Equal Protection right. Because the results of the two tests overlap, qualified immunity—though doctrinally valid—would not serve much of a practical purpose with regard to this element.[263]

The fourth element—the injury—is the element which most resembles the § 1983 claim, so it is no surprise that qualified immunity comes into play here. This element contemplates both physical and civil harm: *Griffin* is an example of the former,[264] and *Hobson* the latter.[265] Again, it is hard to imagine a case in which physical violence would not be deemed to violate clearly established law in light of *Griffin* and basic common sense. On the other hand, in a case that alleges a rights violation, just as in § 1983 cases, the court would need to address whether the right allegedly violated was clearly established. An assessment of qualified immunity would thus be proper as to this particular element.

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[260] *United Bhd.*, 463 U.S. at 828.

[261] 42 U.S.C. § 1985(3) (2012).

[262] *See supra* Sections I.A.–I.B.

[263] On a very discrete level, this overlap is an example of why the substantive requirements limit the necessity for additional barriers. *See also infra* text accompanying notes 282–83.

[264] *See* Griffin v. Breckenridge, 403 U.S. 88, 91 (1971) (physical violence against black men).

[265] *See* Hobson v. Wilson, 737 F.2d 1, 9 (D.C. Cir. 1984) (First Amendment rights).

3. The Faulty Application—Elements that Do Not Invoke Plaintiffs' Rights

Although qualified immunity fits in the determination of the injury element when the injury alleged is a rights violation, § 1985(3)—unlike § 1983—has additional elements that are completely independent of the plaintiffs' rights. Both the first element—the agreement between "two or more persons"—and the third element—the overt act—focus entirely on the conduct of the defendant, irrespective of the plaintiff.[266] Qualified immunity ought not to apply to those elements because addressing those elements cannot be linked to the rights in any way, except by reference to the other elements. By demarcating between elements that involve plaintiffs' rights and those that do not, and addressing qualified immunity only in the former, the Court could properly uphold the traditional link between the conducts and the rights.

While this approach seems new and different, keep in mind that *any* approach the Court could have taken would have been new and different in a sense, because the workings of qualified immunity in § 1985(3) cases was an open question.[267] Of the possible approaches, this demarcating method would more closely mirror the § 1983 (and *Bivens*) jurisprudence, where the requirement of a violation of rights is the fundamental substantive issue. In *Abbasi*, it would have allowed for a more meaningful inquiry into the rights and conduct really at issue. And more generally, this approach would have the benefit of allowing qualified immunity jurisprudence to develop concurrently for all types of civil rights claims.

By contrast, the Court's approach—applying qualified immunity to the conspiracy element—is singular in its application, and it gives rise to a host of problems.

B. Ziglar *and* Ashcroft[268]*: Protecting High-Ranking Federal Officials*

The Court in *Abbasi* attempted to apply qualified immunity to the conspiracy element, looking to the circuit split about the intracorporate conspiracy doctrine

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[266] 42 U.S.C. § 1985(3). To be sure, the four elements of the claim are closely intertwined. In fact, they can be considered in pairs; *cf. Griffin*, 403 U.S. at 102–03 (describing the conspiracy and purpose elements together and then describing the overt act and injury elements together). Ultimately, however, each is distinct.

[267] Recall, for example, that the 11th Circuit didn't apply qualified immunity at all for § 1985(3) claims. *See supra* note 243 and accompanying text.

[268] Obviously, these cases, *Ziglar v. Abbasi* and *Ashcroft v. al-Kidd*, are typically referred to by the names of the plaintiffs, as throughout. Ziglar and Ashcroft were the high-ranking federal officials named as lead defendants in the respective cases.

before concluding that the law was not clearly established.[269] As noted previously, this newly wrought incarnation of qualified immunity had the double effect of an unwarranted dismissal (at least with regard to this particular element) and a failure to address the merits of the intracorporate conspiracy doctrine.

Indeed, the Court's explanation of the intracorporate conspiracy doctrine is unsatisfying for a host of reasons discussed throughout this Comment. But, even putting all those criticisms aside, its application of the "clearly established" standard is problematic. By more or less requiring a consensus among the circuits, the Court appears to have created a new, heightened standard of clarity. Previously, what constituted "clearly established" law was itself—ironically—unclear. As one commentator noted, "[t]he Supreme Court has been especially obscure on this question. Consequently, the federal courts of appeal take divergent approaches to the issue."[270] Many circuits, including the Second Circuit in this very case, relied only on their own case law and did not look to other jurisdictions.[271] The Court did not explicitly say that it wanted to replace such a regime, though the opinion could certainly be interpreted to do just that.

If this were not enough, in what is perhaps the most confusing part of its § 1985(3) analysis, the Court offered a second explanation why the law was not clearly established. There were "sound reasons," it said, "to conclude that conversations and agreements between and among federal officials in the same Department should not be the subject of a private cause of action for damages under § 1985(3)."[272] In particular, a claim alleging a conspiracy amongst high-ranking federal officials "by necessity implicates the substance of their official discussions."[273] This presented a problem for government officers who needed room to make policy decisions. "Were those discussions, and the resulting policies, to be the basis for private suits seeking damages against the officials as individuals, the result would be to chill the interchange and discourse that is necessary for the adoption and implementation of governmental policies."[274]

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269 Ziglar v. Abbasi, 137 S. Ct. 1843, 1868 (2017).

270 John C. Williams, *Qualifying Qualified Immunity*, 65 VAND. L. REV. 1295, 1305 (2012). The Court "has erratically turned to varying sources of law and left it to the lower courts to determine whether those sources are appropriate for their own cases." *Id.* at 1309.

271 *See* Turkmen v. Hasty, 789 F.3d 218, 263 (2d Cir. 2015) (citing Second Circuit precedent).

272 *Abbasi*, 137 S. Ct. at 1868.

273 *Id.*

274 *Id.*

None of this is wrong per se.[275] The confusion comes because this policy balancing act is totally out of place in the part of the analysis concerning whether the law is clearly established. Qualified immunity is routinely characterized as an attempt to balance competing policies of litigants' rights and officers' need for discretion.[276] But that balance of policies explains *why* the doctrine exists, not *how* it is applied. Whatever policies get weighed upon the qualified immunity scales—on either side—cannot logically govern what constitutes clearly established law. Indeed, by invoking those policies here, the Court simply bootstraps the reasons that qualified immunity exists at all. Under such logic, qualified immunity becomes essentially self-executing.

Although each of the two rationales asserted by the Court to explain why the law was not clearly established exhibit serious shortcomings, a straightforward principle actually underlies them both—just not one that appears in the actual opinion. Instead, a reader must look to an earlier concurring opinion of Justice Kennedy—who wrote *Abbasi*—from a prior 9/11 detention case, *Ashcroft v. al-Kidd*.[277] There, the Justice expressed reservations about exposing the Attorney General to liability.[278] More specifically, he said that the "clearly established" determination ought to be different for high-ranking federal officials:

> The fact that the Attorney General holds a high office in the Government *must inform what law is clearly established* for the purposes of this case. Some federal officers perform their functions in a single jurisdiction, say, within the confines of one State or one federal judicial district. They reasonably can anticipate when their conduct may give rise to liability for damages and so are expected to adjust their behavior in accordance with local precedent. In contrast the Attorney General occupies a national office and so sets policies implemented in many jurisdictions throughout the country. The official with responsibilities in many jurisdictions may face ambiguous and sometimes inconsistent sources of decisional law. While it may be clear that one court of appeals has approved a certain

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[275] However, in its final step, the Court appears to conflate the objective "reasonable official" from the standard with the subjective officials in the case. *See id.* at 1868–69 ("[T]he officials in this suit could not be certain that § 1985(3) was applicable to their discussions and actions. . . . It follows that reasonable officers in petitioners' positions would not have known with any certainty that the alleged agreements were forbidden by law.").

[276] *E.g.*, *id.* at 1866 (citing Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982)) (noting that qualified immunity "seeks a proper balance between two competing interests," one of which is the risk that the civil suit will "unduly inhibit officials in the discharge of their duties").

[277] 563 U.S. 731, 744–47 (2011) (Kennedy, J., concurring).

[278] *Id.* at 746–47.

> course of conduct, other courts of appeals may have disapproved it, or at least reserved the issue.[279]

This is the explanation that *Abbasi* lacked, and it sheds light on the otherwise puzzling explanations of why the law was deemed not clearly established. In fact, the *al-Kidd* concurrence reflects a concern more general than just what law is clearly established—namely, that we may not want the Attorney General or the FBI Director to be subject to individual damages liability for making organizational policies, particularly in times of national crisis.

In this context, however, such concern is misplaced. Limiting qualified immunity (and eliminating the intracorporate conspiracy doctrine) does not open the floodgates to liability for the Attorney General—or anyone else, for that matter—because the animus requirement already limits liability in all but the most egregious cases. Indeed, the only case where the Supreme Court actually found "invidiously discriminatory animus" was *Griffin*, where white men held black men at gunpoint and beat them because they believed one "was a worker for Negro civil rights."[280] Similarly, when the D.C. Circuit upheld a verdict against the FBI officers in *Hobson*, it relied on substantial evidence that race-based animus infected the policies, decisions, and actions of the individual defendants.[281] In *Abbasi*, the only way the officials could have been liable is if their agreement had reflected such racism.

Given the animus requirement, it is hard to see any merit in the Court's reliance on the idea that the federal officials' discussions are "essential to the orderly conduct of governmental affairs."[282] Of course such discussions are essential. But everyday policy discussions would never fall within the narrow ambit of the statute. By contrast, if those discussions exhibit "invidiously discriminatory animus," they can hardly be said to be part of the "orderly conduct of governmental affairs." As one district court aptly put it, "[r]acial discrimination can never further any business purpose of a governmental entity."[283]

Of course, given the race- and religion-based aspects of the detention program in *Abbasi*, it is possible that the animus requirement could actually have been met. But, if the Court wanted to exempt the high-ranking officials from liability anyway, it should have said so directly. Its underhanded approach—

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279 *Id*. at 745–46 (emphasis added) (citations omitted).
280 Griffin v. Breckenridge, 403 U.S. 88, 106 (1971).
281 Hobson v. Wilson, 737 F.2d 1, 23–24 (D.C. Cir. 1984).
282 Ziglar v. Abbasi, 137 S. Ct. 1843, 1868 (2017).
283 Rebel Van Lines v. City of Compton, 663 F. Supp. 786, 792 (C.D. Cal. 1987).

avoiding the issue by incorrectly applying qualified immunity—was a poor way to shield those officials. If it had limited qualified immunity to the rights violation, it would have by necessity addressed one of the more substantial aspects of the claim: either whether the right not to be held in such a detention program was clearly established, the merits of the intracorporate conspiracy doctrine, or both. And, perhaps most importantly, it could have considered both the plight of the plaintiffs—for whom it clearly had some sympathy—and the need for some protection for the high-ranking officials. Whether we want or expect federal officials to be held liable in such circumstances, there can be no doubt of the benefits that would accrue from a more searching inquiry.

CONCLUSION

In *Ziglar v. Abbasi*, uncertainty won the day. A four-Justice majority ruled that when some of the highest officials in our national government agreed to detain and hold hundreds of individuals on the basis of their race and religion, it could not be deemed a conspiracy. The reason, according to the Court, was not that those officials needed special protection, though that concern clearly animated the decision. The reason was not that such conspiracies were clearly protected by law—in fact, the leading case below had upheld one such conspiracy. No, rather—the reason was because, in the estimation of the Court, the law was unclear.

In its ruling, the Court managed to avoid not only a discussion of the merits of the civil rights claim, but also any discussion of the very issue that it said was unresolved. In so doing, it enshrined a decades-old doctrine—the continued existence of which continues to vex any commentator who looks closely at it—under an ill-conceived procedural shield, erecting a strange new rampart upon which the plaintiffs' fifteen-year pursuit of a remedy would falter.

The Court's sympathy for the detainees was sincere; its concern for the defendants legitimate. This author shares both that sympathy and concern. But the Court ought not to have ruled as it did. Section 1985(3) exists to root out

institutional, race-based discrimination. Any hindrance to that purpose must be examined closely. And indeed, the barriers here have been weighed in the scales and found wanting. Failing to withstand scrutiny, they should be cast aside.

ALLEN PAGE*

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