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*Finding State Action When Corporations
Govern*

Ass't Prof. Stefan J. Padfield

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Finding State Action When Corporations Govern

Stefan J. Padfield*

Abstract

The financial crisis of 2008-2009 is blurring the lines between the State and the private sector. While painful, this process may facilitate a re-examination of the state action doctrine. This Article argues that corporations have for some time been increasingly taking on roles as pseudo-governmental actors without incurring the accountability to the people generally associated with state action. This is happening via “new governance,” and while the recent financial crisis may suggest that the problems associated with new governance are waning, the reality is that the corporate consolidations likely to follow in the wake of the downturn—together with the government’s oft-stated desire to divest its bailout stakes in private companies as soon as possible—will result in even more powerful corporate actors with an even greater ability to govern. New governance occurs when corporations: (1) directly influence legislation; (2) define ambiguities in enacted laws via unopposed action; or, (3) violate enacted laws without repercussion. In this Article, I argue that there are at least four reasons why state action is present for purposes of the Fourteenth Amendment when private actors leverage state-granted limited liability to carry out this type of governance: First, the corporation does not exist without the State and the State derives significant benefits in exchange for granting corporate status. These points suggest there is a type of “symbiotic” relationship between corporate actors and the State sufficient to attribute at least some actions of the former to the latter. Second, the abuse of the corporate form for illegitimate governing is foreseeable and has been predicted since the 1800s, but state law nevertheless encourages this type of abuse by making shareholder wealth maximization the priority of corporate management and protecting those managers from personal liability via doctrines such as the business judgment rule. This State encouragement of an exclusively public function (i.e., de facto legislating) by corporate actors should constitute state action in at least some circumstances. Third, the democratic process has arguably failed to keep the accumulation of corporate power in check and therefore it falls to the judiciary to rein in the abuse of that power. Fourth, to the extent that the arguments made herein constitute an expansion of current state action doctrine, such expansion is consistent with the history of the doctrine. Understanding state action under the Fourteenth Amendment to include new governance has wide-ranging implications, not least of which is the potential for increasing the degree to which international corporations may be held accountable for human rights violations.

* Assistant Professor, University of Akron School of Law. B.A., Brown University; J.D., University of Kansas. This paper was presented at the Eleventh Ohio Legal Scholars Workshop, the Central States Law Schools Association annual meeting, and at faculty workshops at Roger Williams and Cumberland School of Law. My thanks to all the participants for their helpful comments. Thanks also to Richard Aynes, Martin Belsky, Stephen McAllister, and David Zlotnick. Jerad Zibritosky and William Shelly provided substantial research assistance. Finally, I would like to thank the University of Akron School of Law for providing me with a summer research grant to help me complete this project.

Contents

- I. INTRODUCTION
- II. THE PROBLEM: GOVERNANCE BY CORPORATIONS
 - A. AN OVERVIEW OF “NEW GOVERNANCE”
 - B. FORMS OF NEW GOVERNANCE
- III. THE SOLUTION: THE GRANT OF LIMITED LIABILITY PLUS THE EXERCISE OF GOVERNANCE POWER EQUALS STATE ACTION
 - A. *The State Action Doctrine*
 - B. *Why the Grant of Limited Liability plus the Exercise of Governance Power Should Constitute State Action*
 - 1. *There is a Symbiotic Relationship between States and Their Corporations*
 - a. *There Is No Corporation without the State*
 - b. *The State Benefits by Granting Corporate Charters*
 - 2. *Governance by Corporations (an Exclusively Public Function) is Foreseeable and Encouraged by the State*
 - 3. *The Possibility that the Democratic Process has failed to keep Governance by Corporations in Check is Great Enough to Warrant Judicial Review*
 - 4. *The Historical Flexibility of the State Action Doctrine Supports Expansion of the Doctrine to meet the Challenges of New Governance*
- IV. CONCLUSION & IMPLICATIONS

I. INTRODUCTION

Implicitly, it would seem, state action in granting a corporate charter assumes that the corporation will not exercise its power (granted in theory at least to forward a state purpose) in a manner forbidden the state itself.

Adolf A. Berle Jr.¹

The financial crisis of 2008-2009 is blurring the lines between the State and the private sector.² While painful, this process may facilitate a re-examination of the state action doctrine. This Article argues that corporations have for some time been increasingly taking on roles as pseudo-governmental actors without incurring the

¹ Constitutional Limitations of Corporate Activity-Protection of Personal Rights from Invasion Through Economic Power, 100 U Pa. L. Rev. 933, 952 (1952).

² See, e.g., Richard Barley, Unintended Consequences of the Bailouts, Wall St. J. at C10 (Jan. 27, 2009) (“The distinction between credit and sovereign risk is blurring as losses that would otherwise be taken by the private sector are reallocated to the public sector.”).

accountability to the people generally associated with state action. This is happening via “new governance,”³ and while the recent financial crisis may suggest that the problems associated with new governance are waning, the reality is that the corporate consolidations likely to follow in the wake of the downturn—together with the government’s oft-stated desire to divest its bailout stakes in private companies as soon as possible—will result in even more powerful corporate actors with an even greater ability to govern. In Part II of this Article, I describe the problem of new governance and discuss how it can occur when corporations: (1) directly influence legislation (via lobbying, campaign finance, and regulatory capture); (2) define ambiguous aspects of enacted laws via unopposed action; or, (3) violate enacted laws without repercussion.⁴ Constitutional limitations could restrict this type of private governing under the Fourteenth Amendment via a broad application of the state action doctrine.⁵

In Part III.A., I provide necessary background on the state action doctrine. The Supreme Court has generally found state action present in cases involving private actors where either: (1) the private actor employed judicial or other governmental power to enforce some private right of the private actor; (2) the private actor was performing some public function formerly exclusively or traditionally performed by the government; (3) the private actor was engaged in a joint venture or symbiotic relationship with the government; (4) the private actor was compelled or encouraged by the government to

³ See generally Marcy E. Peek, Information Privacy and Corporate Power: Towards a Re-Imagination of Information Privacy Law, 37 Seton Hall L. Rev. 127 (2006) (hereinafter Peek, Corporate Power) (describing “new governance”).

⁴ See generally Peek, Corporate Power, at 146 (summarizing modes of new governance).

⁵ U.S. Const. Amend. XIV (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .”). See generally, Wilson R. Huhn, The State Action Doctrine and the Principle of Democratic Choice, 34 Hofstra L. Rev. 1379, 1380 (2006) (hereinafter Huhn, Democratic Choice) (“The state action doctrine is . . . a key component of the Fourteenth Amendment—a threshold requirement that must be satisfied before triggering protection of our fundamental rights.”).

engage in the challenged conduct; or, (5) public officials were excessively “intertwined” with the private actor.⁶ In addition to applying these discrete tests, a more liberal “totality of circumstances” approach has been used in some cases to find state action even where a narrow seriatim application of the aforementioned tests would not have found state action.⁷

The details of my argument are set forth in Part III.B. To the extent that this argument calls for an expansion of the current state action doctrine, I argue that the unique and modern phenomenon of new governance warrants a re-examination of current doctrine.⁸ In Part IV, I provide concluding remarks and examine some possible implications of formulating the state action doctrine to capture new governance.

In some ways, this Article can be seen as embracing a principle that Adolf Berle identified as emerging over fifty years ago:

The emerging principle appears to be that the corporation, itself a creation of the state, is as subject to constitutional limitations which limit action as is the state itself. If this doctrine, now coming into view, is carried to full effect, a corporation having economic and supposedly juridical power to take property, to refuse to give equal service, to discriminate between man and man, group and group, race and race, to an extent denying “the equal protection of the

⁶ See generally, Huhn, Democratic Choice, at 1380 (describing tests).

⁷ See, e.g., Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961) (“Addition of all these activities, obligations and responsibilities of the Authority, the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn.”).

⁸ Throughout this Article I refer to the “novel” or “modern” phenomenon of new governance. Certainly, history suggests there is nothing new about the concept of corporations governing. However, whatever one may think about the existence of a new problem in this area, new governance can certainly be viewed as a new “lens” through which to view the problem. See Orly Lobel, The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought, 89 Minn. L. Rev. 342, 345 (2004) (“Prominent scholarly works at the microlevel of doctrinal areas, the macrolevel of constitutional and administrative law, and the metalevel of jurisprudence all advocate the necessity and the possibility of renewal through a new governance model. The new paradigm is instigating change in a wide spectrum of policy issues and fields . . .”) (emphasis added). With new lenses comes the possibility of seeing familiar objects in a new way, which is exactly what this Article is seeking to get the reader to do.

laws,” or otherwise to violate constitutional limitations, is subject to direct legal action.⁹

In carrying forward this “emerging principle,” this Article argues that there can be little doubt that the power of multinational corporations is growing.¹⁰ It seems reasonable to conclude that this gain in power must come at the expense of a loss of power on the part of other parties.¹¹ To the extent that the power that is being transferred in this way is the power to govern, failure to transfer Constitutional limitations on the exercise of that power risks the clandestine reduction of established protections of the citizenry.¹²

So, why consider state action doctrine as an appropriate tool to deal with the problem of new governance? Let me provide three possible answers: First, defining state action to include new governance in certain circumstances should, as discussed in more detail below, provide a much-needed increase in accountability. Second, deeming certain conduct associated with new governance to be state action may provide one of the few effective checks on corporate opportunism not subject to the vagaries of the legislative process. Third, conceptualizing state action for purposes of the Fourteenth Amendment in a way that more readily appreciates the continued blurring of public-private distinctions can help advance a similar recognition in other areas of the law that are arguably “stuck” with overly rigid formulations of state actor status—such as the

⁹ Adolf A. Berle Jr., Constitutional Limitations of Corporate Activity-Protection of Personal Rights from Invasion Through Economic Power, 100 U Pa. L. Rev. 933, 942 (1952).

¹⁰ See Daniel J.H. Greenwood, Markets and Democracy: The Illegitimacy of Corporate Law, 74 UMKC L. Rev. 41, 58 (2005) (hereinafter Greenwood, Illegitimacy of Corporate Law) (“Our publicly traded corporations are a major locus of power in society today. Measured by the wealth they control, the major firms are far larger than most governmental units.”).

¹¹ Cf. Joel R. Paul, Holding Multinational Corporations Responsible Under International Law, 24 Hastings Int'l & Comp. L. Rev. 285, 289-90 (2001) (“Privatization shrinks the public sector while it expands the scope and freedom of private firms.”).

¹² Cf. Allison D. Garrett, The Corporation as Sovereign, 60 Me. L. Rev. 129, 130-31 (2008) (“In the past two hundred years, sovereignty devolved from the monarch to the people in many countries; in our lifetimes, it has devolved in several significant ways from the people to the corporation. The power and influence of the world’s major corporations continue to grow, and with this growth their similarities to sovereign states increase.”).

Alien Tort Claims Act, which is often looked to as a statutory avenue for addressing corporate international human rights violations.¹³ Finally, as will be repeated throughout this Article, it is important to stress that the argument set forth herein is not that all corporations should be deemed state actors. Rather, a corporation must both have the power to effectuate new governance and in fact exercises that power to be deemed a state actor—and then only for purpose of the particular challenged conduct.

II. THE PROBLEM: GOVERNANCE BY CORPORATIONS

*Analogous to the case of the King of England at the time of the American Revolution, the will of corporations and other moneyed interests is the law, but instead of proceeding directly from their mouths, it is handed to the people under the formidable shape of an act of Congress*¹⁴

The traditional view of governance is that it is carried out by the government. However, “the traditional understanding of governance as emanating solely from the government must be—and is being—rethought.”¹⁵ In this section, I will provide a general overview of new governance, followed by an examination of the forms new governance takes in practice.

A. *An Overview of “New Governance”*

Scholars are recognizing that as private actors gain power they are becoming an additional source of governance.¹⁶ For example, Daniel J. H. Greenwood argues that “[c]orporations are power centers, loci of value struggles, political fora. They are not

¹³ See *infra* n.[181] and accompanying text.

¹⁴ Timothy K. Kuhner, *The Separation of Business and State*, 95 CAL. L. REV. 2371, 2381 (2007).

¹⁵ Peek, *Corporate Power*, at 142.

¹⁶ Cf. Gillian E. Metzger, *Privatization as Delegation*, 103 Colum. L. Rev. 1367, 1379 (2003) (noting that the government “rel[ies] on private actors for the content and enforcement of government regulations”) (citing Steven L. Schwarcz, *Private Ordering*, 97 Nw. U. L. Rev. 319, 324 (2002) (“Private ordering can be viewed as part of a broad spectrum within which rulemaking is classified by the amount of governmental participation involved. At one end of the spectrum are rules of law originated and put into force by sovereign governments. At the other end are rules that are adopted entirely by private actors. Between these extremes, private ordering involves a continuum of government participation.”)).

citizens but governance structures and not neutral but deeply influential—if illegitimate—participants in our political struggles.”¹⁷ Dan Danielsen notes that, “Whether the state actors and corporate actors are sitting in a room negotiating or dealing through a more informal dance of reciprocal signaling and expectations, it would seem odd to treat the regulatory result as anything other than a joint product.”¹⁸

This phenomenon of governance by private actors—particularly corporations—has been described as “new governance,”¹⁹ and it has both supporters and detractors. Proponents of new governance “suggest ‘a third way between state-based, top-down regulation,’ on the one hand, ‘and a single-minded reliance on market-based norms,’ on the other, by means of public-private networks, multiparty negotiation, and decentered, collaborative institutional design.”²⁰ Meanwhile, critics worry that “[u]nless corporate power vis-à-vis the individual and . . . governance . . . is addressed, the law will continue to strengthen corporate power” at the expense of individuals.²¹

The criticism of new governance most pertinent to this Article is that it facilitates a loss of accountability—a shortcoming that threatens both our democratic institutions and our citizenry.²² As Paul Verkuil warns, “The perceived threat is to democratic

¹⁷ Daniel J.H. Greenwood, Markets and Democracy: The Illegitimacy of Corporate Law, 74 UMKC L. Rev. 41, 43 (2005).

¹⁸ Dan Danielsen, How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance, 46 Harv. Int'l L. J. 411, 414 (2005).

¹⁹ See Peek, Corporate Power, at 140-41.

²⁰ Amy J. Cohen, Negotiation, Meet New Governance: Interests, Skills, and Selves, __ LAW AND SOCIAL INQUIRY __ (forthcoming); available at SSRN: <http://ssrn.com/abstract=1114169>, at 2 (quoting Orly Lobel, The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought, 89 Minn. L. Rev. 342, 443 (2004)).

²¹ Peek, Corporate Power, at 129.

²² See Joel R. Paul, Holding Multinational Corporations Responsible Under International Law, 24 Hastings Int'l & Comp. L. Rev. 285, 286 (2001) (“Globalization, which has displaced colonialism and then the cold war as the organizing principle of the international system, has reduced the transactional costs of doing business in multiple jurisdictions and, in turn, conferred enormous wealth on multinational corporations. By pressuring states to remove trade barriers, reduce the public sector, and liberalize economic controls,

principles of accountability and process in what has been a largely unexamined shift from public to private governance. On both a national and global stage, a ‘democracy deficit’ may be emerging.”²³ Thomas J. Biersteker and Rodney Bruce Hall note that, “as firms begin to function like governments, this raises major issues for democratic and representative theories of governance [P]rivate entities are not normatively entitled to act authoritatively for the public, because they are not subject to mechanisms of political accountability, but rather are only subject to the accountability of their private members.”²⁴

Because it is corporations that have proven most successful in accumulating and consolidating the power necessary to effectively govern, the corporate entity is the focus of much of the concern regarding new governance. For example, Lawrence Mitchell reports that twenty-two American corporations have a market capitalization greater than the gross domestic product of twenty-two specified individual nations.²⁵ As Allison Garrett points out, this discrepancy means “that foreign corporations have the capacity to exert tremendous influence over the economic stability of developing nations.”²⁶ This leads, according to Shaun Riordan, to these corporate actors being “more influential than many states.”²⁷

globalization has moved some regulatory authority from popularly elected national representatives to international institutions, which are less democratically accountable.”).

²³ Verkuil, Outsourcing Sovereignty at 2.

²⁴ Thomas J. Biersteker & Rodney Bruce Hall, Private Authority as Global Governance, in The Emergence of Private Authority in Global Governance 203, 211 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002).

²⁵ Lawrence E. Mitchell, Corporate Irresponsibility 2 (2001).

²⁶ Allison D. Garrett, The Corporation as Sovereign, 60 Me. L. Rev. 129, 147 (2008) (“If one or more large companies divests or sources product elsewhere, the impact could be devastating to a developing nation. Similarly, a decision to source products in a developing nation could have a tremendously positive economic impact by creating jobs and providing a tax base.”).

²⁷ Shaun Riordan, The New Diplomacy 7 (2003) (noting that multinational corporations’ “economic strength, combined with international networks that frequently outstrip (and outperform) those of traditional diplomatic services, make them more influential than many states. Their interventions are no

As Charlie Cray and Lee Drutman point out, “the large, limited-liability, publicly traded . . . corporations dominate our economy, politics, and culture. The limited-liability corporation dominates our entire society.”²⁸ Some argue that this is so because the corporate form allows for “the virtually unlimited concentration of power with minimal public accountability or legal liability.”²⁹ While James Madison located the threat of abuse of government power in the majority of the community, today he might well express the same concern vis-à-vis the corporation:

Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the Community, and the invasion of private rights is chiefly to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the Constituents. This is a truth of great importance, but not yet sufficiently attended to³⁰

How Madison’s “republican remedy”³¹ will address this problem is yet to be determined. But we can take comfort in the fact that from “generation to generation fresh vindication is given to the prophetic wisdom of the framers of the Constitution in casting it in terms so broad that it has adaptable vitality for the drastic changes in our society which they knew to be inevitable, even though they could not foresee them.”³²

B. *Forms of New Governance*

longer limited to narrowly defined commercial interests. The more forward-thinking corporations are already carving out a role in the design of any future global governance.”).

²⁸ Charlie Cray & Lee Drutman, Corporations and the Public Purpose: Restoring the Balance, 4 Seattle J. Soc. Just. 305, 306 (2005); see also Daniel J.H. Greenwood, Markets and Democracy: The Illegitimacy of Corporate Law, 74 UMKC L. Rev. 41, 57 (2005) (describing corporations as “a golem: a creature we created to be our servant that we are, instead, allowing to govern us”).

²⁹ David. C. Korten, When Corporations Rule the World 104-05 (2001). See also Douglas Litowitz, The Corporation as God, 30 J. Corp. L. 501, 525 (2005) (“The underlying dilemma is that corporations have tremendous economic and political power (not to mention their power to shape public opinion) but they are ruled by a handful of appointed managers.”).

³⁰ 5 Writings of James Madison 272 (Hunt ed. 1904).

³¹ The Federalist No. 10, at 136 (James Madison) (Benjamin Fletcher Wright ed., 1961).

³² Martin v. Struthers, 319 U.S. 141 152 (1943) (Frankfurter, J., concurring).

Marcy Peek has identified three ways in which corporate actors can govern. First, they may directly influence the promulgation of legislation or regulations.³³ In the privacy context, she notes “the profound effect that corporate lobbying has on the ultimate statutory language of privacy statutes and regulatory rules.”³⁴ Obviously, the impact of corporate lobbying on the wording of laws and rules is not limited to the area of privacy law.

Second, corporate actors may effectively legislate by filling in gaps in legislation or regulation. In other words, “corporations may interpret legislation in a way that favors corporate interests, and the government may acquiesce in this interpretation through silence and inaction.”³⁵ For example, Dan Danielson notes that “[i]t is hard to avoid concluding . . . that both national and E.U. regulation and policy with respect to streaming data was the product of the exploitation by new media companies . . . of a restrictive interpretation of the existing broadcast regulations,” which could only have been effectively implemented with “the acquiescence in that exploitation by national and E.U. regulators.”³⁶ As Louis L. Jaffe notes, “In creating custom men create the stuff of law.”³⁷

Finally, corporations may determine the de facto law of the land by violating existing laws or rules without fear of repercussion. This they will naturally do when “government deterrence is weak and ineffective.”³⁸ When this happens, the “intentional

³³ See generally Peek, Corporate Power, at 143-44.

³⁴ Peek, Corporate Power, at 143-44.

³⁵ See Peek, Corporate Power, at 143-44.

³⁶ Dan Danielson, How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance, 46 Harv. Int'l L. J. 411, 422-23 (2005).

³⁷ Louis L. Jaffe, Law Making By Private Groups, 51 Harv. L. Rev. 201, 214 (1937).

³⁸ Peek, Corporate Power, at 143-44 (“[C]orporations may choose to act in ways that openly and egregiously violate the legislative mandate because government deterrence is weak and ineffective.”).

violations . . . operate as the ‘rule’ in the respective arena and thus govern the field as authoritative.”³⁹

In addition to the three ways of exercising new governance just described, corporate actors can also use their power to shape public opinion in such a way as to facilitate their exercise of new governance. This phenomenon has been described by Stephen Lukes as a “third dimension of power,”⁴⁰ whereby “potential issues are kept out of politics, whether through the operation of social forces and institutional practices or through individuals' decisions.”⁴¹ Of course, this power—like the rest of new governance—will be exercised clandestinely.⁴² As Timothy Kuhner points out, “Corporations, with the help of experts in psychology, advertising and marketing, focus groups, and visual media productions, have done their best to frustrate public awareness, even to suppress independent, critical thought.”⁴³ Also, because “[b]usiness interests enjoy superior financial resources and ownership of the media,” it will be exercised with a high degree of efficacy.⁴⁴

³⁹ Peek, Corporate Power, at 143-44.

⁴⁰ Steven Lukes, Power: A Radical View 23 (1974). See Peek, Corporate Power, at 150 (quoting Moira T. Roberts, Note, Individual Rights and Government Power in Collision, 49 Wash. & Lee L. Rev. 1023, 1037-38 (1992) (“Unlike decisional and agenda power, third dimension power does not operate in a climate of conflict, but rather prevents circumstances of overt conflict from occurring by creating a manipulated consensus. . . . Third dimension power is the most effective form of power because it insidiously gains the support, or at least the neutrality, of others even to their own detriment.”)).

⁴¹ John Gaventa, Power and Powerlessness: Quiescence and Rebellion in the Appalachian Valley 12 (1980). See also Peek, Corporate Power, at 150-51 (“This is also an example of what Harvard economist Andrei Shleifer calls ‘cognitive persuasion’: the process by which the persuader (in this case the financial corporation) convinces people of an idea by triggering associations that are consistent with our beliefs and that resonate with our pre-existing ideas.”) (quoting Craig Lambert, Resisting Temptation: Economics Discovers the Irrational, Harv. Mag. 57 (Mar.-Apr. 2006)).

⁴² See Timothy K. Kuhner, The Separation of Business and State, 95 CAL. L. REV. 2371 (2007) (“[L]ike all exercises of power for self-interested purposes, the motivation behind corporate driven reform will not be honestly and openly displayed for all to see.”).

⁴³ Id.

⁴⁴ Timothy K. Kuhner, The Separation of Business and State, 95 CAL. L. REV. 2371, 2383-84 (2007) (“This leads to a superior ability to harness the power of public relations, marketing, and psychological tactics, both in the sale of their own positions and in the discrediting of others.”).

For example, in the privacy context, “corporations send detailed ‘privacy policies’ to customers that are in fact anti-privacy policies.”⁴⁵ Regardless of how non-protective of privacy the particular policy may be, “the consumer receives a document labeled ‘Privacy Policy’ and, based on rational expectations and ideas about what privacy means (i.e., associations), is persuaded that the policy is indeed about the many ways in which their financial institution vigilantly protects their privacy.”⁴⁶ Meanwhile, the reality is that corporate power is further enhanced at the expense of individual citizens.⁴⁷

Finally, though not directly a focus of this Article, outsourcing of inherently governmental functions via privatization is another way in which corporations can end up in governing roles.⁴⁸ While new governance and privatization are not identical, there are many ways in which they overlap and I will cite to scholarship on privatization where appropriate. Certainly, they raise similar accountability issues and challenge the effectiveness of the current state action doctrine. As Gillian Metzger notes, “The inadequacies of current state action doctrine mean that private exercises of government power are largely immune from constitutional scrutiny, and therefore expanding privatization poses a serious threat to the principle of constitutionally accountable government.”⁴⁹

Each of these exercises of new governance power has the potential of undermining our democracy and infringing upon the liberties of its citizens. As Dan

⁴⁵ Peek, Corporate Power, at 150-51.

⁴⁶ Peek, Corporate Power, at 150-51.

⁴⁷ See Peek, Corporate Power, at 129 (“Unless corporate power vis-à-vis the individual and the governance of information privacy law by corporations is addressed, the law will continue to strengthen corporate power and erode privacy in the guise of privacy-enhancing efforts.”).

⁴⁸ See generally Paul R. Verkuil, Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We can Do about It (Cambridge Univ. Press 2007) (hereinafter Verkuil, Outsourcing Sovereignty).

⁴⁹ Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367, 1373 (2003).

Danielson further comments, “When corporations create or shape the content, interpretation, efficacy, or enforcement of legal regimes and, in so doing, produce effects on social welfare similar to the effects resulting from rulemaking and enforcement by governments, corporate actors are engaged in governance.”⁵⁰ It is in response to the threats posed by these exercises of new governance that this Article proposes understanding state action for purposes of the Fourteenth Amendment to include the granting of limited liability coupled with the exercise of governing power. To the extent that this is a novel interpretation of Fourteenth Amendment jurisprudence, the novelty may be justified by the novelty of new governance itself.⁵¹

Because new governance actors leverage market power and legislative ties, a judicial response has to be a part of the solution.⁵² As Marcy Peek notes, “Market dynamics and industry self-regulation cannot be relied upon as correct barometers of public opinion or correct action when the market itself is dominated by the very actors that shape the law and govern the industry practices.”⁵³ Nonetheless, while new governance may have been “accomplished via a steering of such matters away from the judicial system and into legislative and regulatory backwaters.... the jurisprudential glass

⁵⁰ Dan Danielsen, How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance, 46 Harv. Int'l L. J. 411, 412 (2005).

⁵¹ I have been encouraged to frame this proposal as a “thought experiment,” in part because the multitude of issues it raises are arguably beyond the scope of any single article. Cf. Kuhner at n.111, n.145 (identifying proposed statute as “thought experiment” and stating that “[t]he conclusion, like the rest of this Essay, is intended to generate questions and provoke thought. It is not intended to reach any definitive conclusions or provide a full scholarly review of related sources.”). To the extent that such a label makes my proposal easier to digest, I gladly adopt it.

⁵² See Peek, Corporate Power, at 166 (“Similarly, calls for robust privacy legislation appear quixotic when viewed through the lens of corporate governance of information privacy. This is also true of arguments for more robust and frequent FTC enforcement actions because the state is complicit--whether through action or inaction--in governance by corporations. Indeed, ‘in its manifestation as market authority, private authority transforms both the state and state sovereignty. However, the state participates in this transformation.’”) (quoting Thomas J. Biersteker & Rodney Bruce Hall, Private Authority as Global Governance, in The Emergence of Private Authority in Global Governance 203, 209 (Rodney Bruce Hall & Thomas J. Biersteker eds., 2002)).

⁵³ Id. at 161.

is actually half full. Exposing the underlying power structures . . . might well cause a rethinking of possible [judicial] solutions.”⁵⁴

III. THE SOLUTION: THE GRANT OF LIMITED LIABILITY PLUS THE EXERCISE OF GOVERNANCE POWER EQUALS STATE ACTION

If one acknowledges that increased incidences of new governance pose a problem for our democracy, then the question becomes how to address that problem. The solution proposed here—recognizing governing by corporations as a form of state action⁵⁵—is not the only viable one, but it is particularly suited to play a key role in what will ultimately have to be a multi-faceted approach. The following sections will set forth the background of the state action doctrine and then examine why the grant of limited liability should constitute state action when it is paired with the exercise of new governance. This examination will include a discussion of the nature of the corporation and its relationship to the state, as well as an exploration of why a judicial solution is called for.

Before moving on to a general discussion of the state action doctrine, it is worth pausing briefly to note that I make this proposal understanding that there are various objections to be proffered involving the availability of alternative remedies. In the related context of privatization, Gillian Metzger notes that “the actions described may run afoul of legislative, regulatory, or contractual requirements, and the government may itself police the conduct of its private partners to ensure they adhere to constitutional

⁵⁴ Peek, *Corporate Power*, at 167.

⁵⁵ Cf. *Struthers* at 152 (“The Constitution cannot be applied in disregard of the external circumstances in which men live and move and have their being. Therefore neither the First nor the Fourteenth Amendment is to be treated by judges as though it were a mathematical abstraction, an absolute having no relation to the lives of men.”) (Frankfurter, J., concurring).

prohibitions. Tort law also may provide a basis for recourse against some private actions.”⁵⁶ State law may also provide heightened protections.⁵⁷

The presence of alternative remedies might lead some to conclude that “constitutional accountability fears . . . are misplaced.”⁵⁸ Given the availability of alternative remedies, the argument goes, the associated “costs” of being deemed a state actor—e.g., the availability of immunity⁵⁹—caution against the application of “expansive” constitutional remedies.⁶⁰ However, these objections have their own limitations—such as the suggested alternative remedies existing only as a function of legislative grace.⁶¹ For example, the proposal set forth herein could perhaps lay the foundation for challenging as state action a credit card company’s continued charging of high rates in the face of a consumer’s inability to declare bankruptcy pursuant to a law many argue the credit card companies helped draft that makes it harder for individuals to

⁵⁶ Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367, 1404-05 (2003).

⁵⁷ Cf., e.g., Kevin L. Cole, Federal and State “State Action”: The Undercritical embrace of a Hypercriticized Doctrine, 24 Ga. L. Rev. 327, 328-29 (1990) (“Coincidentally, just as the savaging of federal state-action doctrine reached its peak, the United States Supreme Court was perceived to waver in its commitment to protect individual rights through the federal constitution. Calls went out for state courts to take greater responsibility for the protection of individual rights through the interpretation of state constitutions. The result has been a renaissance in state constitutional law, a rediscovery of a device for protecting individual rights that had largely been ignored. . . . Nevertheless, state courts, with few exceptions, have embraced the state action requirement as a limitation on the reach of state constitutional provisions.”).

⁵⁸ Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367, 1404-05 (2003).

⁵⁹ Cf. Lugar at 942 n.23 (“Justice POWELL is concerned that private individuals who innocently make use of seemingly valid state laws would be responsible, if the law is subsequently held to be unconstitutional, for the consequences of their actions. In our view, however, this problem should be dealt with not by changing the character of the cause of action but by establishing an affirmative defense. A similar concern is at least partially responsible for the availability of a good-faith defense, or qualified immunity, to state officials.”).

⁶⁰ Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367, 1404-05 (2003) (“On this view, preserving a private actor’s nongovernmental status arguably better ensures accountability because it offers more opportunities for individuals to recover money damages, from which public entities and employees are frequently immune.”).

⁶¹ Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367, 1404-05 (2003) (“Yet caution is needed so as not to exaggerate the extent to which private law offers equivalent or greater protection of individuals’ rights than is available through constitutional means. Statutory and regulatory measures or contractual provisions may offer more extensive protections, but these protections exist as a matter of legislative or executive grace, and thus largely can be rescinded or limited where governments see fit.”).

seek bankruptcy protection.⁶² While Congress has recently sought to revisit this legislation, it took a financial crisis of global proportions to spur this action.⁶³ Thus, it should come as no surprise that I agree with Professor Metzger when she responds to these objections by asserting that “reexamining constitutional law's current approach . . . is at least as essential.”⁶⁴

A. *The State Action Doctrine*

The first section of the Fourteenth Amendment of the United States Constitution provides, among other things, that: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”⁶⁵ When the legislative or executive branches of government violate this provision, it falls to the courts to protect the fundamental rights of the people. As the Supreme Court stated in a related context, “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of

⁶² See Mechele Dickerson, Regulating Bankruptcy: Public Choice, Ideology, & Beyond, 84 Wash. U. L. Rev. 1861, 1861 (2006) (“For almost a decade, members of Congress fiercely debated legislation that would make it harder for people to discharge their debts in bankruptcy. The legislation was finally enacted on April 20, 2005, when the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) was signed into law. . . . [T]hroughout Congressional debates on the legislation, and even after BAPCPA was enacted, many argued that BAPCPA was written by, bought, and paid for by the consumer credit industry, especially the credit card industry.”).

⁶³ See Credit card reform should be priority, available at http://www.connpost.com/ci_11699919 (“Today, with the economy suffering one crisis after another, the legislative momentum has swung in the other direction. The Senate now is gearing up to pass legislation that would significantly curb the credit card industry's ability to go after customers, and would offer added protections for people who find themselves in trouble.”).

⁶⁴ Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367, 1372 (2003); *id.* at 1402 (“Immunity doctrines and the Court's growing reluctance to imply Bivens actions make obtaining damages for constitutional violations increasingly difficult. These barriers to damages may lead to underenforcement of constitutional norms, but the principle of effective constitutional accountability is preserved by the availability of injunctive and declaratory relief.”).

⁶⁵ U.S. Const. amend. XIV, § 1.

majorities and officials and to establish them as legal principles to be applied by the courts.”⁶⁶ As further noted by Wilson Huhn, “because the Constitution is regarded as law, the duty to enforce its prohibitions against state action is the responsibility of the courts.”⁶⁷

In judicial actions brought pursuant to the Fourteenth Amendment, the state action doctrine requires any claim alleging a violation of this provision to demonstrate the presence of state action.⁶⁸ In other words, the first section of the Fourteenth Amendment “erects no shield against merely private conduct, however discriminatory or wrongful.”⁶⁹ However, the Supreme Court has noted that “[w]hile the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is ‘private,’ on the one hand, or ‘state action,’ on the other, frequently admits of no easy answer.”⁷⁰ The issue can be generally described as whether the challenged conduct is “fairly attributable” to the state because of the “close nexus” between the private actor and the state.⁷¹

Determining whether state action is present for purposes of the Fourteenth Amendment is often fraught with difficulty because, at least in part, private action is always either legal or illegal—it is always either supported by the law or in opposition to it—and that characterization (and the concomitant benefits and burdens that flow from it)

⁶⁶ West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

⁶⁷ Wilson R. Huhn, The State Action Doctrine and the Principle of Democratic Choice, 34 Hofstra L. Rev. 1379, 1384-85 (2006).

⁶⁸ See Wilson R. Huhn, The State Action Doctrine and the Principle of Democratic Choice, 34 Hofstra L. Rev. 1379, 1384 (2006) (“The Constitution is based upon the once revolutionary but now commonplace idea that the people of this Nation are sovereign. . . . The state action doctrine emerges from and reinforces th[is] fundamental principle[] of American government, in that the doctrine requires government action to be subject to judicial review.”).

⁶⁹ Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

⁷⁰ Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-50 (1975).

⁷¹ See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) (“[W]e say that state action may be found if, though only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”).

come from the State. As Paul Brest puts it, “since any private action acquiesced in by the state can be seen to derive its power from the state, which is free to withdraw its authorization at will, positivism potentially implicates the state in every ‘private’ action not prohibited by law.”⁷² Thus, “[t]he argument that corporations are perfectly private fails, then, because it is the law . . . that determines for whom and for what ends corporations act.”⁷³

Another reason for the imprecision of the doctrine is the tension between protecting individual freedom to act while at the same time protecting the fundamental rights of other individuals from invasion. This tension may also be formulated as one between ensuring that government does not avoid its responsibilities while at the same time preserving individual liberty and notions of federalism. G. Sidney Buchanan describes this tension as a critical balancing act:

Why does the state action doctrine matter, and why does it merit the extensive attention it has received from courts and scholars? It matters because it is a core doctrine in our nation's constitutional framework. It is the tool with which the courts attempt to balance at least three competing interests: (1) individual autonomy--the individual's interest in preserving broad areas of life in which he or she can develop and act without being subjected to the restraints placed by the Constitution on government action, (2) federalism--the nation's interest in preserving the proper balance between state and national power, especially the power of states to determine, within generous limits, the extent to which regulatory power should be applied to private action, and (3) constitutional rights--the interest in protecting constitutional rights against invasion by

⁷² Paul Brest, State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks, 130 U. Pa. L. Rev. 1296, 1301 (1982).

⁷³ Daniel J.H. Greenwood, Markets and Democracy: The Illegitimacy of Corporate Law, 74 UMKC L. Rev. 41, 45 (2005).

government or by action fairly attributable to government.
74

Consequently, the state action doctrine has been described as “analytically incoherent,”⁷⁵ a “miasma,”⁷⁶ a “conceptual disaster area,”⁷⁷ and “somewhat of a mystery to law students, legal scholars, lawyers and judges.”⁷⁸

Despite these difficulties, the Supreme Court has over the years established a series of tests for determining when state action is present even though the challenged action is ostensibly carried out by a private actor. Under these tests, state action is present for purposes of the Fourteenth Amendment when: (1) instrumentalities of the State are used by the private actor to consummate the challenged act;⁷⁹ (2) the government coerces or encourages the private actor to take the challenged action;⁸⁰ (3) the private actor is performing a traditional or formerly exclusively public function;⁸¹ (4) the private actor is in a symbiotic relationship with the government;⁸² or, (5) the private

⁷⁴ G. Sidney Buchanan, A Conceptual History of the State Action Doctrine: The Search for Government Responsibility, 34 Hous. L. Rev. 333, 339-40 (1997).

⁷⁵ Gary Peller & Mark Tushnet, State Action and a New Birth of Freedom, 92 Geo. L.J. 779, 789 (2004).

⁷⁶ Alan R. Madry, State Action and the Due Process of Self-Help: Flagg Bros. Redux, 62 U. Pitt. L. Rev. 1, 2 (2000).

⁷⁷ Charles L. Black, Jr., Foreword: “State Action,” Equal Protection, and California’s Proposition 14, 81 Harv. L. Rev. 69, 95 (1967) (describing scholarly commentary on state action doctrine as “a torchless search for a way out of a damp echoing cave”).

⁷⁸ Wilson R. Huhn, The State Action Doctrine and the Principle of Democratic Choice, 34 Hofstra L. Rev. 1379, 1380 (2006).

⁷⁹ See, e.g., Shelley, 334 U.S. at 19-20 (holding that the enforcement of racially restrictive covenant by state court constitutes state action).

⁸⁰ See, e.g., Reitman v. Mulkey, 387 U.S. 369, 381 (1967) (“The California Supreme Court believes that the section will significantly encourage and involve the State in private discriminations. We have been presented with no persuasive considerations indicating that these judgments should be overturned.”).

⁸¹ See G. Sidney Buchanan, A Conceptual History of the State Action Doctrine: The Search for Government Responsibility, 34 HOUS. L. REV. 333, 359 (1997) (“Although earlier Court decisions created expectations of a fairly generous application of the public function technique, Court decisions in the 1970s and 1980s confined the technique to a narrow category of cases: those cases involving the ‘exercise by a private entity of powers traditionally exclusively reserved to the State.’ Thus restricted, the public function technique became a relatively impotent tool in the search for state action under the characterization model. [However], the public function technique has experienced a modest revival in Court decisions in the 1990s.”).

⁸² See, e.g., Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961) (“The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint

actor is controlled by, or entangled with, public officials in such a way that the private party's actions may be deemed those of the state.⁸³ While not a focus of this Article, there are also cases where an ostensibly private actor may simply not be a private actor at all—but rather “the government itself.”⁸⁴

In addition to the above, the Court has found state action under a totality-of-circumstances approach, recognizing that:

From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.⁸⁵

“While the justices of the Supreme Court still disagree about the nature and extent of government involvement that must be present before the actions of a private party will be construed as ‘state action,’”⁸⁶ it has been argued that the totality-of-circumstances

participant in the challenged activity, which, on that account, cannot be considered to have been so ‘purely private’ as to fall without the scope of the Fourteenth Amendment . . .”).

⁸³ See, e.g., Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 299-300 (2001) (“In sum, to the extent of 84% of its membership, the Association is an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling.”).

⁸⁴ Lebron v. National Railroad Passenger Corp., 513 U.S. 374, 378 (1995) (holding that Amtrak was a part of the government). Cf. Roberta S. Karmel, Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?, __ STANFORD JOURNAL OF LAW, BUSINESS, AND FINANCE __ (forthcoming); available at SSRN: <http://ssrn.com/abstract=1128329>, at 9-10 (“In order to meet the tests for categorizing a private corporation as a government entity after Lebron, courts have required the following: ‘[O]nly if (1) the government created the corporate entity by special law, (2) the government created the entity to further governmental objectives, and (3) the government retains permanent authority to appoint a majority of the directors of the corporation will the corporation be deemed a government entity for the purpose of the state action requirement.’”) (quoting Horvath v. Westport Library Ass'n, 362 F.3d 147, 153 (2d Cir. 2004)). This paper will not address how the arguments made herein should be applied to these types of enterprises.

⁸⁵ Brentwood Acad., 531 U.S. at 296.

⁸⁶ Wilson Ray Huhn, In Defense of the Roosevelt Court, 2 Fla. A&M L. Rev. 1, 46 (2007).

approach is most appropriate in light of the complexity of modern state/citizen interaction.⁸⁷ As Charles Black has written:

The commitment of the Court to a single and exclusive theory of state action, or to just five such theories, with nicely marked limits for each, would be altogether unprincipled, in terms of the most vital principle of all—the reality principle. It would fail to correspond to the endless variations not only of reality as presently given, but of reality as it may be manipulated and formed in the hands of people ruled by what seems to be one of the most tenacious motives in American life.⁸⁸

Ultimately, while I break down my arguments for finding state action in the case of new governance under “symbiotic relationship” and “public function/encouragement” headings, the critical reader should keep in mind that they may also be analyzed under a totality-of-circumstances approach—and may in fact fare best there.

In addition to the general tests set forth above, some specifically relevant factual issues have been decided. It appears quite clear that under the current formulation of the doctrine neither contracting with the government to provide public services,⁸⁹ nor being subject to government regulation,⁹⁰ nor being granted a potential monopoly,⁹¹ standing

⁸⁷ See Wilson R. Huhn, The State Action Doctrine and the Principle of Democratic Choice, 34 Hofstra L. Rev. 1379, 1393-94 (2006) (“Because the nature of government involvement in any particular case may arise in myriad forms resulting from different combinations of factors, the ‘totality of the circumstances’ test is more appropriate than the ‘rule-oriented approach’ for measuring whether private parties are engaged in state action.”) (internal footnotes omitted).

⁸⁸ Charles L. Black, Foreward: State Action, Equal Protection, and California’s Proposition 14, 81 Harv. L. Rev. 69, 90-91 (1967). Professor Black was referring to racism when he spoke of “one of the most tenacious motives in American life.” Perhaps in this age of corporate shenanigans we could use similar language to speak of greed.

⁸⁹ See Rendell-Baker v. Kohn, 457 U.S. 830, 840-41 (1982) (“The school, like the nursing homes, is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government. Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.”).

⁹⁰ See Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974) (“The mere fact that a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment. Nor does the fact that the regulation is extensive and detailed, as in the case of most public utilities, do so.”) (citations omitted).

alone, is sufficient to constitute state action. In addition, the public function test is not satisfied unless the function performed by the private actor is one traditionally or exclusively performed by the government.⁹²

These guidelines obviously pose significant obstacles to the argument set forth here that the grant of limited liability, together with acts of governing via new governance, should constitute state action. However, I will argue that when viewed from the proper perspective the novel phenomenon of new governance satisfies both the symbiotic relationship and the public function/encouragement tests.⁹³ And even if expansion of the doctrine is required, the support for that expansion can be found, at least in part, in the failure of the democratic process to rein in governance by corporations.

As the Supreme Court has said, “If the Fourteenth Amendment is not to be displaced . . . its ambit cannot be a simple line between States and people operating outside formally governmental organizations.”⁹⁴ Furthermore, “[d]etermining constitutional claims on the basis of . . . formal distinctions, which can be manipulated largely at the will of the government agencies concerned . . . is an enterprise that [the

⁹¹ See Jackson v. Metro. Edison Co., 419 U.S. 345, 351-52 (1974) (“As a factual matter, it may well be doubted that the State ever granted or guaranteed Metropolitan a monopoly. But assuming that it had, this fact is not determinative in considering whether Metropolitan's termination of service to petitioner was ‘state action’ for purposes of the Fourteenth Amendment.”). But cf. id. at 350-51 (“It may well be that acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be ‘state’ acts than will the acts of an entity lacking these characteristics.”).

⁹² See, e.g., Metropolitan at 352-53 (“If we were dealing with the exercise by Metropolitan of some power delegated to it by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one.”). Cf. Megan M. Cooper, Dusting Off the Old Playbook: How the Supreme Court Disregarded the Blum Trilogy, Returned to Theories of the Past, and Found State Action Through Entwinement in Brentwood Academy v. Tennessee Secondary School Athletic Ass’n, 35 Creighton L. Rev. 913, 956 (2002) (“[I]n Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991)], the Court discarded the public function test's exclusivity requirement and reasoned that state action existed when a private litigant performed a traditional state function.”) (citing G. Sidney Buchanan, A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility (pt. 2), 34 Hous. L. Rev. 665, 758 (1997)).

⁹³ I will be combining the public function and encouragement analysis because the two are inseparably intertwined where, as here, it is argued that what the State encourages itself a public function.

⁹⁴ Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

Court has] consistently eschewed.”⁹⁵ Thus, it is to the substance of new governance and how it implicates state action that we turn next.

B. *Why the Grant of Limited Liability plus the Exercise of Governance Power Should Constitute State Action*

Arguing that a combination of the granting of limited liability and the foreseeable use of that grant by corporate actors to effectuate governance should constitute state action under the current state action doctrine may seem contrary to existing law. For example, in Jackson v. Metropolitan Edison Co.,⁹⁶ the Supreme Court held that a public utility’s failure to provide notice and a hearing before shutting off a customer’s electricity did not run afoul of Fourteenth Amendment because there was no state action despite the fact that the utility was heavily regulated and had been granted a partial monopoly by the state.⁹⁷ Similarly (for purposes of this Article), in Flagg Bros., Inc. v. Brooks, the Court held that there was no state action involved where a corporate warehouseman sold plaintiffs’ possessions pursuant to the self-help provisions of New York’s commercial code.⁹⁸ But what if the facts of those cases were slightly altered? What if it had been shown that Metropolitan Edison acted under a regulation that it had directly influenced via extensive lobbying? Or, what if it had not managed to get the regulation drafted as favorably as it might have liked but instead was able to interpret ambiguities (or perhaps even violate express provisions) in the regulation in its favor in cases such as these on the

⁹⁵ Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 679 (1996).

⁹⁶ 419 U.S. 345 (1975).

⁹⁷ *Id.* at 358-59.

⁹⁸ 436 U.S. 149 (1978); see Alan R. Madry, State Action and the Due Process of Self-Help: Flagg Bros. Redux, 62 U. Pitt. L. Rev. 1, 2 (2000) (“Flagg Bros., Inc. v. Brooks was a minor watershed for the recently constituted Burger-Rehnquist Court. In that single decision in 1978, the Court . . . constricted one of the more powerful legal tools of the civil rights movement, the state action doctrine . . .”).

basis of a “wink-and-nod” relationship with the regulators?⁹⁹ Such alterations in the facts of Jackson and Flagg Bros. should allow for additional state action arguments.

It might be argued that Metropolitan Edison did in fact address the new governance issue when the Court “reject[ed] the notion that Metropolitan's termination is state action because the State ‘has specifically authorized and approved’ the termination practice.”¹⁰⁰ However, there are at least three reasons why that decision should not be read so broadly. First, while Justice Douglas asked in dissent whether a utility may “have complete immunity under federal law when the State allows it [sic] regulatory agency to become the prisoner of the utility,”¹⁰¹ the majority did not directly address this question of capture that lies at the heart of much of the concern regarding new governance. Second, the majority made a point of noting that “Metropolitan had th[e] right at common law [to take the action complained of] before the advent of regulation.”¹⁰² Again, this may be a fact that distinguishes Metropolitan Edison from the types of cases that could arise under the proposal advanced in this Article. Third, the Court in Metropolitan Edison contrasted that case with Public Utilities Comm'n v. Pollak,¹⁰³ wherein the state placed its “imprimatur” on the corporation’s actions when:

The District of Columbia Public Utilities Commission, on its own motion, commenced an investigation of the effects of the piped music, and after a full hearing concluded not

⁹⁹ Cf. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 301 n.4 (2001) (“The significance of winks and nods in state-action doctrine seems to be one of the points of the dissenters' departure from the rest of the Court. . . . But if formalism were the sine qua non of state action, the doctrine would vanish owing to the ease and inevitability of its evasion, and for just that reason formalism has never been controlling.”).

¹⁰⁰ Metropolitan Edison, at 354.

¹⁰¹ Metropolitan Edison at 359 (Douglas, J., dissenting); see also id. at 363-64 (Douglas, J., dissenting) (“One has only to peruse the 84-part Utility Corporations Report by the Federal Trade Commission (under the direction of its able counsel the late Robert E. Healy) to realize that state regulation of utilities has largely made state commissions prisoners of the utilities.”).

¹⁰² Id. at 354, n.11.

¹⁰³ 343 U.S. 451 (1952).

only that Capital Transit's practices were “not inconsistent with public convenience, comfort, and safety,” but also that the practice “in fact, through the creation of better will among passengers, . . . tends to improve the conditions under which the public ride.”¹⁰⁴

Pollack arguably comes closer to the new governance fact pattern than Metropolitan Edison, and the Pollack Court did find state action in that case, at least for the purposes of resolving the First Amendment question raised therein.¹⁰⁵ Furthermore, if Metropolitan Edison had directly addressed the issue of new governance as state action, it is highly doubtful that G. Sidney Buchanan would have asked years later: “If a private actor desires a state actor to engage in certain action, under what circumstances will the state actor's compliance with that desire convert the private actor into one who has acted jointly with the state?”¹⁰⁶

Regardless, in this section, four reasons will be set forth supporting the conclusion state action should be deemed present when the grant of limited liability is leveraged to effect new governance. First, the state and its corporations are entwined in a symbiotic relationship. This is so because (a) there is no corporation without the state (contractarian assertions to the contrary notwithstanding)¹⁰⁷ and (b) the state benefits

¹⁰⁴ Metropolitan Edison at 356-57 (internal citation omitted).

¹⁰⁵ Compare Metropolitan Edison at 356 (“It is not entirely clear whether the Court alternatively held that Capital Transit's action was action of the ‘State’ for First Amendment purposes, or whether it merely assumed, arguendo, that it was and went on to resolve the First Amendment question adversely to the bus riders.”), with id. at 371, n.3 (Marshall, J., dissenting) (“I cannot accept the majority's characterization of Pollack as not necessarily deciding the state-action question there presented. Whatever doubt on that score may have been created by the original opinion has long since been resolved by this Court.”) (citing Evans v. Newton, 382 U.S. 296, 301 (1966); id., at 319-320 (Harlan, J., dissenting); Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94, 119 (1973) (opinion of Burger, C.J.); id., at 133 (Stewart, J., concurring)).

¹⁰⁶ G. Sidney Buchanan, A Conceptual History of the State Action Doctrine: The Search for Government Responsibility, 34 Hous. L. Rev. 333, 410 (1997); see also id. (“[T]his is one of those difficult questions of degree and almost certainly relates, as urged in the Tarkanian dissent, to the degree of compliance leverage that the private actor enjoys over the state actor.”) (citing NCAA v. Tarkanian, 488 U.S. 179 (1988)).

¹⁰⁷ See Stefan J. Padfield, In Search of a Higher Standard: Rethinking Fiduciary Duties of Directors of Wholly-Owned Subsidiaries, 10 FORDHAM J. CORP. & FIN. LAW 79, 95-96 (2004) (hereinafter Padfield,

from the granting of corporate status. The symbiotic nature of the relationship rests upon the state's receipt of substantial revenue in exchange for access to a unique and powerful capital accumulation device.¹⁰⁸ Second, the leveraging of the grant of limited liability to engage in governance has been forecast by many for quite some time and is thus a foreseeable consequence of granting a corporate charter. The engagement of the State in this relationship in the face of its foreseeable consequences constitutes encouragement of conduct (governing) that is "traditionally the exclusive prerogative of the state"¹⁰⁹ and thus state action. Third, the state action doctrine in particular, and the judiciary in general, is the proper focus of regulation of these pseudo-governmental actors because of the risk that the democratic process has broken down vis-à-vis these entities. And finally, the history of the state action doctrine clearly demonstrates that the doctrine is flexible enough to accommodate the additional variable proposed herein. Obviously, while the first two arguments set forth here—covering symbiotic relationship and encouragement of a public function—will be treated in isolation, they are also capable of being considered jointly under a totality of circumstances analysis. In fact, the totality of circumstances analysis is arguably ultimately the best lens through which to view the arguments made herein. For example, it is not argued that the grant of limited liability,

Higher Standard) 95-96 ("Contractarians believe that 'the corporation is a set of contracts among the participants in the business, including shareholders, managers, creditors, employees and others. . . . The policy implication is that private parties to the corporate contract should be free to order their affairs in whatever manner they find appropriate.' They believe that the entity theory of the corporation is no longer valid, and thus the state's prerogative to mandate duties beyond those the contracting parties would have agreed to had they negotiated the matter is severely limited at best.") (quoting Henry N. Butler & Larry E. Ribstein, Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians, 65 Wash. L. Rev. 1, 7-8 (1990)).

¹⁰⁸ See Padfield, Higher Standard, at 79, 89 ("It is important to note here (and should be obvious upon reflection) that the State did not grant limited liability to shareholders or immortality to the corporate entity merely out of a benevolent desire solely to increase the wealth of shareholders. Rather, the State saw that its interests as sovereign, whether building specific pieces of infrastructure or promoting economic growth generally, could be furthered via the corporate form.").

¹⁰⁹ Metropolitan Edison, at 353.

standing alone, suffices for a finding of state action. Rather, it is the leveraging of that grant to effect governing which implicates state action.¹¹⁰

1. *There is a Symbiotic Relationship between the States and Their Corporations*

In Burton v. Wilmington Parking Authority, the Supreme Court, in finding that the discriminatory practices of a restaurant leasing space in a government building constituted state action, stressed that the profits of the business and the State's financial position were intertwined.¹¹¹ However, such a financially symbiotic relationship arguably exists between every State and its corporations. For example, David Porter, Vice Chair of the Corporation Law Committee of the Ohio State Bar Association, notes that "Ohio's corporations . . . are given their charter by the State for the benefit of the State The perceived connection between corporations that are organized in Ohio . . . and the Ohio economy has led the Ohio legislature to provide strong anti-takeover statutes to protect them."¹¹² Furthermore, in seeking to improve their financial position, States have continuously and systematically reduced their oversight of these corporations.¹¹³ This in the face of repeated warnings that these corporate creatures of

¹¹⁰ Cf. Metropolitan Edison, at 358 (declining to find state action despite the fact that "[i]n common with all corporations of the State [defendant corporation] pays taxes to the State"); San Francisco Arts & Athletics, 483 U.S. at 543-44 (congressional grant of corporate charter does not equate corporate action with state action).

¹¹¹ See Rendell-Baker v. Kohn, 457 U.S. 830, 842-43 (1982) ("The [Burton] Court stressed that the restaurant was located on public property and that the rent from the restaurant contributed to the support of the garage. In response to the argument that the restaurant's profits, and hence the State's financial position, would suffer if it did not discriminate, the Court [in Burton] concluded that this showed that the State profited from the restaurant's discriminatory conduct. The Court viewed this as support for the conclusion that the State should be charged with the discriminatory actions.").

¹¹² David Porter, Competing with Delaware: Recent Amendments to Ohio's Corporate Statutes, 40 AKRON L. REV. 175, 185 (2007).

¹¹³ Cf. Liggett Co. v. Lee, 288 U.S. 517, 599 (1933) (Brandeis, J., dissenting) ("The race [for corporate charters] was one not of diligence but of laxity."); William L. Cary, Federalism and Corporate Law: Reflections upon Delaware, 83 Yale L.J. 663, 663 (1974) ("Delaware is both the sponsor and the victim of a system contributing to the deterioration of corporation standards. This unhappy state of affairs, stemming in great part from the movement toward the least common denominator, Delaware, seems to be developing on both the legislative and judicial fronts."). But cf. William J. Carney & George B. Shepherd, The Mystery of Delaware Law's Continuing Success, 2009 U. Ill. L. Rev. 1, 1-2 (2009) ("Ralph Winter

the State will one day seek to swallow their creator.¹¹⁴ When, then, this conflict of interest between the State's financial well-being and its duty to protect its individual citizens is resolved in favor of corporate interests and results in injury to the citizen—it seems only fair to attribute the injury to state action.¹¹⁵ This is so even though, on the surface, the State appears not to be acting at all.¹¹⁶

a. *There Is No Corporation without the State*

“[I]n the beginning, everyone understood that corporations were somewhat sovereign.”¹¹⁷ As Allison Garrett notes, “Many of the earliest corporations were granted charters from the Crown that made them both corporations and political entities. The corporate form was not widely available and these charters were granted on an ad hoc basis, often in accord with the ebb and flow of political expediency.”¹¹⁸

The story told today is that since corporate status is generally available and alternate entities are growing more and more prevalent the role of the state in corporate theory is negligible. The wide acceptance of this story has been fueled by contractarians espousing a classical liberalism that seemingly esteems freedom of contract over all other

responded by arguing that Delaware's gains could not come at the expense of investors, given the efficiency of capital markets.”) (citing Ralph K. Winter, Government and the Corporation (1978); Ralph K. Winter, Jr., State Law, Shareholder Protection, and the Theory of the Corporation, 6 J. Legal Stud. 251 (1977)).

¹¹⁴ See Charles Francis Adams, A Chapter on Erie, in An Autobiography [xx] (1916) (“Modern society had created a class of artificial beings who bid fair soon to be the masters of their creator.”).

¹¹⁵ Cf. Metropolitan at 363-64 (Douglas, J., dissenting) (“Section 1983 was designed to give citizens a federal forum for civil rights complaints wherever, by direct or indirect actions, a State, acting ‘in cahoots’ with a private group or through neglect or listless oversight, allows a private group to perpetrate an injury.”).

¹¹⁶ Cf. Metropolitan at 369 n.2 (Marshall, J., dissenting) (“In Burton v. Wilmington Parking Authority, the Court noted that by its inaction, the State had “elected to place its power, property and prestige behind the admitted discrimination,” although the State did not actually order the discrimination.”); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 949-50, 951 (1991) (finding state action in use of peremptory challenges over dissent by Justice Powell (joined by Justice Rhenquist and Justice O’Connor) that stressed government must be responsible for specific challenged conduct and simply providing mechanism that private actors utilize does not constitute state action).

¹¹⁷ Daniel J.H. Greenwood, The Semi-Sovereign Corporation 2-3 (University of Utah Legal Studies Research Paper Series, Paper No. 05-04, 2005), available at <http://ssrn.com/abstracts=757315>.

¹¹⁸ Allison D. Garrett, The Corporation as Sovereign, 60 Me. L. Rev. 129, 133 (2008).

considerations.¹¹⁹ However, this marginalization of the state in discussions of theory of the corporation is incorrect both from a positive as well as normative perspective. As Arthur Jacobson writes, “associations, from agency to corporation, cannot be understood simply as instances of contract. To reduce associations to contract, one must either transform the traditional doctrine of contracts, or obliterate certain doctrines characteristic of the law of associations.”¹²⁰ Or, perhaps one needs to recognize that the state is one of the parties to the corporate contract with interests beyond merely providing gap-filler rules to effectuate as nearly as possible the intent of the corporate managers and shareholders.

Adolf Berle seemingly explains the marginalization of the state in the theory of the corporation at least partly as a function of the coincidence of the death of special charters occurring before the birth of corporate power as we know it today, which allowed the notion of the purely private corporation to flourish:

Had the question come up, let us say, in 1800, when there were only 300 recorded corporations in the United States, all of which derived their authority from the states or predecessor colonies, the lawyer arguing that they were purely private and, because private, not within the scope of constitutional limitations on governmental action would have had the difficult side of the argument. The case would have been otherwise in the latter part of the nineteenth century. By this time, the long battle had been fought about and against specially chartered corporations. . . . Courts continued to insist that ultimate control over and responsibility for the administration and functioning of the corporation remained with the state because the corporation's existence and functioning was an exercise of

¹¹⁹ Cf. Daniel J.H. Greenwood, Markets and Democracy: The Illegitimacy of Corporate Law, 74 UMKC L. Rev. 41, 51 (2005) (noting that “[s]ince corporations [in the contractual model] appear purely voluntary, the appropriate role of the state is merely to enforce private agreements,” and then setting forth reasons why “[t]he model of corporate law as contract is misleading on several levels”).

¹²⁰ Arthur J. Jacobson, The Private Use of Public Authority: Sovereignty and Associations in the Common Law, 29 Buff. L. Rev. 599, 602 (1980).

the sovereign political power of the state itself. But, absent any economic power seriously to invade individual life, it is not surprising that the constitutional question lay dormant.¹²¹

However this constitutional question may have been addressed in the interim, the emergence of new governance justifies a reexamination.¹²²

By granting limited liability to shareholders and immortality to the corporate entity, the legal act of incorporation bestows “upon corporations and their shareholders a privilege against the rest of the world that they could not obtain under the usual rules of property, contract, and tort.”¹²³ This makes “capital formation easier and more accessible” and “facilitat[es] the expansion of private enterprise.”¹²⁴ Obviously, this dependence of the corporation on the state is significant, since it highlights the prominence of state action in incorporation. As Arthur J. Jacobson argues, “The law of associations, I contend, can properly be understood only as a distribution of sovereignty to private persons beyond the precincts of the state apparatus.”¹²⁵

b. *The State Benefits by Granting Corporate Charters*

The conclusion that there is no corporation without the state makes only half the symbiotic relationship argument—the other half comes from the fact that the state benefits from granting that corporate status. This is most easily demonstrated by the

¹²¹ Adolf A. Berle Jr., Constitutional Limitations of Corporate Activity-Protection of Personal Rights from Invasion Through Economic Power, 100 U Pa. L. Rev. 933, 946 (1952).

¹²² Cf. Shelley at 20 (“State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms.”).

¹²³ Richard Epstein, Bargaining with the State 107 (Princeton Univ. Press 1993). See also Daniel J.H. Greenwood, Markets and Democracy: The Illegitimacy of Corporate Law, 74 UMKC L. Rev. 41, 59 (2005) (“In my view, publicly traded corporations are far more analogous to government than to citizen. Like governments, they are basically bureaucratic enterprises performing a mission that may be given to them in some loose sense by the population as a whole, but which permits plenty of room for independent and potentially heavy-handed action.”).

¹²⁴ Verkuil, Outsourcing Sovereignty at 83.

¹²⁵ Arthur J. Jacobson, The Private Use of Public Authority: Sovereignty and Associations in the Common Law, 29 Buff. L. Rev. 599, 600 (1980).

presence of a generally-accepted “race” between the states for corporate charters.¹²⁶ The most obvious explanation for this race can be seen in the impact revenues collected by a state like Delaware (generally considered the leader in this race) have upon its budget.¹²⁷ “The theory is that the state through its corporation laws is seeking to promote commercial activity and general economic welfare.”¹²⁸

While Delaware is the current consensus front-runner in this race, New Jersey did strive for the early lead when, in the late 1800s, James Dill suggested to the governor of New Jersey that liberalizing the corporation laws was “the best way to increase the financial resources of the state.”¹²⁹ And, this competition for corporate charters continues—suggesting the benefit states derive from granting corporate charters

¹²⁶ Whether this race is to the bottom or top is beyond the scope of this Article. Cf. Kresimir Pirsli, Trends, Developments, and Mutual Influences Between United States Corporate Law(s) and European Community Company Law(s), 14 Colum. J. Eur. L. 277 (2008).

The academic debate seems to have been won by the “race to the top” proponents who conceive of a corporation as a “nexus of contracts,” not as a legal entity with rights and responsibilities like those of a natural person. . . . Yet the progressives claim that the nexus-of-contracts paradigm does not reflect “a positive account of economic reality”; it is simply a model and serves as a better metaphor than any of the alternatives offered. . . . The middle-of-the-road approach is that an overlapping federal and state regulation of public corporations and the absence of any delineation between corporate and securities laws make it impossible to proclaim either side the winner of the debate.

Id. at 315 (internal citations omitted).

¹²⁷ See Michal Barzuza, Delaware’s Compensation, 94 VA. L. REV. 521, 524-25 (2008) (“Delaware’s revenue from providing incorporation services, collected primarily through an annual franchise tax imposed on firms incorporated in the state, comprises approximately twenty percent of its annual tax revenue and translates annually to \$3,000 per family of four). Cf. Daniel J.H. Greenwood, Markets and Democracy: The Illegitimacy of Corporate Law, 74 UMKC L. Rev. 41, 57 (2005) (“Corporations are not humans or ends in themselves. They are tools for our economic advancement . . .”).

¹²⁸ Adolf A. Berle Jr., Constitutional Limitations of Corporate Activity-Protection of Personal Rights from Invasion Through Economic Power, 100 U Pa. L. Rev. 933, 946 n.23 (1952) (citing Morris v. Public Utilities Co., 122 Atl. 696 (Del. Ch. 1923)).

¹²⁹ Dan Ernst, James Dill: Corporation Law without Regret (June 20, 2008) available at <http://legalhistoryblog.blogspot.com/2008/06/james-dill-corporation-law-without.html>.

continues to be greatly valued. In recent years, Ohio,¹³⁰ North Dakota,¹³¹ and Nevada¹³² (just to name a few) have all made changes to their corporate codes in an effort to attract more business.

The fact that the state benefits from granting corporate charters, combined with the corporation's dependence on state-granted limited liability (and other unique benefits of corporate status), suggests a symbiotic relationship between the state and the private corporation that is relevant to state action doctrine analysis under current precedents. Again, in Burton the Supreme Court relied on the fact that the corporation profited from the challenged conduct in that case and that such profits "not only contribute to, but also are indispensable elements in, the financial success of a governmental agency."¹³³

2. *Governance by Corporations (an Exclusively Public Function) is Foreseeable and Encouraged by the State*

Almost from the time of the birth of the modern corporation there have been many voices loudly proclaiming that the accumulation of power that the corporate vehicle promised posed a threat to the people.¹³⁴ As Timothy K. Kuhner notes, "Those of us

¹³⁰ See David Porter, Competing with Delaware: Recent Amendments to Ohio's Corporate Statutes, 40 AKRON L. REV. 175, 175 (2007) ("In October 2006, Ohio House Bill 301 became law, amending Ohio's corporation and other business entity statutes as part of a continuous effort to keep those statutes modern and to maintain Ohio's competitiveness as a business domicile.").

¹³¹ See Larry Ribstein, The North Dakota Experiment, available at <http://blogs.law.harvard.edu/corpgov/2007/04/23/the-north-dakota-experiment/> (April 23, 2007) ("Last week the North Dakota Legislature adopted the North Dakota Publicly Traded Corporations Act. . . . ND qualifies as a legitimate competitor in one way: it will make the kind of money from the incorporation business (\$60 per 10,000 shares of capital stock, and up to \$80,000 per year from each firm, according to Section 10-35-28) that should give it a Delaware-type incentive to 'bond' it to maintaining and developing its law.").

¹³² See Keith Bishop, United States: California, Delaware or Nevada - Choosing Where to Incorporate, available at <http://www.mondaq.com/article.asp?articleid=57652> (Feb. 25, 2008) ("In the last few years, the State of Nevada has tried to compete with Delaware as the state in which to incorporate. In many instances, Nevada has tried to adopt Delaware's positive corporate laws and take them one step further. Thus, in many ways, Nevada can be viewed as Delaware 'on steroids.'").

¹³³ Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961).

¹³⁴ See Christopher M. Bruner, The Enduring Ambivalence of Corporate Law, 59 Ala. L. Rev. 1385, 1389 n.16 ("Early American cases involving corporations in fact note the lack of 'body' and 'soul' (discussing

concerned with the problem of corporations in politics can rest assured, we are in good company.”¹³⁵ These voices include U.S. Presidents like Thomas Jefferson, who urged citizens to “crush in its birth the aristocracy of our monied corporations which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country”;¹³⁶ Abraham Lincoln, who wrote that “corporations have been enthroned and an era of corruption in high places will follow,” and predicted that “the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed”;¹³⁷ and Dwight D. Eisenhower, who warned us to “guard against the acquisition of unwarranted influence . . . by the military industrial complex.”¹³⁸ President Rutherford B. Hayes went so far as to assert that, “This is a government of the people, by the people and for the people no longer. It is a government of corporations, by corporations and for corporations.”¹³⁹ And, while perhaps not “good company” to some, Karl Marx was one of the early thinkers who “cautioned that the concentration of wealth in corporate hands would subjugate the law to private control.”¹⁴⁰ Furthermore, the concerns raised by these

the views of Coke and Blackstone) in casting aspersion on corporations' regard for the social good.”). Cf. Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* 56-59 (2004) (applying psychiatric analysis and concluding corporations satisfy criteria for psychopaths).

¹³⁵ Timothy K. Kuhner, *The Separation of Business and State*, 95 CAL. L. REV. 2353, 2366 (2007).

¹³⁶ Letter from Thomas Jefferson to Tom Logan (Nov. 12, 1816), reprinted in 10 *The Writings of Thomas Jefferson* 69 (Paul L. Ford ed., G.P. Putnam's Sons 1892-1899).

¹³⁷ Letter from Abraham Lincoln to William F. Elkins (Nov. 21, 1864), in 2 Emanuel Hertz, *Abraham Lincoln: A New Portrait* 954 (1931).

¹³⁸ Dwight D. Eisenhower, President, *Farewell Radio and Television Address to the American People* (Jan. 17, 1961), in *Pub. Papers* at 421).

¹³⁹ John Micklethwait & Adrian Woolridge, *The Company: A Short History of a Revolutionary Idea* xiv (Modern Library, 2003) (quoting President Rutherford B. Hayes).

¹⁴⁰ See Peek, *Corporate Power* at n.163 (“Writing in the early 1960s, Chicago-school free market economists reached the same conclusion, developing what has come to be called the ‘capture theory’ of regulation.”) (citing Daniel T. Ostas, *Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory*, 38 Am. Bus. L. J. 261, 269 (2001)).

individuals in earlier years have certainly not abated.¹⁴¹ Seemingly, they find their fulfillment in the modern phenomenon of new governance—which arguably constitutes de facto legislating by private actors.¹⁴²

This act of (effectively) legislating is of such magnitude that it should easily satisfy the public function test. If running a prison can be a public function under the state action doctrine, then surely de facto legislating should also be a viable candidate for such a designation.¹⁴³ As Gillian E. Metzger writes, “Identifying what constitutes government power is a notoriously hazardous enterprise, and little agreement exists on where the boundaries of government power as opposed to private power lie.”¹⁴⁴ However, “[f]ew deny that private prisons are wielding government power When private regulators determine the content and enforcement of standards governing a field of activity, their decisions similarly represent government power in the form of nonconsensual exercises of authority over others.”¹⁴⁵ One could also argue that at least some of the confusion concerning the private/public status of self-regulatory organizations (SROs) in the securities area may be cleared up by focusing on this issue of

¹⁴¹ Cf. Timothy K. Kuhner, The Separation of Business and State, 95 CAL. L. REV. 2353, 2353, 2386 (2007) (“This Essay recasts the phenomenon of money in politics as a separation problem--that is, a problem of the private sphere of business overreaching into the public sphere of governance; in short, excessive entanglement. . . . The separation of business and state stands as the unfinished legacy of the Constitution.”).

¹⁴² Cf. Pollak at n.8 (“(W)hen authority derives in part from Government's thumb on the scales, the exercise of that power by private persons becomes closely akin, in some respects, to its exercise by Government itself.”) (quoting American Communications Ass'n v. Douds, 339 U.S. 382, 401, 70 S.Ct. 674, 685, 94 L.Ed. 925”).

¹⁴³ See Rosborough v. Mgmt. & Training Corp., 350 F.3d 459, 461 (5th Cir.2003) (“In Skelton v. Pri-Cor, Inc., the Sixth Circuit, relying on . . . Supreme Court precedents, held that a private company administering a state corrections facility could be sued under § 1983. The Sixth Circuit found determinative the fact that the corporation was ‘performing a public function traditionally reserved to the state.’”) (quoting Skelton v. Pri-Cor, Inc., 963 F.2d 100, 102 (6th Cir.1991)).

¹⁴⁴ Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367, 1396-97 (2003) (citing David M. Lawrence, Private Exercise of Governmental Power, 61 Ind. L.J. 647, 48 (1986) (“Accepting some fuzziness at the edges, we do recognize certain powers as essentially governmental: rulemaking, adjudication of rights, seizure of person or property, licensing and taxation.”)).

¹⁴⁵ Id.

governance.¹⁴⁶ In at least some cases where “SRO rules were essentially treated as SEC rules . . . the SROs were . . . essentially regarded as state actors.”¹⁴⁷

In Flagg Bros., Justice Rhenquist limited the availability of the public function test to cases involving functions “exclusively reserved to the State.”¹⁴⁸ While this severely limits the functions that may be deemed “public” for purposes of the state action doctrine, adopting “binding rules of general applicability”¹⁴⁹ (i.e., legislating) should fill the bill no matter how narrow the test. As Laurence Tribe has written, “The judicial hostility to private lawmaking represents a persistent theme in American constitutional law.”¹⁵⁰ This should be particularly so in the case of new governance because, as alluded to above, it is a foreseeable consequence of the states’ granting of limited liability, “immortality,” and the other benefits of corporate status, together with (as will be discussed shortly) the state-sanctioned emphasis on profit-maximization.

Thus, the grant of corporate status should come with a type of “non-delegable duty” on the part of the state to ensure the power to govern is not co-opted. By making this statement, I do not mean to implicate the non-delegation doctrine. The role of non-delegation doctrine in new governance is beyond the scope of this Article. The focus of that doctrine is more on overt delegations, and even then the doctrine appears to have a

¹⁴⁶ See Donna M. Nagy, Playing Peekaboo with Constitutional Law: The PCAOB and its Public/Private Status, 80 Notre Dame L. Rev. 975, 1035 n.345 (2005) (“Not surprisingly, in the context of constitutional challenges to conduct by securities industry SROs, traditional state action analysis has produced results that are difficult to reconcile.”) (citing cases).

¹⁴⁷ Roberta S. Karmel, Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?, __ STANFORD JOURNAL OF LAW, BUSINESS, AND FINANCE __ (forthcoming); available at SSRN: <http://ssrn.com/abstract=1128329>, at 45.

¹⁴⁸ 436 U.S. at 158.

¹⁴⁹ Alan R. Madry, State Action and the Due Process of Self-Help: Flagg Bros. Redux, 62 U. Pitt. L. Rev. 1, 21 (2000) (“Presumably, the exclusive prerogative of the sovereign extends only to the power to adopt binding rules of general applicability and to declare taxes to support public programs.”).

¹⁵⁰ Laurence H. Tribe, American Constitutional Law 993 (3d ed., West 1999).

very limited role.¹⁵¹ Since lack of accountability is arguably the main problem presented by new governance, one could view the proposal set forth in this Article as being at least in part designed to force new governance into the sunlight. Once there, current non-delegation doctrine arguably protects private actors from many of the “inefficiency” concerns raised by my proposal.¹⁵² For example, some legitimate attempts to influence government could be funneled into processes regulated by the Federal Advisory Committee Act (“FACA”), which “aims to keep Congress and the public informed about the number, purpose, membership, and activities of groups established or utilized to offer advice or recommendations to the President or to officers or employees of the federal government.”¹⁵³

As G. Sidney Buchanan notes, when the public function test is satisfied government is required “to do one of two things: (1) withdraw the delegation, or (2)

¹⁵¹ See Roberta S. Karmel, Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?, __ STANFORD JOURNAL OF LAW, BUSINESS, AND FINANCE __ (forthcoming); available at SSRN: <http://ssrn.com/abstract=1128329>, at 8-9 (“In theory, the government cannot delegate its power to a private standard setting body, but there have been no cases striking down legislation on non-delegation grounds since the mid-1930s. Although some academics have argued for a resuscitation of the non-delegation doctrine, the Supreme Court has preferred to invoke the separation of powers doctrine or other principles when non-delegation has been invoked. Generally courts have upheld legislation delegating governmental power to administrative agencies on the ground that an intelligible principle is laid down in the statute for the agency to follow.”); Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367, 1411, 1419 (2003) (“In terms of federal constitutional law, private delegation doctrine represents the road not taken. While there have been occasional hints of constitutional restrictions on private delegations, the nature and scope of such potential restrictions remain largely unexplored. . . . To the extent that consideration of whether the government has delegated authority exists, it usually arises in determining whether the public function test is satisfied.”).

¹⁵² Cf. Louis L. Jaffe, Law Making by Private Groups, 51 Harv. L. Rev. 201, 220-21(1937) (“Participation in law-making by private groups under explicit statutory ‘delegation’ does not stand then in absolute contradiction to the traditional process and conditions of law-making; it is not incompatible with the conception of law. It exposes and brings into the open, it institutionalizes a factor in law-making that we have, eagerly in fact, attempted to obscure.”).

¹⁵³ Steven Croley & William Funk, The Federal Advisory Committee Act and Good Government, 14 Yale J. on Reg. 451, 452,453 (1997) (“[T]he FACA was designed to formalize and routinize what was already an age-old institution, in part out of concern that some interests had come to enjoy unchecked and perhaps illicit access to federal executive decisionmakers.”). Cf. Charles H. Koch, Jr., 1 Admin. L. & Prac. § 3.62 (2d ed.) (“Arguments based on the constitutional right to petition the government have not impressed the courts. Despite the fact that FACA will often have a ‘chilling effect’ on parties who opt to petition the government, courts have found that the First Amendment does not guarantee the right to communicate with the government in any form. Thus the government is free to regulate the manner of petition.”).

compel the private actor to conform its actions to the requirements of the Constitution as they apply to governmental action.”¹⁵⁴ This result is consistent with the thinking of commentators like Adolf A. Berle Jr., who opined that (as noted in the Introduction), “[i]mplicitly, it would seem, state action in granting a corporate charter assumes that the corporation will not exercise its power (granted in theory at least to forward a state purpose) in a manner forbidden the state itself,”¹⁵⁵ and Erwin Chemerinsky, who has written that “the concentration of wealth and power in private hands, for example in large corporations, makes the effect of private actions in certain cases virtually indistinguishable from the impact of government conduct,” and that therefore, “states could be required in chartering corporations or granting licenses to insist that the private entity refrain from infringing on constitutional liberties.”¹⁵⁶

The attribution of private corporate conduct to the State argued for here is further supported by the fact that current corporate law doctrine mandates that corporate managers pursue the accumulation of power and wealth for the benefit of shareholders, and insulates those same managers from accountability for their missteps in pursuit of that directive via the business judgment rule.¹⁵⁷ As Daniel Greenwood notes, “the current Delaware corporate law system creates institutions governed by managers and directors who are commanded to set aside all values but profit, and then to pursue law that

¹⁵⁴ G. Sidney Buchanan, A Conceptual History of the State Action Doctrine: The Search for Government Responsibility, 34 Hous. L. Rev. 333, 390 (1997).

¹⁵⁵ Adolf A. Berle Jr., Constitutional Limitations of Corporate Activity-Protection of Personal Rights from Invasion Through Economic Power, 100 U Pa. L. Rev. 933 (1952).

¹⁵⁶ Erwin Chemerinsky, Rethinking State Action, 80 Nw. U. L. Rev. 503, 510-11, 527 (1985).

¹⁵⁷ Cf. Emma D. Enriquez, Comment, Honor Thy Shareholder At All Costs? Towards A Better Understanding of the Fiduciary Duties of Directors of Wholly-Owned Subsidiaries, 32 Sw. U. L. Rev. 97, 113 (2003). (“In a perfect world, the three doctrines [of limited liability to encourage investment, fiduciary duty to address the agency problem, and the business judgment rule to encourage appropriate levels of risk taking on the part of management] allow aggregate investing, create a liquid stock market, and improve America’s standard of living by allowing corporations to make riskier investments than is possible in other business forms. However, when the three doctrines are used to solely maximize personal shareholder and/or director wealth, then the economic policies underlying the doctrines are undermined.”).

maintains this peculiar institution without popular review.”¹⁵⁸ The foreseeable response to these incentives is to seek to influence government. “Self-interested, profit-maximizing entities commonly seek to control the government because laws affect profits.”¹⁵⁹ Thus, in a very real way, the state encourages new governance.

Acknowledgement of this encouragement alone should arguably be sufficient to support a finding of state action. In fact, Barbara Snyder and Robert Hillman argue that “application of the encouragement rationale would have led to a different analysis in Flagg Bros. v. Brooks.”¹⁶⁰ As mentioned above, one may view the encouragement of foreseeable engagement in public functions as giving rise to a type of non-delegable duty on the part of the state.¹⁶¹ Where this non-delegable duty is violated, the necessary “close nexus” should be deemed established when the corporate entity engages in new governance.

3. *The Possibility that the Democratic Process has failed to keep Governance by Corporations in Check is Great Enough to Warrant Judicial Review*

¹⁵⁸ Daniel J.H. Greenwood, Markets and Democracy: The Illegitimacy of Corporate Law, 74 UMKC L. Rev. 41, 43 (2005).

¹⁵⁹ Timothy K. Kuhner, The Separation of Business and State, 95 CAL. L. REV. 2353, 2356 (2007); see also Daniel J.H. Greenwood, Markets and Democracy: The Illegitimacy of Corporate Law, 74 UMKC L. Rev. 41, 72 (2005) (“[I]nterventions in the political process in order to affect regulatory law are no different from any other decision the corporation must make. . . . Publicly traded firms thus become a permanent lobbying force for changing law to promote their own profit, regardless of the cost to competing values.”).

¹⁶⁰ Barbara Rook Snyder & Robert A. Hillman, Private Motivations, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations, 75 CORNELL L. REV. 1053, 1072-73 (1990) (“The U.C.C. provision at issue in Flagg Bros. is clearly state action That state action is unconstitutional under the encouragement approach because it sent the same message to storage companies in New York as Proposition 14 sent to those who wished to discriminate on the basis of race in housing in California: if you choose to engage in this sort of conduct, you will have the approval and the protection of the state.”).

¹⁶¹ Cf. Carlo v. State, 2006 N.Y. Slip Op. 51947(U) at 19 (N.Y.Ct.Cl. Sep 18, 2006) (“The State has a non-delegable duty to adequately design, construct and maintain its roads and highways in a reasonably safe condition to prevent foreseeable injury . . .”).

What about the argument that if corporations have indeed usurped government power then the legislature should be the branch of government to identify and correct that problem? The answer is that corporate power may in fact have risen to such a level as to impinge upon Congress's (and the Executive's¹⁶²) willingness and ability to rein in corporate governing. Capture of the non-judicial branches of our government may in fact have begun to take place via the influence of corporate lobbying¹⁶³ and revolving-door ties between our government and the private sector.¹⁶⁴ For example, some have argued that the real story of the financial crisis of 2008-2009 is "the self-reinforcing cycle of money and favors that led to disastrous policy choices not to regulate the finance industry more,"¹⁶⁵ as evidenced by the fact that "the finance, insurance and real estate (FIRE) industries that collectively are at the center of the current crisis are the single largest sector—by far—of all the major economic and interest groupings that give campaign contributions to federal politicians."¹⁶⁶

¹⁶² Cf. Verkuil, Outsourcing Sovereignty at 9 ("[T]he vice president met privately with leaders of private oil companies to formulate energy policy.") (citing Cheney v. U.S. Dist. Court, 542 U.S. 367).

¹⁶³ See Timothy K. Kuhner, The Separation of Business and State, 95 CAL. L. REV. 2353, 2361 (2007) ("The power of concentrated interests coupled with permissive laws and the monetary demand of political campaigns makes governmental capture something of an inevitability."); Ronald Dworkin, Is Democracy Possible Here?: Principles for a New Political Debate 129 (2006). ("Large campaign contributors purchase what is euphemistically called 'access' to officials; in fact they often purchase not merely access but control.").

¹⁶⁴ See Verkuil, Outsourcing Sovereignty at 37 ("It seems that DHS officials lightened lobbying restrictions on their former colleagues just as they put themselves on the market.") (citing Eric Lipton, Former Antiterror Officials Find Industry Pays Better, N.Y. Times A1 (June 18, 2006)); Michael Lewis, The End of the Financial World as We Know It, available at http://www.nytimes.com/2009/01/04/opinion/04lewiseinhorn.html?pagewanted=1&_r=1&sq=michael%20lewis&st=cse&scp=1 (Jan. 3, 2009) ("The [S.E.C.]'s most recent director of enforcement is the general counsel at JPMorgan Chase; the enforcement chief before him became general counsel at Deutsche Bank; and one of his predecessors became a managing director for Credit Suisse before moving on to Morgan Stanley. A casual observer could be forgiven for thinking that the whole point of landing the job as the S.E.C.'s director of enforcement is to position oneself for the better paying one on Wall Street.").

¹⁶⁵ Frank Pasquale, The Manicures Don't Matter; the Campaign Contributions Do, available at http://www.concurringopinions.com/archives/2008/10/the_manicures_d.html.

¹⁶⁶ Ellen Miller, Finance Industry Giving Visualized, available at <http://blog.sunlightfoundation.com/2008/09/25/finance-industry-giving-visualized/>.

Thus, it arguably falls to the judiciary to police this area¹⁶⁷—even if this involves an expansion of current state action doctrine.¹⁶⁸ As far back as 1830, Alexis de Tocqueville noted that, “The strength of the Courts of law has always been the greatest security that can be offered to personal independence Private rights and interests are in constant danger if the judicial power does not grow more extensive and stronger to keep pace with equality of conditions.”¹⁶⁹ Allowing claims of state action to be based upon the exercise of new governance by corporate actors would arguably help to shed some much-needed light on influence peddling in our government.¹⁷⁰ As Wilson Huhn states:

A more persuasive argument for the expansion of the state action doctrine is based upon the familiar principle that changes in our society may necessitate changes in the application of constitutional norms. If one assumes that the power of private individuals and entities is growing in our society, these accumulations of private power should arguably be subject to greater constitutional scrutiny. . . . [However, s]o long as the democratic process remains strong, the people will have the capability to regulate powerful private interests, and it is not necessary to ask the Supreme Court in its interpretation of the Constitution to do all the work.¹⁷¹

¹⁶⁷ Cf. Lopez at 552 (“the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch”) (quoting Gregory v. Ashcroft at 458); Huhn, State Action, at 1384 (“The state action doctrine . . . requires government action to be subject to judicial review.”); id. at 1384-85 (“[B]ecause the Constitution is regarded as law, the duty to enforce its prohibitions against state action is the responsibility of the courts.”).

¹⁶⁸ Cf. Smith, 321 U.S. 649, 665 (“[W]e are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent.”).

¹⁶⁹ Alexis de Tocqueville, Democracy in America [x] (xxxx).

¹⁷⁰ Cf. Timothy K. Kuhner, The Separation of Business and State, 95 CAL. L. REV. 2353, 2378 (2007) (“Corporate donations, lobbyist contacts, and the true interests motivating public policies, from attempts to privatize social security to the invasion of Iraq, are rarely made visible to the average voter. This signals the need for transparency and disclosure regarding political contributions and contacts with lobbyists.”); id. at 2377 (“[E]xcessive entanglement must refer not to the economic or distributive function of a piece of legislation, a judicial precedent, or executive action, but rather the role of economic influence in generating law and policy.”).

¹⁷¹ See Wilson R. Huhn, The State Action Doctrine and the Principle of Democratic Choice, 34 Hofstra L. Rev. 1379, 1395-97 (2006).

This Article contends, among other things, that there are good reasons to question whether “the democratic process remains strong,” and thus the time may well have arrived to ask the Supreme Court to do some of the work.

The argument set forth in this Article may raise concerns of overregulation.¹⁷² Tying application of the state action doctrine to the presence of sufficient corporate power to in fact effectuate governance may help to assuage some of these concerns and is also consistent with the doctrine generally.¹⁷³ This is what Adolf Berle argued for when he wrote that, “The preconditions of application [of Constitutional limitations] are two: the undeniable fact that the corporation was created by the state and the existence of sufficient economic power concentrated in this vehicle to invade the constitutional right of an individual to a material degree.”¹⁷⁴ Once again, this shows a connection between the arguments set forth in this Article and Berle’s vision that, “One may reasonably forecast, in the future, direct application of constitutional limitations to the corporation,

¹⁷² See Brentwood at 303 (“Even facts that suffice to show public action (or, standing alone, would require such a finding) may be outweighed in the name of some value at odds with finding public accountability in the circumstances.”). Cf. Metropolitan at 373 (“The majority’s conclusion that there is no state action in this case is likely guided in part by its reluctance to impose on a utility company burdens that might ultimately hurt consumers more than they would help them. . . . The solution to this problem, however, is to require only abbreviated pretermination procedures for all utility companies, not to free the ‘private’ companies to behave however they see fit.”) (Marshall, J., dissenting).

¹⁷³ Discussion of the implications of linking what would effectively be some version of monopoly power with public status is beyond the scope of this Article. Cf. Neil K. Komesar, A Job for the Judges: the Judiciary and the Constitution in a Massive and Complex Society, 86 MICH.L.REV. 657, 692 n.78 (1988) (“The During the entire [Lochner] era, the Court limited regulation of prices and rates to businesses ‘affected with a public interest.’ From its inception in the pre-Lochner case of Munn v. Illinois, to its death nearly sixty years later in Nebbia v. New York, this central concept remained a mystery. The Court flirted with the idea of monopoly as a defining element, but it did not consistently adhere to this criterion. . . . For a time, the Court also spoke of a business’s impact on the general public, but it eventually abandoned this unwieldy concept. The Court found itself regularly admitting that the ‘public interest’ test was difficult to explain and apply, but it kept trying to employ it. Finally, in Nebbia, the Court conceded that there could be no ‘closed class’ of businesses ‘affected with a public interest’; all businesses of any importance affect the public.”) (internal citations omitted).

¹⁷⁴ Adolf A. Berle Jr., Constitutional Limitations of Corporate Activity-Protection of Personal Rights from Invasion Through Economic Power, 100 U Pa. L. Rev. 933, 943 (1952).

merely because it holds a state charter and exercises a degree of economic power sufficient to make its practices ‘public’ rules.”¹⁷⁵

4. *The Historical Flexibility of the State Action Supports Expansion of the Doctrine to meet the Challenges of New Governance*

The state action doctrine can be understood as a flexible doctrine that adjusts to real-world changes.¹⁷⁶ Specifically, the doctrine has had a number of incarnations to date. First, in the Civil Rights Cases, the seemingly bright line proposition was espoused that private conduct cannot be limited by the Fourteenth Amendment.¹⁷⁷ Then, in Smith v. Allwright, the Court expanded the doctrine to allow for the actions of ostensibly private parties to be deemed state action in certain circumstances.¹⁷⁸ This has been called a “sea change” in the “Court’s understanding of the state action doctrine.”¹⁷⁹ Next came an expansion of the state action doctrine that “was an essential component of the Court’s efforts to end racial segregation in the South.”¹⁸⁰ The cases from that era include Shelley v. Kraemer,¹⁸¹ which found the Court agreeing with an argument that “some of the

¹⁷⁵ Id. at 953.

¹⁷⁶ See, e.g., Megan M. Cooper, Dusting Off the Old Playbook: How the Supreme Court Disregarded the Blum Trilogy, Returned to Theories of the Past, and Found State Action Through Entwinement in Brentwood Academy v. Tennessee Secondary School Athletic Ass’n, 35 Creighton L. Rev. 913, 914 (2002) (“As time passed, the Court modified its state action tests to focus on the state’s relationship with the private entity, rather than the state’s involvement in the action itself.”).

¹⁷⁷ 109 U.S. 3, 11 (1883) (“It is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.”).

¹⁷⁸ 321 U.S. 649 (1944) (overruling prior precedent and findings actions of private Democratic Party to constitute state action).

¹⁷⁹ Wilson Ray Huhn, In Defense of the Roosevelt Court, 2 Fla. A&M L. Rev. 1, 46 (2007).

¹⁸⁰ Alan R. Madry, State Action and the Due Process of Self-Help: Flagg Bros. Redux, 62 U. Pitt. L. Rev. 1, 6 (2000) (“It extended constitutional protections beyond the expressed ambit of the Fourteenth Amendment to embrace private initiatives as well.”); Wilson Ray Huhn, In Defense of the Roosevelt Court, 2 Fla. A&M L. Rev. 1, 2, 90 (2007) (“From 1937 to 1954 the balance of power on the United States Supreme Court was in the hands of justices who had been appointed by President Franklin Delano Roosevelt.... They did not pretend that by precluding application of Constitutional norms to powerful private interests that they would be promoting ‘individual freedom.’”) (emphasis in original).

¹⁸¹ 334 U.S. 1 (1948) (deeming court enforcement of a racially restrictive covenant to be state action).

greatest legal minds of the 20th century” apparently thought preposterous.¹⁸² This expansion was followed, as is often the case, with a period of retrenchment, including cases such as Flagg Bros itself—arguably one of the major case law impediments to the proposal set forth herein.¹⁸³ More recently, commentators have noted openings for a renewed loosening of the doctrine.¹⁸⁴

Whatever the validity of this final observation, the brief history recounted here certainly supports one having faith that the Court has the ability to adapt the doctrine to meet the needs of the times. In fact, the financial crisis of 2008-09 may well foster additional willingness to change as the inevitable consolidation to come, combined with our government’s oft-stated desire to exit its bailout “ownership” interests as soon as possible, leave us with even more powerful corporate actors.¹⁸⁵ To quote Gillian

¹⁸² Mark Edwards, Drop Everything and Emulate, IV, available at <http://www.concurringopinions.com/archives/teaching/> (“In 1948, a graduate of an undistinguished and then defunct law school, whose parents had been born in slavery, stood before the Supreme Court and, against the urging of some of the greatest legal minds of the 20th century, made an argument that had been unanimously rejected by state and federal courts, including the Supreme Court: that court enforcement of private racially restrictive covenants constituted state action and, as such, was a violation of the Equal Protection Clause of the 14th Amendment.”). While in no way drawing a comparison, I am reminded of an early presentation I gave of this project, at the end which one of the professors attending commented that my proposal sounded “slightly less preposterous” after hearing it a second time.

¹⁸³ See Alan R. Madry, State Action and the Due Process of Self-Help: Flagg Bros. Redux, 62 U. Pitt. L. Rev. 1, 2 (2000) (“Flagg Bros., Inc. v. Brooks was a minor watershed for the recently constituted Burger-Rehnquist Court. In that single decision in 1978, the Court . . . constricted one of the more powerful legal tools of the civil rights movement, the state action doctrine”); Erwin Chemerinsky, Rethinking State Action, 80 Nw. U. L. Rev. 503, 505 n.10 (1985) (“There is no doubt that the Burger Court has tightened substantially the state action requirement, showing far less willingness to apply the Constitution’s protections against private conduct.”). Cf. Huhn, Roosevelt Court at 80 (“The crabbed interpretation of the State Action Doctrine favored by Justice Thomas and Justice Scalia would insulate powerful private interests that are exercising a measure of government power from the demands of the Constitution.”).

¹⁸⁴ See, e.g., Megan M. Cooper, Dusting Off the Old Playbook: How the Supreme Court Disregarded the Blum Trilogy, Returned to Theories of the Past, and Found State Action Through Entwinement in Brentwood Academy v. Tennessee Secondary School Athletic Ass’n, 35 Creighton L. Rev. 913, 961-62 (2002) (“[T]he Brentwood Court found state action through the so-called ‘new’ test of entwinement by examining the totality of circumstances created by all contacts between a state and a private entity. The entwinement test was not actually a ‘new’ test because it merely recalled analyses that prevailed prior to the Blum Trilogy.”).

¹⁸⁵ See Martin Lipton, Risk Management and the Board of Directors, November 26, 2008, available at <http://blogs.law.harvard.edu/corpgov/2008/11/26/risk-management-and-the-board-of-directors/> (“Risk from the financial services sector has contributed to large-scale bankruptcies, bank failures, government

Metzger, writing about the related issue of privatization: “The proposed analysis differs significantly from current state action doctrine, which no doubt limits its chances of judicial adoption. But current doctrine's inability to preserve constitutional accountability in the face of ever-expanding privatization may make courts increasingly willing to consider new approaches.”¹⁸⁶ Thus, the perspective advocated for in this Article should not be seen as some aberrant outlier, but rather a clarification of the state action doctrine that fits easily within the overall discussion of the doctrine. As Dean Chemerinsky has noted:

Western civilization has been marked by a steady expansion of the protection of rights. The Magna Carta protected liberties from interference by the Crown. The American Constitution was novel in that it safeguarded rights from infringements by all three branches of the national government, not just the executive. The fourteenth amendment, adopted after the Civil War, expanded the Constitution by preventing state governments from depriving liberty and denying equality. . . . I contend that the next major expansion in the protection of rights must be to limit infringements of rights made by private entities. The Constitution's declaration of personal liberties must be viewed as a code of social morals that may not be violated without a compelling justification.¹⁸⁷

intervention and rapid consolidation.”); Steven Henn, Citi's sell-off ushers in consolidation era, available at http://marketplace.publicradio.org/display/web/2009/01/14/pm_financial_consolidations/ (“[W]ith banks selling so cheap, Stewart Plessner at Standard & Poors says the next era of financial consolidation has already begun.”).

¹⁸⁶ Gillian E. Metzger, Privatization as Delegation, 103 Colum. L. Rev. 1367, 1376 (2003).

¹⁸⁷ Erwin Chemerinsky, Rethinking State Action, 80 Nw. U. L. Rev. 503, 507 (1985). See also id. at n.18 (“On closer historical analysis, the parallel between the position attained by an industrial concentrate and that of the feudal system is surprisingly close. The feudal lord was the operator of the principal economic activity, namely, use of agricultural land, and he likewise controlled the marketing of goods and products in his area. He also was the political governor. The provisions of Magna Carta protecting the lords against their feudal overlord, the king, were clearly intended to protect the economic as well as the political rights claimed by the feudal lords who rose against King John. In succeeding centuries, the doctrine was naturally invoked by the lesser orders to protect them against the feudal chiefs themselves. Invasion of personality obviously can be accomplished by economic as well as by physical or political action. Obviously when economic power derives from the state itself, the theoretical condition leading to the emergence of Magna Carta and still later to our own Constitutional Bill of Rights is present.”).

In some ways, one may even draw an analogy to the expansion of the Commerce Clause in the face of states' inability or unwillingness to regulate the growth of commerce in this country¹⁸⁸ or "the sense that states were doing their best to evade the Court's civil rights rulings by encouraging private institutions to engage in acts that would be forbidden to the states directly."¹⁸⁹

IV. CONCLUSION & IMPLICATIONS

Broadening of the definition of state action to include incidences of new governance by corporate actors could, of course, impact a number of other statutes, treaties and doctrines.¹⁹⁰ The possibility of holding corporations more accountable for international human rights violations certainly stands out as a possible offshoot of this work. As Sarah Joseph notes, "US courts have tended to use the tests adopted to determine 'state action' for domestic law purposes under § 1983 to determine whether 'state action' exists in an [Alien Tort Claims Act] claim."¹⁹¹ As has been alluded to above, state action doctrine jurisprudence carries over to Section 1983 claims.¹⁹²

¹⁸⁸ Cf. Lopez at 556 ("Jones & Laughlin Steel, Darby, and Wickard ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country.").

¹⁸⁹ Kevin L. Cole, Federal and State "State Action": The Undercritical embrace of a Hypercriticized Doctrine, 24 Ga. L. Rev. 327, n.234 (1990)

¹⁹⁰ See, e.g., Peek, Corporate Power at 136 ("[T]he Privacy Act of 1974, arguably 'the most comprehensive U.S. law pertaining to privacy,' applies only to government actors. Therefore, 'private corporations are not bound by the fair information practices, open-access rules, and data-ownership principles embodied in the Act.'") (citing John M. Eden, When Big Brother Privatizes: Commercial Surveillance, the Privacy Act of 1974, and the Future of RFID, 2005 Duke L. & Tech. Rev. 20 (2005)). Cf. Allison D. Garrett, The Corporation as Sovereign, 60 Me. L. Rev. 129, 130-31 (2008) ("One result of . . . privatization is that it allows states to distance themselves from treaty obligations. Legitimate concerns have been raised by some authors about the extent to which privatizing certain activities may lead to circumvention of treaties and international norms of rights.") (citing Michael K. Addo, Human Rights Perspectives of Corporate Groups, 37 Conn. L. Rev. 667, 670-73 (2005)).

¹⁹¹ Sarah Joseph, Corporations and Transnational Human Rights Litigation 33 (Hart Publishing 2004) ("Most customary human rights norms apply only in the context of governmental action. . . . Thus, in [Alien Tort Claims Act (ATCA)] claims requiring state action against [transnational corporations] or other private bodies, some sort of joint responsibility of both the State and the private body for the impugned act must be established in order for the case to proceed."). Cf. Larry Cata Backer, Multinational Corporations

At the same time, the proposal set forth here clearly implicates campaign finance law¹⁹³ and perhaps other doctrines¹⁹⁴ as well. The resolution of these issues will be left for another day, though it should come as no surprise to the reader that my first inclination is that current free speech doctrine should yield to democratic accountability more than it currently does.¹⁹⁵

In her article entitled “The Corporation as Sovereign,”¹⁹⁶ Allison Garret notes that:

The implications of the nation-state metaphor as a way of viewing corporations are significant. To the extent that the transformation continues, the power of the vote in a democratic society may be eroded by the power of votes purchased through share ownership and the roles that our

as Objects and Sources of Transnational Regulation, available at SSRN: <http://ssrn.com/abstract=1092167> (“Many powerful states continue to oppose the idea of a direct relationship between international law and economic collectives, and draw a sharp distinction between political collectives and everything else. As a result, most of the lawmaking in this area has been directed to states.”).

¹⁹² Cf. Verkuil, Outsourcing Sovereignty at 38-39 (“The state action doctrine has meaning in terms of excluding evidence under the Fourth Amendment or under Color of Law requirements of Section 1983.”).

¹⁹³ Cf. Kuhner at n.124 (“The political obstacles for meaningful reform are presently being tested by Senators Charles E. and Arlen Specter. They are seeking sponsors for a constitutional amendment that would overturn Supreme Court caselaw, beginning with Buckley v. Valeo, 424 U.S. 1 (1976), holding that money is a form of protected speech.”).

¹⁹⁴ Cf. Jackson v. Metro. Edison Co., 419 U.S. 345, 363 (1974) (Douglas, J., dissenting) (“[I]t should be noted that successful attempts by public utilities to exclude themselves from the antitrust laws have been based on the assertion that their monopoly activity constitutes ‘state action.’”); Shane L. Keppner, Note, Clear Inarticulation--State Action Antitrust Immunity and State Agencies: Neo Gen Screening, Inc. v. New England Newborn Screening Program, 2000 BYU L. Rev. 1651, 1652 (2000) (“Private actors are immune under the state action doctrine only when they act pursuant to a clearly articulated state policy and the state actively supervises the anticompetitive conduct.”) (citing California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 104 (1980)).

¹⁹⁵ Cf. Frank Pasquale, Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform, 2008 U. Ill. L. Rev. 599, 601 (2008) (“Given the practical failures of the deliberativist paradigm, reformers need to reclaim the original justification of campaign finance reform: not as a guarantor of structured democratic deliberation before the election, but as an effort to assure that certain powerful groups do not exercise undue influence on its outcome.”); Gore Vidal, Foreword in David Donnelly et al., Money and Politics: Financing our Elections Democratically, at ix-x (1999) (“Of the billions now spent each election cycle, most is donated in checks exceeding \$1,000. But less than one-tenth of 1 percent of the general population make individual contributions at this rate. And among group contributors, better than 90 percent comes from corporations, which duly record their political investment as a tax-deductible ‘cost of doing business.’”).

¹⁹⁶ 60 Me. L. Rev. 129 (2008).

elected officials play may become less important than the roles played by corporate executives.¹⁹⁷

Perhaps the proposal set forth in this Article may play some small part in stemming the tide of this movement toward corporate sovereignty.

¹⁹⁷ Allison D. Garrett, The Corporation as Sovereign, 60 Me. L. Rev. 129, 163 (2008). See also Azizah Y. al-Hibri, The American Corporation in the Twenty-First Century: Future Forms of Structure and Governance, 31 U. Rich. L. Rev. 1399, 1451 (1997) (“This is analogous to a familiar political situation in our past where only landowners had the right to vote in an election and the non-landed, non-owners had no voting rights. We have since recognized in the political arena that those who do not own land are nevertheless an integral part of the citizenship of our country. The same recognition seems to be overdue in corporate law and practice. Getting to it, however, will require a major ideological/conceptual shift not only in the concept of ‘corporate citizenship,’ but also in the concept of the ‘corporation’ itself.”).