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Tradução

Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Serve Human Needs[†]

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Sumário

Introduction; I. Why the Doctrine is a Mess; II. New Urgency; II. A Increased Privatization of Traditionally Public Services; II.B Increased Commercial Use of Arbitration Clauses; II.C Increased Use of The Internet And Digital Communications; III. Current Trends Complicate Understandings of What is Public and What is Private; IV. Alternative Formulations; V. What is Really at Stake: Increasing Accountability; Conclusion; References.

Introduction

In U.S. constitutional law, the state action doctrine — attaching the protections of individual rights to government action — is notoriously confusing, if not incoherent. Though the doctrine is already known for its "lack of clarity,[1]" commentators compete in rhetorical flourishes, describing the

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[1] Emily Chiang, No State Actor Left Behind: Rethinking Section 1983 Liability in the Context of Disciplinary Alternative Schools and Beyond, 60 BUFF. L. REV. 615, 643 (2012).

doctrine "a collection of arbitrary rules,[2]" "a conceptual disaster area,[3]" and, my personal favorite, "a torchless search for a way out of a damp echoing cave.[4]" Yet, satisfying the "state action" requirement is a precondition for judicial enforcement of individual rights. This very fact is sadly a key reason for the doctrine's incoherence. It is the threshold question —the door — into the room of rights; all the pressures and desires to apply and to resist rights tear it from its hinges. Thus, while the basic inquiry over whether the challenged action took place under the auspices of government seems intuitive, the case law over time has created a patchwork quilt of tests and precedents defining who counts as a government actor, when nongovernmental actors may nonetheless be treated as acting with governmental authority, and when a given action involves sufficient indications of governmental authority to give rise to the constitutional limitations that ensure accountability for public values[5].

Attention to the doctrine comes and goes[6]. It now warrants renewed attention for at least three reasons: (i) the sharp increases in privatization due to governmental outsourcing to private actors; (ii) efforts by businesses to insulate themselves from judicial action and from the application of civil rights laws; and (iii) the growing reliance of all aspects of society on privately-built infrastructure, related to the Internet and digital revolution. These challenges reflect tensions between public values and the value of a private sphere; show disagreements about the dividing line between public and private spheres; and implicate constitutional values such as due process, equal protection, and freedom of speech even if federal judicial treatment is not availing. Constitutional values inform efforts by the political branches, state or municipal government action, and private initiatives. When the legal doctrine renders the values remote and unpredictable, there is a problem that deserves not only judicial treatment, but broader public concern. Reformulations could make the state action doctrine more sensible for federal judicial action and other legal and collective responses. The aim of this Article is less to advocate for any particular reformulation than to emphasize how the current chaos itself alters the shape of fundamental rights in lived experience. Constitutional values in this sense are not only materials for federal adjudication, but also the material shaping the debates and aspirations of Americans about how we want to be treated and how we want power held accountable. Other legal resources

[2] Wilson R. Huhn, The State Action Doctrine and the Principle of Democratic Choice, 34 HOFSTRA L. REV. 1379, 1380 (2006).
[3] Charles. L. Black, Jr., Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 HARV. L. REV. 69, 95 (1967).
[4] Charles. L. Black, Jr., Foreword: "State Action," Equal Protection, and California's Proposition 14, 81 HARV. L. REV. 69, 95 (1967).
[5] See infra Section I
[6] For a good recent survey of past and present discussions, see generally Developments in the Law: State Action and the Public/Private Distinction, 123 HARV. L. REV. 1248 (2010) [hereinafter Developments in the Law].

beyond federal courts could remedy the problem as well. The law should not prevent the public from articulating and realizing collective responsibility for constitutional values when trends recast matters of public concern as "private."

What follows are discussions of the mess that is the state action doctrine (Section I), the rise of new issues elevating the importance of the line between governmental and nongovernmental activities in large swaths of daily life (Section II), and the connections and disconnections between the governmental-nongovernmental distinction and what society treats as public versus private (Section III). After these foundational discussions, this Article maps potential alternative formulations of the state action doctrine (Section IV) and additional avenues for change that would advance the goal of accountability to the community that underlies the state action doctrine (Section V).

I. WHY THE DOCTRINE IS A MESS

I have already reported the frequent assessments that the current state action doctrine is notoriously incoherent. Only those acting pursuant to statutes and regulations, government employees, and a narrow set of other actors can enter the state-action doorway and trigger protections of due process under the 5th and 14th Amendments. Behind this doorway exist guarantees of fair hearings, equal protection, and life, liberty, and property[7]. And through the incorporation doctrine, protections of free speech and free exercise of religion are included; however, these protections only arise when a state actor jeopardizes the right. This doctrinal limitation is true even if behavior by a telephone company, credit card agency, Internet service provider, private school, private police, or private prison are awfully constraining and powerful[8].

[7] Federal constitutional norms may enter through means other than federal judicial action. For example, the Restatement (Third) of Prop.: Servitudes § 3.1 (Am. Law Inst. 2001) provides that, "[s]ervitudes that are invalid because they violate public policy include, but are not limited to: . . . [those] that unreasonably burden[ ] a fundamental constitutional right." States enact such a rule through their judicial decisions.

[8] See, e.g., Blum v. Yaretsky, 457 U.S. 991, 1005–12 (1982) (transfer of a patient receiving public health care benefits from a private institution does not involve state action); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350–54 (1974) (holding that state sanctioning a private utility does not sufficiently establish state action when utility terminated electricity supply without notice); Rendell-Baker v. Kohn, 457 U.S. 830, 839–43 (1982) (private school receiving most of its funding from public sources and performing a public function is not a state actor subject to constitutional limitations). The doctrine of private delegation has also failed to cover gaps in accountability when government outsources tasks to private actors. See Gillian E. Metzger, Private Delegations, Due Process, and the Duty to Supervise, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 292 (Jody Freeman and Martha Minow, eds., 2009). For additional discussion of private prisons and state action, see David Yarden, Prisons, Profits, and the Private Sector Solution, 21 Am. J. of Crim. L. 325, 331–32 (1994). For additional discussion on the internet and internet service providers and the inapplicability of the state action doctrine, see Paul Schiff Berman, Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation, 71 U. Colo. L. Rev. 1263, 1283–84 (2000)

Historical analysis does not resolve the confusion but may offer at least some explanation for it[9]. By finding that Congress lacked power to enact the Civil Rights Act of 1875, the Supreme Court set the problem in motion[10]. The Court allowed local and state law to regulate discriminatory conduct in public accommodations, entertainment, and transportation when run by nongovernmental actors. The Court's concern for federalism dominated; it presumed that state law would ensure that innkeepers and public carriers would furnish accommodation and service to "all unobjectionable persons who in good faith apply for them.[11]" The federal government could intervene only if state laws themselves imposed unjust discrimination[12]. Yet, the Court also hinted that the constitutional responses to slavery stop short of federal regulation of choices by individuals about whom to transport or whom to drive[13].

The states failed to guard against racial discrimination in public accommodations, employment, and other activities and countenanced vigilante violence against African-Americans[14]. Propelled by the Civil Rights Movement in the 1950s and 1960s, Congress responded with the 1964 Civil Rights Act, and dodged the limitations of the 1883 Civil Rights Cases by resting the new federal concern in the Commerce Clause rather than the 14th Amendment[15]. Courts expanded the doctrine during the Civil Rights era in the face of inventive and strained efforts by governments to privatize schooling and bypass public housing standards[16]. Hence, state action could be found where the private actor performed a public function or where the privatization rolled back previously available protections. The Court even introduced a notion that entanglement between public and private actors could amount to discriminatory conduct when a

[9] Michael J. Phillips, The Inevitable Incoherence of Modern State Action Doctrine, 28 ST. LOUIS L. J. 683, 718–21 (1984); Developments in the Law, supra note 6, at 1250–52, 1255–66.

[10] See The Civil Rights Cases, 109 U.S. 3, 25–26 (1883) (finding neither the Thirteenth nor Fourteenth Amendments empower Congress to safeguard blacks against the actions of private individuals).

[11] Id. at 25.

[12] Id.

[13] Id.

[14] See WALTER WHITE, ROPE & FAGGOT: A BIOGRAPHY OF JUDGE LYNCH 19–39 (1929) (documenting the use of lynching to terrorize Southern Blacks after the Civil War); FRED POWLEDGE, FREE AT LAST? THE CIVIL RIGHTS MOVEMENT AND THE PEOPLE WHO MADE IT 115–34 (1991) (describing Southern repression of Blacks and obstacles to their exercise of voting rights). Moreover, Southern states enacted Black codes, designed to reinstate limitations on the rights and freedoms of freed slaves. See DOUGLAS BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 53–57 (2008).

[15] See Heart of Atlanta Motel Inc. v. United States, 379 U.S. 241, 252–62 (1964).

[16] See Griffin v. Cty. Sch. Bd. of Prince Edward Cty., 377 U.S. 218, 233–34 (1964) (finding state action and denial of equal protection when the County School Board closed public schools while replacing them with and contributing to private segregated white schools); Reitman v. Mulkey, 387 U.S. 369, 380–81 (1967) (finding unconstitutional an article of the California Constitution preventing any person from using his discretion to decline to sell, lease, or rent his real property to another because it would involve the state in private racial discrimination to an unconstitutional degree).

customer was denied service based on his race by a private restaurant located in a publicly-funded and state-owned building[17].

This expansive view stopped short of encompassing racial discrimination by a private club operating under a public liquor license[18] and the termination of electricity by a utility sanctioned by the state as a monopoly provider[19]. Shifts in the country's politics — including backlash against the Civil Rights Movement and Supreme Court appointments after 1970 — better explain alterations in the state action doctrine than internal doctrinal analyses[20]. Contrast the high water mark of expansive state action and the current day. In Shelley v. Kraemer, the Court found state action for judicial rejection of racially restrictive covenants governing private property because the property owner ultimately relied upon judicial enforcement to secure the purposes of the covenants[21]. Yet forty years later, the Court found no state action when a father severely beat and disabled his child after social services failed to remove the child from his father's custody even after being notified of possible abuse[22].

Thus, even though the nineteenth century Civil Rights Cases undid the federal effort to implement the 14th Amendment's antidiscrimination norms in businesses, contracts, public accommodations, and civil society, the twentieth century civil rights decisions expanded federal enforcement of civil rights norms. And in recent decades, the Supreme Court has declined to expand or even reiterate prior rulings while keeping old precedents in place[23]. The result is a set of decisions bound by their facts, not by their analyses. For instance, the Supreme Court found no state action in the conduct of a private school funded nearly exclusively from government sources[24], but did find state action in a private association of interscholastic athletic competitions including both public and private schools[25]. The Court rejected a claim of state action when a state statute authorized a private warehouse to sell someone's goods as a remedy for an unpaid debt[26], and yet found state action four years later when another creditor was able to attach a debtor's

[17] See Burton v. Wilmington Parking Auth. 365 U.S. 715, 726 (1961) (finding that lessees of publicly-funded buildings must comply with the Equal Protection Clause of the 14th Amendment).
[18] Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178–79 (1972) (declining to find state action when a private club, operating under a state liquor license, refused to admit or serve African-Americans) .
[19] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 258–59 (1974) (holding that state sanctioning a private utility does not sufficiently establish state action when utility terminated electricity supply without notice).
[20] See Phillips, supra note 9, at 697–717.
[21] 334 U.S. 1, 22–23 (1948).
[22] DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 202–03 (1989).
[23] See, e.g., Evans v. Abney, 396 U.S. 435, 445–46 (1970) (declining to extend public function branch of state action doctrine to apply to a will turning a public park into private land after the 1964 Civil Rights Act); Moose Lodge, supra note 18. Efforts to convince the R Supreme Court to change the state action doctrine and expand public protections did not succeed. See, e.g., Christopher W. Schmidt, The Sit-Ins and the State Action Doctrine, 18 William & Mary Bill of Rights J. 767, 828 (2010).
[24] Rendell-Baker v. Kohn, 457 U.S. 830, 837 (1982).
[25] Brentwood Academy v. Tennessee Secondary School Athletic Ass'n, 531 U.S. 288, 291 (2001).
[26] See Flagg Bros., Inc., v. Brooks, 436 U.S. 149, 157 (1978).

property using a writ of attachment issued by a state court clerk and executed by the county sheriff[27].

The Court finds state action at times when public and private actors visibly join together — as they did in an interscholastic athletics association and in seizure of goods by a private creditor — but not when the private actor is empowered by public law to act coercively — i.e., to seize a debtor's goods or to violently beat a child. Perhaps judicial concerns about a limitless state arise when a finding of state action would lead to greater state supervision, liability, or engagement with private actors. Indeed, limitations on state action embody judicial concerns about private actors' freedom and reflect particular conceptions about the roles of state and federal governments, courts and legislatures, and economic markets[28]. Yet the pattern of precedents does not establish coherent protections for liberty nor consistent restrictions on governmental power.

The confusion multiplies in legal questions related, but not identical, to the constitutional state action doctrine. Two connected questions ask who is acting "under color of state law" and who has full or partial immunities accorded to state actors sued for violations of law under 42 U.S.C. § 1983[29]. Similar questions arise under the analogous judge-made doctrine that enables suits against federal actors for violations of law[30]. Consider how a private physician under contract to treat individuals in a state prison acted under color of state law[31], but when state police conducted an illegal raid and arrest, the police department was not held responsible for the officers' conduct when they were sued in their "personal-capacity.[32]" This contrast indicates how the muddled doctrine allows outsourced governmental work to bypass constitutional restrictions and other public obligations, such as disclosure under the Freedom of Information Act[33]. Such inconsistency

[27] See Lugar v. Edmonson Oil. Co., 457 U.S. 922, 942 (1982) (holding private actors acted under color of state law in obtaining ex parte writ of attachment). As another example of this fact-specific set of cases, the Court found that a private school largely funded by the government does not engage in state action when it hires and fires, see Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982), yet previously found that there is state action when a state transfers a public asset like a park to a private corporation for the purpose of evading civil liberties, see Evans v. Newton, 382 U.S. 296, 302 (1966). By using the conclusory phrase, "fairly attributable to the state" to identify state action, the Supreme Court has made the concept seem to turn on "I know it when I see it." See Lugar, 457 U.S. at 937.

[28] Lillian BeVier & John Harrison, The State Action Principle and Its Critics, 96 VA. L. REV. 1767, 1811, 1827, 1835 (2010).

[29] This statute provides a remedy for deprivation of constitutional rights when that deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage" of a State. See generally Lugar, supra note 27, for the Court's analysis of this issue.

[30] See Bivens v. Six Unknown Named Agents, 403 U.S. 388, 397 (1971) (finding that damages may be recovered from injuries consequent upon violation of the Fourth Amendment by a federal official).

[31] See West v. Atkins, 487 U.S. 42, 57 (1988) (holding that private physician who had allegedly mistreated a prisoner in a state prison acted under color of state law).

[32] See Kentucky v. Graham, 473 U.S. 159, 171 (1985); see also Richard H.W. Maloy, "Under Color Of" — What Does It Mean?, 56 MERCER L. REV. 565, 606–07 (2005).

[33] Martha Minow, Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 110, 121 (Jody Freeman & Martha Minow, eds., 2009); Steven J. Kelman, Achieving Contracting

renders unclear restrictions against privatizing "inherently governmental functions.[34]" Further complications arise as private actors — running shopping malls, Internet services, and other nongovernmental efforts — are replacing public squares and towns as the modern spaces where people interact, express themselves, and connect with others.

Resurging concerns about federalism echo the Civil Rights Cases of 1883. In contemporary contexts that bring greater intermixing of state and federal action and public and private activities, federal judges may find it best to leave regulation to the states or to Congress. For example, after initially protecting freedom of speech at private shopping malls, the Supreme Court has reversed course as a matter of federal law. However, some states have continued to protect speech at shopping malls under their state constitutions[35]. Will the federal analysis extend to virtual shopping malls and other spaces on the Internet[36]? Could statutes provide more consistency and reach private activities substituting for public settings? Congress can and does extend some constitutional norms — such as antidiscrimination and free speech protections — to private actors as conditions on federal spending or as regulations of interstate commerce[37]. However, these concessions do little to properly address the growing need to define clearly the state action doctrine in a way that accords with modern difficulties.

II. NEW URGENCY

Goals and Recognizing Public Law Concerns: A Contracting Management Perspective, in GOVERNMENT BY CONTRACT, id. The Supreme Court has recently decided that a private contractor used by the Navy does not benefit from the immunity that would attach to the Navy in a case involving digital recruitment and governed by the Telephone Consumer Protection Act. Campbell-Ewald Co. v. Gomez, __ U.S. __ (2016), https:// www.supremecourt.gov/opinions/15pdf/14-857_8njq.pdf, archived at https://perma.cc/M2XNHJ78. In the same term, the Court reversed a Sixth Circuit opinion that had denied government immunity to a government contractor engaged to collect debts, although the Supreme Court skipped the immunity question by concluding that there would be no liability in any case. Sheriff v. Gillie, __ U.S. __ (2016), https://www.supremecourt.gov/opinions/15pdf/15- 338_lkgn.pdf, archived at https://perma.cc/GMV8-TXFU. For an analysis of these developments, see Alexander "Sasha" Volokh, How Does Privatization Affect Government Liability?, July 19, 2016, http://reason.org/news/show/privatization-government-liability, archived at https://perma.cc/7ENY-BYHV.

[34] Paul R. Verkuil, Outsourcing and the Duty to Govern, in GOVERNMENT BY CONTRACT, 310, 325–327 (Feb. 2008), http://tradeinservices.mofcom.gov.cn/upload/2009/06/30/ 1246341575078_322905.pdf, archived at https://perma.cc/W5MX-MHMA; See generally Kate M. Manuel, Definitions of "Inherently Governmental Function" in Federal Procurement Law and Guidance, CONGRESSIONAL RESEARCH SERVICE 21 (Dec. 23, 2014), https://www.fas .org/sgp/crs/misc/R42325.pdf, archived at https://perma.cc/5J3F-AHEA.

[35] In Amalgamated Food Employees Union Local v. Logan Valley Plaza, Inc., 391 U.S. 308, 325 (1968), the Supreme Court ruled that the First Amendment barred delegation of power to the private shopping malls to restrict speech through use of trespass law. Hudgens v. Nation Labor Relations Board, 424 U.S. 507, 521 (1976), reversed this decision while leaving in place the protection of speech in a company town. State courts in California, Colorado, Massachusetts, and New Jersey have protected speech in shopping malls under their state constitutions. See James Barger, Extending Speech Rights Into Virtual Worlds, 7 SCI TECH LAW, 18, 18–22 (July 2010); Developments in the Law, supra note 6, at 1303–14.

[36] See James Barger, supra note 35.

[37] See, e.g., 42 U.S.C.A. §§ 2000d–2000d-7 (2016); 42 U.S.C.A. §§ 2000e–2000e-17 (2016).

Concerned with the power of monopolies and big business and worried about passive consumerism, Justice Louis D. Brandeis wrote that, "the law has everywhere a tendency to lag behind the facts of life.[38]" This remains true even now. Brandeis planned, according to historian Steven Piott, to "chip away at the assumption that the principles of law should be unchanging" and "break the traditional hold on legal thinking [by] work[ing] to harmonize the law with the needs of the community.[39]" In the same spirit, this Article suggests that the facts of contemporary life are changing in ways that the law should acknowledge.

Yet instead of reflecting contemporary life, the state action doctrine breeds confusion and incoherence. Some may argue that doctrinal confusion acts as a resource for litigators and reformers. Reformers can draw from the inconsistent strands of case law in advancing their arguments[40]. But a doctrinal mess impairs understanding and realization of purposes; it also obscures the issues and makes them less accessible for public debate. Three modern developments make the current mess of the state action doctrine even more significant: first is the expansion of private actors performing functions or actions formerly performed by state actors; second is the increased insertion of arbitration clauses in consumer contracts; and third is the increased use of Internet and digital communication by consumers and businesses.

II.A Increased Privatization of Traditionally Public Services

In my other work, I have explored the United States government's heavy reliance on private contractors who served in paramilitary units with the Central Intelligence Agency. These private contractors gathered intelligence, maintained combat equipment, provided logistical support, and worked on surveillance and targeting during the recent conflicts in Afghani stan and Iraq[41]. Gillian Metzger was one of the first to emphasize the inadequacy of the state action doctrine in the face of increasing governmental reliance on private entities[42]. Edward Rubin calls privatization one of

[38] Louis D. Brandeis, The Living Law, 10 ILL. L. REV. 11, 14 (1916), reprinted in JAMES W. ELY, REFORM AND REGULATION OF PROPERTY 461, 464 (1997).

[39] STEVEN L. PIOTT, AMERICAN REFORMERS, 1870–1920: PROGRESSIVES IN WORD AND DEED 127, 128 (2006); see also Jeffrey Rosen, LOUIS D. BRANDEIS: AMERICAN PROPHET 15 (2016) ("[Brandeis] insisted that 'the living law' had to adapt to social change and attempted to translate the values of the framers of the Constitution into an age of technologies and massproduction methods they could not have imagined.").

[40] See Christopher W. Schmidt, On Doctrinal Confusion: The Case of the State Action Doctrine, 2016 BYU L. REV. 575, 614 (2016).

[41] Minow, Outsourcing Power, supra note 33, at 112–17. See also Laura Dickinson, Pub- R lic Values/Private Contract, in GOVERNMENT BY CONTRACT, supra note 33, at 335, 336–51 R (noting similar issues and the silence in the contracts about training for private contractors in human rights law).

[42] See Gillian E. Metzger, Privatization as Delegation, 103 COLUM. L. REV. 1367, 1421 (2003); Gillian E. Metzger, Private Delegations, Due Process, and the Duty to Supervise, in GOVERNMENT BY CONTRACT, supra note 33, at 291.

the two trends defining administrative law over the past several decades[43]. Private military contractors, prisons, police, and disaster-relief organizations take up government work through contracts, vouchers, and other funding mechanisms[44]. Governments rely on private actors to provide information technology, management, social services, and even oversight of outsourcing. At the same time, private individuals notably rely on for-profit and nonprofit organizations for schooling, dispute resolution, and safety and security[45].

Challenges to public values increase when businesses claim proprietary information and use other legal arguments to avoid public duties. Ironically, in a different development, some businesses have sought constitutional shields to be exempt from civil rights laws and other legal claims; here, private actors turn to the Constitution to avoid compliance with public legal duties[46].

[43] Edward Rubin, The Possibilities and Limitations of Privatization: Outsourcing and American Democracy, 123 HARV. L. REV. 890, 891 (2010).

[44] Jody Freeman & Martha Minow, Reframing the Outsourcing Debates, in GOVERNMENT BY CONTRACT, supra note 33, at 1–13. In light of an Inspector General report that private R prisons have higher rates of assaults and other violations, the U.S. Department of Justice is ending its use of private facilities. Matt Zapotosky and Chico Harlan, Justice Department Says It Will End Use of Private Prisons, WASH. POST, Aug. 18, 2016, https://www.washingtonpost .com/news/post-nation/wp/2016/08/18/justice-department-says-it-will-end-use-of-private-prisons/?utm_term=.32c57299bdc7, archived at https://perma.cc/KB5M-78L5. This decision by itself does not affect the use of private providers in immigration and detention facilities, in state jails and prisons, and in probation, parole, and other aspects of corrections, although future reforms may emerge.

[45] See MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 7–22, 57–68, 132–38, (2002); Martha Minow, Outsourcing Power: Privatizing Military Efforts and the Risks of Accountability, Professionalism, and Democracy, in GOVERNMENT BY CONTRACT, supra note 33, at 110, 111–14

[46] Claiming exemptions due to First Amendment rights issues is well beyond the state action doctrine. But as public functions are performed by private sectors, First Amendment claims raise further jeopardy to public accountability. The increasing clashes between LGBT rights of equality and privacy on the one hand and free exercise of religion on the other is exemplary. In Burwell v. Hobby Lobby Stores, Inc., 134 S.Ct. 2751, 2759 (2014), the Supreme Court held that a closely-held for-profit company could be exempt from the federal regulation under the Affordable Care Act, 124 Stat. 119 (2010), requiring employers to cover certain forms of contraception in health insurance offered to employees, 134 S.Ct. 2751, 2759 (2014). The Court rejected the federal regulation as failing to accord the least restrictive alternative for a company run by owners with religious objections, id., as required by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq. (1993). The decision raises the specter of private businesses claiming religious exemptions for a variety of federal laws. See Adam Liptak, Ruling Could Have Reach Beyond Issue of Contraception, N.Y. TIMES, Mar. 24, 2014, http:// www.nytimes.com/2014/03/25/us/contraception-ruling-could-have-reach-far-beyond-womensrights.html?_r=0, archived at https://perma.cc/VQ82-V64D; see also Martha Minow, Religious Exemptions, Stating Culture: Foreword to Religious Accommodations in the Age of Civil Rights, 88 SO. CAL. L. REV. 453, 456 (2015); see generally Martha Minow, Should Religious Groups be Exempt from Civil Rights Laws?, 48 B. C. L. REV. 781 (2007). See also EEOC v. R.G. & G.R. Funeral Homes, 100 F. Supp. 3d 594 (E.D. Mich. 2015) (rejecting claimed Title VII violation by trans employee in light of exemption afforded by the Religious Freedom Restoration Act); Mark Joseph Stern, Federal Judge: Hobby Lobby Legalized Anti-LGBTQ Discrimination by Religious Employers, SLATE, Aug. 18, 2016, http://www.slate.com/blogs/outward/2016/08/18/federal_judge_uses_religious_liberty_to_legalize_anti_lgbtq_discrimina tion.html, archived at https://perma.cc/SN2P-HXVW. Other similar claims increasingly insulate corporate behavior from public accountability. As a technical matter, Hobby Lobby did not involve any constitutional rights. But constitutional rights lie just below the surface. For many observers, the religious exemption claimed by the private company put in jeopardy the reproductive freedom of employees. The religious freedom claim arose under a federal statute enacted to restore the scope of religious freedom to a standard expressed by the Supreme Court before its most recent general statement; the objection to the claim reflected underlying

Further limitations on public values come when businesses use contract terms limiting access to courts to enforce rights. While these developments may not implicate the state action doctrine directly, they sharply curtail the ability of individuals to pursue or exercise constitutional rights[47].

II.B Increased Commercial Use of Arbitration Clauses

Consider the increasingly common business practice of including contract terms that require individuals to submit any complaints to arbitration[48]. Credit card companies, for example, require customers to agree to arbitrate any disputes, and thereby prevent class actions[49]. This mechanism means that individuals are considerably less capable of asserting consumer and tort claims, as they can seldom cover the litigation expenses without the aggregation effects of class actions. Additionally, employers, Internet providers, cell phone carriers, rental car agencies, and nursing homes have privatized dispute resolution through contracts, thereby curtailing access to court, which in the past had been protected as a 14th Amendment right of due process.

Unfortunately, this arguably unconstitutional practice seems here to stay. Supreme Court advocate Paul Clement has observed that there is only one question about the repeated challenges to arbitration clauses coming up to the United States Supreme Court: will the challengers lose by

concerns about reproductive freedom, affected by the government's historic reliance on private employers to provide health care insurance. Both the company and the employees are private, but both the company's claim and the employees' interests have constitutional overtones. Besides the growing debate over what scope if any should corporations have to claim religious freedom from otherwise prevailing laws, this case and related issues expose the difficulties elected branches face in resolving conflicts between fundamental rights. See Elliot Zaret, Commercial Speech and the Evolution of the First Amendment, WASH. LAW. (Sept. 2015), https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/september-2015-commercial-speech.cfm, archived at https://perma.cc/9MPJ-VV8P.

[47] Phillips, supra note 9, at 727.

[48] See Jessica Silver-Greenberg & Robert Gebeloff, Arbitration Everywhere, Stacking the Deck of Justice, N.Y. TIMES, Oct. 31, 2015, http://nyti.ms/1KMvBJg, archived at https://perma .cc/6FJ2-6YL4; Jessica Silver-Greenberg and Michael Corkery, Start-Ups Embrace Arbitration to Settle Workplace Disputes, N.Y. TIMES, May 14, 2016, http://nyti.ms/1OqSESo, archived at https://perma.cc/84DM-2XE3. Challenging the claims that arbitration is better and cheaper than judicial resolution of disputes, Professor Judith Resnik reviews data on its extremely infrequent use by consumers and suggests this lack of use stems in part from the ban on collective action and insufficient fee waivers. Judith Resnik, Arbitration Cuts the Public Out and Limits Redress, NATIONAL L.J., Aug. 22, 2016, http://www.nationallawjournal.com/ id=1202765654457/Arbitration-Cuts-the-Public-Out-and-Limits-Redress, archived at https:// perma.cc/JR6T-ANPY.

[49] See Credit Infocenter, Mandatory Binding Arbitration - Credit Card Arbitration, Credit Card Disputes, Is Credit Card Arbitration Fair For Consumers? (June 13, 2016), http://www .creditinfocenter.com/cards/credit-card-arbitration.shtml, archived at https://perma.cc/AM2WPB3X; Public Citizen, The Arbitration Trap: How Credit Card Companies Ensnare Consumers 3, 9 (Sept. 2007), http://www.citizen.org/documents/ArbitrationTrap.pdf, archived at https://perma.cc/SR93-6YR8; Silver-Greenberg & Gebeloff, supra note 48. CFPB, Notice of Proposed Rulemaking on Arbitration Agreements, 81 Fed. Reg. 32829 (May 3, 2016); Consumer Financial Protection Bureau, CFPB Proposes Prohibiting Mandatory Arbitration Clauses that Deny Groups of Consumers their Day in Court (May 5, 2016), http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-prohibiting-mandatory-arbitration-clauses-deny-groups-consumers-their-day-court, archived at https://perma.cc/4HLM-WAFY.

a 5-to-4 vote or lose 9-0[50]? The Court recently upheld a contractual clause requiring arbitration of all claims brought against American Express and prohibiting merchants from bringing any class action claims — even if the effect is to prevent the vindication of contract claims[51]. Justice Elena Kagan wrote in dissent, "[t]he monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.[52]"

Businesses can not only use the private ordering tools of contract to avoid public obligations; but they can also assert exemptions from otherwise applicable laws, curtailing the ability of individuals to enforce constitutional rights[53]. As some businesses successfully assert religious freedom as grounds for avoiding public duties, others claim freedom of speech to avoid regulation and increasingly threaten to insulate corporate behavior from public accountability[54]. There is a possible solution, however. In earlier decades, the state action doctrine included a strand identifying "public functions," and applied constitutional requirements to private actors performing essentially governmental functions[55]. This concept has received less judicial approval in recent years[56]. Perhaps a broad view of public function would extend to private arbitration. The instances of private arbitration and businesses denying access to insurance coverage for employees electing contraceptives could be covered under the widest interpretation of state action — finding it present when the government is entangled with private conduct, when a private actor's scope of authority is itself crafted by law, or when its enforcement would depend upon judicial action[57]. A similar conclusion would come under a view advanced by Cass Sunstein — that state action is always present because the law recognizes and enforces the private laws of contract and property[58].

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[50] Paul Clement, Vaughan Lecture at Harvard Law School (Oct. 26, 2015).

[51] Am. Exp. Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2312 (2013).

[52] Id. at 2314 (Kagan, J., dissenting); Jill I. Gross, Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration, 81 Brook. L.Rev. 111, 131, 134 (2015).

[53] Michael J. Phillips, The Inevitable Incoherence of Modern State Action Doctrine, 28 St. Louis L.J. 683, 726–28, 730–31 (1984).

[54] See Amanda Shanor, The New Lochner, 2016 Wis. L.Rev. 133 (2015); Elliott Zaret, Commercial Speech and the Evolution of the First Amendment, WASH. LAW., Sept. 2015, https://www.dcbar.org/bar-resources/publications/washington-lawyer/articles/september-2015- commercial-speech.cfm, archived at https://perma.cc/KZ2K-PQ3X.

[55] See Marsh v. Alabama, 326 U.S. 501, 506 (1946); Evans v. Newton, 382 U.S. 296, 301–02 (1966). See also Blum v. Yaretsky, 457 U.S. 991, 1004–05 (1982) (describing how state action can be identified when private actors perform an exclusively government function, or if there exists a sufficient nexus, a symbiotic relationship, or entwinement connecting government and private actors).

[56] See, e.g., Rendell-Baker, v. Kohn, 457 U.S. 830 (1982); see Kathleen M. Sullivan and Noah Feldman, CONSTITUTIONAL LAW, 819–21 (18th ed. 2013).

[57] See Burton v. Wilmington Parking Authority, 365 U.S. 715, 726 (1961) (finding that lessees of publically funded buildings must have practices that comply with the Equal Protection Clause of the 14th Amendment); Shelley v. Kraemer, 334 U.S. 1, 22–23 (1948).

[58] Cass R. Sunstein, State Action is Always Present, 3 CHI. J. OF INT'L L. 465, 466–67 (2002), http://chicagounbound.uchicago.edu/cjil/vol3/iss2/15/, archived at https://perma.cc/ 59LF-V7FV; see

II.C Increased Use of the Internet and Digital Communications

Another huge shift making the state action question newly critical comes with the Internet and digital communications. Individuals, families, schools, businesses, governments, and other sectors have quickly become dependent on digital resources for communicating, storing and retrieving information, assessing conduct and performance, and even resolving disputes[59]. This innovation presents the question: when should notions of freedom of speech, protections of individual privacy, and equal protection apply? Furthermore, should they apply by law or by contractual and selfgoverning efforts by tech companies and those using them[60]? Employer searches of employee email may or may not violate statutory law; but the statutes may themselves have little connection with employee expectations founded in constitutional norms[61]. Facebook's experiments with mood manipulation raised objections in terms of privacy and personal autonomy as well as concerns that Facebook, not users, have power and control[62]. Whether the questions implicate freedom of speech, privacy, equal protection, or fairness, the nongovernmental status of the

generally Erwin Chemerinsky, Rethinking State Action, 80 Northwestern L. Rev. 503 (1985) (arguing for eliminating the use of the state action requirement).

[59] See generally E. Katsh & J.Rifkin, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE (2001); Ethan Katsh et al., E-Commerce, E-Disputes- and E-Dispute Resolution: In the Shadow of "eBay" Law, 15 OHIO. ST. J. ON DISPUTE RESOL. 705 (2000); Orna Rabinovitch-Einy, Going Public: Diminishing Privacy in Dispute Resolution in the Digital Age, 7 VA. J. LAW AND TECHN. 2 (2002), http://www.vjolt.net/vol7/issue2/v7i2_a04-Rabinovitch-Einy.pdf, archived at https://perma.cc/AU92-T46R; Nancy Leong, Constitutional Rights in the Digital Age, HUFF POST TECH, Sept. 18, 2014, http://www.huffingtonpost.com/ nancy-leong/constitutional-rights-in-first-amendment_b_5601216.html, archived at https://per ma.cc/E22N-46YX.

[60] Dispute resolution systems can combine artificial intelligence, game theory, digital communications, and auctions, sometimes producing resolutions without the involvement of a human adjudicator or mediator in the individual case. See Arno Lodder & John Zeleznikow, Artificial Intelligence and Online Dispute Resolution, in ONLINE DISPUTE RESOLUTION THEORY AND PRACTICE 61–82 (Mohamed Abdel Wahab, Ethan Katsh & Daniel Rainey, eds., 2012). Ebay and Paypal have online dispute resolution. Rich Stim, Resolving eBay Disputes, NOLO (last visited Nov. 16, 2016), http://www.nolo.com/legal-encyclopedia/resolving-ebaydisputes-29970.html, archived at https://perma.cc/SX6F-M2T3. Ebay and Paypal's on-line dispute resolution mechanism has generated concerns by both buyers and sellers even though it registers fairly high levels of satisfaction. See Anna Tims, If eBay's Customers Are Always Right, Who'll Protect Its Sellers?, THE GUARDIAN (July 11, 2014), http://www.theguardian com/money/2014/jul/11/ebay-buyer-complained-decide-against-seller, archived at https://per ma.cc/U9AC-XWM2; User comments, PAYPAL COMMUNITY HELP FORUM (last visited Nov. 16, 2016), https://www.paypal-community.com/t5/Disputes-and-claims-Archive/Paypals-dispute-resolution-is-a-joke-DO-NOT-WASTE-YOUR-TIME/td-p/126166, archived at https://per ma.cc/L7L9-2T9J.

[61] 1 See e.g., L.V. Anderson, Can Your Boss Read Your E-Mail?, SLATE, Mar. 11, 2013, http://www.slate.com/articles/news_and_politics/explainer/2013/03/harvard_email_search_ scandal_can_your_employer_read_your_private_messages.html, archived at https://perma.cc/ HJ6T-D83N.

[62] See Julie Posetti, Facebook Has All the Power, THE ATLANTIC, July 10, 2014, http:// www.theatlantic.com/technology/archive/2014/07/facebook-has-all-the-power-you-have-al most-none/374215/ (interview with media critic Jay Rosen), archived at https://perma.cc/3MQ J-D52G.

Internet, service providers, search engines, and related entities will make it difficult, if not impossible, to find state action despite people's hopes and claims[63].

III. CURRENT TRENDS COMPLICATE UNDERSTANDINGS OF WHAT IS PUBLIC AND WHAT IS PRIVATE

Each of the trends described in the previous section has raised numerous unanswered, but important, questions about how to operate legally within the public and private spheres. Should due process attach to on-line dispute resolution? Should private military contractors be liable for violating constitutional and Military Code of Justice guarantees? Should private prisons be bound by constitutional restrictions? Should Internet providers be bound by freedom of speech and antidiscrimination norms? Should corporations be able to prevent employees and customers from raising legal claims against them in court? There are no natural or universal answers to these questions, especially because it has become difficult to distinguish what is public from what is private. Attempts to make such distinctions ultimately depend on and reflect choices made by a society at a particular place and time.

The very notion that a private sphere is different from a public sphere varies across cultures and shifts over time[64]. We in the United States for at least several decades have associated the two spheres with distinct characteristics. For public spaces, we value transparency, equality, and adherence to clear processes. For private spaces, we emphasize autonomy of decisionmaking by owners, efficiency, intimacy, and seclusion. Converting everything into the public sphere jeopardizes values of independence, variety and ease, and risks greater costs, standardization, and bureaucratization. Converting everything into the private sphere threatens personal freedoms to

[63] See generally Net Neutrality: What You Need to Know Now, FREE PRESS (last visited Nov. 16, 2016), http://www.savetheinternet.com/net-neutrality-what-you-need-know-now, archived at https://perma.cc/PN8W-GSUA; Timothy Carr, Your Internet Provider is Distorting Free Speech, OTHER WORDS (Oct. 14, 2015), http://otherwords.org/your-internet-provideris-distorting-free-speech, archived at https://perma.cc/95YT-YYZY; About the Issue, DIGITAL DUE PROCESS (2010), http://digitaldueprocess.org/index.cfm?objectid=37940370-2551-11DF8E02000C296BA163, archived at https://perma.cc/GP2F-5R7E; Who Has Your Back?: Protecting Your Data from Government Requests, ELECTRONIC FRONTIER FOUNDATION (2015), https://www.eff.org/who-has-your-back-government-data-requests-2015, archived at https:// perma.cc/KB7W-4XA8. New protections for consumers may come, though, now that the Court of Appeals for the D.C. Circuit has upheld the authority of the Federal Communications Commission to treat the Internet as a utility. See United States Telecom Asso'n v. FCC, _Slip Op. (D.C. Cir. June 14, 2016); Cecilia Kang, Court Backs Rules Treating Internet as Utility, Not Luxury, N.Y. TIMES, June 14, 2016, https://www.law.yale.edu/yls-today/news/law-and-gui do-calabresi?utm_source=newsletter&utm_medium=email&utm_content=Guido&utm_cam paign=1409, archived at https://perma.cc/CRK4-JSN6.

[64] William J. Novak, Public-Private Governance: A Historical Introduction, in GOVERNMENT BY CONTRACT, supra note 33, at 23; Rubin, supra note 43, at 911–12.

associate, to enjoy transparency, and to pursue innovations tested by economic and social marketplaces.

Yet this statement of the tensions, pinpointed to our moment in time and geography, makes the distinction between public and private seem all too easy. Even restricting our focus to 2016 in the United States, the distinction between "public" and "private" regularly means two very different ideas. The first distinguishes all that is governmental from all that is not; the second distinguishes the home, family, and intimate relations from all that is not. Sliding between these definitions of public and private is the space between home and government that includes all that is commercial or contractual, and now, the Internet as well. We call some zones within this space "public accommodations" even though the hotels, restaurants and buses so identified are privately owned and the clubs and associations are organized by private groups[65]. We treat the Internet as nongovernmental even though some countries do not, and even though in the United States, the U.S. Department of Commerce plays a role[66]. In addition, some civic activities can fall within this murky terrain. For example, some civic organizations are so large and inclusive that they become so infused with public significance that the Supreme Court has decided that they should not be allowed to discriminate on the basis of gender[67]. Political parties at times seem public — as when they control election procedures — and at other times seem private — as when they pursue ideas, assembly, and competition for adherents[68].

There are multiple possibilities for drawing distinctions between what is public and what is private, but the focus on any place to draw the distinction does not frankly reveal the choices about what values should prevail in different parts of human experiences. For example, consider whether a space that was traditionally free from public regulation should now be subject to a public requirement, such as a ban against discrimination on the basis of sexual orientation. A basic problem is treating this issue as though the distinction between what is public and what is private is something that can be found in nature or discerned objectively. On the contrary, clarifying when constitutional rights are implicated necessarily involves choices, not discovery of facts of nature.

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[65] Title II of the Civil Rights Act of 1964 applies to public accommodations, including restaurants and sports stadiums, but not to private homes. 42 U.S.C. § 2000a (2006). Title VII of the Civil Rights Act of 1964 applies to private employment but not to workplaces employing very few employees. 42 U.S.C. § 2000e (2006).

[66] See NAT'L TELECOMMS. AND INFO. ADMIN., U.S. DEP'T. OF COMMERCE (last visited Nov. 16, 2016), http://www.ntia.doc.gov/, archived at https://perma.cc/4UYK-HVE6.

[67] New York State Club Ass'n v. City of New York, 487 U.S. 1, 11–15 (1988); Board of Directors of Rotary International v. Rotary Club, 481 U.S. 537, 542–47 (1987); Roberts v. United States Jaycees, 468 U.S. 609, 621–29 (1984).

[68] Compare Nixon v. Herndon, 273 U.S. 536, 541 (1927) (exclusion of blacks from Democratic primaries violates the 14th Amendment) with Nixon v. Condon, 286 U.S. 73, 88–89 (1932) and Grovey v. Townsend, 295 U.S. 45, 52 (1935) (party convention treated as private and outside of constitutional requirements). See Samuel Issacharoff, Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition, 101 COLUM L. REV 274 (2001).

When courts decline to engage in this difficult undertaking, that decision reflects a choice about when public values apply just as much as it does when courts do accept the challenge and assert public values. In such cases, judicial inaction rings just as loudly as judicial action.

Neither a definition of state action nor a distinction between what is public and what is private can easily resolve ongoing questions about what values should apply and what accountability measures deserve enforcement. However, in light of new trends like the rise of the Internet and the expansion of mandatory arbitration, this question must be answered. Whether framed in terms of the state action doctrine applied by courts, or determined as a matter of public policy through legislation and community action, promising reforms should identify potential alternative ways to demarcate what should be treated as public and what should be treated as private.

IV. ALTERNATIVE FORMULATIONS

Given that the two different meanings of public and private are affecting and, in turn, shaped by the legal characterization of state action, American law tries to respect several competing values. We want to enforce constitutional restrictions on governmental action, but we also want to protect the autonomy and self-determination of individuals, businesses, and non-profit organizations, including religious organizations. We want accountability, but we do not want excessive burdens on either public bureaucracies or private conduct. Given these multiple goals, consider seven basic alternatives to the existing muddle of the state action doctrine:

1) Read state action very broadly to include private conduct backed by law, and interpret private law in light of constitutional norms;[69]

2) Decide matters on a case-by-case basis by balancing competing public and private interests;[70]

3) Rely on government officials to define through contracts, statutes, and regulations the extent to which individuals and private organizations must observe constitutional norms;[71]

4) Find state action where the state has lent its coercive powers to a private party and enabled an injury only because the state did so;[72]

[69] See Mark Tushnet, The Issue of State Action/Horizontal Effect in Comparative Constitutional Law, 1 INT'L J. OF CONST. L. 79, 94 (2003).

[70] See Erwin Chemerinsky, Rethinking State Action, 80 NW. U. L. REV. 503, 551 (1985).

[71] See Huhn, supra note 2, at 1457–60. Another narrower version calls for reliance on R state common law and statutes to define and enforce duties by private actors that can but do not always mirror federal constitutional norms. See generally Alexander Volokh, The Modest Effect of Minneci v. Pollard on Inmate Litigants, 46 AKRON L. REV. 287 (2013).

[72] See Chiang, supra note 1, at 651–52. Chiang also proposes as an element for finding R state action an affirmative answer to whether the private actor is "cloaked in the authority of the state." Id. at 696–97.

5) Define and bolster a doctrine of privacy to protect interests that otherwise would be jeopardized by expansive views of state action;

6) Define state action very narrowly to refer solely to conduct of state employees and officials;

7) Define immunities for state actors if their actions do not violate clearly established law.

These alternatives are arrayed roughly on a spectrum. On one end is an option extending federal constitutional guarantees broadly; on the other end is an option narrowing the scope of such guarantees. Neither extreme nor an in-between option is perfect, but each is better than the current muddle. Either extreme would steer judicial application to greater predictability and expose the crucial question behind debates over state action: when and how should powerful actors be held accountable? Ultimately, these alternatives point in many instances to methods of accountability beyond the work of the judiciary. Here is a sketch of the arguments for and against each of these options:

1) Read state action very broadly to include private conduct backed by law even if role of state officials is indirect or remote. This option would extend guarantees of due process, speech, and other constitutional rights to govern both relations between the government and private actors, and relations between private actors who have authority behind their actions, or use government enforcement to resolve their disputes. This revives *Shelley v. Kraemer*. This view is also advanced by the dissenters in DeShaney v. Winnebago County Social Services Department,[73] where the state is held liable for returning the child to the care of his father when state social workers knew the child was in grave danger. Mark Tushnet and others call this "horizontal application" of constitutional norms[74] applying between private individuals, as opposed to vertical application, which is between individuals and the government. This alternative has been adopted in Ireland, Canada, Germany, South Africa, and the European Union.

    In favor: This alternative relieves reliance on the definition of state action and shifts analysis instead to the scope of a given right. It is an alternative pursued in many other constitutional democracies, which suggests it is workable, and it treats constitutional values as germane to conduct throughout society.

    In opposition: This alternative subjects many activities currently excluded from government supervision to judicial challenge with attendant economic costs and restrictions on discretion, privacy, and experimentation.

[73] See 489 U.S. 189, 203–12 (1989) (Brennan, J., dissenting); id., at 212–213 (Blackmun, J., dissenting).
[74] See Tushnet, supra note 69.

2) Courts should decide matters on a case-by-case basis by balancing competing public and private interests. For example, what kind of due process is appropriate when a private utility terminates a customer's service should reflect the relative weights of the competing interests at stake[75].

In favor: This alternative makes judicial decisions about the scope of constitutional norms explicit and frames them in terms of normative values rather than discernment of a public/ private line.

In opposition: This alternative subjects more domains of life and human interaction to judicial decision-making without clear guideposts for decisions, permits discretion based on the views of individual judges, and risks jeopardizing respect for the judiciary if the decisions are viewed as controversial or politicized. Courts may lack capacities to know or understand the prospective economic and social costs of their decisions.

3) Rely on government officials to define through contracts, statutes, and regulations the extent to which individuals and private organizations must observe constitutional norms. For example, contracts with private prison companies can specify as requirements adherence to due process and protections against cruel and unusual punishment; these conditions on the expenditure of public funds are then transparent and also subject to the choice of voters. Similarly, a state legislature may prohibit through a public accommodation law discrimination on the basis of race, gender, and/or sexual orientation in a private club. Establishing this norm through a statute would be transparent and open to democratic debate and accountability[76]

In favor: Contracts allow parties to specify terms, and when the government is a party, it can craft terms to implement public values to which the government itself is bound by and committed. Private ordering by contract allows the parties to adapt terms, to monitor compliance, and to use financial incentives and the power to terminate or renew the contract in order to promote enforcement.

In opposition: Experience to date suggests that the failure of government agencies to supply and enforce contractual terms reflects lack of capacity, resources, and will to use contractual terms for public accountability. Hence, there is significant likelihood that serious monitoring efforts would

[75] Chemerinsky, supra note 70, at 552 (pointing to Jackson v. Metropolitan Edison. Co., R 419 U.S. 345 (1974)).
[76] See generally Huhn, supra note 2

themselves require outsourcing to private contractors — with the same problems of insufficient capacity and resources — that will lead back to the initial issue of private enforcement.

4) Find state action where the state has lent its coercive powers to a private party and enabled an injury only because the state did so. For example, students subject to compulsory schooling who are assigned without choice to an alternative school run by a private for-profit company should be able to assert enforceable protections against discipline imposed without due process and unreasonable searches conducted without protections of students' privacy[77].

   In favor: This approach prevents governments from substituting a privately-organized actor to perform what is otherwise a public or government activity in order to avoid the accountability and restrictions attached to a government actor; this approach, as a result, makes the use of the private organization turn on factors other than avoidance of public duties.

   In opposition: This alternative limits innovation, competition, and potential cost-savings by forcing private entities to follow precisely the same strictures attached to public ones.

5) Courts and/or legislatures should define and bolster a doctrine of privacy to protect interests that otherwise would be jeopardized by expansive views of state action. Concerns about invasion of rights of private association and individual autonomy would be addressed by affirmative protections for private clubs to discriminate

   In favor: This alternative identifies the independent value of privacy, which means ensuring individuals and groups have control over their own information, autonomous choices, and latitude to diverge from state-enforced conformity as significant and worthy of government protection. This alternative shifts focus and debate away from the state action muddle and instead to the desirable scope of privacy protections.

   In opposition: Privacy, some think, is less important than equality and uniform protection of rights. "Privacy" also lends itself to its own debates and ambiguities.

6) Define state action very narrowly to refer solely to conduct of state employees and officials. Accordingly, private contractors and other private actors would not be subject to federal constitutional requirements, although the conduct of private actors would

[77] See Chiang, supra note 1, at 651–52

be subject to the terms of government contracts or otherwise prevailing state or federal statutory or common law[78]

In favor: This option embraces formalist definitions and the efficiency and clarity that accompany them. It also confines public restrictions to the behavior of individuals who have accepted the application of those restrictions by choosing their roles as government officials.

In opposition: This option invites avoidance of public duties through arrangements that shift activities to individuals or groups identified as nongovernmental even when they deploy governmental resources and authority or perform functions identical to those undertaken by government.

7) Define immunities for state actors if their actions do not violate clearly established law. Here, even actions by state employees and officials would not give rise to liability under federal law if the individuals involved are performing discretionary functions and where their actions, even if later found to be unlawful, did not violate "clearly established law.[79]"

In favor: This option acknowledges that the techniques of correctional justice — involving litigation and risk of damages or injunctive relief — are costly and sometimes ill-suited to the complexities of providing governmental services. This option could even extend to private actors, performing functions that would be shielded from accountability under government immunities if undertaken by government officials.

In opposition: This option removes accountability tools even in some contexts, such as prisons and schooling, when alternative accountability tools — offered by market competition or consumer choice — are often unavailable or ineffective.

The contrast among these alternatives can help to clarify the trade-offs at stake. Defining state action expansively triggers the broad application of constitutional norms. A narrow definition of state action permits more scope for racial and gender discrimination, more constraints on speech, and more abuses of power. What these diverse alternatives share is specificity. Selecting any of these options would steer judicial application to greater predictability. Each exposes the crucial question behind debates over state action: When and how should powerful actors be held

[78] New problems arise with this approach. Larry Alexander and Paul Horton explain that the category of "government officials" is unprincipled and represents an ad hoc and unstable compromise. See LARRY ALEXANDER & PAUL HORTON, WHOM DOES THE CONSTITUTION COMMAND?: A CONCEPTUAL ANALYSIS WITH PRACTICAL IMPLICATIONS, 89–90 (1988).

[79] See generally Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

accountable? The alternatives point in many instances to a consideration of accountability broader than the work of the judiciary, and hence it is to other avenues for accountability that this Article now turns.

V. WHAT IS REALLY AT STAKE: INCREASING ACCOUNTABILITY

The state action doctrine, and the distinction between what should be viewed as public and what as private, embed normative choices inside definitions without clarifying what is at stake for society. Courts consider questions in terms of state action or what is public versus private rather than questions such as: Should governments avoid constitutional restrictions by outsourcing their work to private contractors? Should businesses be able to use contract law to shield their activities from the due process requirements otherwise available to enforce employee and consumer rights, or exempt themselves from public norms by asserting religious and speech rights? How much should society constrain person and group privacy and freedom in combating discrimination and insistent processes? Should the expansion of so much commercial, social, and expressive activity to the Internet displace the protections of due process, privacy, speech, and equality that would apply in comparable face-to-face interactions? Older more expansive readings of state action could be revived (if judges agree), but decisions couched in terms of the scope of state action do not address the underlying questions of what values should prevail where and how should society best organize risks and benefits. No formulation of the meaning of "state action" can adequately resolve these questions or weigh the competing values represented by public norms and protection for private realms.

Accountability fundamentally underlies such questions: Who is responsible for conduct and what consequences should follow from misconduct? When should particular actions be subject to the deterrence that follows risks of sanctions for wrongdoing? It is a mistake to place all hopes for collective accountability in federal constitutional law, interpreted by courts. Rules governing justifiability of cases in federal courts limit what courts can enforce; the state action doctrine may serve a screening function to limit courts to what some think is their scope of competence. Other branches of the federal government, the states, and other actors have authority and responsibility also to realize constitutional values[80]. Private actors as well as public actors face accountability through law; the doctrines of tort, contract, and criminal law apply. Market mechanisms of competition for partners, consumers, and investors also govern private action. Other ways to

[80] See Lawrence Gene Sager, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 HARV. L. REV. 1212, 1264 (1978).

pursue articulation and realization of values underlying the constitution include working through democratic institutions and other initiatives[81]. These include:

1) State constitutional law;

2) State statutory and common law;

3) Public contract with private actors;

4) Private contracts with contractors, employees, and consumers;

5) Voluntary codes of conduct;

6) Private competition;

7) Political protests, economic boycotts, and crowd-sourced ratings.

Thus, some state constitutions explicitly extend state constitutional guarantees to private action and some simply do not specifically confine the guarantees to governmental action[82]. Some states have interpreted their constitutions to protect freedom of speech in private shopping malls.[83] Similar approaches could extend to Internet speech and to other behavior as long as such interpretations would not contravene federal constitutional protections for religious exercise, association, or property. State statutory and common law can define what is a public accommodation and what duties commercial actors have to employees and consumers, again, subject to the limitations of the federal constitution.[84]

Contract terms can incorporate the norms expressed in the federal constitution and apply them to private conduct. Thus, governments that outsource public functions can write into their contracts explicit terms that require compliance with norms established by the Constitution or that otherwise attach to government actors.[85] Private contracts between employers and employees and between companies and consumers can include terms that mirror constitutional protections of speech, privacy, antidiscrimination, and opportunities to be heard. These terms are missing from contracts either because of inattention or lack of bargaining power for those seeking them. Inattention could be tackled through political protests, economic boycotts, and crowd-sourced ratings of merchants and companies. These same tools could generate support for state-level law reforms and voluntary codes of conduct and perhaps shape consumer demand. Businesses could

[81] See BeVier & Harrison, supra note 28, at 1769 (treating such alternatives as R subconstitutional).
[82] See G. Alan Tarr, UNDERSTANDING STATE CONSTITUTIONS 14–15 (1998); see also Daniel D. Devitt, State Action in Pennsylvania: Suggestions for a Unified Approach, 3 EMERGING ISSUES IN ST. CONST. L. 87 (1990).
[83] See Tarr, supra note 82, at 13.
[84] See Joseph W. Singer, We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom, 95 B. U. L. REV. 929, 950 (2015); see also Joseph W. Singer, After the Flood: Property and Equality in Property Regimes, 52 LOY. L. REV. 243, 258, 270–82, 329–31 (2006); Joseph W. Singer, No Right to Exclude: Public Accommodations and Private Property, 90 NW. U. L. REV. 1283, 1303–73, 1439–42 (1996) (providing history of and justifications for public accommodation law).
[85] Dickinson, supra note 41, at 336; Nina A. Mendelson, Six Simple Steps to Increase R Contractor Accountability, in GOVERNMENT BY CONTRACT, supra note 33, at 243.

compete for customers and employees by supplying protections for speech, privacy, equal treatment, due process, equal protection, and other norms, but thus far such demand has not been suficiente.

CONCLUSION

Governments pay or subsidize private actors to supply prisons, law enforcement, elements of national security, and schooling; businesses try to avoid regulations and the enforcement of the rights of consumers and employees through contract terms and other maneuvers; and the Internet substitutes for so many public squares and people increasingly take their selfexpression, purchasing, and activities of assembly and association to digital environments. Stemming from separate causes, these trends each push public values such as due process, equal protection, and freedom of speech out of reach for people conducting their daily lives. In the process, accountability recedes. So does public debate over the resulting shifts in the architecture of American society. The scope of public values shrinks as opportunities for discrimination and unfairness and erosions of privacy and trust grow. In earlier times, fights over the state action doctrine served as flash points for individuals and groups seeking constitutional attention to powerful actions. The doctrine has grown abstract, incoherent, and unavailing even as it stands in the way of explicit debate over the desirable scope of underlying values of fairness, privacy, equality, and speech. The state action doctrine actually could be redesigned to take one of many specific articulations on a spectrum of possibilities offering more or less application of constitutional values. Seeing and comparing concrete alternative formulations of the doctrine can sharpen the trade-offs at stake. Even if no single formulation of the state action doctrine can produce a perfect resolution of the complex value choices it implicates, alternative formulations can assist public awareness and discussion of the departure from public commitments underway. Public awareness and discussion might well look beyond federal constitutional doctrine to state constitution, statutory, regulatory, and common law resources for accountability. Also available are terms for contracts involving public and private parties, voluntary codes of conduct, economic competition, political protests, boycotts, and crowd-sourced ratings. Perhaps with more efforts to articulate and debate explicitly what values should apply and what accountability mechanisms should be available in a world increasingly blurring public and private lines, we can help law catch up with how we actually live now.

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