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(Un)Masking Race-Based Intracorporate Conspiracies under the Ku Klux Klan Act

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> The object of [§ 1985(3)] is . . . the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights, shall be within the scope of the remedies of this section.[1]

I. INTRODUCTION

In the spring of 1866, six white men formed the Ku Klux Klan.[3] Their first meeting was not in the deep woods or in a cotton field, but in

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1 CONG. GLOBE, 42d Cong., 1st Sess., 478 (1871) (statement of Rep. Shellabarger, sponsor of the Ku Klux Klan Act), *quoted in* Griffin v. Breckenridge, 403 U.S. 88, 100 (1971).

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3 WYN CRAIG WADE, THE FIERY CROSS: THE KU KLUX KLAN IN AMERICA 32-33 (1987); ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN CONSPIRACY AND SOUTHERN RECONSTRUCTION 3 (1971). For a historical overview of the Klan, see WADE, *supra*, at 31-47; TRELEASE, *supra*, at 3-28; GLADYS-MARIE FRY, NIGHT RIDERS IN BLACK FOLK HISTORY 110-122 (1975); BETTY A. DOBRATZ & STEPHANIE L. SHANKS-MEILE, THE WHITE SEPARATIST MOVEMENT IN THE UNITED STATES 34-53 (1997).

a law office in Pulaski, Tennessee.[4] Within a year of its formation, the Klan morphed into one of the United States' first terrorist organizations.[5] To maintain white power, white control and white supremacy, the Klan and its sympathizers engaged in extreme violence against freed slaves and Republicans.[6] In 1871, in an attempt to stop the assaults, murders, and property destruction, the Forty-Second Congress passed the Civil Rights Act of 1871, also known as the Ku Klux Klan Act.[7] Section 2 of the Ku Klux Klan Act, in part, specifically targeted racially-motivated conspiracies, prohibiting "two or more persons" from conspiring to deprive any person or class of persons of the "equal protection of the laws" or "equal privileges and immunities under the laws."[8] This provision of section 2 of the Ku Klux Klan Act, now codified at 42

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4 WADE, *supra* note 3, at 33; TRELEASE, *supra* note 3, at 5.

5 *See* S. POVERTY L. CTR., KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE 6, 12 (5th ed. 1997) (describing the Klan as "one of the nation's first terrorist groups"); *see also* S. Poverty Law Ctr., *U.S. Map of Hate Groups*, *at* http://www.tolerance.org/maps/hate/group ("The Ku Klux Klan, with its mystique and its long history of violence, is the most infamous – and oldest – of American hate groups.").

6 *See, e.g.*, SALLY HADDEN, SLAVE PATROLS: LAW AND VIOLENCE IN VIRGINIA AND THE CAROLINAS 209 (2001) ("Whites who had once mistrusted their slaves but controlled them through physical intimidation now sought to control the freedmen in order to diminish their fears. Terror was the key."); ERIC FONER, A SHORT HISTORY OF RECONSTRUCTION 184 (1990) (characterizing the Klan as essentially a "military force" that "aimed to destroy the Republican party's infrastructure, undermine the Reconstruction state, reestablish control of the black labor force, and restore racial subordination in every aspect of Southern life.").

7 Civil Rights Act of April 20, 1871, ch. 22, 17 Stat. 13 (1871). The Civil Rights Act of 1871 will be referred to as the "Ku Klux Klan Act" and the "1871 Act" interchangeably in this article.

8 *Id.* The section as currently codified provides:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, 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; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of 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 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.

42 U.S.C. § 1985(3) (2003).

U.S.C. § 1985(3), is the only federal civil statute enacted specifically to address race-based conspiracies.[9]

Despite a national legislative priority to eliminate race-based conspiracies and the harms these conspiracies inflict on individuals and society, the intracorporate conspiracy doctrine, a legal fiction developed in antitrust law, is currently undermining the 1871 Congress' efforts.[10] The intracorporate conspiracy doctrine shields corporations from liability for internal conspiracies.[11] Under the doctrine, a corporation's employees cannot conspire with each other or with the corporation because the acts of the agents of the corporation are attributed to the corporation itself.[12] In other words, the corporation, its officers and employees are considered one person, so the "two or more persons"

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[9] *See* 42 U.S.C. § 1985(3) (2003); *see also* Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1238-39 (3d Cir. 1978) (en banc) ("The statute now codified as 42 U.S.C. § 1985(3) began its existence as a part of § 2 of the Act of April 20, 1871 (the Ku Klux Klan Act)."), *vacated by* 442 U.S. 366 (1979); Michael Finch, *Governmental Conspiracies to Violate Civil Rights: A Theory Reconsidered*, 57 MONT. L. REV. 1, 2 (1996) ("The sole federal statute that expressly creates conspiracy liability for civil rights violations is 42 U.S.C. § 1985 . . . .").

[10] While the statute's coverage of racially-motivated conspiracies is well settled, coverage of other class-based discriminatory animus is not. The Supreme Court has specifically ruled that § 1985(3) does not reach conspiracies motivated by economic or commercial animus or conspiracies motivated by anti-abortion sentiment, however, the Court has been less forthcoming in identifying what classes are actionable. The majority of the federal circuits have recognized women or gender as a cognizable class. *See generally* Devin S. Schindler, *The Class-Based Animus Requirement of 42 U.S.C. § 1985(3): A Limiting Strategy Gone Awry?*, 84 MICH. L. REV. 88 (1985); Matthew C. Hans, Lake v. Arnold*: The Disabled and the Confused Jurisprudence of 42 U.S.C. § 1985(3)*, 15 J. CONTEMP. HEALTH L. & POL'Y 673 (1999); Daniel E. Durden, *Republicans as a Protected Class?:* Harrison v. Kvat Food Management, Inc. *and the Scope of Section 1985(3)*, 36 AM. U. L. REV. 193 (1986).

[11] Intracorporate conspiracies are conspiracies among employees or agents of the same corporation. *See* Kathleen F. Brickey, *Conspiracy, Group Danger and the Corporate Defendant*, 52 U. CIN. L. REV. 431, 437 (1983) ("Intra-corporate conspiracies are conspiracies whose membership is limited to the corporation and its officers and agents.").

[12] *See, e.g.*, Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952) ("A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation."); Dickerson v. Alachua County Comm'n, 200 F.3d 761, 767 (11th Cir. 2000) ("Under the intracorporate conspiracy doctrine, a corporation's employees, acting as agents of the corporation, are deemed incapable of conspiring among themselves or with the corporation."); Id. ("The reasoning behind the intracorporate conspiracy doctrine is that it is not possible for a single legal entity consisting of the corporation and its agents to conspire with itself, just as it is not possible for an individual person to conspire with himself.").

plurality requirement of conspiracy law is not met.[13] The majority of federal courts have extended the intracorporate conspiracy doctrine to § 1985(3), essentially immunizing corporate and government entities from § 1985(3) liability for internal agreements to engage in racial discrimination.[14] For example, even after white supervisors and co-workers of a black correctional officer were found to have engaged in a racially-motivated conspiracy to demote him, the county was immune from § 1985(3) liability because "the County jail and its employees are considered to constitute a single legal entity that cannot conspire with itself."[15]

This article argues that the failure to compare the objectives of antitrust law and civil rights law leads to the inappropriate application of the intracorporate conspiracy doctrine to race-based conspiracies, masking racist actors and casting a cloak over racial discrimination and its resulting harms. Intracorporate conspiratorial conduct that results in bias-motivated violence, employment discrimination, or civil rights violations—whether in public or private services, housing, insurance, prisons, medical care, or education–should be actionable. Racist

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[13] *See, e.g.,* Dussouy v. Gulf Coast Inv. Corp., 660 F.2d 594, 603 (5th Cir. 1981) ("[A]gency principles attribute the acts of agents of a corporation to the corporation, so that all of their acts are considered to be those of a single legal actor, negating the multiplicity of actors necessary to conspiracy . . . .").

[14] *See* Finch, *supra* note 9, at 27 ("During the past two decades, a rather remarkable doctrine has evolved in conspiracy litigation. According to a substantial number of federal courts, persons acting within the scope of corporate enterprise enjoy 'intracorporate immunity' from liability under section 1985(3), as do their corporate employers."); *see also* cases cited *infra* note 93. The majority of federal courts have extended the doctrine to government agencies. Finch, *supra* note 9, at 29; *see also Dickerson*, 200 F.3d at 767 ("This doctrine had been applied not only to private corporations but also to public, government entities."); Wright v. Ill. Dept. of Children & Family Servs., 40 F.3d 1492, 1508 (7th Cir. 1994); Runs After v. United States, 766 F.2d 347, 354 (8th Cir. 1985).

[15] *Dickerson*, 200 F.3d at 768 (relying on Chamblis v. Foote, 562 F.2d 1015 (5th Cir. 1977)).

The doctrine has also been applied in tort law. *See* Garrido v. Burger King Corp., 558 So. 2d 79, 81 (Fla. Dist. Ct. App. 1990) (allegation against defendant for conspiracy to misappropriate idea of advertising agency not actionable because "[a] corporation cannot conspire with its own directors, officers or employees."). Jurisdictions are split on the doctrine's application to civil RICO claims. *Compare* Neb. Sec. Bank v. Dain Bosworth, Inc., 838 F. Supp. 1362, 1370-72 (D. Neb. 1993) *with* Maruiber v. Shearson/Am. Express, 567 F. Supp. 1231, 1241 (S.D.N.Y. 1983). *See also* Robert Blakey & Kevin Roddy, *Reflections on* Reves v. Ernst & Young*: Its Meaning and Impact on Substantive, Accessory, Aiding Abetting and Conspiracy Liability Under RICO*, 33 AM. CRIM. L. REV. 1345, 1448 (1996).

conspirators should not be shielded from § 1985(3) liability simply because of corporate form.

Section I provides the background and historical development of § 1985(3) and the application of the intracorporate conspiracy doctrine to race-based conspiracies.[16] Part A provides a brief history of the Ku Klux Klan's violent resistance to Reconstruction.[17] Part B discusses how, in 1871, Congress responded to the Klan and its sympathizers by enacting the Ku Klux Klan Act. The Act included several provisions designed to challenge the many ways in which Blacks and white Republicans were terrorized.[18]

Part C of Section I explains the judicial reception of section 2 of the 1871 Act, from which § 1985(3) is derived. Within ten years of its passage, the criminal provision of section 2, which punished private actors who deprived citizens of their equal protection rights, was struck down as unconstitutional in *United States v. Harris*. The criminal provision's demise chilled civil claims until the Supreme Court ultimately gutted the civil remedy in *Collins v. Hardyman*. Part C concludes with a review of *Griffin v. Breckenridge*, which revived the civil conspiracy provisions of the Ku Klux Klan Act and delineated the elements of a *prima facie* case under § 1985(3), 100 years after the law's enactment.[19]

Part D explains that shortly after § 1985(3)'s resuscitation, federal courts began applying the intracorporate conspiracy doctrine as a corporate shield against liability for racially-motivated intracorporate agreements.[20]

Section II of the article explains the ways in which the intracorporate conspiracy doctrine masks conspiracies driven by racial or class-based animus.[21] It is divided into four parts.

Part A of this section argues that the intracorporate conspiracy doctrine subverts § 1985(3), and should be rejected as a "fiction without a purpose," as it has been in criminal conspiracy law.[22] As demonstrated by the unsuccessful attempts to apply it to criminal conspiracy law, the

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16 *See infra* notes 27 to 91.
17 *See infra* notes 21 to 40.
18 *See infra* notes 41 to 53.
19 *See infra* notes 66 to 85.
20 *See infra* notes 86 to 97.
21 *See infra* notes 98 to 231.
22 United States v. Hartley, 678 F.2d 961, 970 (11th Cir. 1982).

intracorporate conspiracy doctrine should be limited to the unique area of antitrust law and not applied in all conspiratorial contexts. To demonstrate why the doctrine does not belong in civil rights law, this section of the article engages in an in-depth explanation of its development in antitrust law. The doctrine increases competition in the marketplace by permitting agreements internal to a single corporation. Internal agreements to restrain trade within a single corporation give the corporation a competitive edge, but external agreements between two or more corporations are prohibited, in order to avoid the convergence of economic forces that would harm competition in the market. Finally, Part A demonstrates that the doctrine's application to § 1985(3) conspiracies does not serve the purpose of the 1871 Act, which sought to eliminate all types of conspiracies, including those inside corporations.[23]

Part B of Section II argues that the text of the statute includes intracorporate agreements.[24] The language of the statute specifically states 'two or more persons' and does not provide an exemption for corporations.

Part C of Section II explains that the use of the intracorporate conspiracy doctrine to shield conspirators fosters racial discrimination. Race-based agreements within a single corporation are immunized from liability, even after the plaintiff proves purposeful animus, a conspiracy to discriminate, and injury-in-fact. Part C also argues that § 1985(3) should not be limited to acts of extreme violence. Race-based conspiracies that harm individuals in employment, housing, retail, and other areas should be covered by the Act to accommodate evolving notions of equality.[25]

Part D of Section II asserts that immunizing intracorporate agreements turns the Ku Klux Klan Act on its head, even for the most violent activities by groups like the Klan, because such organizations incorporate.[26]

Section III concludes the article by explaining that § 1985(3), the only race-based federal civil conspiracy provision, serves an important

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23 *See infra* notes 98 to 194.
24 *See infra* notes 189 to 208.
25 *See infra* notes 209 to 225.
26 *See infra* notes 226 to 231.

and unique role in the comprehensive legislative efforts to eliminate racial discrimination.[27]

II. THE KU KLUX KLAN ACT OF 1871

A. The Reconstruction Klan

The Ku Klux Klan formed about a year after Robert E. Lee's surrender at Appomattox.[28] According to the founding members, the original purpose of the Klan was to alleviate the small town boredom they experienced after returning from the battlefields of the Civil War.[29] Some scholars insist that the initial objective of the Klan was not so innocent, but was designed to frighten Blacks with psychological tricks.[30] The group's original purpose may be debatable, but most scholars agree that within months of its inception, the Klan and its

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27 *See infra* notes 232 to 235.

28 WADE, *supra* note 3, at 33; TRELEASE, *supra* note 3, at 3. James Crowe, Richard Reed, Calvin Jones, John Lester, Frank McCord, and John Kennedy met in the law office of Judge Thomas M. Jones and started the Klan. WADE, *supra* note 3, at 32; TRELEASE, *supra* note 3, at 3. Four of the original founders were lawyers, one of whom was eventually elected to the Tennessee Legislature. Another became the editor of the Pulaski *Citizen*, the local newspaper. WADE, *supra* note 3, at 32; TRELEASE, *supra* note 3, at 3. For a detailed discussion of the Reconstruction Klan, see generally Lisa Cardyn, *Sexualized Racism/Gendered Violence: Outraging the Body Politic in the Reconstruction South*, 100 MICH. L. REV. 675 (2002).

29 WADE, *supra* note 3, at 34 ("James Crowe stated emphatically that the original Ku Klux Klan was 'purely social and for our amusement.' Devoid of practical, humanitarian, or political significance, it obligated members only to 'have fun, make mischief, and play pranks on the public.'"); TRELEASE, *supra* note 3, at 5 ("On one crucial point all the early members who later had anything to say about the matter were unanimous: the Klan was designed purely for the amusement, and for some time after its founding it had no ulterior motive . . . .").

30 FRY, *supra* note 3, at 110 ("The avowed purpose of this new club [the Klan] was to 'have fun, make mischief, and play pranks on the public.' To these youths the black population constituted 'the public,' and the pranks they organized consisted of dressing in ghostly garb and frightening ex-slaves."); HADDEN, *supra* note 6, at 207 ("Even this supposedly innocuous beginning contained indefensible elements of terror."); JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 154 (1961) ("The young Tennesseans . . . could hardly have been unaware of what they were doing."); WADE, *supra* note 3, at 36 ("Scholars have claimed that these 'harmless' psychological techniques of playing upon the freedmen's fears represented the *first phase* of the Klan's control of blacks.") (emphasis in the original). *But see* WADE, *supra* note 3, at 36 ("There is no evidence, however, that these scare tactics exerted any control over blacks whatsoever.").

sympathizers were using intimidation tactics and violence as a means to force the newly freed slaves back into chains.[31]

Psychological intimidation and violence were not new methods of control in the South.[32] During slavery, white southerners engaged in Night Patrols to "regulate" slave insurrections.[33] Armed, mounted patrols traveled southern roadways at night, looking for runaway slaves, curfew violators, and revolt instigators.[34] The patrols attempted to frighten slaves into obedience by dressing in supernatural disguises to play upon what they believed to be the slaves' superstitious natures. Members of the patrols also rummaged through slave dwellings in search of weapons and indicia of reading or writing, required slaves to prove they had permission from their masters to be off the plantations, raped and molested female slaves, and often brutally whipped slaves who were not in compliance with "the rules."[35]

The "first phase" of the Klan was reminiscent of the Night Patrols.[36] Although Blacks were now free, members of the Klan still sought to

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31 *See* WADE, *supra* note 3,at 37 ("From late 1866 to mid-1867, the Tennessee Klan began turning more and more from burlesque to night rider and 'patteroller' techniques in its dealing with blacks."); HADDEN, *supra* note 6, at 207 ("Men in the KKK had made the transition from pranks to systematic brutality by 1867. By then Klan members routinely resorted to violence . . . ."); FRANKLIN, *supra* note 29, at 154 ("Within a matter of months it had selected its name, adopted its ritual, and had begun to terrorize the Negroes of the area."); Cardyn, *supra* note 27, at 682-83 ("The minacity of its practices became abundantly clear as the Klan's early attempts to frighten its self-styled antagonists by parading about in ghoulish costumes precipitately degenerated into a series of violent terroristic campaigns aimed at reversing the course of Reconstruction."). For a detailed account of the events from inception of the organization to beginning violence, see WADE, *supra* note 3, at 31-53; TRELEASE, *supra* note 3, at 3-46; Cardyn, *supra* note 27, at 682-83.

32 HADDEN, *supra* note 6, at 4 ("The Klan's reign of racial terror in the late nineteenth century emphasized the most extreme elements of earlier slave patrol behavior."); HADDEN, *supra* note 6, at 202 ("The seemingly unrestricted brutality of patrols would find its mirror image during Reconstruction in the extralegal activities of vigilante groups that operated outside virtually all social restrictions."); *id.* at 209 ("The Klan also allowed militant Whites to reassert psychological dominance over freedmen who seemed such an ominous threat, just as patrols had done in the prewar period.").

33 *See* HADDEN, *supra* note 6, at 105-36; FRY, *supra* note 3, at 82-109.

34 *Id.*

35 *See* HADDEN, *supra* note 6, at 106-21; FRY, *supra* note 3, at 92.

36 WADE, *supra* note 3, at 36 ("Scholars have claimed that these 'harmless' psychological techniques of playing upon the freedmen's fears represented the *first phase* of the Klan's control of blacks.") (emphasis in the original); HADDEN, *supra* note 6, at 4 ("Although slave patrols officially ceased to operate at the close of the Civil War, their functions were assumed by other Southern institutions. Their law-enforcing aspects—checking suspicious persons, limiting nighttime movement—became the duties of Southern police forces, while their lawless, violent aspects were taken up by vigilante

maintain control through intimidation. The early Klan dressed in white sheets and ghoulish masks and rode on horses to the homes of black families in order to frighten and threaten them.[37] As Klan membership increased, the violence escalated.[38] The post-Civil War Klan maimed, lynched, raped, murdered, and terrorized Blacks and Republicans.[39] Even after the Thirteenth, Fourteenth and Fifteenth Amendments were adopted, the perpetrators of these crimes and civil rights violations went unpunished by state and local authorities, and the violence and terror intensified.[40] Federal intervention was necessary.[41]

B. The Ku Klux Klan Act of 1871

On March 23, 1871, President Grant warned Congress that "[a] condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and collection of

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groups like the Ku Klux Klan."); *see also* HADDEN, *supra* note 6, at 207-20; FRY, *supra* note 3, at 147-53; S. Poverty L. Ctr., *supra* note 5, at 7.

[37] *See* FRY, *supra* note 3, at 135-147; S. Poverty L. Ctr., *supra* note 5, at 10-11; WADE, *supra* note 3, at 33-37.

[38] *See* FONER, *supra* note 6, at 186 (describing whippings to deprive Blacks of their share of the harvest and force them "back to the farms to labor."); *see also* W.E.B. DUBOIS, BLACK RECONSTRUCTION IN AMERICA, 1860-1880 674 (1962); WADE, *supra* note 3, at 37-53. For a state-by-state account, see generally TRELEASE, *supra* note 3.

[39] *See* JEAN EDWARD SMITH, GRANT 543-44 (2001) ("Led by the Ku Klux Klan, masked night riders introduced a reign of terror in the South. Black schools were burned, teachers beaten, voters intimidated and political opponents of both races kidnapped and murdered."). The Klan targeted the Republican Party because it supported Reconstruction. *See* FONER, *supra* note 6, at 184:

> In effect the Klan was a military force serving the interests of the Democratic party, the planter class, and all those who desired the restoration of white supremacy. Its purposes were political in the broadest sense, for it sought to affect power relations, both public and private, throughout Southern society. It aimed to destroy the Republican party's infrastructure, undermine the Reconstruction state, reestablish control of the black labor force, and restore racial subordination in every aspect of Southern life.

[40] Between the years of 1865 and 1875, Congress enacted three constitutional amendments, the Thirteenth, Fourteenth and Fifteenth, and five civil rights statutes. *See* Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 983 (2002); Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1323 (1952); *see also* FONER, *supra* note 6, at 184-95; WADE, *supra* note 3, at 54-79; HADDEN, *supra* note 6, at 209 ("Whites who had once mistrusted their slaves but controlled them through physical intimidation now sought to control the freedmen in order to diminish their fears. Terror was the key.").

[41] *See* FONER, *supra* note 6, at 194-95; SMITH, *supra* note 38, at 544 ("As the Klan grew bolder and the death toll mounted, Southern Republicans desperately petitioned Washington for help.").

revenue dangerous," and requested legislation to address the situation.[42] In response, Congress enacted the Civil Rights Act of 1871, also known as "The Ku Klux Klan Act."[43] The 1871 Act empowered the federal government to enforce the mandates of the Fourteenth and Fifteenth Amendments.[44]

Acknowledging that local law enforcement and state systems were not willing to or capable of stopping the rampant violence, Congress made certain crimes federal offenses.[45] Additionally, the Act empowered the President to declare martial law, to deploy federal troops to squelch violent civil disruptions, and to suspend *habeas corpus* if necessary.[46] Congress also attempted to eradicate the influence of the

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[42] Monroe v. Pape, 365 U.S. 167, 172-73 (1961). By mentioning the mail and revenue, Grant gave Congress an additional reason for federal intervention. *See* WILLIAM S. MCFEELY GRANT 369 (1981); SMITH, *supra* note 38, at 545.

[43] MCFEELY, *supra* note 41, at 369 ("With this somewhat tepid but indispensable call for action, Congress on April 20 passed a strong measure, called the Ku Klux Klan Act, designed to enforce the Fourteenth Amendment."); SMITH, *supra* note 38, at 545 ("Known as the Ku Klux Klan bill, the legislation represented an unprecedented peace time extension of national authority."). A major force in convincing Congress to pass the Ku Klux Klan Act was the Scott Report, which investigated the Klan violence in North Carolina leading up to the 1870 elections in which "an intrastate war broke out between the Republican state government and the Ku Klux Klan." WADE, *supra* note 3, at 84.

[44] *Monroe*, 365 U.S. at 171 ("[Section 1 of the Ku Klux Klan Act] was one of the means whereby Congress exercised the power vested in it by § 5 of the Fourteenth Amendment to enforce the provisions of that Amendment."); *see also* MCFEELY, *supra* note 42, at 369; FONER, *supra* note 6, at 195.

[45] *See* SMITH, *supra* note 38, at 544 ("Traditionally, crimes such as murder, arson and assault fell within the jurisdiction of state and local authorities, yet with rare exceptions law enforcement officials in the South refused to move against the Klan. The prosecution of such crimes by the national government would represent a significant departure."); FONER, *supra* note 6, at 195 ("The most sweeping measure, the Ku Klux Klan Act of April 1871, for the first time brought certain crimes committed by individuals under federal law."); *see also Monroe*, 365 U.S. at 180 (Congress intended to "afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."); *id.* at 174 ("The debates are replete with references to the lawless conditions existing in the South in 1871. There was available to the Congress during these debates a report, nearly 600 pages in length, dealing with the activities of the Klan and the inability of the state governments to cope with it.").

[46] WADE, *supra* note 3, at 90. These provisions can be found at section 3 and section 4 of the original Ku Klux Klan Act. *See* Theodore Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 485 (1982).

Klan and its allies in government, particularly in law enforcement,[47] by authorizing criminal and civil remedies against persons acting under color of law to deprive a person of the "rights, privileges, or immunities secured by the Constitution and laws."[48]

To protect black citizens against public and private collective action, section 2 of the Act created criminal[49] and civil offenses where "two or more persons" conspire to prevent public officials from performing their duties,[50] conspire to interfere with trial proceedings or obstruct justice,[51]

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47 *See Monroe*, 365 U.S. at 171 ("'The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law . . . .'") (quoting Sen. Edmunds).

48 Section 1 of the Civil Rights Act of 1871 was the original version of the most well known and commonly litigated civil rights statute today, 42 U.S.C. § 1983. Section 1983 prohibits deprivations of a citizen's federal right by a state or local official acting under color of state law. Beermann, *supra* note 39, at 1002-05. Although it does not create substantive rights, it provides a remedy for violations of federal laws, including damages and injunctive relief. *See id.* at 1002-05, 1010; Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 2-7 (1985).

49 Section 2 of the 1871 Act's criminal counterpart was found to be unconstitutional, *see* United States v. Harris, 106 U.S. 629 (1882), and ultimately was repealed by Congress, *see* Finch, *supra* note 9, at 9.

50 The current version is codified at 42 U.S.C. § 1985(1):

(1) Preventing officer from performing duties

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties.

For further explanation and an analysis of § 1985(1), see generally Vicki Y. Wind, *State Judges as "Quasi-Federal" Officials: Section 1985(1) and* Lewis v. News-Press and Gazette Co., 61 UMKC L. REV. 571 (1993).

51 The current version is codified at 42 U.S.C. § 1985(2):

(2) Obstructing justice; intimidating party, witness, or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the

or, under what is today § 1985(3) and the subject of this article, conspire to deprive "any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."[52]

The Civil Rights Act of 1871 was a comprehensive congressional strategy to challenge the violent resistance to Reconstruction, and section 2 of the Act specifically targeted collective action because of the unique dangers it posed and harmful consequences it wreaked.[53] Unfortunately, both the criminal and civil provisions had little opportunity to achieve the objectives Congress had envisioned.. Consistent with the Supreme Court's early hostility to the Reconstruction Amendments and statutes, the criminal provision of section 2 of the Ku Klux Klan Act was struck down as unconstitutional a mere ten years after its passage.[54]

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laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws . . . .
For further explanation and an analysis of § 1985(2), see generally Brian J. Gaj, *Section 1985(2) Clause One and its Scope*, 70 CORNELL L. REV. 756 (1985); James L. Richey, *Nonviolent Retaliation, Federalism, and the Injury Requirement of § 1985(2)*, 69 VA. L. REV. 179 (1983).

[52] 42 U.S.C. § 1985(3); *see also* Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 370 (1979). For the current text of § 1985(3), see *supra* note 8. To prove a § 1985(3) *prima facie* case, the plaintiff must show: (1) a conspiracy of two or more persons, (2) who are motivated by some racial or class-based, invidiously discriminatory animus, (3) to deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) which results in injury to the plaintiff, (5) as a consequence of an overt act committed by the defendants in connection with the conspiracy. *See* Griffin v. Breckenridge, 403 U.S. 88, 102-03 (1971); Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 268 (1993). The 1871 Act also created a companion provision to the original version of § 1985, which imposed an affirmative duty on any person with knowledge of Klan violence and the authority to prevent it to act to prevent potential harm. Failure to act to prevent the deprivation of rights would subject the individual to civil liability. *See* 42 U.S.C. § 1986; *see also* Linda E. Fisher, *Anatomy of an Affirmative Duty to Protect*, 56 WASH. & LEE L. REV. 461 (1999).

[53] FONER, *supra* note 6 ("Conspiracies to deny citizens the right to vote, hold office, serve on juries, and enjoy the equal protection of the laws, could now, if states failed to act effectively against them be prosecuted by federal district attorneys and even lead to military intervention and the suspension of habeas corpus.").

[54] *See* United States v. Harris, 106 U.S. 629 (1883); *see also* Collins v. Hardyman, 341 U.S. 651, 657 (1951) ("The provision establishing criminal conspiracies in language indistinguishable from that used to describe civil conspiracies came to judgment in *United States v. Harris*."); Finch, *supra* note 9, at 9; Frederick M. Lawrence, *Civil Rights and Criminal Wrongs: The Mens Rea of Federal Civil Rights Crimes*, 67 TUL. L. REV. 2113, 2163-65 (1993). "Shortly after the Reconstruction Congress completed its ambitious plan for protecting civil rights at the federal level – including those provisions aimed at the atrocities of the Klan – the Supreme Court began dismantling Congress' grand vision." Ken Gormley, *Private Conspiracies and the Constitution: A Modern*

C. One Hundred Years of Dormancy for Section 2 of the Ku Klux Klan Act

In *United States v. Harris*, twenty white men were indicted under the criminal provision of section 2 of the 1871 Act for lynching a black man.[55] The Supreme Court held that the Thirteenth, Fourteenth, and Fifteenth Amendments and the Privileges and Immunities Clause did not give Congress the constitutional authority to criminalize private conspiracies to deprive persons of the "equal protection of the laws" or to infringe their "privileges and immunities."[56]

The Supreme Court concluded that the Fifteenth Amendment authorized congressional action on the right to vote, but not to enforce the equal protection of the laws or to guarantee a citizen's privileges and immunities.[57] The Court held that the Fourteenth Amendment and the Privileges and Immunities Clause authorized Congress to prohibit state action that infringed upon privileges and immunities, due process, and the equal protection of the laws, but that neither constitutional provision gave Congress authority to regulate actions by private persons.[58] Furthermore, the Court asserted that while the Thirteenth Amendment prohibited slavery and involuntary servitude, the criminal conspiracy statute in question was "broader than the Thirteenth Amendment would justify."[59]

Vision of 42 U.S.C. § 1985(3), 64 TEX. L. REV. 527, 541 (1985). The line of cases assaulting the laws of Reconstruction included the Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) (holding that the Privileges and Immunities Clause of the Fourteenth Amendment violated the Constitution by diluting control of State governments); United States v. Cruikshank, 92 U.S. 542 (1875) (holding that the Ku Klux Klan Act violated the Constitution because it created offenses and imposed penalties infringing the rights of the several States and the people); and *In re* Civil Rights Cases, 109 U.S. 3 (1882). For an overview of the Supreme Court cases during the "Dreadful Decade," see generally A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM 81-108 (1996) and Gormley, *supra*, at 541-46.

55 *Harris*, 106 U.S. at 632.

56 *See Harris*, 106 U.S. at 637, 639, 642 and 644.

57 *See id.* at 636-37.

58 *See id.* at 640 ("[The legislation] is directed exclusively against the action of private persons, without reference to the laws of the states or their administration by the officers of the state, we are clear in the opinion that it is not warranted by any clause in the fourteenth amendment to the constitution."); *id.* at 643-44 ("But [the Privileges and Immunities Clause], like the fourteenth amendment, is directed against state action.").

59 *Id.* at 641. The *Harris* Court also determined that to extend the conspiracy coverage to every crime that infringed on the right to life, property or reputation would give Congress power over a broad range of crimes. *See id.* at 643.

The *Harris* decision chilled civil claims under section 2 of the 1871 Act, which was assumed to have the same constitutional inadequacies as the corresponding criminal provision.[60] In 1951, the Supreme Court put speculation to rest and limited the civil provision to state action.[61] In *Collins v. Hardyman*,[62] members of a political organization filed a civil conspiracy claim against private defendants for deprivations of their right to peaceably assemble and for infringement of the privileges and immunities to which they were entitled. The *Collins* Court found the plaintiffs' complaint defective because it contained no allegations of state action.[63] Although the Court touched upon the lack of congressional authority to create civil liability for private action,[64] it largely sidestepped the constitutional question and instead based its state action requirement solely on the language of the statute.[65] After that decision, section 2 of the Ku Klux Klan Act lay dormant for another twenty years.[66]

In 1971, section 2 of the 1871 Act was given new life.[67] In *Griffin v. Breckenridge*, the defendants, two white men, blocked the passage of three black travelers on a Mississippi highway. Assuming that one or

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60 *See* Beermann, *supra* note 39, at 1017-18 ("Because of this ruling, the civil version lay dormant for a long time since people simply assumed that it was unconstitutional as well."); Gressman, *supra* note 39, at 1355 ("For many years section 47(3) lay dormant, probably suffering from the effects of the Supreme Court's decision in *United States v. Harris*."); Finch, *supra* note 9, at 11 ("The relative uselessness of section 1985(3) is attributable largely to the facts that the statute was thought inapplicable to purely private conduct, and both the scope of constitutional rights applicable to state and local government and the meaning of state action were highly limited throughout the first half of the 20th century.").

61 *See* Collins v. Hardyman, 341 U.S. 651 (1951).

62 *Id.* at 653-54.

63 *See id.* at 655, 661.

64 *See id.* at 659 (stating that the plaintiffs' complaint raised "constitutional problems of the first magnitude . . . in light of history"); *id.* ("These [problems] would include issues as to congressional power under and apart from the Fourteenth Amendment, the reserved power of the States, the content of rights derived from national as distinguished from state citizenship, and the question of separability of the Act in its application to those two classes of rights.").

65 *See id.* at 662 ("We say nothing of the power of Congress to authorize such civil actions as respondents have commenced . . . . We think that Congress has not, in the narrow class of conspiracies defined by this statute, included the conspiracy charged here. We therefore, reach no constitutional questions.").

66 Gressman, *supra* note 39, at 1356 ("As a practical matter, the Collins decision has reduced [§ 1985(3)] to the vanishing point.").

67 *See* Griffin v. Breckenridge, 403 U.S. 88 (1971); Gormley, *supra* note 53, at 547 ("The rebirth of section 1985(3) came in the landmark decision of *Griffin v. Breckenridge*."); Finch, *supra* note 9, at 11 ("The revival of section 1985(3) commenced in 1971 with the United States Supreme Court's ruling in *Griffin v. Breckenridge*.").

more of the occupants of the vehicle were civil rights workers, the defendants ordered them from the car, threatened to kill them, held them at gunpoint, and attacked them with clubs.[68] The plaintiffs' allegations under § 1985(3) included conspiratorial deprivations of the rights of free speech, association, assembly, movement, liberty and security of one's person.[69] The Supreme Court held that the civil conspiracy statute applied not only to conspiracies of state officials but private actors as well.[70] After analyzing the wording of section 2, its relation to other 1871 Act provisions, and its legislative history, the Court reversed *Collins*.[71]

First, the Court determined that the clear language of the statute – "two or more persons in any State or Territory" – referred to private citizens. The Court could not overlook the obvious: that the "going in disguise" language had to include private conduct because it was an "activity so little associated with official action and so commonly connected with private marauders,"[72] such as the Klan. Furthermore, the language of § 1985(3) itself prohibits "preventing or hindering the constituted authority of any State or Territory from giving or securing to all persons . . . the equal protection of the laws," which must include private parties that attempt to do so.[73]

Second, the Court explained that § 1985(3) liability for private conspiracies was consistent with a reading of the 1871 Act *in toto*.[74] A companion provision – today codified in § 1983 – included a cause of action for "deprivations of any rights, privileges, or immunities secured by the Constitution and laws" that were done under color of state law.[75]

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68 *See Griffin*, 403 U.S. at 90-92.

69 *See id.* at 90.

70 *See id.* at 101.

71 *See id.* at 96-101 ("It is thus evident that all indicators – text, companion provisions, and legislative history – point unwaveringly to § 1985(3)'s coverage of private conspiracies."); *id.* at 95-96 ("Whether or not *Collins v. Hardyman* was correctly decided on its own facts is a question with which we need not be concerned here. But it is clear . . . that many of the constitutional problems there perceived simply do not exist."); *see also Bray*, 506 U.S. at 268 ("In *Griffin* this Court held, reversing a 20-year-old precedent, see *Collins v. Hardyman*, that § 1985(3) reaches not only conspiracies under color of state law, but also purely private conspiracies.") (citation omitted).

72 *Griffin*, 403 U.S. at 98 ("'Men who "go in disguise upon the public highway or upon the premises of another" are not likely to be acting in official capacities.'") (quoting United States v. Williams, 341 U.S. 70, 76 (1951)).

73 *See id.* at 99.

74 *See id.* at 98-99 ("A like construction of § 1985(3) is reinforced when examination is broadened to take in its companion statutory provisions.").

75 *See id.* at 99.

To interpret § 1985(3) as only reaching state action would leave it with no independent effect.[76] In addition, section 3 of the 1871 Act gave the President the authority to use military action if private lawlessness made a state government incapable of protecting its citizens from violations of their federal rights.[77] Finally, the Court looked at the legislative history of the Act and found it to be consistent with its holding because of the 1871 debates' abundant and consistent references to eliminating private conduct.[78]

While the *Griffin* Court resuscitated § 1985(3), it sharply limited the statute's ability to punish a broad range of race-based conspiracies by private actors.[79] The Court required identification of a "source of congressional power to reach the private conspiracy" in the case.[80] Conspirators may be held liable under § 1985(3) only for violating constitutional rights that are guaranteed against encroachment by private actors.[81] The source of congressional power to reach the private conspiracy in *Griffin* derived, not from the Fourteenth Amendment, but from the two constitutional provisions with the authority to reach private action recognized by the Supreme Court to date—the Thirteenth Amendment and the right of interstate travel.[82]

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76 *See id.*

77 *See id.*

78 *See id.* at 101.

79 Beermann, *supra* note 39, at 1020 ("The limitation of § 1985(3)'s coverage against private conspiracies to constitutional rights . . . basically means that in the vast majority of cases, *Collins v. Hardyman* might as well have never been overruled."). For a discussion of these limitations, see generally Gormley, *supra* note 53, at 553-56, 565-72.

80 *Griffin*, 403 U.S. at 104.

81 *See Bray*, 506 U.S. at 278 ("The statute does not apply . . . to private conspiracies that are 'aimed at a right that is by definition a right only against state interference," but applies only to such conspiracies 'aimed at interfering with rights . . . protected against private, as well as official encroachment.'") (quoting United Bhd. of Carpenters v. Scott, 463 U.S. 825, 833 (1983)); *see also* Beermann, *supra* note 39, at 1019 ("[W]ith regard to private conspiracies, defendants can be liable under § 1985(3) only for transgressing constitutional rights that are capable of being violated by private actors.").

82 *See Griffin*, 403 U.S. at 104-07; *Bray*, 506 U.S. at 278 ("There are few such rights (we have hitherto recognized only the Thirteenth Amendment right to be free from involuntary servitude, and, in the same Thirteenth Amendment context, the right of interstate travel).") (citations omitted); *see also* Beermann, *supra* note 39, at 1019. Section 2 of the Thirteenth Amendment empowers Congress to prohibit private individuals from imposing slavery or involuntary servitude on other persons. Congress has the authority to determine what constitutes the "badges and incidents of slavery" and pass legislation to address them. *See Griffin*, 403 U.S. at 105 ("[T]here has never been any doubt of the power of Congress to impose liability on private persons under § 2 of that amendment, 'for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude

One hundred years after its controversial conception, § 1985(3) crawled back into existence. The *Griffin* Court delineated a *prima facie* case for a civil conspiracy claim under § 1985(3). The plaintiff must show: (1) a conspiracy of two or more persons, (2) who are motivated by some race- or class-based, invidiously discriminatory animus, (3) to deprive the plaintiff of the equal enjoyment of rights secured by the law to all, (4) which results in injury to the plaintiff, (5) as a consequence of an overt act committed by the defendants in connection with the conspiracy.[83] Section 1985(3) was resuscitated and has been added to the civil rights lawyer's list of rights-based statutes.[84]

However, today, the federal courts must sculpt the legal parameters of the statute in a very different world than the one in which it was conceptualized over 130 years ago.[85] These struggles are reflected in the current status of § 1985(3) as a statute riddled with disparate interpretations, inconsistent rulings, and unclear boundaries.[86] One of the most confusing and misguided developments in § 1985 jurisprudence has been the introduction of the intracorporate conspiracy doctrine.

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shall not exist in any part of the United States.'") (quoting *Civil Rights Cases*, 109 U.S. 3, 20 (1883)). The *Griffin* Court also held private interference with the right to travel actionable because the right to interstate travel is a right and privilege of national citizenship. *See id.* at 106 (citing Twining v. New Jersey, 211 U.S. 78 (1908)). The Supreme Court did not consider section 5 of the Fourteenth Amendment as a source of congressional authority to reach private action. *See* Gormley, *supra* note 53, at 549 ("[T]he *Griffin* Court raised the possibility that section five, the enabling clause of the fourteenth amendment, might provide a constitutional basis for Congress to reach such private conspiracies. . . . [H]owever, the Court left the issue for another day . . . ."). The lower courts are divided on the issue. *See* Gormley, *supra* note 53, at 556.

83 *See id.* at 102-03; *Bray*, 506 U.S. at 268.

84 There have been three major Supreme Court decisions specifically addressing § 1985(3) as a cause of action since *Griffin* in 1971. *See* Bray v. Alexandria Women's Health Clinic, 506 U.S. 753, 759 (1991) ("women seeking abortion" is not a protected class under § 1985(3), nor is opposition to abortion an invidious discriminatory animus against women); United Bhd. of Carpenters v. Scott, 463 U.S. 825 (1983) (class-based animus under § 1985(3) does not include labor unions); Great Am. Sav. & Loan v. Novotny, 442 U.S. 366 (1978) (Title VII may not serve as a federal deprivation actionable under § 1985(3)).

85 *See* Gormley, *supra* note 53, at 531-32 ("In modern times, when the thunder of cannons and the clatter of horses' hooves has disappeared into the mist of a distant era, the problems of interpreting a statute born of Civil War days become enormous.").

86 *See* Beermann, *supra* note 39, at 1020 ("There are only a small category of cases that can be brought under § 1985(3) against private conspirators such as the Ku Klux Klan, but Court decisions with little or no textual or historical support have drained most of the life blood out of the statute.") Determining the forms of class-based animus that are prohibited under the statute and identifying the types of private deprivations that Congress has the power to make actionable are probably the most litigated elements.

D. Section 1985(3) and the Intracorporate Conspiracy Doctrine

The first time a federal appeals court applied the intracorporate conspiracy doctrine to a § 1985(3) claim was a year after *Griffin* resurrected the cause of action.[87] Joseph Dombrowski, a white attorney, sued building manager Jack Dowling and Dowling's corporate employer, Arthur Rubloff & Co., for failure to rent him office space—allegedly because "a substantial number of his clients were of the black race or of Latin origin."[88] Dombrowski alleged violations of several civil rights statutes, including 42 U.S.C. § 1985(3).[89] The district court awarded the plaintiff summary judgment on the § 1985(3) claim—not on the basis of racial discrimination—but because the defendants conspired to discriminate against a criminal lawyer.[90] The Seventh Circuit Court of Appeals reversed the district court on two grounds. First, the court held that, absent state action, discrimination on the basis of one's status as a criminal lawyer was not actionable. Second, it held that the "two or more persons" requirement was not met because the defendants were a single corporation and its employees.[91] The court held that a "single act" of discrimination by a "single business entity" does not fall within the reach of § 1985.[92]

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87 *See* Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972); Washington v. Duty Free Shoppers, 696 F. Supp. 1323, 1326 (N.D. Cal. 1988) ("The first case to extend the intracorporate conspiracy doctrine to the civil rights arena was *Dombrowski v. Dowling.*"); *See also* Note, *Intracorporate Conspiracies under § 1985(c)*, 92 HARV. L. REV. 470, 472-73 (1978).

88 *See Dombrowski*, 459 F.2d at 191.

89 In addition to reversing the district court on the § 1985(3) claims, the Seventh Circuit Court of Appeals affirmed summary judgment to the defendants on the plaintiff's § 1983 and § 3604 claims, and reversed the district court's award of summary judgment to defendant on plaintiff's claims under § 2000 and § 1981. *See Dombrowski*, 459 F.2d at 196-200.

90 *See id.* at 191.

91 *See id.* at 196 ("We also believe that the statutory requirement that 'two or more persons . . . conspire or go in disguise on the highway,' is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm.").

92 *See id.* at 196. The court left some room for the notion that something more than a single act of discrimination may subject a corporation to § 1985(3) liability. *See id.* ("We do not suggest that an agent's action within the scope of his authority will always avoid a conspiracy finding. Agents of the Klan certainly could not carry out acts of violence with impunity simply because they were acting under orders from the Grand Dragon.").

Although a minority of federal circuits refuse blanket application of the intracorporate conspiracy doctrine to § 1985 conspiracies,[93] a majority, like *Dombrowski*, extend it to such conspiracies with little, if any, legal reasoning or analysis.[94] The opinions are devoid of any explanation of the distinctions or similarities between the objectives of the Sherman Act and the Ku Klux Klan Act, the broader goals of antitrust law and civil rights law, or the reasoning for the doctrine's application to § 1985 conspiracies.[95] Some courts apply the intracorporate conspiracy doctrine, but have crafted exceptions to its application.[96]This article argues that the intracorporate conspiracy doctrine should not be applied to racially-motivated internal agreements within corporations. The intracorporate conspiracy doctrine is a legal barrier beneath which corporate and government actors shield themselves from civil liability, masking practices that would make both

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[93] The following cases do not have blanket application of the intracorporate conspiracy doctrine to 42 U.S.C. § 1985: Stathos v. Bowden, 728 F.2d 15, 20-21 (1st Cir. 1984) (a corporation and its employees can conspire in violation of § 1985(3)); Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1256-59 (3d Cir. 1978) (en banc) (officers and directors of a single corporation can be liable for conspiracy under § 1985(c)), *vacated on other grounds by* 442 U.S. 366 (1979); Washington v. Duty Free Shoppers, 696 F. Supp. 1323, 1326 (N.D. Cal. 1988) ("[T]he intracorporate conspiracy doctrine should not be extended to §§ 1985(3) and 1986 because its rationale does not apply in the civil rights context."); Jacobs v. Board of Regents, 473 F. Supp. 663, 670-71 (S.D. Fla. 1979) (the intracorporate conspiracy doctrine inapplicable to § 1985(3)); Hodgin v. Jefferson, 447 F. Supp. 804, 807 (D. Md. 1978) (sex discrimination conspiracy claim permitted pursuant to § 1985(3)).

[94] The following cases apply the intracorporate conspiracy doctrine to 42 U.S.C. § 1985: Benningfield v. City of Houston, 157 F.3d 369, 378 (5th Cir. 1998); Hartman v. Bd. of Trs. of Cmty. Coll. Dist. No. 508, 4 F.3d 465, 469-70 (7th Cir. 1993) (agreement to restrict scope of student recruitment program not a conspiracy within the meaning of § 1985); Richmond v. Bd. of Regents of the Univ. of Minn., 957 F.2d 595, 598 (8th Cir. 1992) (intracorporate conspiracy doctrine precluded claim of conspiracy to deprive plaintiff of civil rights on the basis of race); Hull v. Cuyahoga Valley Bd. of Educ., 926 F.2d 505, 509 (6th Cir. 1991) (applying the intracorporate conspiracy doctrine to claims under § 1985(3)); Buschi v. Kirven, 775 F.2d 1240, 1251-52 (4th Cir. 1985) (intracorporate conspiracy exception recognized in § 1985(3) case); Herrmann v. Moore, 576 F.2d 453, 458-59 (2d Cir. 1978) (vote of faculty and trustee to discharge law school professor was not a conspiracy under § 1985(2) because conspiratorial conduct was essentially a single act by a single corporation).

[95] One of the few courts to explain its reasoning was the Seventh Circuit in *Travis v. Gary Community Mental Health Center, Inc.*, 921 F.2d 108 (7th Cir. 1990).

[96] *See* Note, 92 HARV. L. REV., *supra* note 86 (explaining exceptions.); *see e.g.* Dickerson v. Alachua County Comm'n, 200 F.3d 761, 769 n.9 (11th Cir. 2000) For example, some courts will not apply the intracorporate conspiracy doctrine if the defendant's activities go beyond a "single act of discrimination." *See* Stathos v. Bowden, 728 F.2d 15, 21 (1st Cir. 1984). However, there are no well-settled rules as to when an exception applies.

the early and modern day Klan proud.[97] Immunizing corporate internal agreements that are designed to discriminate on the basis of race, ethnicity, gender, or the intersections thereof, does not foster "the object of [§ 1985(3)]" which is "the prevention of deprivations which shall attack the equality rights of American citizens"[98]

III. (UN)MASKING RACE-BASED INTRACORPORATE CONSPIRACIES

A. The Intracorporate Conspiracy Doctrine Subverts the Purpose of § 1985(3)

The intracorporate conspiracy doctrine should not be invoked in instances in which it would subvert the purpose the conspiracy law seeks to achieve. A majority of the federal circuits, like the Eleventh Circuit in *United States v. Hartley*, recognize the distinctions between antitrust and criminal law, and refuse to apply the intracorporate conspiracy doctrine -in the criminal context.[99] As this article will explain, immunizing a single corporation's internal agreements to discriminate on the basis of race undermines the purpose of the Ku Klux Klan Act and § 1985(3).

In *Hartley*, two corporate officers invoked the intracorporate conspiracy doctrine in an effort to shield themselves from conviction of conspiracy to defraud the government.[100] The Eleventh Circuit Court of

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[97] This article specifically addresses intracorporate conspiracies under § 1985(3) and does not address the intracorporate conspiracy doctrine's application to conspiracies under §§ 1985(1), 1985(2) and 1983.

[98] CONG. GLOBE, 42d Cong., 1st Sess., 478 (1871) (statement of Rep. Shellabarger, sponsor of the Ku Klux Klan Act); *see also* Griffin v. Breckenridge, 403 U.S. 88, 100 (1971).

[99] *See* United States v. Hartley, 678 F.2d 961, 972 (11th Cir. 1982); *see also* United States v. Am. Grain, 763 F.2d 312, 320 (8th Cir. 1985); United States v. Peters, 732 F.2d 1004, 1008 (1st Cir. 1984) ("The actions of two or more agents of a corporation, conspiring together on behalf of the corporation, may lead to conspiracy convictions of the agents . . . and of the corporation . . . ."); United States v. S & Vee Cartage Co., 704 F.2d 914, 920 (6th Cir. 1983) (Holding "that in the criminal context a corporation may be convicted of conspiring with its officers."). *See also* Brickey, *supra* note 11, at 433-34 ("[I]ntra-corporate liability is recognized in conspiracy prosecutions commenced under general federal conspiracy law . . . ."); Geoff Lundeen Carter, *Section 1985(3) – A New Exception to the Intracorporate Conspiracy Doctrine*, 63 U. CHI. L. REV. 1139, 1160 (1996) ("Courts today uniformly reject the intracorporate conspiracy doctrine in criminal conspiracy cases and routinely hold government employees and employees of single corporations liable for criminal conspiracies.").

[100] *Hartley*, 678 F.2d at 970-71.

Appeals found that the intracorporate conspiracy doctrine served a meaningful purpose in antitrust law, but not criminal law.[101] The court explained that under basic agency principles, a corporation is personified through the acts of its agents. Therefore the agents' acts become the acts of the corporation, forcing it to shoulder financial responsibility for its agents' negligent acts.[102] Corporate personification was created to expand corporate liability, not limit it.[103] "The fiction was never intended to prohibit the imposition of criminal liability by allowing a corporation or its agents to hide behind the identity of the other."[104] The *Hartley* Court refused to limit corporate liability, because to view the corporation as a single legal actor in the context of criminal conspiracy law creates a "fiction without a purpose."[105]

The intracorporate conspiracy doctrine may serve the objectives of antitrust law, but it subverts the purpose of conspiracy law in the civil rights context.[106] Yet a majority of federal courts import the doctrine into § 1985 jurisprudence without comparing the objectives of § 1985 to the unique objectives of antitrust law that served as the platform for the intracorporate conspiracy doctrine's development.[107] One of the few courts to make such a comparison is the Seventh Circuit Court of

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101 *See id.* at 971 ("Antitrust litigation is a peculiar form of legal action. . . . Section one's reference to conspiracies 'in restraint of trade' implies a requirement of multiple entities; whereas section two's prohibition of monopolies aims at a single conglomerate. If section one's conspiracy charge was satisfied by a single corporate entity, it would arguably render section two meaningless.").

102 *See id.* at 970.

103 *See id.*

104 *Id.*

105 *See id.* at 970 ("'In these situations, the action by an incorporated collection of individuals creates the "group danger" at which conspiracy liability is aimed, and the view of the corporation as a single legal actor becomes a fiction without a purpose.") (quoting Dussuoy v. Gulf Coast Inv. Corp., 660 F.2d 594, 603 (5th Cir. 1981)). Federal courts also reject the intracorporate conspiracy doctrine in the closest criminal counterpart to § 1985(3), 18 U.S.C. § 241, which prohibits conspiratorial civil rights deprivations. *See* United States v. S & Vee Cartage Co., 704 F.2d 914 (6th Cir. 1983); Shaun P. Martin, *Intracorporate Conspiracies*, 50 STAN. L. REV. 399, 427 (1998). Oddly enough, the Eleventh Circuit has extended the criminal conspiracy rule to a § 1985(2) claim because the underlying allegation for the deprivation was criminal in nature. *See* McAndrew v. Lockheed Martin Corp., 206 F.3d 1031, 1038 (11th Cir. 2000) (en banc) (noting that as to § 1985(3) however, *Dickerson* remained good law).

106 *See* Washington v. Duty Free Shoppers, 696 F. Supp. 1323, 1326 (N.D. Cal. 1988) ("[T]he intracorporate conspiracy doctrine should not be extended to §§ 1985(3) and 1986 because its rationale does not apply in the civil rights context.").

107 *See Hartley*, 678 F.2d at 961 ("Antitrust litigation is a peculiar form of legal action."); *Washington*, 696 F. Supp. at 1326 ("Antitrust conspiracies are a unique breed.")

Appeals in *Travis v. Gary Community Mental Health Center.*[108] However, the *Travis* opinion is fundamentally flawed because it treats the objective of antitrust law—fostering competition in the market—as if it is the same as the objective of the civil rights mandate of § 1985(3)—eliminating invidious racial discrimination.

Denise Travis sued defendant Gary Community Mental Health Center ("GCMHC") and several senior executives for terminating her after she testified in a co-worker's lawsuit against GCMHC.[109] The plaintiff alleged violations of the Fair Labor Standards Act ("FLSA"). Because a companion section to § 1985(3), § 1985(2), prohibits conspiracies to deter or injure any party or witness for testifying in any court of the United States, Travis also alleged a violation of 42 U.S.C. § 1985(2).[110]

A jury found that GCMHC unlawfully retaliated against Travis, awarding her $83,000 in damages.[111] Although the court of appeals affirmed the judgment, it held that the damages could only be recovered under the FLSA, not § 1985(2).[112] The court concluded that the executives were employees of the same entity acting within the scope of their employment and such intracorporate conspiracies were not actionable under § 1985(2).[113] In an opinion authored by Judge Easterbrook, the court draped the history of the Ku Klux Klan Act in the language and theory of antitrust law to justify the intracorporate conspiracy doctrine's application to § 1985 conspiracies.[114] The court stated:

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

109 *See id.* at 109.

110 *See* text of 42 U.S.C. § 1985(2), *supra* note 50. There are four types of conspiracies targeted by § 1985(2): 1) to deter a party or witness from participating in a United States court proceeding; 2) to injure a party or witness involved in a United States court proceeding; 3) to hinder the due course of justice in a state intended to deny a citizen equal protection of the laws; and 4) to injure a person for lawfully enforcing their equal protection rights. *See* Wright v. No Skiter, Inc., 774 F.2d 422, 425 (10th Cir. 1985).

111 *See Wright*, 774 F.2d at 109.

112 The Fair Labor Standards Act regulates wages and hours to protect employees from substandard wages, excessive working hours and extreme labor conditions. *See* 29 U.S.C. § 202 (2003).

113 *See Wright*, 774 F.2d at 110.

114 The phrases "unilateral action," "unite disparate centers of influence," "single firm acting independently," and "risks of lesser caliber" came from the world of antitrust law and Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984). These phrases are virtually non-existent in the 900 pages of congressional debates on the Ku Klux Klan

> The Radical Republicans in Congress wanted to put down the Invisible Empire, whose night riders were terrorizing the newly freed blacks and their white supporters. Congress was concerned not about unilateral action but about organized, almost society-wide resistance to emancipation and civil rights. Fear of violence (a theme running through the text of the debates on the 1871 act) could unite disparate centers of influence, closing opportunities to the freed men. Bigoted acts by a single firm acting independently, pose risks of lesser caliber. [115]

The *Travis* Court concluded that, in antitrust law, an intracorporate conspiracy cannot be actionable under the Sherman Act "without defeating the foundation of competition,"[116] and that the same is true for § 1985 actions. Intracorporate agreements are outside the statute's domain because "§ 1985 aims at preserving independent decisions by persons or business entities, free of the pressure that can be generated by conspiracies."[117] The *Travis* court's comparison is fundamentally flawed because § 1985(3)'s objectives do not parallel those of the Sherman Act and antitrust law.

Act. *See* CONG. GLOBE, 42d Cong., 1st Sess. 1-930 (1871). Compare *Copperweld*, a leading antitrust case on the underpinnings of the intracorporate conspiracy doctrine's role in antitrust law, explained:

> The reason Congress [under the Sherman Act] treated concerted behavior more strictly than *unilateral behavior* is readily appreciated. Concerted activity inherently is fraught with anticompetitive *risk*. It deprives the market of the *independent centers of decisionmaking* that competition assumes and demands. . . This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction.

Copperweld, 467 U.S. at 768-71.

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

116 *See id.*

117 *See id.*

1. Antitrust Law and the Intracorporate Conspiracy Doctrine

The objective of antitrust law is to foster competition in the market, primarily by ensuring independent economic decisions by corporate entities.[118] The passage of the Sherman Act in 1890 cemented the underlying principle of antitrust law that unrestrained competitive forces will optimize the market's use of economic resources, lowering prices and increasing the quality of products and services.[119] The Act itself did not define any of the terms in the statute, leaving federal courts to incorporate the common law rules of antitrust into their decisions, or to develop new interpretations under the Sherman Act as economic, technological, and political policies changed over time.[120] But it was clear to all that the Sherman Act's two substantive provisions, section 1

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118 *See Travis*, 921 F.2d at 110.

119 As the Supreme Court has explained:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions.

N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4-5 (1958). An additional purpose was to avoid excessive concentration of wealth. *See* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 50 (1911); James M. Steinberg, *The Long Awaited Death Knell of the Intra-enterprise Doctrine*, 30 VILL. L. REV. 521, 522 (1985) ("The [Sherman] Act's major purpose was to preserve and promote competition in the market place, thereby preventing vast agglomerations of economic power and the formation of trusts, which were considered anticompetitive and injurious to the public."). For an in-depth discussion of the goals of antitrust law, *see generally* Thomas A. Piraino, Jr., *Identifying Monopolists' Illegal Conduct Under the Sherman Act*, 75 N.Y.U. L. REV. 809, 826-28 (2000); Steven R. Beck, *Intent as an Element of Predatory Pricing Under Section 2 of the Sherman Act*, 76 CORNELL L. REV. 1242, 1264-68 (1991); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 2.1 (1994). Most of the substantive provisions of the federal antitrust laws were passed in 1890, 1914, 1936 and 1950. HOVENKAMP, *supra*, at 50. These consisted of the Sherman Act of 1890, the Clayton and Federal Trade Commission Acts of 1914, the Robinson-Patman Act of 1936, and the 1950 Cellar-Kefauver Amendments to the Clayton Act. HOVENKAMP, *supra*, at 50.

120 HOVENKAMP, *supra* note 118, at 48, 52-55; *see generally* United States v. E.I. du Pont De Nemours Co., 351 U.S. 377, 386 (1956) ("Because the Act is couched in broad terms, it is adaptable to the changing types of commercial production and distribution that have evolved since its passage."); Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933) ("As a charter of freedom, the act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.").

and section 2, sought to preserve "free and unfettered competition as the rule of trade."[121]

Section 1 of the Sherman Act prohibits "every contract, combination . . . or conspiracy in restraint of trade or commerce."[122] Although every business agreement has the potential to restrain trade, only agreements that unreasonably restrain trade violate this section.[123] The distinction between a reasonable and unreasonable restraint is decided by an analysis under the "rule of reason."[124] The fact-finder must determine "whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[125] In analyzing the restraint's impact on competitive conditions, considerations include the area of business in which the restraint is applied, the pre- and post-restraint conditions, the perceived or real threat to competition because

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121 N. Pac. Ry. Co., 356 U.S. at 2-3; *see also* E.I. du Pont de Nemours, 351 U.S. at 385-86 ("The Sherman Act has received long and careful application by this Court to achieve for the Nation the freedom of enterprise from monopoly or restraint envisaged by the Congress that passed the Act in 1890.").

122 Section 1 of the Sherman Act states:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000 or by imprisonment not exceeding three years or both said punishments, in the discretion of the court.

15 U.S.C. § 1. *See also* James M. Steinberg, *supra* note 119, at 525-27 ("This section is violated when two or more persons conspire to restrain unreasonably interstate trade.").

123 *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 98 (1984) ("[E]very contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade."); Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 HARV. L. REV. 661, 663 (1982) ("All internal firm decisions can, in some sense, restrain trade."); *see also* Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 342-43 (1982); Chicago Bd. of Trade v. United States, 246 U.S. 231, 230-39 (1918).

124 *See* Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 723 (1988) ("Ordinarily, whether particular concerted action violates § 1 of the Sherman Act is determined through case-by-case application of the so-called rule of reason . . . ."); *Maricopa County Med. Soc'y*, 457 U.S. at 343 ("[W]e have analyzed most restraints under the so-called 'rule of reason.'").

125 Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49 (1977); *Bus. Elec. Corp.*, 485 U.S. at 723 ("[T]he factfinder weighs all of the circumstances of the case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.") (quoting *Continental T.V.*, 433 U.S. at 36); *Chicago Bd. of Trade*, 246 U.S. at 238 ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.").

of the restraint, and the restraint's purpose.[126] In some cases, restraints that are manifestly anticompetitive – such as price fixing – are *per se* illegal without a "rule of reason" inquiry.[127]

Section 1's prohibition of the restraint of trade, like most conspiracy statutes, requires conduct by "two or more persons."[128] In situations in which the unreasonable restraint of trade was based on the actions of two or more separate corporations, the plurality requirement was not an issue. However, the rule of law was not so clear when the allegations were against multiple officers of a single corporation.[129]

In 1952, the Fifth Circuit Court of Appeals addressed this issue in *Nelson Radio & Supply Co. v. Motorola*. Nelson Radio sold Motorola products, including communication equipment, in a specific geographic area for several years, until Motorola changed its distributor agreement.[130] The new agreement permitted Nelson Radio to sell some Motorola products, but specifically excluded Motorola communication equipment. To add insult to injury, Motorola reserved its right to sell the communication equipment in Nelson Radio's geographic area and prohibited the company from selling communication equipment manufactured by Motorola's competitors.[131] Motorola refused to enter into the contract unless Nelson Radio complied with its conditions.[132]

Nelson Radio sued, alleging that Motorola's president, sales managers, and officers conspired to restrain trade in violation of section 1 of the Sherman Act.[133] The Fifth Circuit Court of Appeals found that Nelson Radio's allegations suffered from a fundamental defect: to have a conspiracy under section 1 of the Sherman Act, there must be at least two persons or two entities involved.[134] The officers, agents, and employees of the corporation and the corporation itself are considered

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126 *See Chicago Bd. of Trade*, 246 U.S. at 238; *see also Maricopa County Med. Soc'y*, 457 U.S. at 343 ("As its name suggests, the rule of reason requires the factfinder to decide whether under all of the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.").

127 *See Bus. Elec. Corp.*, 485 U.S. at 723 ("Certain categories of agreements, however, have been held to be *per se* illegal, dispensing with the need for case-by-case evaluation.").

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

129 *Id.*

130 *Id.* at 912.

131 *Id.*

132 *Id.*

133 *Id.* at 913.

134 *Id.* at 914.

one person, not the "two or more persons" required of a conspiracy.[135] The court explained that "[a] corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation."[136] A corporation may be guilty of conspiring to restrain trade if it engages in activities with another separate corporate entity.[137] However, the business decisions among the officers or employees of a single corporation are not a conspiracy under section 1 of the Sherman Act.[138] Defendant Motorola, a single corporate entity, did not violate the Act by availing itself of the only vehicles through which it could operate—its officers and representatives.[139]

In an attempt to clarify the "two or more persons" requirement as it applied to actions by a single firm, the Fifth Circuit Court of Appeals laid the foundation for the intracorporate conspiracy doctrine's unassailable position in antitrust law.[140] *Nelson Radio* established that a single corporation's internal agreements do not violate section 1 of the

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135 *Nelson Radio*'s holding that an intracorporate conspiracy between a corporation and its officers is not subject to liability under section 1 of the Sherman Act was subsequently followed by the majority of federal circuits and ultimately explained, based on an allegation against a subsidiary and parent corporation, by the Supreme Court more than thirty years later in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

136 *Nelson Radio*, 200 F.2d at 914.

137 *Id.*

138 *Id.* The court stated:

> Surely discussions among those engaged in the management, direction and control of a corporation concerning the price at which the corporation will sell its goods, the quantity it will produce, the type of customers or market to be served, or the quality of goods to be produced do not result in the corporation being engaged in a conspiracy in unlawful restraint of trade under the Sherman Act.

Id.

139 *Id.* ("The defendant is a corporate person and as such it can act only through its officers and representatives. . . . It does not violate the Act when it exercises its rights through its officers and agents, which is the only medium through which it can possibly act.").

140 The plurality requirement of two corporations for restraint in trade violations extends to both civil liability and criminal prosecutions for antitrust violations. *See* Brickey, *supra* note 11, at 433-34 (1983) ("Although intra-corporate conspiracy liability is recognized in corporate prosecutions commenced under general federal conspiracy law, federal courts seem uniformly in accord that a corporation and its officers and agents may not form a conspiracy that is punishable under section 1 of the Sherman Act.").

Sherman Act's prohibition on the restraint of trade.[141] Therefore, a single corporate entity's business conduct that restrains trade is only actionable under section 2 of the Sherman Act, which prohibits monopolization.[142]

Section 2 of the Sherman Act punishes "every person" who attempts to monopolize, conspires to monopolize, or in fact monopolizes any part of trade or commerce.[143] The use of the term "every person" in section 2 means that, unlike in section 1, a single corporate entity may be liable for internal agreements or unilateral conduct that monopolizes or attempts to monopolize.[144] Section 2 is violated when a business possesses monopoly power – "the power to control prices or exclude competition" [145] – in a relevant market and engages in wrongful conduct to maintain or increase its power.[146] A company's possession of

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141 *Nelson Radio*, 200 F.2d at 914 ("The Act does not purport to cover a conspiracy which consists merely in the fact that the officers of a single defendant corporation did their day to day jobs in formulating and carrying out its managerial policy.").

142 *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767 (1984) ("The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization."); *Nelson Radio*, 200 F.2d at 914 ("It is true that the acts of the corporate officers may bring a single corporation within Section 2 of the Sherman Act, which covers an attempt to monopolize . . . .").

143 Section 2 of the Sherman Act provides in pertinent part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.

Copperweld, 467 U.S at 768 n.13 (quoting 15 U.S.C. § 2).

144 *Copperweld*, 467 U.S at 768 n.13 ("[P]urely unilateral conduct is illegal only under § 2 and not under § 1."). In other words, section 1 regulates the unreasonable restraint of trade between *separate* entities. Section 2 regulates not only separate entities, but also a single entity that attempts to monopolize or actually monopolizes an area of business.

145 *See* United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) ("[W]e define monopoly power as 'the power to control prices or exclude competition.') (quoting United States v. E. I. duPont de Nemours, 351 U.S. 377, 391 (1956)); Eastman Kodak Co. v. Image Technical Serv., 504 U.S. 451, 464 (1992) ("Market power is the power 'to force a purchaser to do something that he would not do in a competitive market.'") (quoting Jefferson Parish Hosp. Dist. v. Hyde, 466 U.S. 2, 14 (1984)); *See also* Fortner Enter., Inc. v. United States Steel Corp., 394 U.S. 495, 503 (1969) ("Market power is usually stated to be the ability of a single seller to raise price and restrict output . . . ."). Monopoly power is often inferred when a business has the predominant market share. *See, e.g.*, *Grinnell Corp.*, 384 U.S. at 570-71 ("The existence of such power ordinarily may be inferred from the predominant share of the market."). *See generally* Piraino, *supra* note 118, at 813-18 (discussing the harmful and beneficial effects of monopolies); Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, 80 OR. L. REV. 109, 111-12 (2001) (discussing monopolization).

146 *Grinnell Corp.*, 384 U.S. at 570-71; *Eastman Kodak Co.*, 504 U.S. at 480-81. Monopolies are considered harmful because they increase the price of products, reduce

monopoly power alone is not sufficient for section 2 liability;[147] the business must also engage in impermissible "exclusionary practices" to enhance its monopoly position.[148]

The intracorporate conspiracy doctrine's application to Sherman Act jurisprudence means that section 1 regulates only concerted action, not unilateral action, and section 2 regulates both unilateral and concerted action that threatens to monopolize. Despite the significance of its decision, the *Nelson Radio* Court did not explain how the intracorporate conspiracy doctrine served the objectives of the Sherman Act.[149] The explanation was not forthcoming until thirty years later when the Supreme Court, in *Copperweld Corp. v. Independence Tube Corp.*, aligned the intracorporate conspiracy doctrine with the restraint on trade and monopolization distinctions of sections 1 and 2 of the Sherman Act and antitrust law's overarching goal of fostering competition in the market.[150]

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output of products and reduce the number of choices available for a particular product. *See* Piraino, *supra* note 118, at 813.

147 Section 2 regulates collective and unilateral conduct that threatens monopolization or, in fact, results in monopolization. For the elements of completed and attempted monopolization, see Beck, *supra* note 118, at 1250.

148 Monopoly power involves more than "extraordinary commercial success" but "'something like the use of means which made it impossible for other persons to engage in fair competition.'" *E. I. duPont de Nemours*, 351 U.S. at 390 (quoting Sen. Hoar, 21 CONG. REC. 3151). *See also* Eastman Kodak Co., 504 U.S. at 482-83 ("The second element of a § 2 claim is the use of monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.'") (quoting United States v. Griffith, 334 U.S. 100, 107 (1948)); Piraino, *supra* note 118, at 810 ("Decisively rejecting the notion that monopolies should be deemed illegal in and of themselves, the courts have found monopolists liable under Section 2 only when they have engaged in predatory conduct."). The court must find business conduct designed to increase or maintain monopoly power that cannot be explained by historic accident, the use of a superior product or some other business justification. *Grinnell Corp.*, 384 U.S. at 571; *see also* Crandall, *supra* note 144, at 111 ("It is not sufficient to demonstrate, in Judge Learned Hand's words, that the defendant obtained a monopoly position if it did so through 'superior skill, foresight and industry. The government also must prove that the defendant . . . undertook specific actions designed to exclude competition.'"); Piraino, *supra* note 118, at 825 ("Monopolists misuse their power when they take affirmative steps to exclude competitors either from the monopolized market itself or from a related market to which they are attempting to extend their monopoly power."). Identifying anticompetitive behavior actionable under section 2 is not easy. For a discussion of the reasons for such difficulty, see generally Piraino, *supra* note 118, at 810-11 and 826-28.

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

150 467 U.S. 752 (1984). In *Copperweld*, the Supreme Court held that a parent corporation could not conspire with its own subsidiary. Although this case dealt with the relationship between a parent corporation and its subsidiary, it should apply equally to other intracorporate agreements.

The *Copperweld* Court explained that the Sherman Act makes a "basic distinction between concerted [two or more corporations] and independent action [a single corporation]" because of the nature of competition in the market.[151] A single firm aggressively competing in the marketplace may leave the impression that it is restraining trade as it "capture[s] unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result."[152] But this is the type of competition the Sherman Act was designed to foster, not squelch.[153] Such competitive zeal is not a threat to competition until it threatens monopolization, which is prohibited under section 2.[154] Therefore, section 1 does not prohibit a single firm's unilateral conduct, even when it restrains trade, but regulates concerted activity because it is "inherently . . . fraught with anticompetitive risks."[155] The market and the consumer suffer when separate entities, or "independent centers of decisionmaking" agree to combine forces for their own benefit.[156] These combinations "reduce[] the diverse directions in which economic power is aimed [and] suddenly increase[] the economic power moving in one particular direction."[157] The anticompetitive potential of joining the resources of two corporations warrants scrutiny even in the absence of a monopoly because of the threat to competition.[158]

Internal agreements within a single entity do not pose the same anticompetitive dangers.[159] Intracorporate agreements do not threaten the market, but rather, are beneficial to it because they foster competition.[160] The officers of a single corporation are not "separate

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151 *Copperweld*, 467 U.S. at 767 (quoting Monsanto Co. v. Spray Rite Serv. Corp., 465 U.S. 752, 761 (1984)).

152 *Id.* at 767. It is often difficult to distinguish "robust competition from conduct with long-run anticompetitive effects." *Id.* at 768.

153 *Id.*

154 *Id.*

155 *Id.* at 768-69.

156 *Id.* at 769.

157 *Id.* ("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.").

158 *Id.* The evil targeted by section 1 is "an evil that exists only when two different business *enterprises join* to make a decision, such as fixing a price, that in a competitive world each would take separately." *Stathos*, 728 F.2d at 21.

159 *Copperweld*, 467 U.S. at 769 ("But it 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.").

160 *Id.* ("[C]oordination may be necessary if a business enterprise is to compete effectively.").

economic actors pursuing separate economic interests."[161] Agreements among officers of a single corporation "do not suddenly bring together economic power that was previously pursuing divergent goals."[162] In fact, these intracorporate agreements among officers of a single corporation may be necessary for it to compete effectively in the market.[163] Therefore, section 1 does not regulate independent or unilateral action by a single entity but requires agreements to restrain trade by two or more separate entities to satisfy the "two or more persons" requirement.[164]

As the Supreme Court has explained, the intracorporate conspiracy doctrine serves antitrust law objectives by regulating competition in the market for the benefit of society.[165] The Sherman Act is aimed at a particular evil,[166] and the intracorporate conspiracy doctrine that developed in that context does not serve the underlying purposes of § 1985(3). The Ku Klux Klan Act of 1871 was enacted to serve very different objectives than those of the Sherman Act. The Forty-Second Congress did not enact the Ku Klux Klan Act in order to further competition and trade by "preserving independent decisions by persons or business entities."[167] Rather, the 1871 legislators were driven by the

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161 *Id.*

162 *Id.*

163 *Id.*

164 *Id.* ("[O]fficers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy."); *see* Nurse Midwifery Assoc. v. Hibbett, 918 F.2d 605, 611 (9th Cir. 1990) ("It is crucial that a plaintiff demonstrate that there has been a contract, combination, or conspiracy between separate entities, because section 1 does not reach unilateral conduct even if such conduct unreasonably restrains trade."). Two or more persons must have engaged in conduct in restraint of trade; the activities of one person cannot be the basis of § 1 liability. *See* HOVENKAMP, *supra* note 118, § 4.7, at 180-83; *Nurse Midwifery Assoc.*, 918 F.2d at 611-12 ("Unilateral conduct is governed by section 2 of the Sherman Act 'and is unlawful only when it threatens actual monopolization.'") (quoting *Copperweld*, 467 U.S. at 768). The *Copperweld* Court recognized that the focus of section 1 on concerted activity leaves a "gap" in the Act's regulation of a unilateral or single corporation's unreasonable restraint of trade that falls short of illegal monopolization under section 2, which regulates both unilateral and concerted activity. 467 U.S. at 775-76. But the "gap" is supported by the Act's objective to foster competition because to subject every firm's internal agreements to judicial scrutiny would chill, not foster, competitive zeal. *Id.*

165 *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4-5 (1958).

166 Stathos v. Bowden, 728 F.2d 15, 21 (1st Cir. 1984) ("The evil at which the 'conspiracy' section of the Sherman Act, 15 U.S.C. § 1, is aimed is an evil that exists only when two different business *enterprises join* to make a decision, such as fixing a price, that in a competitive world each would take separately.").

167 *See* Travis v. Gary Cmty. Mental Health Ctr., Inc., 921 F.2d 108, 110 (7th Cir. 1990); *see also Copperweld*, 467 U.S. at 768-69 ("Concerted activity inherently is

changing relationships between Blacks and Whites, the expansion of federal power, evolving notions of equality, and both the violent and nonviolent resistance that erupted in response to each.[168] The Reconstruction Amendments and legislation permanently changed the legal relationships between Blacks and Whites.[169] Congress could not, however, legislate change in the hearts and minds of many Democrats, the Klan, and their sympathizers.[170] The new legal environment threatened not only some white Southerners' way of life, but also their self-proclaimed superiority.[171]

The Ku Klux Klan Act of 1871 was a comprehensive effort to enforce the mandates of the Fourteenth and Fifteenth Amendments in the face of blatant, ongoing civil rights deprivations. One section empowered the President with the immediate ability to quash violent uprisings where state law enforcement was paralyzed.[172] Another section focused on government corruption by prohibiting deprivations by government actors acting in their official capacity or "under color of

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fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands.").

168 ERIC FONER, AMERICA'S UNFINISHED REVOLUTION xxiv-xxvi (1988) ("Reconstruction produced enduring changes in the laws and Constitution that fundamentally altered federal-state relations and redefined the meaning of American citizenship.").

169 "The fact that these Amendments could not have been adopted under any other circumstances or at any other time before or since, may suggest the crucial importance of the Reconstruction era in American history." RECONSTRUCTION, AN ANTHOLOGY OF REVISIONIST WRITINGS 11-12 (Kenneth Stamp & Leon Litwick eds., 1969).

170 "Neither Grant, the reformers, or the Republicans in Congress foresaw the virulence of white Southern opposition to Negro suffrage, or the proclivity for violence in states where respect for law and order had eroded substantially." SMITH, *supra* note 38, at 543. *See also id.*, at 544 ("The Klan's avowed purpose was to undermine Reconstruction, destroy the Republican party in the eleven states of the old Confederacy, and reestablish black subordination in every aspect of Southern life.").

171 *See* HADDEN, *supra* note 6, at 209 ("Aggression and insecurities . . . were not the only psychological needs driving Southern whites after the war's end. Freedom for slaves elevated the status of African Americans, but in the minds of Southern whites that freedom implicitly lowered the status of all whites in society."). WADE, *supra* note 3, at 11 ("Slavery was the linchpin of Southern self-esteem as well. Jefferson Davis had said without compunction that the 'lower race of human beings' that made up the 'slave population of the South elevates every white man in our community.'"); KENNETH M. STAMP, THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH 32-33 (1956) (explaining that many southern Whites who owned no slaves defended the institution of slavery because it limited economic competition and provided "concrete evidence of membership in a superior caste").

172 *See* WADE, *supra* note 3, at 90; Eisenberg, *supra* note 45, at 485.

law."[173] The section that ultimately became § 1985 targeted collective action.[174]

Each section of the 1871 Act was specifically tailored to address the systemic and multifaceted ways in which civil rights violations were committed. [175] The civil rights violations included those committed by single corporate entities. Section 1985(3) encompasses intracorporate conspiracies.

2. The Purpose of § 1985(3) Encompasses Intracorporate Conspiracies

In the face of civil rights deprivations that included assaults, murders, and property destruction, the Forty-Second Congress sought to eliminate any collective action designed to deny Blacks and other citizens their basic rights. The focus of the conspiracy provisions of the 1871 Act was not on the organizational structure of the conspiracy (i.e. a single corporation or two or more corporations), as the *Travis* Court argued, but on the ability of a group of persons to use collective resources to deny citizens their rights.[176] The historical context in which the 1871 Act was enacted supports the idea that the Act covers such deprivations when they result from the actions of a single corporation or government entity.

By the end of 1868, Klan dens existed in almost every county in Tennessee, in every state that was a part of the Confederacy, and in Kentucky.[177] Some of the dens received their charters from the Pulaski chapter or from Nathaniel Bedford Forrest, the ex-Confederate General who took the helm as the Grand Imperial Wizard in the spring of

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173 *See* Monroe v. Pape, 365 U.S. 167, 171 (1961) ("'The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law . . . .) (quoting Sen. Edmunds); Eisenberg, *supra* note 45, at 485.

174 *See* text of § 1985, *supra* note 8.

175 *See supra* notes 41 to 52.

176 The *Travis* Court's analysis is faulty because it focused on the kind of conspiracy in which the deprivations occurred, rather than on the deprivations themselves. The court concluded that the members of the Klan could not avoid liability because "the Klan meddled in the business of others; that is what made it dangerous. The [defendant] Center minded its own business." *See* Travis v. Gary Cnty. Mental Health Ctr., Inc., 921 F.2d 108, 110 (7th Cir. 1990).

177 *See* WADE, *supra* note 3, at 57; Cardyn, *supra* note 27, at 683; FONER, *supra* note 6, at 184 ("By 1870 the Ku Klux Klan and kindred organizations like the Knights of the White Camellia and the White Brotherhood were deeply entrenched in nearly every Southern state.").

1867.[178] But many Klan dens organized without any connection to the founders or Klan hierarchy, forming their local organization based on information they received in newspapers and by word of mouth.[179]

With the March 1870 ratification of the Fifteenth Amendment (the Amendment that gave black men the right to vote) and the May 1870 passage of the Enforcement Act (which banned the use of force, bribery, or intimidation as a means of interfering with voting), Klan violence and intimidation escalated to unprecedented levels.[180] Even with hundreds of indictments of Klansmen by the newly created Justice Department, the campaign of Klan terror continued and was so broad-reaching that more federal action was necessary to establish order and curb the violations of black citizens' most basic freedoms.[181]

The lack of response by local and state government authorities to the intense level of violence was no coincidence. Members of the Klan were not rogues, isolated from Southern society. They were men who in the light of day and without masks, could be found in all levels of the government, the media, and private industry.[182] Klansmen were newspaper editors, doctors, lawyers, businessmen, law enforcement officers, local politicians, legislators, and judges.[183] Regardless of

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178 *See* TRELEASE, *supra* note 3, at 49-50. Forrest used his influence with ex-confederate soldiers across the southern states to recruit men into the secret society. *See id.*

179 *See* TRELEASE, *supra* note 3, at 51; WADE, *supra* note 3, at 37.

180 *See* WADE, *supra* note 3, at 82-83.

181 *See* SMITH, *supra* note 38, at 545; MCFEELY, *supra* note 41, at 368-69. Congress created the DOJ in June 1870. Central to the DOJ was the office of Attorney General, which was previously limited to legal advisor to the President. Instead of contracting out the federal government's trial work, the Attorney General would be responsible for a team of in-house lawyers, all of the United States' attorneys across the country and the federal marshals. *See* SMITH, *supra* note 38, at 544; MCFEELY, *supra* note 41, at 368-69. Congress also created the office of the Solicitor-General. *See* SMITH, *supra* note 38, at 544. The DOJ indicted hundreds in the 1870s, particularly in North Carolina and Mississippi. *See* SMITH, *supra* note 38, at 545. For an in-depth discussion of the DOJ's inception and its role during Reconstruction, *see* Robert J. Kaczorowski, *Federal Enforcement of Civil Rights During the First Reconstruction*, 23 FORDHAM URB. L.J. 155, 158-65 (1995).

182 *See* FONER, *supra* note 6, at 188 ("Community support extended far beyond the Klan's actual membership, embracing the numerous Southern women who sewed costumes and disguises for night riders, and those unconnected with the Klan who still seemed to view violence against blacks as something less than a crime.").

183 See TRELEASE, *supra* note 3, at 52, 54, 62-63; S. Poverty L. Ctr., *Ku Klux Klan: A History of Racism and Violence*, *supra* note 5, at 12 ("One of the Klan's greatest strengths during this period was the large number of editors, ministers, former Confederate officers and political leaders who hid behind its sheets and guided its actions."); Cardyn, *supra* note 27, at 683-84 ("Drawing adherents from all corners of the

whether the Klan member was in a business suit or judicial robe in the daytime; regardless of whether he donned a white robe at night in Tennessee, Louisiana, Texas, or South Carolina; and regardless of which tactic the Klan member employed; Regardless of a Klan member's profession, or where he lived, or what his methods were, each Klansman and every chapter was bound by a common mission. "[T]he tie that bound them together [and] was too shadowy to be cut or untied"[184] was the maintenance of white supremacy.[185]

Because the Klan and opposition to Reconstruction were so deeply embedded in the fabric of southern society, the Ku Klux Klan Act was intended to be broad-reaching. As one sponsor of the 1871 Act stated, section 2 – from which § 1985 is descended – was designed to "provide for the punishment of *any combination* or conspiracy to deprive a citizen of the laws of the United States and of the Constitution."[186] The legislation targeted the hundreds of combinations of collective action taking place in Klan strongholds.[187] These combinations included: conspiracies to engage in deprivations by the members of single Klan

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South, Klan membership was a decidedly cross-class phenomenon that embraced similarly disposed white men from hardscrabble farmers to wealthy planters, lawyers, physicians, and judges, virtually all of whom were in some way aligned with the Democratic party."); Kaczorowski, *supra* note 180, at 163 ("Many Klansmen were respected members of the community whose Klan activity was perceived by the majority of white southerners as an attempt to restore the proper order of Southern society. Defendants frequently enjoyed the advantages of wealth, political influence and social prominence.").

184 TRELEASE, *supra* note 3, at 11 (quoting the Richmond Enquirer and Examiner April 30, 1868, copied in the Pulaski Citizen, May 22, 1869).

185 *See* SMITH, *supra* note 38, at 543-44; FONER, *supra* note 6, at 184 ("The Klan was a military force serving the interest of the Democratic Party, the planter class, and all those who desired restoration of white supremacy."); TRELEASE, *supra* note 3, at 51 ("The maintenance of white supremacy, and the old order generally was a cause in which white men of all classes felt an interest."); Cardyn, *supra* note 27, at 690 ("Although their specific concerns were necessarily influenced by local conditions, the enduring mission of each of [the Klan and similar organizations] was the advancement of white supremacy in every sector of southern society.").

186 CONG. GLOBE at 382 (Rep. Shellabarger) (emphasis added).

187 *See* FONER, *supra* note 6, at 184 ("The Klan, even in its heyday, did not possess a well-organized structure or clearly defined regional leadership."); FONER, *supra* note 6, at 186 ("No simple formula can explain the pattern of terror that engulfed parts of the South while leaving others relatively unscathed."); *See generally*, Gormley, *supra* note 53, at 530-31 ("There was little question concerning the immediate purpose of the statute – it was designed to solidify the country's reconstruction after the Civil War and bring under control acts of hatred and violence by Klansmen in the former Confederate States.").

dens,[188] Klan dens coordinating with other dens,[189] and collusion among members and sympathizers of the Klan in law enforcement, the judicial system, and other important institutional bodies.[190]

On most occasions, it was not possible for victims of Klan violence to determine the identity of the perpetrators because they were disguised in masks and white robes and came in the night.[191] Their victims could

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188 *See* WADE, *supra* note 3, at 61 (explaining that individual Klan dens would hold regular meetings, discuss potential targets, agree on a specific victim, conduct a trial, and dole out a sentence that was to be awarded during the raid).

189 *See* WADE, *supra* note 3, at 62 ("Depending on the victim, it might be necessary to enlist the support of another den. Neighboring dens sometimes combined for a major undertaking and, occasionally in border areas, there was cooperation between dens of different states.").

190 *See* FONER, *supra* note 6, at 187-88 ("Much Klan activity took place in those Democratic counties where local officials either belonged to the organization or protected it. Even in Republican areas, however, the law was paralyzed."); *see also* WADE, *supra* note 3, at 78-79 (detailing story of freedman imprisoned in a jail in which the bailiff and deputies were Klansmen, taken from the jail by a disguised Klansman, escorted by over one hundred Klansmen to a swamp, castrated and left to die. He managed to walk over two miles to a home which happened to be that of the jailer who refused to help him.); WADE, *supra* note 3, at 83-85 (describing deplorable conditions because of local law enforcement's complicity in Alabama, North Carolina, Mississippi and Tennessee and South Carolina); WADE, *supra* note 3, at 97 (Major Merrill assigned to duty in York County, South Carolina reported that the local sheriff, a trial justice and other state officials were either Klansmen or so closely affiliated with Klansmen as to "practically amount to the same thing."); THE TROUBLE THEY SEEN: THE STORY OF RECONSTRUCTION IN THE WORDS OF AFRICAN AMERICANS 384 (Dorothy Sterling ed., 1976) (Black minister and preacher who was badly crippled by Klan raid in York County, South Carolina explains how his attackers were not prosecuted, but released, even though he identified them as men whom he had known for twenty years.). In modern times, the Klan and other white supremacist organizations continue to engage in a multitude of conspiratorial combinations. Single Klan corporations: Donald v. United Klans of Am., No. 84-0725-C (S.D. Ala., Feb. 12, 1987) (Members of a single organization, United Klans of America killed a black man, Michael Donald, and hung his body on a tree in a Mobile, Alabama neighborhood); Mansfield v. World Church of the Creator, No. 94-345-CA (Cir. Ct. Escambia County, Florida, May 2, 1994) (single white supremacist organization members kill black sailor); Berhanu v. Metzger, No. A8911-07007 (Cir. Ct. Multomah County, Oregon, filed Nov. 22, 1989). Two or More Klan Organizations: Williams v. Southern White Knights, No. 87-CV-565 (N.D. Ga. Oct 27, 1989) (members of 3 separate white supremacist groups, the Southern White Knights of the Ku Klux Klan, Forsyth County Defense League and the Invisible Empire of the Ku Klux Klan, intimidate and harass black protestors in Forsyth, Georgia); Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993 (S.D. Tex. 1981) (Ku Klux Klan and American Fisherman's Coalition members harass and intimidate Vietnamese Fisherman in Galveston, Texas). Klan and Government Officials: Marshall v. Bramer, 828 F.2d 355 (6th Cir. 1987).

191 Most of the raids occurred between 11 p.m. and 2 a.m. by a group ranging from six to sixty men in disguise. The average size of a group was approximately a dozen men. *See* TRELEASE, *supra* note 3, at 59; WADE, *supra* note 3, at 61. The mask, costumes and

not identify the Klan members or their affiliations, or the other participants in conspiracies, including local businessmen, law enforcement officers, and state officials.[192] Klansmen hid their identity to avoid detection as reflected in the statute[193] prohibiting "two or more persons" from going "in disguise" with the purpose of depriving citizens of their rights. As the *Travis* Court implies, the notion that a victim of the Klan's terrorism could identify the activities as belonging to a single Klan den, two or more dens, or the Klan in cahoots with local government, is farfetched.

When addressing civil rights violations, unlike dealing with competition in the market, it makes no practical difference if two corporations act in concert or two officers of one corporation act in concert: if the actions taken are based on racial animus, they constitute collective action that denies an individual the equal protection of the laws. In either case, race-based conspiracies "strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights."[194] Both inter and intracorporate conspiracies contravene the purpose of § 1985(3).[195] Interpreting § 1985(3) as punishing intracorporate conspiracies is also supported by the text of the statute.

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disguises inspired most states to enact anti-masking statutes. *See* Wayne R. Allen, *Klan, Cloth and Constitution: Anti-Mask Law and the First Amendment*, 25 GA. L. REV. 819, 821-28 (2001).

192 *See* FONER, *supra* note 6, at 187-88 ("Much Klan activity took place in those Democratic counties where local officials either belonged to the organization or protected it. Even in Republican areas, however, the law was paralyzed."). The failure of local authorities to act on behalf of citizens prompted the passage of the companion provision to § 1985(3), § 1986. *See supra* note 51.

193 42 U.S.C. § 1985(3) (2003).

194 CONG. GLOBE, 42d Cong. 1st Sess., 478 (1871) (statement of Rep. Shellabarger).

195 *See* Novotny v. Great Am. Fed. Sav. & Loan Ass'n, 584 F.2d 1235, 1257 (3d Cir. 1978) (en banc) ("If, as seems clear under § 1985(3), the agreement of three partners to use their business to harass any Blacks who register to vote constitutes an actionable conspiracy, we can perceive no function to be served by immunizing such actions once the business is incorporated."), *vacated by* 442 U.S. 366 (1979); Washington v. Duty Free Shoppers, 696 F. Supp. 1323, 1326 (N.D. Cal. 1988) ("There is no reason to believe that discrimination by an individual business is less harmful than discrimination by multiple businesses or that discrimination by a single business deserves to be protected because it confers any benefit on society.").

B. The Text of § 2 of the Ku Klux Klan Act Does Not Exclude Race-Based Intracorporate Conspiracies

The text of section 2 of the Ku Klux Klan Act does not exclude corporate and government conspiracies driven by racial discrimination. Section 1985(3) states that damages are recoverable:

> If two or more persons in any State or Territory conspire . . . 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.[196]

The approach to Reconstruction statutes is to "'accord [them] a sweep as broad as [their] language,'"[197] and section 2 of the Act specifically stated, as § 1985 does today, "two or more persons." The Forty-Second Congress' failure to identify an exception for the internal actions of corporations and governmental entities indicates a congressional intent to punish intracorporate conspiracies.[198]

Proponents of the intracorporate conspiracy doctrine's application to § 1985(3) cases argue that at the time that the statute was enacted a "corporation and its managers" were viewed as "one person in law."[199] But the argument is not persuasive. First, arguing that the intracorporate conspiracy doctrine makes sense in civil rights law today because corporations were immune from liability based on corporate personification in 1871, is not consistent with the legal rulings of the era.[200] Second, the legal fiction of corporate personification is not necessarily synonymous with what we recognize today as the intracorporate conspiracy doctrine. Intracorporate conspiracy doctrine

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196 Griffin v. Breckenridge, 403 U.S. 88, 97 (1971) (alterations in *Griffin*) (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

197 *See id.* ("The approach of this Court to other Reconstruction civil rights statutes in the years since *Collins* has been to accord [them] a sweep as broad at [their] language.") (alterations in *Griffin*) (quoting United States v. Price, 383 U.S. 787, 801 (1966)).

198 *See Griffin,* 403 U.S. at 97. In *Griffin*, the Supreme Court in rejecting the limitation to only state action, stated: "Indeed, the failure to mention any such requisite can be viewed as an important indication of congressional intent to speak in § 1985(3) of all deprivation of 'equal protection of the laws' and 'equal privileges and immunities under the laws,' whatever their source." *Id.* at 97.

199 *See Travis*, 921 F.2d at 110 (quoting WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 456 (1st ed. 1765)); *See also* Martin, *supra* note 104, at 449-50.

200 *See* Carter, *supra* note 34, at 1154–56.

evolved from a merging of corporate personification, the plurality requirement of conspiracy law, the distinctions between sections 1 and 2 of the Sherman Act, and the underlying objectives of antitrust law.[201] Third, even if the two doctrines are synonymous, as the *Hartley* Court explained, corporate personification was not designed to limit corporate liability, but to expand it.[202] Finally, the idea that corporate personification means immunizing intracorporate agreements is inconsistent with the many federal intracorporate criminal conspiracy convictions that occur.[203]

In antitrust law, the distinction between conspiratorial agreements between two or more entities and conspiratorial agreements within one entity serves the purpose of fostering competition in the marketplace.[204] An anticompetitive conspiracy involving two or more corporations "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands."[205] There is no such threat from internal agreements in a single corporation. Intracorporate agreements do not "raise the antitrust dangers that § 1 was designed to police," but facilitate competition by enhancing the ability of the corporation to compete in the market place.[206] But the benefits of immunizing internal

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201 *See, e.g.*, Washington v. Duty Free Shoppers, 696 F. Supp. 1323, 1326 (N.D. Cal. 1988) ("Nowhere did the court [in *Copperweld*] justify the doctrine on the basis that a corporation can act only through its agents and that acts of an agent are acts of the corporation, thus preventing a plurality of actors."); Finch, *supra* note 9, at 28 (explaining agency theory and that "the doctrine of intracorporate immunity takes the additional step of concluding that, upon attribution of liability to the corporation, the agents' plural identities meld into a single corporate entity" that cannot conspire with itself).

202 *See United States v. Hartley*, 678 F.2d 961, 970 (11th Cir. 1982) ("By personifying a corporation, the entity was forced to answer for its negligent acts and to shoulder financial responsibility for them. The fiction was never intended to prohibit the imposition of criminal liability by allowing a corporation or its agents to hide behind the identity of the other."); *see also* Note, *Intracorporate Conspiracies Under 42 U.S.C. § 1985(C)*, *supra* note 86, at 477-78.

203 *See supra* notes 98 to 104.

204 *See supra* notes 117 to 163; *see also Washington*, 696 F. Supp. at 1326 ("[I]n the anti-trust context actions within a single business are presumed to be procompetitive and, therefore, beneficial to society."); Brickey, *supra* note 11, at 440 ("Without some limitation on enterprise liability for intra-corporate agreements, many legitimate business decisions that are essential to a corporation's ability to function – decisions regarding production, pricing and marketing for example – would have conceivable antitrust consequences.").

205 Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768-69 (1984).

206 *Id.* at 769. In fact, intracorporate agreements are necessary for a company to compete in the market. *See id.* ("In the market place, such coordination may be necessary if a business enterprise is to compete effectively.").

agreements in antitrust do not translate into the realm of civil rights or § 1985(3). 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] Unlike agreements within a corporation to compete in the market, it is difficult to conceive of race-based internal agreements that benefit the corporation or society.[208] No commentator or jurist has articulated what these benefits might be.[209]

Immunizing intracorporate conspiracies not only undermines the purpose of the 1871 Act, but also fosters racial discrimination.

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207 Racial discrimination cannot be ignored. As has been noted:

> Racial discrimination in all areas, and particularly in the areas of education and employment, is a devastating and reprehensible policy that must be vigilantly pursued and eliminated from our society: Racial discrimination can be the most virulent of strains that infect a society and the illness in any society so affected can be quantified. . . . The disease must be recognized and vigorously eliminated wherever it occurs.

Edwards v. Jewish Hosp. of St. Louis, 855 F.2d 1345, 1349 (8th Cir. 1988) (quoting Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 413 (1982) (Marshall, J., dissenting)).

208 Stathos v. Bowden, 728 F.2d 15, 21 (1st Cir. 1984) ("Where 'equal protection' is at issue, . . . one cannot readily distinguish in terms of harm between the individual conduct of one enterprise and the joint conduct of several. Nor can one readily identify desirable social conduct as typically engaged in jointly by the officers of a single enterprise."); Rebel Van Lines v. City of Compton, 663 F. Supp. 786, 792-93 (C.D. Cal. 1987) ("Racial discrimination can never further any 'business purpose' of a governmental entity. To apply the intra-corporate conspiracy exception to public entities and officials would immunize official policies of discrimination.").

209 *Washington*, 696 F. Supp. at 1327 ("Conspiracies to discriminate and to deprive Blacks or other minorities of these basic rights can only perpetuate inequality, even if formed and carried out within a single business."); *See also* Brickey, *supra* note 11, at 439-40 (explaining the difference between intracorporate agreements under antitrust law and intracorporate agreements subject to liability under general conspiracy law); Brickey, *supra* note 11, at 440 ("Agreements between corporate officials to make illegal political contributions, to falsify documents, to give or take bribes, to evade the tax laws or otherwise to defraud the government cannot be said to be incident to necessary and legitimate corporate decisionmaking. To subject the corporation to vicarious liability for such conspiracies therefore does not threaten disruption of the orderly management of its legitimate business affairs."). *But see Travis*, 921 F.2d at 110 ("Fear of violence (a theme running through the text of and debates on the 1871 act) could unite disparate centers of influence, closing opportunities to the freed men. Bigoted acts by a single firm, acting independently, pose risks of lesser caliber.") The *Travis* opinion offers no reasoning for why a corporation and society benefit from race-based intracorporate conspiracies.

C. Race-Based Intracorporate Conspiracies Foster Racial Discrimination

Race-based intracorporate conspiracies foster racial discrimination because even in the face of proven racial discrimination, a corporation and its officers can avoid liability for their wrongful acts.

During the congressional debates on § 1985(3), there was significant concern that making the myriad of crimes perpetrated against newly freed slaves and Republicans subject to civil action would amount to an unconstitutional federal encroachment on state tort law.[210] To avoid the constitutional infringement, the Supreme Court in *Griffin* held that the statute did not apply to "all tortious, conspiratorial interferences with the rights of others," but required "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action."[211] Therefore, a plaintiff must prove that an agreement to racially discriminate existed among the conspirators.[212] However, when the intracorporate conspiracy doctrine is imported into § 1985(3) jurisprudence, even if a plaintiff proves that two or more conspirators motivated by racial animus deprived him or her of constitutional rights,

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210 *Griffin*, 403 U.S. at 102 ("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.").

211 *Griffin*, 403 U.S. at 101-02; *Bray*, 506 U.S. at 268-69.

212 In addition to the invidious animus and other elements, *see supra* note 210, the plaintiff must prove a conspiracy existed. To prove a conspiracy between two or more persons, the plaintiff must show that the conspirators planned to inflict injury on the plaintiff, who, in fact, suffered injury to his or her person, property or a right granted to a United States citizen. *See* Green v. Benden, 281 F.3d 661, 665-66 (7th Cir. 2002) (explaining that in a § 1985(3) action, the injury includes a harm to person, property or deprivation of a right granted to a United States citizen.). It is not necessary to prove that each conspirator knew every detail of the plan or that there were other coconspirators. It is only necessary to prove that each conspirator was aware of the general nature and scope of the plan and agreed to the objective. *See id.* A meeting of the minds must have occurred among the coconspirators to achieve the conspiratorial objectives. *Id.* at 666. Direct evidence of the agreement is not required but can be inferred from circumstantial evidence. *See id.*; Smith v. Thornburg, 136 F.3d 1070, 1090 (6th Cir. 1998) (dissent) ("Rarely in a conspiracy case will there be direct evidence of an express agreement among all the conspirators to conspire, and circumstantial evidence may provide adequate proof of conspiracy.") (citing Bell v. City of Milwaukee, 746 F.2d 1205, 1255-59 (7th Cir. 1984); *see also* Thomas Leach, *Civil Conspiracy: What's the Use?*, 54 U. MIAMI L. REV. 1, 33-34 (1999).

there is no liability.[213] *Dickerson v. Alachua County Commission*, mentioned in the introduction, is illustrative.[214]

One night in early spring, at approximately 9:50 P.M., an inmate escaped from the Alachua County Correctional Center in Florida. The escape occurred during Shift III, while Lt. Steven Roberts, a white male, was in charge.[215] The plaintiff, Lt. Alfred Dickerson, an African-American, was not on duty during the escape, but supervised the officers who discovered the prisoner's absence during Shift I.[216] White officers conducted an internal investigation, and concluded that Dickerson was at fault.[217] Dickerson and six other officers were disciplined and Dickerson and three other African-American officers who worked on Shift I were demoted. Meanwhile, the white supervisory staff on duty when the escape occurred received written warnings.[218]

Dickerson sued the Alachua County Commission and correctional officers under several federal statutory and constitutional provisions, including § 1985(3).[219] A jury found that the white correctional officers engaged in a racially-motivated conspiracy to shift responsibility to the black officers and awarded Dickerson $50,000 in non-economic compensatory damages. [220] Despite a jury's conclusion that a group of

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213 Without proof of an injury or deprivation of a privilege of citizenship, the § 1985(3) conspiracy fails as with most civil conspiracies. *See Green*, 281 F.3d at 665-66 (explaining that in a § 1985(3) action, the injury includes a harm to person, property or deprivation of a right granted to a United States citizen.). *But see* Leach, *supra* note 211, at 2-3 (arguing that civil conspiracy ought to be a stand-alone cause of action "as a means of sanctioning and preventing types of anti-social behavior that are not sufficiently addressed by other tort causes of action or statutory schemes").

214 200 F.3d 761 (11th Cir. 2000).

215 *See id.* at 763-64.

216 *See id.*

217 The Alachua County Commission and the Florida Department of Corrections investigations cited the county jail for violating a new state rule that prohibited leaving uncertified officers alone in the housing units. The only violation cited was during Dickerson's shift, not during Shift III when the prison break occurred. *See Dickerson*, 200 F.3d at 764-65. Dickerson argued that the officers who conducted the internal investigation were at fault for the escape because 1) they knew about the escape in advance and failed to file a report, and 2) they did not have enough trained officers to staff the new section of the jail where the inmate escaped. *See id.* at 764.

218 *See id.* at 764.

219 Dickerson sued the defendants for race discrimination in violation of Title VII, 42 U.S.C. § 1981, 42 U.S.C. § 1983 (for violations of his liberty interests, free speech and due process rights) and Equal Protection. *See id.* at 764. The district court granted defendants summary judgment on the § 1981 and procedural due process claims.

220 *See id.* at 765. The jury did not find a violation of Dickerson's rights under Title VII, the Fourteenth Amendment, or the First Amendment. Therefore, the only claim left

Dickerson's coworkers and supervisory correctional officers acted with purposeful animus to deprive him of his civil rights because of his race, the Eleventh Circuit struck down the jury's verdict, relying on the intracorporate conspiracy doctrine.[221]

The outcome in *Dickerson* demonstrates that immunizing intracorporate conspiracies does not further the goals of federal law, as it does in the antitrust context, but instead, fosters illegal racial discrimination. As the *Dickerson* defendants openly stated: "[E]ven if certain jail employees conspired against Dickerson because of his race . . . they did so within the scope of their employment. No conspiracy claim lies for such actions, all of which are imputed to the County, Dickerson's employer, and the entity that demoted him."[222] The intracorporate conspiracy doctrine permits individuals to openly agree to racial discrimination, act upon it to cause devastating injury to their victim, and then throw up the corporate form to mask their racist acts.[223]

Perhaps the resistance to using § 1985(3) to exorcise the evils of racial discrimination from the inner sanctums of corporations and government institutions stems from the era in which it was enacted. In 1871, the most visible deprivations of civil rights were in the form of extreme violence.[224] However, to limit § 1985(3) to acts of violence is not warranted. Such a limited interpretation fails to accord to civil rights

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was § 1985(3). *See* Dickerson v. Alachua Comm'n, No. GCA 96cv142-MMP (April 24, 1998) (Verdict). *See also Dickerson*, 200 F.3d at 765.

221 *See id.* at 767-770. To muddy the waters even more, the Eleventh Circuit has refused to apply the intracorporate conspiracy doctrine to § 1985(2) claims. *See* McAndrew v. Lockheed Martin Corp., 206 F.3d 1031, 11th Cir. 2000)(en banc) (holding that a civil conspiracy under § 1985(2) is actionable because the complaint alleged criminal conduct in that it falls under the criminal exception that rejects the doctrine in criminal conspiracies).

222 Alachua County Bd. of County Comm'rs v. Dickerson, No. 98-03041 (January 26, 1999) (Brief of Appellant Alachua County Board of County Commissioners) (Eleventh Circuit Brief) (citing Tabor v. City of Chicago, 10 F. Supp. 2d 988, 994 (N.D.Ill. 1998)) ("Where the defendants' ability to injure a plaintiff derives solely from their positions within the entity for which they work, and the influence they wield there from, the doctrine will apply.").

223 *See* Rebel Van Lines v. City of Compton, 663 F. Supp. 786, 792 (N.D. Cal. 1987) ("Conspirators should not be able to avoid the civil rights laws merely by incorporating before they commit their discriminatory acts."); NAIA v. Deal, 13 F. Supp.2d 1369, 1379 (S.D. Ga. 1998) (declining to apply the intracorporate conspiracy doctrine the court stated: "If the Court were to hold otherwise, two or more persons could incorporate in order to immunize their illegal acts from prosecution, a result which the Court cannot condone.").

224 While the most visible forms of deprivations were through violent acts, non-violent deprivations were almost certainly frequent.

statutes the proper breadth, and is not "attuned to the evolving ideal of equality."[225] The 1871 Act sought to eliminate conspiratorial agreements to deprive Blacks and others of their rights that accompany citizenship.[226] Safeguarding these rights is just as important today. Methods of violence were the means of maintaining white supremacy in 1871, but the ways in which discrimination manifests itself today, including violent and nonviolent acts, do not disguise the underlying message of white supremacy (or any other form of oppression) or the resulting harms.

The ultimate focus in delineating a cause of action under § 1985(3) should not be whether the collective action takes place in the form of a group of white supremacists with bats on a highway, businessmen who use their power in a boardroom, or correctional officers who use their informal network of friends. The focus should be that in each situation, a racially motivated group deprives the victims of their rights. Any distinctions as to the severity of the defendants' acts may go to the court's remedy or fact-finder's damages determination.

D. The Intracorporate Doctrine May Immunize Violent Klan Activities

Finally, immunizing internal agreements of corporations from the reach of § 1985(3) can frustrate the Ku Klux Klan Act of 1871, even when it comes to violent conspiratorial acts. Groups affiliated with the Ku Klux Klan and similar organizations often incorporate.[227] In *Donald v. United Klans of America, Inc.*, several members of the United Klan of America wanted to send a message to Blacks after a jury deadlocked in

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225 *Novotny*, 584 F.2d at 1241 ("The fact is that the wording of § 1985(3) gives no basis for excluding women from its protection, rather, the phrases of the statute are attuned to the evolving ideal of equality"); *see Griffin*, 403 U.S. at 96 ("The approach of this Court to other Reconstruction civil rights statutes in the years since *Collins* has been to 'accord [them] a sweep as broad as [their] language.'") (quoting United States v. Price, 383 U.S. 787, 801 (1966)); *Novotny*, 584 F.2d at 1241 (expanding coverage of § 1985 to women) ("While the impetus toward enactment of the lineal ancestor of § 1985(3) was supplied by concern regarding violence directed at Blacks and Union sympathizers, the bill subsequently enacted contained no such limitations.").

226 *See supra* notes 41 to 52. The scope of these rights has yet to be fully outlined.

227 The majority of states have at least one white supremacist organization incorporated. *See* data in author's research file. *See also* Saville v. Houston County Healthcare Auth., 852 F. Supp. 1512, 1539 (M.D. Ala. 1994) (in rejecting the intracorporate conspiracy doctrine's application in § 1985(3), the court stated that "[s]urely, members of the Ku Klux Klan could not avoid the strictures of § 1985(3) simply be incorporating themselves.").

the criminal trial of a black man accused of shooting a white police officer.[228] The Klansmen searched the streets of Mobile, Alabama, and selected a young black man, Michael Donald, as their victim. They forced him into their car and drove him to a remote location where they beat him, choked him to death, and slit his throat. They placed a noose around Michael Donald's neck and hung his body from a tree in a Mobile neighborhood.[229] The United Klans of America, an Alabama corporation, was sued under § 1985(3), and a jury awarded Michael Donald's mother, Beulah Mae Donald, a $7 million award.[230]

However, according to the Eleventh Circuit's holding in *Dickerson,* the intracorporate conspiracy doctrine would preclude liability for the same acts today. Section 1985(3) served an important role in punishing the racist conspirators who killed Michael Donald by ultimately bankrupting the United Klans of America.[231] However, if the *Donald* case had been filed in the Southern District of Alabama in 2003, theoretically, the United Klans of America would not be subjected to § 1985(3) liability for Michael Donald's death. Organized hate groups could avoid civil liability by simply filing papers of incorporation.[232]

Because the intracorporate conspiracy doctrine could apply in cases of violence, even for jurists and scholars who believe that § 1985(3) is limited to violent, Klan-like activities, as opposed to a broad range of discriminatory, nonviolent, race-based conspiracies, allowing the intracorporate conspiracy doctrine defense does not make sense.

CONCLUSION

The intracorporate conspiracy doctrine should not be applicable to

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228 *See* Donald v. United Klans of Am., Inc., No. 84-0725-AH (S.D. Ala. January 14, 1987) (complaint). The United Klans of America did not simply espouse words of hatred, but had a history of violence against Blacks that included the 1961 beating of the Freedom Riders, the church bombing of the Sixteenth Street Baptist Church in Birmingham that killed four young black girls and a laundry list of murders, including Michael Donald's in March 1981. *See, e.g.,* Unites States v. Johns, 615 F.2d 672 (5th Cir. 1980); *see also* Strat Douthat, *Suits Knock Wind Out of Klan Sheets; Hard Times for KKK In Stomping Grounds*, WASHINGTON POST, Nov. 26, 1987.

229 *See Donald*, No. 84-0725-AH (complaint); Douthat, *supra* note 227.

230 *See* S. Poverty L. Ctr., *Center Battles White Supremacist Groups, Legal Action*, at http://www.splcenter.org; Douthat, *supra* note 227.

231 *See* S. Poverty L. Ctr., *Center Battles White Supremacist Groups, Legal Action*, *supra* note 230; Douthat, *supra* note 228.

232 *See Saville*, 852 F. Supp. at 1539 ("Surely, members of the Ku Klux Klan could not avoid the strictures of § 1985(3) simply by incorporating themselves.").

§ 1985(3) conspiracies. Section 2 of the Ku Klux Klan Act was designed to specifically challenge collective action and eliminate the many ways in which individuals conspired to engage in civil rights violations. Some commentators may argue that race-based intracorporate agreements are actionable under other federal anti-discrimination laws and state causes of actions.[233] However, § 1985(3) fulfills a unique role in the national comprehensive civil rights scheme to eliminate different forms of bias-motivated and discriminatory actions. As the only federal civil conspiracy statute that punishes individuals who use collective resources to deprive others of their federally protected rights, it serves the unique role of eliminating the dangers present in racially-motivated collective activity.[234] These group dangers

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[233] Section 1985(3) offers some procedural and evidentiary advantages in relation to other civil rights statutes that are valuable to the civil rights litigant. Unlike Title VII and other anti-discrimination laws, § 1985(3) does not require the exhaustion of administrative remedies, provides longer filing deadlines, offers unlimited recovery of compensatory and punitive damages, and reaches both government and private action that infringes on constitutional rights, regardless of number of employees or size.
Also, as a conspiracy statute, the plaintiff may use Federal Rule of Evidence 801(d)(2)(E) which permits the statement by a co-conspirator of a party during the course or in furtherance of the conspiracy to be admissible as nonhearsay. *See* FED. R. EVID. 801(d)(2)(E). For an explanation of this hearsay exception generally, see John E. Sullivan, Note, *Bourjaily v. United States: A New Rule For Admitting Coconspirator Hearsay Statements Under Federal Rule of Evidence 801(d)(2)(E)*, 1988 WIS. L. REV. 577 (1988); Patrick J. Sullivan, Note, *Bootstrapping of Hearsay Under Federal Rule of Evidence 801(d)(2)(E): Further Erosion of the Coconspirator Exemption*, 74 IOWA L REV. 467 (1989). This evidentiary advantage may be particularly important in proving discriminatory animus, which is often difficult to prove because discriminatory motives are easy to hide and often intertwined with other non-discriminatory motives. For difficulty of proving discriminatory intent see Kenneth Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1165 (1978); Barbara J. Flagg, *Was Blind But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953 (1993); Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 319 (1987).
Furthermore, once a violation of § 1985(3) is proven, a plaintiff may turn to 42 U.S.C. § 1986 to prove liability on the part of anyone in law enforcement who had knowledge of the conspiracy and authority to prevent it, but who failed to do so.

[234] *See* Washington v. Duty-Free Shoppers, 696 F. Supp. 1323, 1326 (N.D. Cal. 1988) ("In the area of civil rights, a real danger exists from the collaboration among agents of a single business to discriminate."); *see, e.g., id.* at 1327 (stating that the agreements within a single corporation "threaten exactly the group danger at which conspiracy liability is aimed by the enactment of §§ 1985(3) and 1986."). See generally *Callanan v. United States*, which explained the "special dangers" of conspiracies:

> This settled principle derives from the reason of things in dealing with socially reprehensible conduct: collective criminal agreement – partnership in crime – presents a greater potential threat to the public than individual delicts. Concerted action both increases the

exist when the collective is comprised of members of two different corporate entities *and* when the collective is comprised of members of one corporation.[235] Immunizing civil rights violations simply because the perpetrators are members of the same corporation veils the racist acts of conspirators behind the mask of a legal fiction. These conspirators hide behind the intracorporate conspiracy doctrine's cloak, while their victims suffer deprivations and permanent harm. The uncompensated physical and psychological injuries from collective racist acts that go unpunished make the intracorporate conspiracy doctrine a "fiction without a purpose."[236]

> likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from theirpath of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

364 U.S. 587, 593-594 (1961). *See also* United States v. Jimenez Recio, 123 S. Ct. 819, 822 (2003); Jeffers v. United States, 432 U.S. 137, 157 (1977); Iannelli v. United States, 420 U.S. 770, 778 (1975); Pinkerton v. United States, 328 U.S. 640, 644 (1946); Brickey, *supra* note 11, at 443-44.

235 Carter, *supra* note 34, at 1142 ("[C]onspiracy law addresses the special problem of group danger by imposing extra punishment on those who threaten society through concerted group action. The intra-corporate conspiracy doctrine interferes with this . . . purpose . . . ").

236 *Washington*, 696 F. Supp. at 1327 ("[A]greements to discriminate between a business and its employees threaten exactly the group danger at which conspiracy liability is aimed by the enactment of §§ 1985(3) and 1986. Thus, the view of a business as a single legal actor becomes a fiction without a purpose.").