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## FINDING STATE ACTION WHEN CORPORATIONS GOVERN

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*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.” 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. 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 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*

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*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.*

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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.<sup>1</sup>

The financial crisis of 2008–2009 is blurring the lines between the State and the private sector.<sup>2</sup> While painful, this process may facilitate a re-examination of the state

1. Adolf A. Berle, Jr., *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 952 (1952).

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,”<sup>3</sup> and while the recent financial crisis may suggest that the problems associated with new governance are waning, the reality is that the corporate consolidations<sup>4</sup> 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<sup>5</sup>—will result in even more powerful corporate actors<sup>6</sup> 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.<sup>7</sup> Constitutional limitations could restrict this type of private governing under the Fourteenth Amendment via a broad application of the state action doctrine.<sup>8</sup>

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 engage in the challenged conduct; or (5) public officials were excessively “intertwined” with the private actor.<sup>9</sup> In addition to applying these discrete tests, a more liberal “totality of circumstances” approach has been used in some cases

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2. See, e.g., Richard Barley, *Unintended Cost of the Bailouts*, WALL ST. J., Jan. 27, 2009, at C10 (noting that difference between credit and sovereign risk is disappearing as private sector losses are increasingly absorbed by public sector).

3. See generally Marcy E. Peek, *Information Privacy and Corporate Power: Towards a Re-imagining of Information Privacy Law*, 37 SETON HALL L. REV. 127 (2006) (describing “new governance”).

4. See *Marketplace: Citi’s Sell-Off Ushers in Consolidation Era* (American Public Media radio broadcast Jan. 14, 2009) (transcript and broadcast available at [http://marketplace.publicradio.org/display/web/2009/01/14/pm\\_financial\\_consolidations/](http://marketplace.publicradio.org/display/web/2009/01/14/pm_financial_consolidations/)) (suggesting that new era of financial consolidation has already begun).

5. See Stephen Manning, *Will GM Become ‘Government Motors’?*, CNSNEWS.COM, April 30, 2009, <http://www.cnsnews.com/public/Content/Article.aspx?rsrcid=47424> (reporting government is not interested in nationalizing private automobile companies); cf. Robin Sidel, *Profit Solid, J.P. Morgan Aims to Repay TARP Funds*, WALL ST. J., Apr. 17, 2009, at C1 (discussing stigma attached to private institutions taking public funds).

6. See Peter Eavis, *Are Large Banks Now Too Big to Fail?*, WALL ST. J., July 8, 2009, at C14 (suggesting Obama administration’s regulatory changes may result in strengthening of large, powerful U.S. banking institutions).

7. See generally Peek, *supra* note 3, at 146 (summarizing modes of new governance).

8. See U.S. CONST. amend. XIV, § 1 (“No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .”); Wilson R. Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA L. REV. 1379, 1380 (2006) (discussing how state action doctrine is important threshold requirement of Fourteenth Amendment protection).

9. See Huhn, *supra* note 8, at 1380 (discussing state action doctrine’s four related applications).

to find state action even where a narrow seriatim application of the aforementioned tests would not have found state action.<sup>10</sup>

The details of my argument are set forth in Part III.B. Essentially, I argue that the corporate role in new governance should constitute state action in at least some circumstances because: (1) the corporation does not exist without the State and the State derives significant benefits in exchange for granting corporate status; (2) 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; and (3) 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. To the extent that my argument calls for an expansion of the current state action doctrine, I further argue that the unique and modern phenomenon of new governance warrants a re-examination of current doctrine. In Part IV, I provide concluding remarks and examine some possible implications of formulating the state action doctrine to capture new governance.

It should be noted that throughout this Article I refer to the “novel” or “modern” phenomenon of new governance even though history suggests there is nothing new about the concept of corporations governing. 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. In the past ten years, scholars like Orly Lobel,<sup>11</sup> Jody Freeman,<sup>12</sup> and others<sup>13</sup> have all discussed the form of governance described herein as something new. Meanwhile, Gráinne de Búrca and Joanne Scott have noted that the “new” in “new governance” is not necessarily “intended to signify being recent in time, but rather something which is distinctive from what has gone before.”<sup>14</sup> Certainly, modern technology has added a new element to the discourse.<sup>15</sup> Either way, 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 vis-à-vis the concept of state action.

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10. See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 723–25 (1961) (discussing various circumstances leading to determination of state action).

11. 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) (referring to new governance model as recent paradigm).

12. See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 546–47 (2000) (noting that private role in governance has only recently attracted attention).

13. See, e.g., Scott Burris et al., *Changes in Governance: A Cross-Disciplinary Review of Current Scholarship*, 41 AKRON L. REV. 1, 3–4 (2008) (arguing distinction between public sphere as realm of governing and private sphere as realm of governed has eroded).

14. Gráinne de Búrca & Joanne Scott, *Introduction: New Governance, Law and Constitutionalism, in LAW AND NEW GOVERNANCE IN THE EU AND THE US* 1, 2–3 (Gráinne de Búrca & Joanne Scott eds., 2006) [hereinafter *LAW AND NEW GOVERNANCE*]; see also *id.* at 1 (describing new governance as new academic phenomenon); Chris Sagers, *Monism, Nominalism, and Public-Private in the Work of Margaret Jane Radin*, 54 CLEV. ST. L. REV. 219, 221–22 (2006) (observing recent boom in “new governance” scholarship).

15. See Sagers, *supra* note 14, at 222 (discussing effect of technology on jurisprudence).

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 laws," or otherwise to violate constitutional limitations, is subject to direct legal action.<sup>16</sup>

In carrying forward this "emerging principle," this Article argues that there can be little doubt that the power of multinational corporations is growing.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> As Daniel Greenwood notes:

We have classified corporations as private—civil society, not government; entities that need to be protected from government, not government-like entities from which we need to be protected. So, corporations have rights, for example, of speech and privacy, but we do not have a structure of fundamental rights against them. . . . As the state diminishes and our largest economic entities expand, this dichotomy is increasingly dysfunctional, concealing potentially unjust power relations and distracting us from needed reform.<sup>20</sup>

So, why consider the 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 Alien Tort Claims Act, which is often looked to as a statutory avenue for addressing

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16. Berle, *supra* note 1, at 942.

17. See Daniel J.H. Greenwood, *Markets and Democracy: The Illegitimacy of Corporate Law*, 74 UMKC L. REV. 41, 58 (2005) (noting that major corporations measured by wealth are much bigger than many governmental units).

18. Cf. Joel R. Paul, *Holding Multinational Corporations Responsible Under International Law*, 24 HASTINGS INT'L & COMP. L. REV. 285, 289 (2001) ("Privatization shrinks the public sector while it expands the scope and freedom of private firms.").

19. Cf. Allison D. Garrett, *The Corporation as Sovereign*, 60 ME. L. REV. 129, 130 (2008) (arguing sovereignty has shifted in recent years "from the people to the corporation").

20. Daniel J.H. Greenwood, *The Semi-Sovereign Corporation 1* (Utah Legal Studies Working Paper No. 05-04, 2005), available at <http://ssrn.com/abstract=757315>.

corporate international human rights violations.<sup>21</sup> 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 exercise that power to be deemed a state actor—and then only for purposes 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 . . .*<sup>22</sup>

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.”<sup>23</sup> As Robert Hale noted many years ago, “we are apt to . . . overlook the existence of private government, which, unless restrained by law, is as capable in some circumstances of destroying individual liberty as is public government itself.”<sup>24</sup> 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.<sup>25</sup> For example, Daniel Greenwood argues that “[c]orporations are power centers, loci of value struggles, political fora. They are not citizens but governance structures and not neutral but deeply influential—if illegitimate—participants in our political struggles.”<sup>26</sup> Dan Danielsen notes that,

21. See *infra* Part IV for a discussion of the role of the state action doctrine in Alien Tort Claims Act claims.

22. Timothy K. Kuhner, *The Separation of Business and State*, 95 CAL. L. REV. 2353, 2381 (2007).

23. Peek, *supra* note 3, at 142.

24. ROBERT L. HALE, *FREEDOM THROUGH LAW*, at vii (1952); see also BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT* 17 (1998) (explaining Hale’s argument regarding coercion in private sphere); JAMES K. GALBRAITH, *THE PREDATOR STATE: HOW CONSERVATIVES ABANDONED THE FREE MARKET AND WHY LIBERALS SHOULD TOO*, at xiii (2008) (discussing disastrous effect collapse of major corporation has on people and government); cf. Sagers, *supra* note 14, at 220 (explaining importance of keeping Hale’s argument alive (citing Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHI.-KENT L. REV. 1295, 1295 (1998))).

25. See, e.g., Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1379 (2003) (noting that government “rel[ies] on private actors for the content and enforcement of government regulations”); 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.”).

26. Greenwood, *supra* note 17, at 43.

“[w]hether 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.”<sup>27</sup>

This phenomenon of governance by private actors—particularly corporations—has been described as “new governance,”<sup>28</sup> and it has both supporters and detractors. Proponents of new governance argue that this model “suggest[s] ‘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.”<sup>29</sup> 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.<sup>30</sup>

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.<sup>31</sup> Paul Verkuil warns: “The perceived threat is to democratic 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.”<sup>32</sup> 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.”<sup>33</sup>

Because corporations 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.<sup>34</sup> As Allison Garrett points out, this discrepancy means “that foreign corporations have the capacity to exert tremendous influence over the economic stability of developing

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27. Dan Danielsen, *How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance*, 46 HARV. INT'L L.J. 411, 414 (2005).

28. Peek, *supra* note 3, at 140–41.

29. Amy J. Cohen, *Negotiation, Meet New Governance: Interests, Skills, and Selves*, 33 LAW & SOC. INQUIRY 503, 504 (2008) (quoting Lobel, *supra* note 11, at 443).

30. Peek, *supra* note 3, at 129; *cf.* LAW AND NEW GOVERNANCE, *supra* note 14, at 4–10 (reviewing various perspectives on new governance, including “reduced capacity” perspective, which expresses “concern that new governance may evade traditional legal mechanisms for securing accountability”).

31. *See* Paul, *supra* note 18, at 286 (explaining how globalization makes government representatives less accountable to people).

32. PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* 2 (2007).

33. 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).

34. LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT* 2 (2001).

nations.”<sup>35</sup> This leads, according to Shaun Riordan, to these corporate actors being “more influential than many states.”<sup>36</sup>

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.”<sup>37</sup> 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.”<sup>38</sup> 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 to . . . .<sup>39</sup>

How Madison’s “republican remedy”<sup>40</sup> 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.”<sup>41</sup>

#### B. *Forms of New Governance*

Marcy Peek has identified three ways in which corporate actors can govern. First, they may directly influence the promulgation of legislation or regulations.<sup>42</sup> In the privacy context, she notes “the profound effect that corporate lobbying has on the ultimate statutory language of privacy statutes and regulatory rules.”<sup>43</sup> Obviously, the

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35. Garrett, *supra* note 19, at 147.

36. SHAUN RIORDAN, *THE NEW DIPLOMACY* 7 (2003) (noting reasons why multinational corporations are gaining influence and approaching global governance so quickly).

37. Charlie Cray & Lee Drutman, *Corporations and the Public Purpose: Restoring the Balance*, 4 SEATTLE J. SOC. JUST. 305, 306 (2005); *see also* Greenwood, *supra* note 17, at 57 (describing corporation as “a golem: a creature we created to be our servant that we are, instead, allowing to govern us”).

38. DAVID C. KORTEN, *WHEN CORPORATIONS RULE THE WORLD* 104 (2d ed. 2001); *see also* Douglas Litowitz, *The Corporation as God*, 30 J. CORP. L. 501, 525 (2005) (observing that despite corporations’ tremendous power, they are only controlled by handful of managers).

39. Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 5 *THE WRITINGS OF JAMES MADISON* 269, 272 (Gaillard Hunt ed., 1904).

40. *THE FEDERALIST* NO. 10, at 136 (James Madison) (Benjamin Fletcher Wright ed., 1961).

41. *Martin v. City of Struthers*, 319 U.S. 141, 152 (1943) (Frankfurter, J., dissenting).

42. *Cf.* Simon Mackenzie & Penny Green, *Performative Regulation: A Case Study in How Powerful People Avoid Criminal Labels*, 48 BRIT. J. CRIMINOLOGY 138, 141 (2008) (illustrating through case study how corporate actors can manipulate criminal legislation to avoid prosecution). *See generally* Peek, *supra* note 3, at 143–44 (describing corporate behavior and power).

43. Peek, *supra* note 3, at 143.



impact of corporate lobbying on the wording of laws and rules is not limited to the area of privacy law.<sup>44</sup>

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.”<sup>45</sup> For example, Dan Danielsen 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.”<sup>46</sup> As Louis Jaffe notes, “[i]n creating custom men create the stuff of law.”<sup>47</sup>

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 “governmental deterrence is weak and ineffective.”<sup>48</sup> When this happens, the “intentional violations . . . operate as the ‘rule’ in the respective arena and thus govern the field as authoritative.”<sup>49</sup>

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 Steven Lukes as a “third dimension of power,”<sup>50</sup> whereby “*potential issues* are kept out of politics, whether through the operation of social forces and institutional practices or through individuals’ decisions.”<sup>51</sup> Of course, this power—like the rest of new

44. See, e.g., Wesley A. Cann, Jr., *Section 7 of the Clayton Act and the Pursuit of Economic “Objectivity”: Is There Any Role for Social and Political Values in Merger Policy?*, 60 NOTRE DAME L. REV. 273, 309–10 (1985) (listing areas of law where corporate interests have affected legislation); Mackenzie & Green, *supra* note 42, at 141 (describing corporate influence on laws and regulations concerned with vehicle safety and asbestos-related diseases); Scott Daniel McBride, Note, *Reformulating Executive and Legislative Relationships After Reformulated Gasoline: What’s Best for Trade and the Environment?*, 23 WM. & MARY ENVTL. L. & POL’Y REV. 299, 332 (1998) (describing example of congressman asking corporate lobbyists to write pro-industry environmental laws).

45. Peek, *supra* note 3, at 143.

46. Danielsen, *supra* note 27, at 422–23.

47. Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 214 (1937).

48. Peek, *supra* note 3, at 143.

49. *Id.*

50. See STEVEN LUKES, *POWER: A RADICAL VIEW* 11 (2d ed. 2005) (describing how “‘third dimension’ of power” involves shaping preferences of constituents to legitimize rule); Peek, *supra* note 3, at 150 n.134 (describing Lukes’s third dimension of power as “creating a manipulated consensus” (quoting Moira T. Roberts, Note, *Individual Rights and Government Power in Collision: A Look at Rust v. Sullivan Through the Lens of Power Analysis*, 49 WASH. & LEE L. REV. 1023, 1038 (1992))).

51. JOHN GAVENTA, *POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY* 12 (1980) (quoting STEVEN LUKES, *POWER: A RADICAL VIEW* 24 (1974)) (internal quotation marks omitted); see also Peek, *supra* note 3, 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, *The Marketplace of Perceptions*, HARV. MAG., Mar.–Apr. 2006, at 50, 93)).

governance—is exercised clandestinely.<sup>52</sup> As Timothy Kuhner points out, “[c]orporations, 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.”<sup>53</sup> Also, because “[b]usiness interests enjoy superior financial resources and ownership of the media,” it will be exercised with a high degree of efficacy.<sup>54</sup>

For example, in the privacy context, “corporations send detailed ‘privacy policies’ to customers that are in fact anti-privacy policies.”<sup>55</sup> Regardless of how nonprotective 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.”<sup>56</sup> Meanwhile, the reality is that corporate power is further enhanced at the expense of individual citizens.<sup>57</sup>

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.<sup>58</sup> 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, “[t]he 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.”<sup>59</sup>

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 Danielsen further comments, “[w]hen 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.”<sup>60</sup> 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.

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52. See Kuhner, *supra* note 22, at 2371 (noting corporations will not display true motivations behind their attempts to effect self-interested reforms).

53. *Id.*

54. *Id.* at 2383–84; see also *id.* (arguing that these advantages allow corporations to utilize public relations, marketing, and psychology to support their own positions and discredit opposing positions).

55. Peek, *supra* note 3, at 151.

56. *Id.*

57. See *id.* at 129 (arguing that privacy protection law will continue to erode privacy and to strengthen corporate power unless corporations are prevented from shaping information privacy law).

58. See generally VERKUIL, *supra* note 32.

59. Metzger, *supra* note 25, at 1373.

60. Danielsen, *supra* note 27, at 412.

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.<sup>61</sup>

Because new governance actors leverage market power and legislative ties, a judicial response has to be a part of the solution.<sup>62</sup> As Marcy Peek notes, “[m]arket 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.”<sup>63</sup> 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 is actually half full. Exposing the underlying power structures . . . might well cause a rethinking of possible [judicial] solutions.”<sup>64</sup> It is the purpose of this Article to facilitate some of this rethinking.

### 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 action<sup>65</sup>—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

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61. 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. *See* Kuhner, *supra* note 22, at 2378 n.111, 2386–87 n.145 (identifying proposed statute as “thought experiment” intended to provoke thought and not provide conclusions or full scholarly treatment). To the extent that such a label makes my proposal easier to digest, I gladly adopt it.

62. *See* Peek, *supra* note 3, 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 Biersteker & Hall, *supra* note 33, at 209)).

63. *Id.* at 161 (footnote omitted).

64. *Id.* at 167.

65. *Cf.* *Martin v. City of Struthers*, 319 U.S. 141, 152 (1943) (Frankfurter, J., dissenting) (noting application of Constitution must recognize external circumstances and thus judges cannot interpret First and Fourteenth Amendments as abstractions absent considerations of their relation to people’s lives).

may itself police the conduct of its private partners to ensure they adhere to constitutional prohibitions. Tort law also may provide a basis for recourse against some private actions.”<sup>66</sup>

The presence of alternative remedies might lead some to conclude that “constitutional accountability fears . . . are misplaced.”<sup>67</sup> Given the availability of alternative remedies, the argument goes, the associated “costs” of being deemed a state actor—e.g., the availability of immunity<sup>68</sup>—caution against the application of “expansive” constitutional remedies.<sup>69</sup> However, these objections have their own limitations—such as the suggested alternative remedies existing only as a function of legislative grace.<sup>70</sup> 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 seek bankruptcy protection.<sup>71</sup> While Congress has recently sought to revisit this legislation, it took a financial crisis of global proportions to spur this action.<sup>72</sup> 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” as exploring other approaches.<sup>73</sup>

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66. Metzger, *supra* note 25, at 1404; cf. Kevin Cole, *Federal and State “State Action”: The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 328–29 (1990) (noting that Supreme Court’s waning use of state action doctrine to protect individual rights led to calls for state courts to deploy state constitutions to this end, “[n]evertheless, state courts, with few exceptions, have embraced the state action requirement as a limitation on the reach of state constitutional provisions”).

67. Metzger, *supra* note 25, at 1404.

68. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 942 n.23 (1982) (“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.”).

69. See Metzger, *supra* note 25, at 1404 (noting view that preserving nongovernmental status offers greater accountability because private entities do not enjoy immunity from money damage awards).

70. See *id.* at 1404–05 (cautioning that private-law accountability mechanisms are statutory or contractual and thus can be easily rescinded).

71. See A. Mechele Dickerson, *Regulating Bankruptcy: Public Choice, Ideology, & Beyond*, 84 WASH. U. L. REV. 1861, 1861 (2006) (noting argument that credit card industry was integral in writing and passing of Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which made discharging personal debt more difficult).

72. See Op-Ed., *Credit Card Reform Should Be Priority*, CONN. POST ONLINE, Feb. 13, 2009, <http://www.allbusiness.com/government/elections-politics-political-parties/12098086-1.html> (“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.”).

73. Metzger, *supra* note 25, at 1373. Metzger notes that “[i]mmunity 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.” *Id.* at 1402.

A. *The State Action Doctrine*

The first section of the Fourteenth Amendment of the United States Constitution provides, among other things, that “[n]o 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.”<sup>74</sup> 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, “[t]he 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 majorities and officials and to establish them as legal principles to be applied by the courts.”<sup>75</sup> 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.”<sup>76</sup>

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.<sup>77</sup> In other words, the first section of the Fourteenth Amendment “erects no shield against merely private conduct, however discriminatory or wrongful.”<sup>78</sup> 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.”<sup>79</sup> 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.<sup>80</sup>

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) comes 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.”<sup>81</sup> Thus, “[t]he argument that corporations are perfectly private fails, then, because it is the law . . . that determines for whom and for

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74. U.S. CONST. amend. XIV, § 1.

75. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

76. Huhn, *supra* note 8, at 1384–85.

77. *See id.* at 1384 (discussing how U.S. Constitution is premised on idea that people are sovereign, and how state action doctrine builds off this sovereignty by subjecting government action to judicial review).

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

79. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 349–50 (1974).

80. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (citation omitted).

81. Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296, 1301 (1982).

what ends corporations act.”<sup>82</sup> As Chris Sagers has noted in the context of privatization:

An obvious challenge for scholarship in this area is that the line-drawing problem of the public-private distinction must be addressed by some doctrinal means by any proposed policy correction to privatization problems. More sophisticated scholarly efforts normally acknowledge the distinction’s difficulty, as its use in the courts has been among the most criticized doctrinal issues in modern times. However, in privatization and elsewhere, legal academics frequently go on to assert that it nevertheless can be handled through some second-best or heuristic alternative. Some of these efforts seem surprisingly formal and uncritical, and even more thorough efforts can be unsatisfying, though often they can be quite subtle. They are all understandable; one sometimes senses that these authors, consciously or unconsciously, are really struggling to avoid confrontation of a Marxist instinct, which under current circumstances would be quite unfashionable.<sup>83</sup>

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 governmental 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 government or by action fairly attributable to government.<sup>84</sup>

Consequently, the state action doctrine has been described as “analytically incoherent,”<sup>85</sup> a “miasma,”<sup>86</sup> a “conceptual disaster area,”<sup>87</sup> and “somewhat of a mystery to law students, legal scholars, lawyers, and judges.”<sup>88</sup>

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82. Greenwood, *supra* note 17, at 45.

83. Chris Sagers, *The Myth of “Privatization,”* 59 ADMIN. L. REV. 37, 57–58 (2007) (footnotes omitted).

84. G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility* (pt. 1), 34 HOUS. L. REV. 333, 339–40 (1997) (footnotes omitted).

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

86. Alan R. Madry, *State Action and the Due Process of Self-Help; Flagg Bros. Redux*, 62 U. PITT. L. REV. 1, 2 (2000).

87. 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 “torchless search for a way out of a damp echoing cave”).

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;<sup>89</sup> (2) the government coerces or encourages the private actor to take the challenged action;<sup>90</sup> (3) the private actor is performing a traditionally or formerly exclusively public function;<sup>91</sup> (4) the private actor is in a symbiotic relationship with the government;<sup>92</sup> or, (5) the private actor is controlled by, or entangled with, public officials in such a way that the private party's actions may be deemed to be those of the State.<sup>93</sup> 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.”<sup>94</sup>

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.<sup>95</sup>

“While the justices of the Supreme Court still disagree about the nature and extent of governmental involvement that must be present before the actions of a private party will be construed as ‘state action,’”<sup>96</sup> it has been argued that the totality-of-circumstances approach is most appropriate in light of the complexity of modern state/citizen interaction.<sup>97</sup> As Charles Black has written:

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88. Huhn, *supra* note 8, at 1380.

89. *See, e.g., Shelley v. Kraemer*, 334 U.S. 1, 19–20 (1948) (holding that enforcement of racially restrictive covenant by state court constitutes state action).

90. *See, e.g., Reitman v. Mulkey*, 387 U.S. 369, 381 (1967) (upholding California Supreme Court's ruling that state constitutional provision improperly encouraged discriminatory housing practices).

91. *See Buchanan, supra* note 84, at 359 (noting that public function characterization of state action is mostly limited to private entities exercising powers traditionally reserved to state).

92. *See, e.g., Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961) (finding sufficient state action to proceed with discrimination suit where restaurant that leased property in public building refused to serve an African American customer).

93. *See, e.g., Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 299–300 (2001) (finding sufficient state action for lawsuit against state high school athletic association because most of its members were public school representatives acting in their official capacity).

94. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995); *see also id.* at 397–400 (holding that Amtrak was part of government); *cf. Roberta S. Karmel, Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?*, 14 STAN. J.L. BUS. & FIN. 151, 157 (2008) (arguing that Financial Industry Regulatory Agency, which did not meet two of the three prongs of *Lebron* requirements, should not be treated as government entity (citing *Horvath v. Westport Library Ass'n*, 362 F.3d 147, 153 (2d Cir. 2004))). This Article will not address how the arguments made herein should be applied to these types of enterprises.

95. *Brentwood Acad.*, 531 U.S. at 295–96.

96. Wilson Ray Huhn, *In Defense of the Roosevelt Court*, 2 FLA. A & M U. L. REV. 1, 49 (2007).

97. *See Huhn, supra* note 8, at 1393–94 (noting that totality-of-circumstances test is more appropriate than “rule-oriented approach” to determine state action because cases involve very different circumstances).

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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.<sup>98</sup>

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,<sup>99</sup> nor being subject to government regulation,<sup>100</sup> nor being granted a potential monopoly,<sup>101</sup> standing 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 formerly exclusively performed by the government.<sup>102</sup>

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.<sup>103</sup> 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.

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98. Black, *supra* note 87, at 90–91. Professor Black was referring to racism when he spoke of “one of the most tenacious motives in American life.” *Id.* Perhaps, in this age of corporate shenanigans, we could use similar language to speak of greed.

99. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 840–41 (1982) (holding that private school does not engage in state action simply by enrolling students whose tuition was paid by city).

100. *See Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974) (holding that extensive government regulation of private utility corporation does not create sufficient state action to bring Fourteenth Amendment claim).

101. *See id.* at 351–52 (stating that existence of monopoly would not alone determine whether utility company’s discontinuation of customer’s service constituted “state action” for Fourteenth Amendment purposes). *But cf. id.* at 350–51 (suggesting that acts of heavily state-regulated utilities with government-protected monopoly are more likely to be found “state acts”).

102. *See, e.g., id.* at 352–53 (observing that case would be very different if Court were dealing with private company exercising some traditional sovereign power delegated to it by state); *cf. Megan M. Cooper, Note, Dusting Off the Old Play Book: 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) (stating that Court in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), found that private entity performing traditional state function was state action without treating exclusivity element of public function test as requirement of state action (citing Buchanan, *supra* note 84, at 387–88)).

103. 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 is itself a public function.



As the Supreme Court has said, “[i]f the Fourteenth Amendment is not to be displaced . . . its ambit cannot be a simple line between States and people operating outside formally governmental organizations.”<sup>104</sup> 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 Court has] consistently eschewed.”<sup>105</sup> 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.*,<sup>106</sup> 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 the 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.<sup>107</sup> Similarly (for purposes of this Article), in *Flagg Bros. v. Brooks*,<sup>108</sup> 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.<sup>109</sup>

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 basis of a “wink-and-nod” relationship with the regulators?<sup>110</sup> Such alterations in the facts of *Jackson* and *Flagg Bros.* should allow for additional state action arguments.

It might be argued that *Jackson* did in fact address the new governance issue when the Court “reject[ed] the notion that Metropolitan’s termination [was] state action because the State ‘ha[d] specifically authorized and approved’ the termination practice.”<sup>111</sup> However, there are at least three reasons why that decision should not be

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104. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001).

105. *Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 679 (1996) (citation omitted).

106. 419 U.S. 345 (1974).

107. *Jackson*, 419 U.S. at 358–59.

108. 436 U.S. 149 (1978).

109. *Flagg Bros.*, 436 U.S. at 151–53; *see also* Madry, *supra* note 86, at 1 (calling *Flagg Bros.* “minor watershed” for Burger-Rehnquist Court because it constricted state action doctrine, which had been powerful legal tool for civil rights movement).

110. *Cf. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 301 n.4 (2001) (observing that “winks and nods” are important in practical governance of public-private action, despite dissenters’ assertions, and if formalities were sole determinant of state action, doctrine would be too easy to evade).

111. *Jackson*, 419 U.S. at 354.

read so broadly. First, while Justice Douglas asked in dissent whether a utility may “have complete immunity under federal law when the State allows its regulatory agency to become the prisoner of the utility,”<sup>112</sup> 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.”<sup>113</sup> Again, this may be a fact that distinguishes *Jackson* from the types of cases that could arise under the proposal advanced in this Article. Third, the Court in *Jackson* contrasted that case with *Public Utilities Commission v. Pollak*,<sup>114</sup> 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 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.”<sup>115</sup>

*Pollack* arguably comes closer to the new governance fact pattern than *Jackson*, and the *Pollack* Court did find state action in that case, at least for the purposes of resolving the First Amendment question raised therein.<sup>116</sup> Furthermore, if *Jackson* 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?”<sup>117</sup>

Regardless, this section will set forth four reasons supporting the conclusion that 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)<sup>118</sup> and (b) the state benefits

112. *Id.* at 359 (Douglas, J., dissenting); *see also id.* at 363–64 (referring to Federal Trade Commission’s Utility Corporations Report as illustrative of state regulation resulting in state commissioners becoming “prisoners” of utility companies).

113. *Id.* at 354 n.11 (majority opinion).

114. 343 U.S. 451 (1952).

115. *Jackson*, 419 U.S. at 356–57 (alteration in original) (citations omitted).

116. *Compare id.* at 356 (finding ambiguity regarding how *Pollack* Court resolved question of state action), *with id.* at 371 n.3 (Marshall, J., dissenting) (disagreeing with majority’s characterization of *Pollack*’s handling of state action issue as ambiguous), *and* *Evans v. Newton*, 382 U.S. 296, 319–20 (1966) (Harlan, J., dissenting) (same), *and* *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 119 (1973) (plurality opinion) (same), *and id.* at 133 (Stewart, J., concurring) (same).

117. Buchanan, *supra* note 84, at 410. Buchanan also observes that “this 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.” *Id.* (citing *NCAA v. Tarkanian*, 488 U.S. 179, 199 (1988) (White, J., dissenting)).

118. In an earlier article, I explained that:

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

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.<sup>119</sup> 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.<sup>120</sup> 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"<sup>121</sup> and thus state action. Third, the state action doctrine in particular and the judiciary in general are 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.<sup>122</sup> And finally, the history of the state action doctrine clearly demonstrates that the doctrine is flexible enough to accommodate the additional variable proposed herein.<sup>123</sup>

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, standing alone, suffices for a finding of state action. Rather, it is the leveraging of that grant to effectuate governing which implicates state action.<sup>124</sup>

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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.

Stefan J. Padfield, *In Search of a Higher Standard: Rethinking Fiduciary Duties of Directors of Wholly-Owned Subsidiaries*, 10 *FORDHAM J. CORP. & FIN. L.* 79, 95–96 (2004) (alteration in original) (footnotes omitted) (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)).

119. As I've also stated previously:

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.

*Id.* at 89.

120. See *infra* Part III.B.2 for a discussion of the public function test and its relationship to corporate governance.

121. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 353 (1974).

122. See *infra* Part III.B.3 for a discussion of the need for judicial review of corporate governance.

123. See *infra* Part III.B.4 for a historical analysis of the state action doctrine.

124. *Cf.* *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 543 (1987) (reasoning that congressional grant of corporate charter does not equate corporate action with state action); *Jackson*, 419 U.S. at 358 (declining to find state action despite fact that "[i]n common with all corporations of the State [defendant corporation] pays taxes to the State").

1. There Is a Symbiotic Relationship Between the States and Their Corporations

In *Burton v. Wilmington Parking Authority*,<sup>125</sup> 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.<sup>126</sup> 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."<sup>127</sup> Furthermore, in seeking to improve their financial position, States have continuously and systematically reduced their oversight of these corporations.<sup>128</sup> This competition for corporate charters has taken place in the face of repeated warnings that these corporate creatures of the State will one day seek to swallow their creator.<sup>129</sup> 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

125. 365 U.S. 715 (1961).

126. *Burton*, 365 U.S. at 723–25; see also *Rendell-Baker v. Kohn*, 457 U.S. 830, 842–43 (1982) (discussing factors dispositive to Court in determining state action in *Burton*). The *Rendell-Baker* Court noted:

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.

*Id.* at 843.

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

128. Cf. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 557–60 (1933) (Brandeis, J., dissenting) (discussing competitive pressures between states to reduce limitations on corporations and noting that "[t]he 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."). *But cf.* William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 1–2 (arguing that, though dominant in area of corporate law, Delaware's common law and statutes are murky, inferior, and increase transaction costs, unlike William Cary's assertions of a "race to the bottom" and Ralph Winter's theory that capital markets' efficiencies protect investment costs (citing Cary, *supra*; 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)).

129. See C.F. Adams, Jr., *A Chapter of Erie*, in CHARLES F. ADAMS & HENRY ADAMS, CHAPTERS OF ERIE, AND OTHER ESSAYS 1, 95–96 (1871) ("Modern society has created a class of artificial beings who bid fair soon to be the masters of their creator.").

injury to state action.<sup>130</sup> This is so even though, on the surface, the State appears not to be acting at all.<sup>131</sup> As Justice Black stated in the context of primary elections:

For a state to permit such a duplication of its election processes is to permit a flagrant abuse of those processes to defeat the purposes of the Fifteenth Amendment.

. . . It is immaterial that the state does not control that part of this elective process which it leaves for the [private party] to manage.<sup>132</sup>

*a. There Is No Corporation Without the State*

“In the beginning, everyone understood that corporations were somewhat sovereign.”<sup>133</sup> As Allison Garrett notes, “[m]any 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.”<sup>134</sup>

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.<sup>135</sup> The wide acceptance of this story has been fueled by

130. *Cf.* *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 363–64 (1974) (Douglas, J., dissenting) (noting that § 1983 gives citizens means to complain whenever states allow—either by being “in cahoots” or by neglect—private groups to injure individuals).

131. *Cf.* *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 622, 634, 637 (1991) (finding state action in plaintiff’s use of peremptory challenges in district court to exclude juror based on race); *Jackson*, 419 U.S. at 369 n.2 (Marshall, J., dissenting) (stating that in *Burton*, state’s inaction did not relieve it from liability for discrimination by private entity because it had “‘elected to place its power, property and prestige behind the admitted discrimination’” (quoting *Burton*, 365 U.S. at 725)).

132. *Terry v. Adams*, 345 U.S. 461, 469 (1953) (plurality opinion).

133. Greenwood, *supra* note 20, at 2.

134. Garrett, *supra* note 19, at 133 (footnote omitted); *cf.* David Loy, *Can Corporations Become Enlightened? A Buddhist Critique of Transnational Corporations*, BUTTERFLY: J. CONTEMPORARY BUDDHISM (2001), <http://ccbs.ntu.edu.tw/FULLTEXT/JR-MISC/101784.htm> (discussing concurrent development of states and limited liability corporations). Loy writes,

Incorporated business enterprises, with legally limited economic liabilities, began in Europe. The earliest record I have found of such a corporation is from Florence, Italy, in 1532.

. . . .

What is the relevance of all that now?

. . . [I]t shows us that from the very beginning corporations have also had an incestuous relationship with the state. In the sixteenth century nation-states as we know them did not exist. Rulers generally were too limited in resources to exercise the kind of sovereignty that we take for granted today. The state as we know it today—politically self-enclosed and self-aggrandizing—developed along with the royally-chartered corporation; you might even say they were Siamese twins inescapably joined together. The enormous wealth extracted from the New World, in particular, enabled states to become more powerful and ambitious, and rulers assisted the process by dispatching armies and navies to ‘pacify’ foreign lands. As this suggests, there was a third partner, which grew up with the other two: the modern military. Together they formed an ‘unholy trinity,’ thanks to the new technologies of gunpowder, the compass (for navigation), and this clever new type of business organization which minimized the financial risk.

*Id.*

135. Butler & Ribstein, *supra* note 118, at 21.

contractarians espousing a classical liberalism that seemingly esteems freedom of contract over all other considerations.<sup>136</sup> 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 contract, or obliterate certain doctrines characteristic of the law of associations.”<sup>137</sup> 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 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.<sup>138</sup>

However this constitutional question may have been addressed in the interim, the emergence of new governance justifies a re-examination.<sup>139</sup>

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.”<sup>140</sup> This makes “capital formation easier and more accessible” and “facilitat[es] the expansion of private enterprise.”<sup>141</sup> Obviously, this dependence of the corporation on the state is significant, since it highlights the

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136. Cf. Greenwood, *supra* note 17, at 51 (stating 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”).

137. Arthur J. Jacobson, *The Private Use of Public Authority: Sovereignty and Associations in the Common Law*, 29 *BUFF. L. REV.* 599, 602 (1980).

138. Berle, *supra* note 1, at 945–46 (footnote omitted).

139. Cf. *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948) (“State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms.”).

140. RICHARD A. EPSTEIN, *BARGAINING WITH THE STATE* 107 (1993); see also Greenwood, *supra* note 17, at 59 (equating role and power of corporations to that of governmental units).

141. VERKUIL, *supra* note 32, at 83.

prominence of state action in incorporation. As Arthur Jacobson argues, “[t]he 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.”<sup>142</sup> Certainly, this conception of the corporation should sound familiar to the Supreme Court, which has in the past noted that:

[S]tate regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law. As Chief Justice Marshall explained: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created.”<sup>143</sup>

*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 presence of a generally accepted “race” between the states for corporate charters.<sup>144</sup> The most obvious explanation for this race can be seen in the impact related revenues collected by a state like Delaware (generally considered the leader in this race) have upon its budget.<sup>145</sup> “The theory is that the state through its corporation laws is seeking to promote commercial activity and general economic welfare.”<sup>146</sup>

While Delaware is the current consensus front-runner in this race, New Jersey did strive for the early lead when, in the late nineteenth century, James Dill suggested to the governor of New Jersey that liberalizing the corporation laws was the best way to

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142. Jacobson, *supra* note 137, at 600.

143. *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (quoting *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819)).

144. Whether this race is to the bottom or top is beyond the scope of this Article. Krešimir Piršl, in his article *Trends, Developments, and Mutual Influences Between United States Corporate Law(s) and European Community Company Law(s)*, 14 COLUM. J. EUR. L. 277 (2008), explains that

[t]he 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 (footnotes omitted).

145. See Michal Barzuza, *Delaware’s Compensation*, 94 VA. L. REV. 521, 524–25 (2008) (explaining significance of corporate franchise taxes on Delaware’s yearly tax revenue); cf. Greenwood, *supra* note 17, at 60 (“Corporations are . . . tools for our economic advancement . . .”).

146. Berle, *supra* note 1, at 946 n.23 (citing *Morris v. Am. Pub. Utils. Co.*, 122 A. 696, 699–700 (Del. Ch. 1923)).

increase the financial status of the state.<sup>147</sup> And, this competition for corporate charters continues—suggesting the benefit states derive from granting corporate charters continues to be greatly valued. In recent years, Ohio,<sup>148</sup> North Dakota,<sup>149</sup> and Nevada<sup>150</sup> (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 finding state action in *Burton* the Supreme Court relied on the fact that the corporation profited from the challenged conduct and that such profits “not only contribute to, but also are indispensable elements in, the financial success of a governmental agency.”<sup>151</sup>

## 2. Governance (an Exclusively Public Function) by Corporations 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.<sup>152</sup> As Timothy Kuhner notes, “[t]hose of us concerned with the problem of corporations in politics can rest assured, we are in good company.”<sup>153</sup> These voices include U.S. presidents like Thomas Jefferson, who urged citizens to “crush in it’s [sic] 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”;<sup>154</sup> Abraham Lincoln, who wrote that “corporations have been

147. Posting of Dan Ernst to Legal History Blog (June 20, 2008), <http://legalhistoryblog.blogspot.com/2008/06/james-dill-corporation-law-without.html>. See generally LAWRENCE E. MITCHELL, *THE SPECULATION ECONOMY: HOW FINANCE TRIUMPHED OVER INDUSTRY* 39–42 (2007) (explaining both James Dill’s background and how his suggestions to New Jersey’s governor increased New Jersey incorporations).

148. See Porter, *supra* note 127, at 175 (recognizing Ohio’s development of its laws “as part of a continuous effort to . . . maintain Ohio’s competitiveness as a business domicile”).

149. See Posting of Larry Ribstein to The Harvard Law School Forum on Corporate Governance and Financial Regulation, <http://blogs.law.harvard.edu/corpgov/2007/04/23/the-north-dakota-experiment/> (April 23, 2007) (reporting that adoption of North Dakota Publicly Traded Corporations Act will allow North Dakota to challenge Delaware’s revenue from in-state corporations, “\$60 per 10,000 shares of capital stock, and up to \$80,000 per year from each firm . . . that should give it a Delaware-type incentive to ‘bond’ it to maintaining and developing its law”).

150. See Keith Bishop, *United States: California, Delaware or Nevada—Choosing Where to Incorporate*, MONDAQ, Feb. 25, 2008, <http://www.mondaq.com/article.asp?articleid=57652> (discussing Nevada’s zealous attempt to attract corporations away from Delaware).

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

152. See Christopher M. Bruner, *The Enduring Ambivalence of Corporate Law*, 59 ALA. L. REV. 1385, 1389 n.16 (2008) (noting that harsh early American commentary on corporations stemmed from influence of English jurists, who criticized corporate lack of “body” and “soul”); 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).

153. Kuhner, *supra* note 22, at 2366.

154. Letter from Thomas Jefferson to George Logan (Nov. 12, 1816), in 10 *THE WRITINGS OF THOMAS JEFFERSON* 68, 69 (Paul Leicester Ford ed., 1899).



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”;<sup>155</sup> and Dwight D. Eisenhower, who warned us to “guard against the acquisition of unwarranted influence . . . by the military-industrial complex.”<sup>156</sup> President Rutherford B. Hayes went so far as to assert that “[t]his 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.”<sup>157</sup> 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.”<sup>158</sup> Furthermore, the concerns raised by these individuals in earlier years have certainly not abated.<sup>159</sup> Seemingly, they find their fulfillment in the modern phenomenon of new governance—which arguably constitutes de facto legislating by private actors.<sup>160</sup> In fact, this phenomenon may be at the very heart of the financial crisis of 2008. As Simon Johnson notes:

The crash has laid bare many unpleasant truths about the United States. One of the most alarming . . . is that the finance industry has effectively captured our government . . . . If the [International Monetary Fund]’s staff could speak freely about the U.S., it would tell us what it tells all countries in this situation: recovery will fail unless we break the financial oligarchy that is blocking essential reform.<sup>161</sup>

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.<sup>162</sup> As Gillian Metzger writes, “[i]dentifying 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.”<sup>163</sup>

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155. 2 EMANUEL HERTZ, ABRAHAM LINCOLN: A NEW PORTRAIT 954–55 (1931) (quoting Letter from Abraham Lincoln to William F. Elkins (Nov. 21, 1864)).

156. Farewell Radio and Television Address to the American People, in 1960–61 PUB. PAPERS 1035, 1038 (Jan. 17, 1961).

157. JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA, at xiv (2003) (quoting President Rutherford B. Hayes).

158. Daniel T. Ostas, *Deconstructing Corporate Social Responsibility: Insights from Legal and Economic Theory*, 38 AM. BUS. L.J. 261, 269 (2001); see also *id.* (noting free market economists’ concurrence with views of Marx gave birth to “capture theory” of regulation).

159. Cf. Kuhner, *supra* note 22, at 2385 (arguing that problems stemming from entanglement of private sphere of business and public sphere of governance can only be stymied by separation of business and state).

160. Cf. *Pub. Utils. Comm’n v. Pollak*, 343 U.S. 451, 462 n.8 (1952) (“[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 *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 401 (1950))).

161. Simon Johnson, *The Quiet Coup*, ATLANTIC, May 2009, at 46, 46.

162. See *Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003) (discussing Sixth Circuit’s reliance on Supreme Court precedent in *Skelton v. Pri-Cor, Inc.*, 963 F.2d 100, 102 (6th Cir. 1991), holding that private company operating state correctional institute could be held liable under § 1983 since function being performed was traditionally state function).

163. Metzger, *supra* note 25, at 1396–97.

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.”<sup>164</sup> 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 governance.<sup>165</sup> In at least some cases where “SRO rules were essentially treated as SEC rules . . . the SROs were . . . essentially regarded as state actors.”<sup>166</sup>

In *Flagg Bros.*, Justice Rehnquist limited the availability of the public function test to cases involving functions “exclusively reserved to the State.”<sup>167</sup> While this severely limits the functions that may be deemed “public” for purposes of the state action doctrine, adopting “binding rules of general applicability”<sup>168</sup> (i.e., legislating) should fill the bill no matter how narrow the test. As Laurence Tribe has written, “[t]he judicial hostility to private lawmaking . . . represents a persistent theme in American constitutional law.”<sup>169</sup> 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.

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.<sup>170</sup> 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

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164. *Id.* at 1397 (citing David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 647–48 (1986) (noting that certain powers, such as rulemaking, adjudication of rights, seizure of persons or property, taxation, and licensing, are largely recognized as governmental powers)).

165. 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) (highlighting inconsistent results in application of state action analysis in cases concerning SROs in securities area).

166. Karmel, *supra* note 94, at 183.

167. *Flagg Bros. v. Brooks*, 436 U.S. 149, 158 (1978). *But see* Cooper, *supra* note 102, at 956 (stating that Court in *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), found that private entity performing traditional state function was state action without treating exclusivity element of public function test as requirement of state action (citing Buchanan, *supra* note 84, at 387–88)).

168. Madry, *supra* note 86, at 21 (outlining State’s exclusive powers to adopt rules and collect taxes).

169. 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-19, at 993 (3d ed. 2000).

170. 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.”). *But see* Posting of Lyman Johnson to The Conglomerate, <http://www.theconglomerate.org/2009/05/why-it-matters.html> (May 6, 2009) (noting that despite continuing debate, many scholars agree that “shareholder primacy is not mandated by law”).

that maintains this peculiar institution without popular review.”<sup>171</sup> 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.”<sup>172</sup> Thus, in a very real way, the State encourages new governance.

Acknowledgement of this encouragement alone should also arguably be sufficient to support a finding of state action. In fact, Barbara Snyder argues that “application of the encouragement rationale would have led to a different analysis in *Flagg Bros. v. Brooks*.”<sup>173</sup> One may even 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.<sup>174</sup> Where this non-delegable duty is violated, the necessary “close nexus” should be deemed established when the corporate entity engages in new governance.

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 since the focus of that doctrine is more on overt delegations.<sup>175</sup> However, 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. Then, current non-delegation doctrine arguably protects private actors from many of the “inefficiency” concerns raised by my proposal.<sup>176</sup> For example, some legitimate attempts to influence government could be funneled into processes regulated by the Federal Advisory Committee Act (“FACA”),<sup>177</sup> which “aims to keep Congress and the public informed about the number, purpose, membership, and activities of groups established or utilized to offer

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171. Greenwood, *supra* note 17, at 43.

172. Kuhner, *supra* note 22, at 2356; *see also* Greenwood, *supra* note 17, at 72 (arguing that publicly traded entities develop lobbies and interfere with political process for same reasons that entities make other decisions: to maximize profits).

173. Barbara Rook Snyder, *Private Motivation, State Action and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053, 1072 (1990). In discussing state action, Snyder suggests:

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.

*Id.* at 1072–73.

174. *Cf.* Carlo v. State, No. 104937, 2006 WL 2944667, at \*19 (N.Y. Ct. Cl. Sept. 18, 2006) (stating state has non-delegable duty to build and maintain roads in reasonable manner to prevent foreseeable harm), *aff’d*, 855 N.Y.S.2d 919 (2008).

175. *See* Karmel, *supra* note 94, at 155–56 (noting Supreme Court’s resistance to non-delegation doctrine in favor of separation of powers doctrine); Metzger, *supra* note 25, at 1411, 1419 (suggesting Supreme Court’s hesitancy to apply non-delegation doctrine has resulted in lack of clarity in regards to nature and scope of constitutional restrictions on private delegations).

176. *Cf.* Jaffe, *supra* note 47, at 220–21 (arguing that lawmaking by private parties under statutory delegation does not contradict traditional process of lawmaking).

177. 5 U.S.C. app. §§ 1–16 (2006).

advice or recommendations to the President or to officers or employees of the federal government.”<sup>178</sup>

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) compel the private actor to conform its actions to the requirements of the Constitution as they apply to governmental action.”<sup>179</sup> This result is consistent with the thinking of commentators like Adolf Berle, who opined (as noted in the Introduction) that “[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,”<sup>180</sup> 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 governmental conduct,” and therefore, “states could be required in chartering corporations or granting licenses to insist that the private entity refrain from infringing constitutional liberties.”<sup>181</sup>

### 3. The Possibility That the Democratic Process Has Failed to Keep Governance by Corporations in Check Is Great Enough to Warrant Judicial Review

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’s<sup>182</sup>) 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 lobbying<sup>183</sup> and revolving-door ties between our government and the private sector.<sup>184</sup> For example, some have

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178. Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 452–53 (1997) (noting that FACA was created to formalize already established institution, out of concern that some parties had “unchecked and perhaps illicit access” to governmental decision makers); cf. 1 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 3.62, at 310 (2d ed. 1997) (noting courts have failed to find First Amendment right to communicate with government despite fact that FACA often has “‘chilling effect’ on parties who opt to petition the government”).

179. Buchanan, *supra* note 84, at 345 (footnote omitted).

180. Berle, *supra* note 1, at 952.

181. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 510–11, 527 (1985).

182. Cf. VERKUIL, *supra* note 32, at 9 (noting that vice president met with energy company executives to formulate energy policy (citing *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 373–74 (2004))).

183. See RONALD DWORKIN, IS DEMOCRACY POSSIBLE HERE?: PRINCIPLES FOR A NEW POLITICAL DEBATE 129 (2006) (noting that large campaign contributors purchase access to candidates and, ultimately, control); Kuhner, *supra* note 22, at 2362 (arguing that need for campaign funds, coupled with powerful interest groups and permissive laws, make “governmental capture” inevitable).

184. See VERKUIL, *supra* note 32, at 37 (suggesting Department of Homeland Security officials lifted lobbying restrictions because of influence from former colleagues-turned-lobbyists (citing Eric Lipton, *Former Antiterror Officials Find Industry Pays Better*, N.Y. TIMES, June 18, 2006, at A1)); Michael Lewis & David Einhorn, Op-Ed., *The End of the Financial World as We Know It*, N.Y. TIMES, Jan. 3, 2009, <http://www.nytimes.com/2009/01/04/opinion/04lewiseinhorn.html?pagewanted=1&r=1&sq=michael%20lewis&st=cse&scp=1> (noting that three recent SEC directors of enforcement were later given powerful positions at Wall Street firms, leading some to believe that role as SEC director of enforcement may have been means to attain objective of landing high-paying job on Wall Street).

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,”<sup>185</sup> 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.”<sup>186</sup>

Thus, it arguably falls to the judiciary to police this area<sup>187</sup>—even if this involves an expansion of current state action doctrine.<sup>188</sup> As far back as 1835, Alexis de Tocqueville noted that, “[t]he power of the courts has always been the greatest guarantee of individual independence . . . . Private rights and interests are always in peril unless the judicial power grows and expands as conditions become more equal.”<sup>189</sup> 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.<sup>190</sup> 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.<sup>191</sup>

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

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185. Posting of Frank Pasquale to Concurring Opinions, [http://www.concurringopinions.com/archives/2008/10/the\\_manicures\\_d.html](http://www.concurringopinions.com/archives/2008/10/the_manicures_d.html) (Oct. 9, 2008).

186. Posting of Ellen Miller to Sunlight Foundation, <http://blog.sunlightfoundation.com/2008/09/25/finance-industry-giving-visualized/> (Sept. 25, 2008).

187. *Cf.* *United States v. Lopez*, 514 U.S. 549, 552 (1995) (explaining principles underlying separation of powers), *superseded by statute*, Pub. L. No. 104-208, 110 Stat. 3009-369, 3009-372 (1996), *as recognized in* *United States v. Dorsey*, 418 F.3d 1038 (9th Cir. 2005); Huhn, *supra* note 8, at 1384 (noting that state action doctrine subjects government action to judicial review as a means of protecting fundamental rights of people); *id.* at 1384–85 (noting that it is constitutional duty of courts to enforce prohibitions against state action).

188. *Cf.* *Smith v. Allwright*, 321 U.S. 649, 665 (1944) (recognizing importance of not following precedent in face of former error).

189. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 825 (Arthur Goldhammer trans., Library of Am. 2004) (1835).

190. *Cf.* Kuhner, *supra* note 22, at 2378 (reasoning that lack of transparency in political campaigns and lobbying results in average voter not knowing “the true interests motivating public policies”); *id.* at 2377–78 (stating that “excessive entanglement” does not simply refer to economic function of law or government action, but rather refers to economic influence in generating such policy).

191. Huhn, *supra* note 8, at 1395, 1397 (footnote omitted).

The argument set forth in this Article may also raise concerns of overregulation.<sup>192</sup> 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.<sup>193</sup> This is what Adolf Berle argued for when he wrote that “[t]he 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.”<sup>194</sup> Once again, this shows a connection between the arguments set forth in this Article and Berle’s vision that “[o]ne may reasonably forecast, in the future, direct application of constitutional limitations to the corporation, merely because it holds a state charter and exercises a degree of economic power sufficient to make its practices ‘public’ rules.”<sup>195</sup>

#### 4. The Historical Flexibility of the State Action Doctrine 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.<sup>196</sup> Specifically, the doctrine has had a number of incarnations to date. First, in the *Civil Rights Cases*,<sup>197</sup> the seemingly bright-line proposition was espoused that private conduct cannot be limited by the Fourteenth Amendment.<sup>198</sup> Then, in *Smith v. Allwright*,<sup>199</sup> the Court expanded the doctrine to allow for the actions of ostensibly private parties to be deemed state action in certain circumstances.<sup>200</sup> This has been called a “sea change” in the “Court’s understanding of the ‘state action’ doctrine.”<sup>201</sup> Next came an expansion of the state action doctrine that “was an essential

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192. See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 303 (2001) (stating that showing of public action may be outweighed by particular value that was found to be at odds with finding public accountability); cf. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 373 (1974) (Marshall, J., dissenting) (noting that majority’s holding that there was no state action stemmed from reluctance to burden customers who would ultimately feel effect, and arguing that abbreviated pre-termination procedures for all utility companies would be better alternative).

193. 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. See Neil K. Komisar, *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) (discussing progression of Court’s jurisprudence regarding interplay of monopoly power and business’s status as “affected with a public interest”).

194. Berle, *supra* note 1, at 943.

195. *Id.* at 953.

196. See, e.g., Cooper, *supra* note 102, at 914 (noting that Court adjusted state action test to focus on state’s relationship with private entity, instead of state’s involvement in act).

197. 109 U.S. 3 (1883).

198. *Civil Rights Cases*, 109 U.S. at 11 (stating that Fourteenth Amendment prohibits certain state action and is not concerned with private invasion of individual rights).

199. 321 U.S. 649 (1944).

200. *Allwright*, 321 U.S. at 664–65 (overruling precedent and finding actions of private Democratic Party to constitute state action).

201. Huhn, *supra* note 96, at 46.

component of the Court's efforts to end racial segregation in the South."<sup>202</sup> The cases from that era include *Shelley v. Kraemer*,<sup>203</sup> which found the Court agreeing with an argument that "some of the greatest legal minds of the 20th century" apparently thought preposterous.<sup>204</sup> 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.<sup>205</sup> More recently, commentators have noted openings for a renewed loosening of the doctrine.<sup>206</sup>

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 2008–2009 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.<sup>207</sup> To quote Gillian 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."<sup>208</sup> 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:

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202. Madry, *supra* note 86, at 6 (stating Court extended constitutional protections to embrace private initiatives); Huhn, *supra* note 96, at 2, 89 (noting that Court from 1937 to 1954 was filled with Roosevelt appointees and arguing that justices did not pretend to promote individual freedom by precluding application of constitutional protections against private entities).

203. 334 U.S. 1 (1948) (deeming court enforcement of racially restrictive covenant to be state action).

204. Posting of Mark Edwards to Concurring Opinions, [http://www.concurringopinions.com/archives/2008/12/drop\\_everything.html#more-10726](http://www.concurringopinions.com/archives/2008/12/drop_everything.html#more-10726) (Dec. 19, 2008) (explaining how graduate from "undistinguished" law school and son of slaves argued that enforcement of racially discriminatory restrictive covenants constitutes state action in *Shelley*, even though legal scholars thought such argument was sure to fail). While in no way drawing a comparison, I am reminded of an early presentation I gave of this project, at the end of which one of the professors attending commented that my proposal sounded "slightly less preposterous" after hearing it a second time.

205. See Chemerinsky, *supra* note 181, at 505 n.10 (noting that Burger Court constricted use of state action doctrine by its unwillingness to apply constitutional protections against private conduct); Madry, *supra* note 86, at 2 (noting that *Flagg Bros. v. Brooks* constricted state action doctrine, which was major tool of civil rights movement); cf. Huhn, *supra* note 96, 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 governmental power from the demands of the Constitution.").

206. See, e.g., Cooper, *supra* note 102, at 962 ("[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." (footnote omitted)).

207. See Posting of Martin Lipton to The Harvard Law School Forum on Corporate Governance and Financial Regulation, <http://blogs.law.harvard.edu/corpgov/2008/11/26/risk-management-and-the-board-of-directors/> (Nov. 26, 2008) ("Risk from the financial services sector has contributed to large-scale bankruptcies, bank failures, government intervention and rapid consolidation.").

208. Metzger, *supra* note 25, at 1376.

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.<sup>209</sup>

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 country<sup>210</sup> 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."<sup>211</sup> Certainly, the Court has recently reminded us that it is concerned with the corrupting influence of corporate political largesse when it held that the due process rights of litigants may be violated by a judge's refusal to recuse in the face of large campaign contributions from one of the corporate litigants.<sup>212</sup>

#### IV. CONCLUSION AND IMPLICATIONS

Broadening the definition of state action to include instances of new governance by corporate actors could, of course, impact a number of other statutes, treaties and

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209. Chemerinsky, *supra* note 181, at 507. Adolf Berle argues that the organization of modern corporations and the feudal system are similar in structure:

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.

Berle, *supra* note 1, at 942 n.18.

210. *Cf.* *United States v. Lopez*, 514 U.S. 549, 556 (1995) (stating that *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), *United States v. Darby*, 312 U.S. 100 (1941), and *Wickard v. Filburn*, 317 U.S. 111 (1942), brought about new era of Commerce Clause jurisprudence, expanding Congress's authority in reaction to changes in realities of business operations), *superseded by statute*, Pub. L. No. 104-208, 110 Stat. 3009-369, 3009-372 (1996), *as recognized in* *United States v. Dorsey*, 418 F.3d 1038 (9th Cir. 2005).

211. Cole, *supra* note 66, at 391 n.234.

212. *See* *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2263-64 (2009) (noting that "there is a serious risk of actual bias . . . when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds" and that the inquiry in such cases "centers on the contribution's relative size [and] . . . the total amount spent in the election").



doctrines.<sup>213</sup> 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 points out:

Most human rights abuses are only prohibited by customary international law if committed by or in collusion with a governmental public actor. . . . US courts have found that rape, summary execution, torture, cruel inhuman and degrading treatment, pollution of international waters contrary to UNCLOS, crimes against humanity, rights to associate and organise, and racial discrimination are presently proscribed by the law of nations only when state action is present . . . .<sup>214</sup>

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 ATCA [(Alien Tort Claims Act)] claim.”<sup>215</sup> As has been alluded to above, state action doctrine jurisprudence carries over to § 1983 claims.<sup>216</sup> “[I]t could be argued that a State’s failure to adequately control a corporation amounts to ‘state action’ in international law for the purposes of activating ATCA.”<sup>217</sup>

At the same time, the proposal set forth here clearly implicates campaign finance law<sup>218</sup> and perhaps other doctrines<sup>219</sup> as well. The resolution of these issues will be left

213. See, e.g., Peek, *supra* note 3, at 136 (stating that Privacy Act of 1974 applies only to government actors, and thus fair information practices, open-access rules, and data-ownership principles do not bind private corporations (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, \*4)); cf. Garrett, *supra* note 19, at 150–51 (expressing concern over how privatization can allow states to circumvent international treaties (citing Michael K. Addo, *Human Rights Perspectives of Corporate Groups*, 37 CONN. L. REV. 667, 670–73 (2005))).

214. SARAH JOSEPH, *CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION* 48 (2004) (footnotes omitted).

215. *Id.* at 33 (noting that since most human rights norms apply only against government action, claims brought under Alien Tort Claim Act against private entity require some sort of joint responsibility on part of entity and state); see also 28 U.S.C. § 1350 (2006) (“The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”); cf. Larry Catá Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14 ILSA J. INT’L & COMP. L. 499, 502 (2008) (noting opposition amongst powerful states to idea of direct relationship between international law and economic collectives, resulting in international law being mostly directed towards states).

216. Cf. VERKUIL, *supra* note 32, at 38–39 (noting state action doctrine applies to both Fourth Amendment exclusionary rule and § 1983 “Color of Law requirements”).

217. JOSEPH, *supra* note 214, at 39.

218. Cf. Kuhner, *supra* note 22, at 2381 n.124 (noting that Senators Arlen Specter and Charles Schumer are currently investigating possibilities for meaningful reform, specifically developing constitutional amendment overturning line of Supreme Court cases holding that money is protected free speech, which began with *Buckley v. Valeo*, 424 U.S. 1 (1976)). Unfortunately, the recent Supreme Court case of *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010) (overruling portions of Bipartisan Campaign Reform Act of 2002), came out too late to allow for meaningful comment here. Obviously, to the extent that decision further loosens restrictions on corporate influence over our democratic process, it merely serves to amplify many of the concerns raised in this Article.

219. Cf. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 363 (1974) (Douglas, J., dissenting) (noting that private utilities have successfully avoided antitrust law based on argument that their monopoly status is result of 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,

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.<sup>220</sup> As Kent Greenfield, Daniel Greenwood, and Erik Jaffe note, “[l]ike freedom of contract, freedom of speech is a doctrine of selective government abstention, and the absence of government always empowers those who have the power to do as they please.”<sup>221</sup>

In her article entitled *The Corporation as Sovereign*, Allison Garrett notes:

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 elected officials play may become less important than the roles played by corporate executives.<sup>222</sup>

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

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1652 (stating that private entities are insulated from liability under state action doctrine only when acting pursuant to “a clearly articulated state policy” and where state supervision of antitrust conduct is present (citing *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104 (1980))).

220. Cf. Gore Vidal, *Foreword to DAVID DONNELLY ET AL., MONEY AND POLITICS: FINANCING OUR ELECTIONS DEMOCRATICALLY*, at ix–x (1999) (noting that majority of campaign contributions come in form of checks exceeding \$1,000, and less than one-tenth of one percent of U.S. population make contributions of that value, but ninety percent of group contributions come from corporations who deduct contributions as cost of doing business); Frank Pasquale, *Reclaiming Egalitarianism in the Political Theory of Campaign Finance Reform*, 2008 U. ILL. L. REV. 599, 601 (stating that those interested in reforming campaign financing must reclaim original justification of reform: ensuring that the powerful do not exercise undue influence on outcomes of political campaigns).

221. Kent Greenwood et al., *Should Corporations Have First Amendment Rights?*, 30 SEATTLE U. L. REV. 875, 877 (2007).

222. Garrett, *supra* note 19, at 163; 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.”).