Notes

CONSTITUTIONAL LIMITS ON PRIVATE POLICING AND THE STATE'S ALLOCATION OF FORCE

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ABSTRACT

This Note argues that a variety of "private police" forces, such as university patrols and residential security guards, should be held to the constitutional limitations found in the Bill of Rights. These private police act as arms of the state by supplying force in response to a public demand for order and security. The state, as sovereign, retains responsibility to allocate force, in the form of either public or private police, in response to public demand. This state responsibility—a facet of its police power—is evidenced throughout English and American history. When this force responds to a public demand for order and security, existing state action doctrine case law places both public and private force under constitutional scrutiny.

INTRODUCTION

Policing in modern America has become a tangled web of what are typically referred to as public and private police forces.[1] By the end of the twentieth century, public-private police partnerships

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1. At a basic level, the distinction between public and private police is one of funding: public police are funded directly by the state, while private police are funded directly by private organizations. *See infra* Table 1: Models of Police Authority and Part I.B. A university patrol paid by a private university would be a private police force. For additional examples of private police, see *infra* note 3.

included joint investigations, information sharing, and cooperative urban renovation initiatives.[2] Disneyland, shopping malls, university campuses, residential neighborhoods, and many corporations rely on private police forces.[3] Since September 11, 2001, private police have taken on increasingly important roles that were unanticipated even in the early 1990s.[4]

Both domestically and internationally, accusations of civil liberties violations and human rights abuses sometimes accompany private police activities. Abu Ghraib prison in Iraq employed private police.[5] The United States indicted five Blackwater security guards in 2008 for the shooting deaths of fourteen Iraqi civilians.[6] Campus police accused of racial profiling at Yale and Harvard universities have denied Freedom of Information Act requests for personnel records, arguing that public disclosure requirements do not apply to "private" entities.[7]

The state's power and responsibility to allocate force in response to its needs (namely, the need for order and security) can benefit but can also threaten individuals' liberty and freedom. The United States Constitution, along with the Bill of Rights and the Fourteenth Amendment, serves to limit federal and state government by, among

2. Elizabeth E. Joh, *The Forgotten Threat: Private Policing and the State*, 13 IND. J. GLOBAL LEGAL STUD. 357, 380–84 (2006); *see also* L. Johnston, *Private Policing: Uniformity and Diversity*, *in* POLICING ACROSS THE WORLD 226, 234 (R.I. Mawby ed., 1999) ("Business Improvement Districts (BIDs) have been set up to facilitate co-operation between public police and commercial security companies in the resuscitation of urban areas.").

3. *See, e.g.*, B. Loveday, *Government and Accountability of the Police*, *in* POLICING ACROSS THE WORLD, *supra* note 2, at 132, 143 ("Some [American] townships have privatized their local police service entirely."); Joh, *supra* note 2, at 358 (listing "Disneyland, Abu Ghraib U.S. military prison, [and] the Mall of America" among the places employing private police); Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 919 (2007) ("Today, the so-called 'private police' are everywhere: conducting residential security patrols; monitoring shoppers in department stores; safeguarding warehouses; patrolling college campuses and shopping malls; and guarding factories, casinos, office parks, schools and parking lots.").

4. Joh, *supra* note 2, at 388; *see also* JAMES F. PASTOR, THE PRIVATIZATION OF POLICE IN AMERICA 42–43 (2003) (comparing 1990 data on private policing with post-9/11 estimates).

5. Joh, *supra* note 2, at 358.

6. The incident occurred in Iraq on September 16, 2007. Del Quentin Wilber, *Contractors Charged in '07 Iraq Deaths*, WASH. POST, Dec. 9, 2008, at A2.

7. In 2006, the *Harvard Crimson* lost its lawsuit to force the Harvard police to disclose their records. Nadya Labi, *Lux et Privacy*, YALE ALUMNI MAG., Mar./Apr. 2008, at 49; *see also* Harvard Crimson, Inc. v. President & Fellows of Harvard Coll., 840 N.E.2d 518, 523 (Mass. 2006) ("[P]ublic records law . . . [is] applicable to documents held by public entities, not private ones."). In 2008, however, the Freedom of Information Commission ruled against the Yale Police Department. Labi, *supra*, at 49.

other things, countering some of the negative aspects of the state's allocation of force.[8] But, as the Supreme Court has observed, these constitutional amendments restrain only government action, that is, the public supply of force.[9] Yet throughout history and into today, states have relied on a mix of public and private organizations to supply force in response to the public demand for security and order in the community. The state action doctrine, as espoused by the U.S. Supreme Court, maps poorly onto this mix of public and private supply.

This Note seeks to bring clarity to the Court's confused state action doctrine[10] by reconceptualizing the distinction between public and private police forces. Part I begins by arguing that the underlying legitimizing authority for the use of force is, and has always been, the state. Part I conceptualizes legitimate force[11] along two dimensions, namely, public-private and supply-demand, and identifies four models of policing authority (Table 1). Deriving authority from its populace, the state's exclusive police powers represent its obligation to allocate the supply of public or private force in response to the demands of its citizens for order and security. Private demand for force, which this Note considers demand for force unrelated to communal needs for order and security, also exists, but is outside the state's obligation.[12]

8. *See, e.g.*, U.S. CONST. art. I, § 8, cls. 10–16 (delimiting the military powers of Congress); *id.* art. I, § 9, cl. 2 (providing for the writ of habeas corpus); *id.* art. II, § 4 (allowing for impeachment of executive officers); *id.* art. III, § 2, cl. 3 (requiring jury trials in criminal cases); *id.* art. III, § 3 (limiting the crime of treason); *id.* amend. IV (limiting searches and seizures); *id.* amend. V (requiring due process); *id.* amend. VI (requiring certain criminal procedures).

9. *See, e.g.*, Virginia v. Rives, 100 U.S. 313, 318 (1879) (noting that the Fourteenth Amendment applies exclusively to state action).

10. For direct critiques of the state action doctrine, see *infra* notes 147–48.

11. In the context of this Note, legitimate force is understood simply as force within the boundaries of established tradition or law. Legitimate does not equal constitutional. *Compare* United States v. Lee, 106 U.S. 196, 220 (1882) ("No man in this country is so high that he is above the law."), *with* Monroe v. Pape, 365 U.S. 167, 172 (1961), *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978) ("'[U]nder color of' enumerated state authority excludes acts of an official or policeman who can show no authority under state law, state custom, or state usage to do what he did.").

12. *See infra* Part I.B; *infra* note 133 and accompanying text.

Table 1. Models of Policing Authority

		Supply of Force	
		Public	Private
Demand for Force	Public	Official Police	Arms of the State
	Private	Official Mercenaries	Private Mercenaries

Parts II and III demonstrate the evolution of the state's derived authority through a historical analysis of policing in England and America, respectively. Part II emphasizes the shifting allocation of public and private supplies of force over time and the consistent exclusive sovereign responsibility to maintain peace and security. Part III details how the American Revolution and the U.S. Constitution shifted the American conception of government to one of popular sovereignty while retaining traditional English notions of policing. Part III also introduces the public-private distinction in policing that became prevalent after the establishment of modern, professional police departments.

Part IV applies these four models of police authority in order to reconceptualize the state action doctrine. The proposed categories in Table 1 build upon accepted notions of state action. Public suppliers of force—under the "official police model" and the "official mercenaries model"—are either government-employed police officers acting in an official capacity or otherwise operating under color of law under traditional state action doctrine.[13] Because the state cannot waive its police power responsibility, legitimate responses to public demand for force are attributable, explicitly or implicitly, to the state. A response explicitly attributable to the state reveals the responder to be part of the official police model. A response implicitly attributable to the state falls within the "arm of the state model."[14] For example, business owners in an East Los Angeles neighborhood hired a private security patrol in response to burglaries, graffiti, and an inadequate police response.[15] The private security patrol's response to a public demand for order and security places the patrol within the arm of the state model. Crucially, individuals operating within the arm of the state model should be

13. *See infra* Part IV.A.

14. *See infra* Part IV.B.

15. Simmons, *supra* note 3, at 920.

liable for constitutional violations. Only the fourth category—"private mercenaries"—should be outside the reach of the Constitution because only these private mercenaries act outside the scope of the state's police power responsibility.[16]

I. THEORETICAL UNDERPINNINGS OF THE STATE'S USE OF FORCE

In its role as sovereign, the state retains the ultimate responsibility and obligation to allocate force to ensure order and security.[17] The state chooses some combination of public and private entities to supply this force, legitimizing these entities through laws and customs. This combination of public and private, supply and demand, results in four basic models of policing authority: official police, official mercenaries, arms of the state, and private mercenaries.[18] The Bill of Rights should constrain not only official state entities but also arms of the state because, although the state can allocate force, it cannot relinquish its responsibility.

A. The State's Monopoly on Allocation of Legitimate Force

Under one influential theory of the state—which was of particular importance in American Revolutionary theory[19]—the state is endowed with certain responsibilities that, by their collective nature, cannot be left solely to the individual.[20] Primary among these responsibilities is the maintenance of security and order.[21] When

16. *See infra* Part IV.C.

17. Other competing theories of the state exist, but they are well outside the scope of this Note. *See generally* PHILIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY 6 (2002) ("States may be militaristic, legalistic, and traditional to varying degrees . . . .").

18. *See supra* Table 1: Models of Policing Authority.

19. *See, e.g.*, NOAH WEBSTER, AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION, BY A CITIZEN OF AMERICA (1787), *reprinted in* THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS 110, 131 (David Wootton ed., 2003) ("In a free government . . . the *whole society* engages to *protect each individual*.").

20. *See, e.g.*, Munn v. Illinois, 94 U.S. 113, 124 (1876) ("When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relations to others, he might retain. . . . This is the very essence of government . . . ."); THOMAS HOBBES, LEVIATHAN 116 (Marshall Missner ed., 2008) (1651) (describing the establishment of the commonwealth as necessary to the preservation and contentedness of man).

21. *See, e.g.*, THOMAS PAINE, COMMON SENSE 3 (Forgotten Books 2008) (1776) ("[S]ecurity being the true design and end of government . . . .").

individuals leave the state of nature,[22] the state assumes collective responsibility for their security demands.[23] As such, the state's existence and the security of its people necessarily depend on the state's ability to govern—specifically, to allocate force.[24]

By definition, the state monopolizes "*legitimate* coercion" in a civilization.[25] Legitimacy derives from popular authority: sovereigns must obtain explicit or implicit consent from their subjects.[26] A state may gain authority through the effective use of elections, fear, religion, or custom.[27] Popular authority is closely related to and influenced by force, but they are not equivalent.[28] "In a system of political belief that takes popular sovereignty as its first principle, the rule of law must appear to represent the people: law is authoritative because it is representative."[29]

A long-standing and often unquestioned truism is that the Hobbesian state of nature[30] leads to the conclusion that "[t]he state has, must have, or should have a monopoly of force."[31] In historical

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22. *See* Clifford J. Rosky, *Force, Inc.: The Privatization of Punishment, Policing, and Military Force in Liberal States*, 36 CONN. L. REV. 879, 883–85 (2004) (illustrating the basic state-of-nature story).

23. *See* Ian Loader & Neil Walker, *Necessary Virtues: The Legitimate Place of the State in the Production of Security*, *in* DEMOCRACY, SOCIETY AND THE GOVERNANCE OF SECURITY 165, 185 (Jennifer Wood & Benoît Dupont eds., 2006) ("[S]ecurity is a constant foundational presence as the most basic instrument in the realization of . . . freedom.").

24. ANDREW E. TASLITZ, RECONSTRUCTING THE FOURTH AMENDMENT: A HISTORY OF SEARCH AND SEIZURE, 1789–1868, at 2 (2006).

25. LES JOHNSTON, THE REBIRTH OF PRIVATE POLICING 218 (1992) (emphasis added); *see also* PASTOR, *supra* note 4, at 40 ("The legitimacy of government, particularly regarding the use of force and of powers of arrest, had a deep-seated historical premise.").

26. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 532 (1985).

27. *See, e.g.*, BOBBITT, *supra* note 17, at 213 ("Different constitutional orders are responsive to different demands for legitimacy."); HOBBES, *supra* note 20, at 128 (distinguishing between three types of commonwealths: democracy, monarchy, and aristocracy, all of which derive authority from the populace); NICCOLÒ MACHIAVELLI, THE PRINCE 103 (Leo Paul S. de Alvarez trans., 1980) (1532) ("[S]ince men love at their own pleasure and fear at the prince's pleasure, a wise prince should found himself on that which is his, not on that which is dependent on others . . . .").

28. *See, e.g.*, BOBBITT, *supra* note 17, at 6 (suggesting that "[h]istory, strategy, and law" legitimize military force and "make possible legitimate governing institutions").

29. PAUL W. KAHN, THE REIGN OF LAW: MARBURY V. MADISON AND THE CONSTRUCTION OF AMERICA 23 (1997).

30. "[I]f there be no power erected, or not great enough for our security, every man will and may lawfully rely on his own strength and art for caution against all other men." HOBBES, *supra* note 20, at 116.

31. Rosky, *supra* note 22, at 885; *see also, e.g.*, JOHNSTON, *supra* note 25, at 24 ("[I]t has generally been assumed that policing is an inherently public good, whose provision has to reside in the hands of a single, monopoly supplier, the state.").

practice, however, public versus private distinctions and a variety of state compositions complicate this monopoly thesis.[32]

The monopoly thesis, problematically, conflates the *supply* of force with the *allocation* of force. This Note, in contrast, distinguishes these terms.[33] The state responds to the demand for order and security in a community by *allocating* the supply of force to meet that demand. This response can be an explicit construction of policing institutions or an implicit acceptance of policing customs and norms.

Take a state where the market privately supplies all force: military, punishment, and policing force.[34] The state allocates force through private channels, but ultimately remains a state: "[b]oundaries are defended; allies are protected; wars are fought. Suspects are found and caught. Criminals are imprisoned . . . ."[35] But how can the state ensure that it will not be violently overthrown if its military is privately run?[36] This issue typically triggers the monopoly thesis: suggesting that this supply of force must be made public to ensure the state's continuing existence.[37]

But moving to a state with a public military—a public supply of force—changes little. Public military complexes are just as capable of violent overthrow as private military industries.[38] With either public or private supplies of force, the state requires a "culture of loyalty": a "set of beliefs, symbols and rituals" to discourage violent overthrow

32. *See* Simmons, *supra* note 3, at 918, 921–24 (recognizing that state exclusivity of criminal justice services "is . . . anomalous when compared to the provision of criminal justice services over the past one thousand years").

33. *Cf.* Rosky, *supra* note 22, at 914–17 & fig.1 (laying out the possible quadrants stemming from the public-private and supply-demand dimensions of force); *id.* at 921–22 (defining how exercise and allocation relate to supply and demand of force, respectively).

34. This example borrows heavily from Rosky's "ultraminimal state" thought experiment. *See id.* at 978–80 (describing the thought experiment). Nozick imagines a similar scenario in which a single "dominant protection agency" is transformed into an ultraminimal state through enforcement of its monopoly rights. JOHNSTON, *supra* note 25, at 32 (citing ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 15–17 (1974)).

35. Rosky, *supra* note 22, at 979.

36. *See id.* at 979–80 (positing that a private military industry would quickly lead to the subversion and overthrow of the state because the private industry controls force); *see also* MACHIAVELLI, *supra* note 27, at 112 ("[A] prince ought to have two fears: one fear arises from within and concerns his subjects; the other arises from without and concerns external powers.").

37. *See* Rosky, *supra* note 22, at 890 ("On its face, the monopoly thesis seems to suggest that punishment, policing, and military institutions must be 'public' . . . .").

38. *See id.* at 982 (recognizing that, in the case of both public and private supply of military, "the relevant players are roughly the same").

through the establishment of "duty."[39] Because either scenario—public or private supply of force—results in a (precariously formed) state, the public *supply* of force cannot, by definition, be an essential characteristic of a state.[40] Rather, the state's *allocation* of force is the essential characteristic.

B. Models of Policing Authority

Table 1 presents four models of policing authority. Two of these models—official police and arms of the state—can fulfill a public demand for security and order.[41] The other two models—official mercenaries and private mercenaries—can fulfill a private demand for force. Official police and official mercenaries are public suppliers of force. Arms of the state and private mercenaries are private suppliers of force. The state decides how to allocate force among the four models through law, custom, and direct action.

Severity, breadth, and speed outline the practical limits of the public *supply* of force.[42] At some point, the state allows individuals to supply their own force—for example, when self-defense becomes necessary—because public supply at that point is impractical, slow, or inefficient.[43] The point at which this public-private supply distinction is drawn varies depending on a state's particular circumstances, but the state still allocates police and punishment through legal rules even in the case of self-defense.

Public and private *demand* for force lie on opposite ends of a continuum, making fine distinctions difficult to discern. A corporation or other private organization sometimes supplies force based on the need for force and community security (a public demand) and sometimes supplies force based on other market concerns (a private

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39. *Id.* at 984, 985–87; *see also* MACHIAVELLI, *supra* note 27, at 126 (claiming that a prince always arms his subjects to shift distrust to loyalty and faithfulness).

40. *See, e.g.*, Adam Crawford, *Policing and Security as 'Club Goods': The New Enclosures?*, *in* DEMOCRACY, SOCIETY AND THE GOVERNANCE OF SECURITY, *supra* note 23, at 111, 111 ("It has become generally accepted that governments alone no longer determine (if they ever fully did) what sort of security is needed by, nor are they the sole providers of policing on behalf of, the populations they govern.").

41. *See supra* Table 1: Models of Policing Authority.

42. *Cf.* Kimberly Kessler Ferzan, *Self-Defense and the State*, 5 OHIO ST. J. CRIM. L. 449, 451 (2008) (evaluating self-defense in light of "the structure and practicalities of law making"); Rosky, *supra* note 22, at 1021–23 (arguing that speed, severity, and breadth all contribute to the justification for self-defense and self-help).

43. *See* Rosky, *supra* note 22, at 1021 ("Every liberal definition of self-defense refers . . . to 'imminent' harms.").

demand). For example, a bank security guard whose sole function is to guard a bank vault from thieves fulfills a private demand for force and thereby acts under the private mercenary model. The demand that the security guard fulfills is private precisely because the guard would choose not to intervene to prevent altercations or crimes unrelated to the security of the vault. Intervening in an unrelated crime would answer to a communal interest in order and security and would detract from the guard's primary mission to protect the vault. A private university patrolman is more likely to fulfill a public demand for order and security, in part because his job responsibilities are more generalized and in part because he must regularly interact with the general public. The private university patrolman thus generally acts under the arms of the state model.

Ostensibly, the state allocates all legitimate uses of force.[44] But the state bears a special responsibility for preventing crime and maintaining domestic order, which this Note refers to as the public demand for security and order.[45] "[G]overnments will inevitably remain central to crime prevention in modern societies . . . because the state cannot renounce the responsibility. The maintenance of domestic order is as crucial to the legitimacy of government as defence against external enemies."[46] The Bill of Rights tracks this responsibility mainly by imposing restrictions on the means by which the state enforces order and security.[47]

C. Applicability of Constitutional Restrictions to Models of Policing Authority

Under the state action doctrine, the Bill of Rights applies to official police.[48] Official mercenaries also fall under constitutional restrictions, because the state action doctrine is often preoccupied with determining whether the state acted through its official proxies:

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44. *See supra* Part I.A. The extent to which the state practically controls the use of force in society is the source of some debate. *See, e.g.*, *supra* note 40.

45. In addition to order and security, punishment and military force are the other two aspects of the public demand of force. *See* Rosky, *supra* note 22, at 896–912 (delineating the three aspects of force). These two aspects, however, are beyond the primary focus of this Note.

46. Monique Marks & Andrew Goldsmith, *The State, the People and Democratic Policing: The Case of South Africa*, *in* DEMOCRACY, SOCIETY AND THE GOVERNANCE OF SECURITY, *supra* note 23, at 139, 150 (quoting D. BAYLEY, POLICE FOR THE FUTURE 144 (1994)).

47. *See, e.g.*, U.S. CONST. amend. IV (restricting searches and seizures); *id.* amend. V (requiring due process).

48. *See infra* Part IV.A.

its employees. To say, however, that the state action doctrine enforces constitutional restrictions on only public suppliers of force is a convenient shorthand, but it is misleading and inaccurate.

To fulfill its citizens' public demands for force, the state can and does utilize private suppliers, such as private police forces, which represent the arms of the state model. Regardless of whether the private supply of force is followed by eventual state intervention, the private supply of force to fulfill a public demand should fall under constitutional auspices. "Whether termed 'traditional,' 'exclusive,' or 'significant,' . . . . the State's *delegation* of that power to a private party is, accordingly, subject to due process scrutiny."[49]

The state action doctrine should therefore focus not on the actor's status (official or private) but on the actor's function. Because the state cannot abdicate its responsibility for the allocation of legitimate force,[50] whenever private police act either explicitly or implicitly as suppliers (arms of the state) to fulfill this public demand for force, the Bill of Rights should apply to those private police actions. When private police act as suppliers to fulfill some other private demand for force (private mercenaries), however, the Bill of Rights should not apply.

Private police action thus breaks down into three relevant categories. First, some private police may be explicitly transformed into public suppliers answerable to the Bill of Rights: they become de facto official police.[51] Second, the private police may be seen as fulfilling a public demand for force and thus are again answerable to the Bill of Rights as arms of the state even without explicit state involvement.[52] The state has—in this case, implicitly—allocated the demand for force to the private police force. The private police rely on this underlying state authority to legitimize their actions. Third, private police may be private mercenaries fulfilling a private demand for force irrelevant to the establishment of security and order in society, and thereby beyond the scope of Bill of Rights protections.[53]

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49. Flagg Bros. v. Brooks, 436 U.S. 149, 176 (1978) (Stevens, J., dissenting). Delegation, as it is used in this dissent, is arguably equivalent to this Note's use of the term "allocation." *See supra* Part I.A.

50. Joh, *supra* note 2, at 359–60 ("Whether it encourages by inaction, or discourages through legislation and public critique, the state is always implicated in the development of private policing.").

51. *See infra* Part IV.A.

52. *See infra* Part IV.B.

53. *See infra* Part IV.C.

II. COMMUNITY POLICING AND THE ROLE OF THE SOVEREIGN IN HISTORICAL ENGLAND

To understand American Revolutionary conceptions of police and sovereignty, it is necessary to begin with the evolution of policing and sovereign power in medieval and colonial England.[54] Even before the Norman invasion, communal policing derived legitimacy from both local representation and sovereignty in the form of royalty.[55] As townships and commerce grew in complexity and size, medieval citizens increasingly recognized the sovereign both as the only legitimate source of force and as ultimately responsible for internal policing.[56]

The evolution of historical English policing institutions supports several larger points that are crucial to a theoretical understanding of public versus private policing. Throughout English history, royalty fought to preserve and strengthen its monopoly on the legitimate use of force. As a consequence, the sovereign acquired responsibility for internal policing: maintaining the security and well-being of its citizenry. At the same time, English royalty never relied solely on public officers, but rather on a complex mix of public and private suppliers of force to fulfill policing needs. In part because of this mixed reliance, speaking in terms of public versus private policing before the 1800s has little meaning.[57]

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54. *See, e.g.*, LEONARD A. STEVERSON, POLICING IN AMERICA 4 (2008) ("A history of policing in England helps us understand policing practices in America, because the colonists adopted primarily English law enforcement strategies.").

55. *See infra* notes 59, 64 and accompanying text.

56. *See infra* notes 78, 82 and accompanying text.

57. *See* Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573, 579 ("Most historical studies of public policing begin by noting the patchwork of private and quasi-public measures that existed before . . . 1829 . . . ." (footnote omitted)). *But see id.* at 580 ("[E]arly examples of private policing . . . are better classified as examples of community obligations, volunteer efforts, and vigilantism.").

"Prior to the eighteenth century, if the word 'police' was used, reference was, in effect, being made to the broad social function of 'policing': 'the general regulation or government, the morals or economy, of a city or country.'" JOHNSTON, *supra* note 25, at 4 (quoting STANLEY H. PALMER, POLICE AND PROTEST IN ENGLAND AND IRELAND 1780–1850, at 69 (1988)). The use of "police" in reference to specific crime prevention corresponded with the rise of public police around 1800 in London. *Id.* at 4 (noting the first statutory use of "police" in the modern sense occurred in 1800 with reference to the Thames River Police); *see also id.* at 6 (describing the shift after 1829 from ad hoc watch forces and constables to uniformed, paid police forces).

A. Policing by Arms of the State in Anglo-Saxon Communities Before the Norman Invasion

Prior to 1066, Saxon kings exerted minimal direct control over internal policing; local communities policed themselves at that time.[58] The Saxon kings relied heavily on this local communal organization, responding to public demand for security by legitimizing these systems of localized community protection and effectively establishing arms of the state.[59] Landless freemen banded together into tythings (groups of ten men) and elected a representative headborough or tythingman to gain the protection of the king's law.[60]

Over time, a more official and structured system evolved, reflecting a minor shift toward the public end of the public-private supply spectrum. Groups of ten tythings formed "hundreds," and both hundreds and tythings "had definite police functions to perform."[61] Namely, these groups pursued criminals, held the prisoners captive until trial, and produced the detained criminals at trial.[62] Tythingmen and hundredmen were both local, private citizens but also were, in some respects, de facto public officers for the king. Shire reeves (sheriffs) represented the most public end of this spectrum because they had the ability to "muster the *posse comitatus*, or whole available police force of the shire [essentially, every armed man in the tything], in case of emergency."[63] King Edgar (r. 959–975) consolidated and institutionalized this system, formalizing his role as "highest maintainer of the peace"[64] and officially recognizing the state's obligation to ensure, through some allocation of force, order and security in society.

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58. STEVERSON, *supra* note 54, at 5.

59. For example, King Alfred the Great (r. 871–900) required resident landowners known as thanes "to produce the culprit or satisfy the claim" against his kinfolk. WILLIAM LAURISTON MELVILLE LEE, A HISTORY OF POLICE IN ENGLAND 3 (1901), *available at* http://books.google.com/books?id=laiMjUpwYWcC.

60. *Id.*; David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1195 (1999); *see also* STEVERSON, *supra* note 54, at 5; Joh, *supra* note 57, at 580 (describing the groups as tithings).

61. MELVILLE LEE, *supra* note 59, at 4–5.

62. *Id.* at 5; Sklansky, *supra* note 60, at 1195. Fines were levied against the tything and the hundred, in turn, for their failures to carry out these responsibilities. MELVILLE LEE, *supra* note 59, at 5.

63. MELVILLE LEE, *supra* note 59, at 7–8.

64. *Id.* at 1 ("[This] 'King's Peace' . . . guaranteed, or at least promised, to his subjects, a state of peace and security in return for the allegiance which he demanded from them.").

B. *The State's Responsibility as Allocator of Force after the Norman Invasion*

The invading Normans adopted the basic Saxon community system,[65] enforcing it through a preemptive, compulsory bail called a frankpledge[66] that anticipated the arrest of individuals.[67] The Normans also established a constable position,[68] which continued the shift toward a reliance on suppliers of force who were increasingly public in nature. William the Conqueror and his successors also maintained the Saxon tradition of issuing proclamations of "general peace orders" upon their accession to avoid lapses in the "King's Peace" upon the former ruler's death.[69] Time and again, English sovereigns would each lay claim to the responsibility of peace maintenance and to the title of "champion of order,"[70] thereby reinforcing the state's obligatory role as allocator of force to ensure order and security throughout society.

C. *A Shift Toward the Public End of the Public-Private Supply Spectrum During the Late Middle Ages*

The Statute of Winchester, enacted in 1285,[71] formalized—at least idealistically if not practically—several institutions illustrative of the theory of sovereign power over police and the public-private policing dichotomy. The statute affirmed the frankpledge system[72] and officially established the constable office.[73] Sheriffs and constables were royal officers with powers of inspection and general supervision, and they sometimes played the role of official mercenary

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65. *Id.* at 14.

66. The "frankpledge signif[ied] the guarantee for peace maintenance demanded by the king from all free Englishmen, the essential properties of this responsibility being, that it should be local, and that it should be mutual." *Id*. at 4.

67. Sklansky, *supra* note 60, at 1196.

68. *Id.* at 1196; *see also* R.I. Mawby, *Variations on a Theme: The Development of Professional Police in the British Isles and North America*, *in* POLICING ACROSS THE WORLD, *supra* note 2, at 28, 29 (recognizing the increased use of the term constable after the Norman invasion).

69. MELVILLE LEE, *supra* note 59, at 2 n.1.

70. *Id.* at 21.

71. *See id.* at 24–25 (describing the statute as the foundation of the modern police structure).

72. Sklansky, *supra* note 60, at 1196; *see also* MELVILLE LEE, *supra* note 59, at 25 (describing the statute as "the definite product of a long series of experiments all tending in the same direction").

73. Joh, *supra* note 57, at 580; Sklansky, *supra* note 60, at 1196.

when the king employed them for political ends unconnected to peace maintenance.[74] Sheriffs could also use *posse comitatus* to keep the peace.[75] Night watchmen were appointed, on a rotating basis, for every city and borough.[76]

In the late Middle Ages, the justice of the peace eventually superseded the role of sheriff.[77] In 1328, Edward III (r. 1327–1377) considerably extended the scope of the justices' powers by empowering them to examine and punish lawbreakers.[78] By 1360 the Justices of the Peace Statute had formalized the justices' policing role.[79] The justices of the peace represented the culmination of a shift toward reliance on actors that fell somewhere between arms of the state and de facto official police for the maintenance of order and security.

Another common phenomenon that persisted throughout the Middle Ages and into the fifteenth century was the reliance by the constable and sheriff on the support of their fellow citizens—a concept of mutual responsibility dating back to Saxon communities[80] that illustrates the complex interweaving of public and private suppliers of force. Like the ancient frankpledge, freemen of the fifteenth century "enter[ed] into a solemn obligation to keep the peace, a compact which . . . had its origin in the ancient oath of allegiance."[81] The oaths required of constables and freemen demonstrate "how a compromise was arrived at between the ancient system of frankpledge and the more modern plan of employing a professional class of peace officers, and how, by means of the combined action of police and public, domestic tranquility was assured."[82]

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74. MELVILLE LEE, *supra* note 59, at 28.

75. *Id.* at 44–45. *Posse comitatus*, as in Saxon culture, involved the response of all presently available armed men in the community. *See supra* note 63 and accompanying text.

76. Sklansky, *supra* note 60, at 1196–97. The night watch was generally "responsible for reporting fires, raising the 'hue and cry' when crimes were committed, and arresting or detaining suspicious persons." Joh, *supra* note 57, at 581.

77. *See* MELVILLE LEE, *supra* note 59, at 45 (describing how the corruption of sheriffs led to their displacement by justices of the peace).

78. *Id.* at 46.

79. *Id.* at 48; Mawby, *supra* note 68, at 29 (placing the date of passage as 1361).

80. MELVILLE LEE, *supra* note 59, at 75–76.

81. *Id.* at 76.

82. *Id.* at 76–77.

D. *Precursor to the Modern "Private Police": The Rise of Private Funding via Commercial Property Interests*

After a period of feeble monarchs, during which nobles ignored the king's peace, Henry VII (r. 1485–1509) set out "to re-assert the personal ascendancy of the sovereign, especially with regard to the maintenance of the peace."[83] Reformation measures included remuneration for de facto official officer positions and reliance on private experts supplied by trade guilds or livery companies to police increasingly complex commercial transactions.[84]

By the eighteenth and nineteenth centuries in Britain and America, volunteer groups using private funding complemented, supplemented, or supplanted the mandatory systems of community protection.[85] In Britain, felons associations posted rewards to apprehend criminals, assisted their members in prosecuting criminals, and sometimes hired private patrols.[86] Victims hired private thief-takers to retrieve stolen property.[87]

In colonial America, Boston established a night watch in 1636, and watchmen became commonplace throughout the colonies.[88] "Crime control administered by a centralized government did not exist, and responsibility for protection was thrust upon the people themselves."[89] The constable and the night watch eventually became prevalent in American cities and towns by the early nineteenth century.[90]

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83. *Id.* at 82.

84. *Id.* at 85–86. Because the highly commercialized middle class found compulsory constable duties to be unprofitable and time consuming, the system "degenerated into a system of paid substitutes." Joh, *supra* note 57, at 581.

85. *See* Joh, *supra* note 57, at 582–84 (describing variants of privately funded associations).

86. *Id.* at 582. Between 1750 and 1856, felons associations surged in popularity. *Id.*; *see also* Johnston, *supra* note 2, at 228 (estimating the number of felons associations to be between 750 and 4000). A typical association had twenty to sixty members covering ten to twenty miles. JOHNSTON, *supra* note 25, at 10.

87. Joh, *supra* note 57, at 583; Mawby, *supra* note 68, at 30.

88. Mawby, *supra* note 68, at 31 (quoting F.B. FOSDICK, AMERICAN POLICE SYSTEMS 59 (1920)).

89. Joh, *supra* note 57, at 580.

90. *Id.* at 581.

III. THE AMERICAN REVOLUTION AND THE DEVELOPMENT OF THE PUBLIC-PRIVATE DISTINCTION

The American Revolution provides an important link between the English policing tradition and the U.S. Supreme Court's state action doctrine. Although the Revolution brought with it new theories on sovereignty, the American states remained responsible—much like the English sovereigns before them—for the maintenance of order and security in society. The nineteenth century introduced both more official public police forces and more powerful private corporate entities that further highlighted the public-private distinction in policing and paved the way for the Court's state action doctrine.

A. American Conceptions of Sovereignty and Police Power

The American Revolution and subsequent Constitution rejected English royalty as a basis for sovereignty yet adopted very traditional English views of policing. Revolutionary thinkers permeated the constitutional debate with concerns about sovereign power and the maintenance of security and order. Competing theories argued that sovereign power either flowed from the people or from the individual states.[91] Either way, sovereign power in the United States remained responsible for the allocation of force to ensure order and security in society.

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91. Some argued that constitutional legitimacy flowed from the people of the United States as a whole. By the time of the Convention, for example, delegate James Wilson, who later became one of the first Supreme Court Justices, believed that sovereignty was naturally held by neither national nor state governments, but rather by the people. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 8 n.27 (2002) (citing GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 530–31 (1969)).

Others, like James Madison, placed the Constitution's legitimacy with the peoples of the individual states but conceded that this was a theoretical point with limited practical significance. Madison argued that the "[proposed government] is of a mixed nature," "consisting of many coëqual sovereignties," but he readily conceded that "the authorities of the general government and state governments all radiate from the people at large. The people is their common superior." 3 THE DEBATES IN THE SEVERAL STATES CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 94, 381, 332 (William S. Hein & Co. 1996) (Jonathan Elliot ed., 2d ed. 1891) (remarks of James Madison).

Still others, like Thomas Jefferson, felt that understanding the Constitution as a compact among individual states was important to post-ratification constitutional law. Jefferson's belief, according to Philip Bobbitt, that "the state was the creation of sovereign power, not the other way round," theoretically founded Jefferson's Declaration of Independence. PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION 5 (1991).

The word police entered the American lexicon during the political debates of the 1770s and 1780s.[92] Along with this word, the American Revolution's reconceptualization of sovereignty imported English ideas of responsibility for peace and order.[93] After 1776, the newly emergent theory of police "gave political voice to a conception of republican government . . . grounded in the older communitarian idiom of 'peace and unitie' or 'safety and happiness' but shaped by a developing consciousness of popular right."[94] Although the foundation of sovereign authority had shifted, the sovereign's responsibility for security and order had not.[95]

Delegates to the Constitutional Convention voiced concerns over the continued police power of the states.[96] For example, Roger Sherman of the Connecticut delegation offered two motions to recognize the states' power of "internal police."[97] Jefferson, later writing from Monticello, would sarcastically query, "[c]an it be believed that under the jealousies prevailing against the General Government at the adoption of the Constitution, the States meant to surrender the authority of preserving order, of enforcing moral duties, and restraining vice, within their own territory?"[98] Jefferson's

92. CHRISTOPHER L. TOMLINS, LAW, LABOR AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 55 (1993).

93. For example, in the Constitution's Preamble, "domestic Tranquility" echoes the famous English jurist William Blackstone's conception of police. Christopher Tomlins, *The Supreme Sovereignty of the State: A Genealogy of Police in American Constitutional Law, from the Founding Era to* Lochner, *in* POLICE AND THE LIBERAL STATE 33, 35 (Markus D. Dubber & Mariana Valverde eds., 2008).

94. TOMLINS, *supra* note 92, at 58–59.

95. *See* MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT 84 (2005) ("Government also meant, as it always had, policing others.").

96. Article IV, section 4 implicitly protects state cognizance of internal police power by allowing the federal government to protect "against Domestic Violence" only upon "Application of the Legislature, or of the Executive." U.S. CONST. art. IV, § 4. During a 1908 rebellion in Nevada, President Theodore Roosevelt refused to provide national troops to Nevada Governor John Sparks, citing Article IV, section 4 and noting that "[t]he State government does not appear to have made any serious effort to do *its duty* by the effective enforcement of *its police functions*." 2 DAVID KEMPER WATSON, THE CONSTITUTION OF THE UNITED STATES: ITS HISTORY APPLICATION AND CONSTRUCTION 1298 (1910) (emphasis added).

97. 1 WATSON, *supra* note 96, at 597; 2 *id.* at 1307.

98. 1 *id*. at 598 (quoting Letter from Thomas Jefferson to William Johnson (June 12, 1823), *in* THE JEFFERSONIAN CYCLOPEDIA 844, 844 (John P. Foley ed., 1900)).

comment is an appropriate definitional basis of what would become the states' police power.[99]

Nineteenth century case law on the states' police power reflects both Revolutionary-era thinking about popular sovereignty and English traditions concerning sovereign responsibility for internal policing. State supreme courts, not surprisingly, advanced state police power theories that emphasized state sovereignty and responsibility for protecting the peace and welfare of their citizenry.[100] For example, the Supreme Court of Pennsylvania recognized that threats to the state may originate externally, necessitating a militaristic response, or "arise within the State, [for which] self-preservation requires their suppression . . . . by the exercise of the police power which . . . provides for the public welfare, and the protection of citizens against the violence and the fraudulent conduct of each other."[101] This police power links the old English notion of king's peace to the American conception of popular sovereignty granted by the people to the states. Importantly, the police power doctrine described in these cases recognized that states, like English royalty of times past, had necessarily adopted responsibility for maintaining peace and order as part of their delegated sovereign responsibilities.[102]

B. Development of the Public-Private Distinction in Policing

Increased reliance on the police power doctrine presaged and accompanied the rise of public police and the public-private police

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99. *Id.*

100. *See, e.g.*, Commonwealth v. Alger, 61 Mass. 53, 85 (1851) (hesitating to "prescribe limits" but noting that "the police power [is] . . . vested in the legislature by the [Massachusetts] constitution"); Thorpe v. Rutland & Burlington R.R., 27 Vt. 140, 149–50 (1854) (distinguishing "police power," which protects property, from "general police power of the State, by which persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State"). The U.S. Supreme Court also discussed the states' police power in the context of federalism. *See, e.g.*, Mayor of New York v. Miln, 36 U.S. (11 Pet.) 102, 103 (1837) ("It is not only the right, but the bound[] and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare . . . .").

101. Commonwealth v. Vrooman, 164 Pa. 306, 316 (1894).

102. The police power doctrine extends beyond the responsibility and power of the state to maintain security and order in the traditional sense. Nor is the police power simply the power to create the police per se. Expansion of the police power concept paralleled the nineteenth century Jacksonian expansion of government power through canals, railroads, free schools, and liquor prohibition. BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 80 (1995).

distinction in the nineteenth and twentieth centuries.[103] Modern, professional public suppliers of force, in the form of police departments, became the norm, whereas professional private suppliers of force, such as the Pinkertons,[104] took advantage of both the public demand for security and order in the West and the private corporate demand to rein in labor unions. Finally, late twentieth century policing gave rise to private multinational organizations that may realistically replace the state as an allocator of force.[105]

The inadequacy of the "loosely coordinated patchwork of public and private arrangements" for policing that characterized the early nineteenth century led to increasingly official public police forces.[106] In 1829, the English Metropolitan Police Act established a professional, tax-supported police force that was uniformed, quasi-military, and separate from the courts.[107] The state prohibited these full-time officers from supplementing their incomes with private payments on the side.[108] The Metropolitan Police served as the primary modern policing model for England and America.[109]

New York created the first modern American public police force in 1844,[110] and other cities followed shortly thereafter.[111] A national police force did not exist, perhaps because "[t]he individual states were not willing to turn over complete authority to the federal government, and they stringently guarded their rights to govern themselves."[112] Most states shifted toward uniformed, official police during the second half of the nineteenth century.[113]

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103. *See* Sklansky, *supra* note 60, at 1225 ("[O]nly in the second half of the nineteenth century did a relatively clear dividing line emerge between public and private policing.").

104. *See infra* note 119 and accompanying text.

105. Les Johnston, *Transnational Security Governance*, *in* DEMOCRACY, SOCIETY AND THE GOVERNANCE OF SECURITY, *supra* note 23, at 36, 38; *see also infra* note 140.

106. Sklansky, *supra* note 60, at 1202.

107. *Id.*

108. *Id.* at 1203.

109. *Id.* at 1202; *see also* Mawby, *supra* note 68, at 38 (suggesting that the New York police force was modeled after the London police).

110. Johnston, *supra* note 2, at 226; Mawby, *supra* note 68, at 38. Sklansky places the establishment of the New York police at 1845. Sklansky, *supra* note 60, at 1207.

111. Sklansky, *supra* note 60, at 1207; *see also* Mawby, *supra* note 68, at 38 (noting the establishment of public police in Boston, Philadelphia, Chicago, New Orleans, and Cincinnati).

112. Mawby, *supra* note 68, at 38 (quoting Beverly Sweatman & Adron Cross, *The Police in the United States*, 5 CRIM. JUST. INT'L 11, 11 (1989)).

113. Sklansky, *supra* note 60, at 1210.

Before and after the Civil War, the American South, however, relied on both official and unofficial force to sustain security and order in a culture in which slavery was pervasive. Officials participating in slave patrols drew their authority from the perfunctory warrant procedures—which paralleled pre-Revolutionary general warrants[114]—provided by federal and state fugitive-slave laws.[115] During Reconstruction, the Southern Black Codes meant that African Americans "fac[ed] continuing violence—sometimes overtly state-sanctioned, sometimes by 'private' mobs often led by state officials—and seizures of their property."[116] These patrols and mobs are examples of how both de facto official police and arms of the state, respectively, can answer societal demands for security and order in an unconstitutional, abusive manner.[117]

Also during the nineteenth century, interstate corporations, particularly railroads, hired private police firms to avoid jurisdictional problems with local public police forces and to protect their property in the relatively lawless western United States.[118] Such private police firms were quintessential arms of the state in the sense that, by allowing them to exist, the state could avoid spending excessive resources on official police to enforce order and security in those areas. Private police agencies, such as the Pinkertons,[119] protected property (playing the role of private mercenary), but more significantly, combated labor-related violence for steel, coal, and manufacturing corporations after the Civil War[120] (playing, in part, the role of arm of the state by answering a distinctly public demand for greater order and security than the state was willing to provide directly). Corporations used private police to verify employee

114. *See generally* TASLITZ, *supra* note 24, at 17–36 (detailing British use of and colonial objections to general warrants and writs of assistance).

115. *Id.* at 12. "For all practical purposes, patrols had nearly unlimited authority to search, seize, and exercise violence . . . ." *Id.* at 109.

116. *Id.* at 13.

117. *Cf.* LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 246 (1985) (discussing how post-Civil War "racial apartheid" used "ostensibly 'private' power," making it "hard to accept with equanimity a rigid legal distinction between state and society").

118. Joh, *supra* note 2, at 362–63. Sklansky distinguishes between "company police," hired by corporations "to protect their own property and empowered as police officers by the state," and "national private police agenc[ies]" such as the Pinkerton agency. Sklansky, *supra* note 60, at 1211.

119. Joh, *supra* note 2, at 363. Other similar private organizations include the Pennsylvania Cossacks (The Coal and Iron Police), Burns, and Brinks. JOHNSTON, *supra* note 25, at 20; Johnston, *supra* note 2, at 228.

120. Joh, *supra* note 2, at 364.

integrity, undermine labor strikes, work as "scabs," and guard property during labor unrest.[121]

Congressional investigations on private policing soon followed the 1892 Homestead Riot,[122] in which Pinkerton guards exchanged gunfire with striking steelworkers.[123] Notably, the Senate voiced a concern that private police forces impugned state sovereignty: "use of private armed men is an assumption of the state's authority by private citizens."[124] This critique assumed that the states were obligated to ensure order and security, but had failed to allocate force in a responsible manner thereby risking their very sovereignty.[125]

The distinction between public and private policing took on new significance, but the practical effect of the Homestead hearings was limited.[126] While Pinkerton's agency transitioned into guarding banks and jewelry stores, other agencies quickly filled the need for private police to protect corporate property and disrupt labor strikes.[127] The period from 1900 through 1920 became a "golden age" for such organizations.[128]

Continued violence between unions and corporations, which was undoubtedly exacerbated by the Great Depression, led to additional incidents and hearings.[129] In 1936, Senator Robert La Follette, Jr. investigated the use of private police in strikebreaking, but he found it difficult to distinguish between the functions of private police agencies and suppliers of public police.[130] A local sheriff, for example, deputized scores of men at the behest of a manufacturing company

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121. *Id.* at 362, 364.

122. *Id.* at 365–66; Sklansky, *supra* note 60, at 1214–15.

123. Joh, *supra* note 2, at 365–66; Sklansky, *supra* note 60, at 1214–15. Three workers and twelve guards were killed. Sklansky, *supra* note 60, at 1215.

124. Joh, *supra* note 2, at 366 (quoting S. REP. NO. 52-1280, at XV (1893)); *see also* The Homestead Case, 1 Pa. D. 785, 789 (1892) ("It is the duty of the state to protect every citizen within her borders . . . . When the state fails to do this it fails in its duty as sovereign . . . .").

125. *See* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1428 (1982) ("The attack [late in the nineteenth century] on the public/private distinction was the result of a widespread perception that so-called private institutions were acquiring coercive power that had formerly been reserved to governments.").

126. Joh, *supra* note 2, at 367.

127. *Id.* at 368; Sklansky, *supra* note 60, at 1216.

128. Joh, *supra* note 2, at 368 & n.64 (noting that private organizations in this period "patrolled rail yards, served warrants, protected small businesses, and even captured Army deserters for the federal government").

129. *See id.* at 369 ("No employer facing a labor crisis, it seemed, went without the aid of private police assistance.").

130. *Id.*; Sklansky, *supra* note 60, at 1218.

anticipating a strike at its textile mills.[131] This same manufacturing company used private police to stop and search every car on the area's only paved highway.[132] Perhaps because of this blending of private and public, the La Follette Committee sharply distinguished public and private police responsibilities: "[p]rivate police systems . . . are created to meet the economic needs and desires of private interests. . . . [and] cannot be viewed as agencies of law and order."[133] The Committee had recognized that these private police could legitimately operate in the private mercenaries model, responding to private economic needs and desires, but they should not be allowed to operate as arms of the state, enforcing order and security, without the imposition of additional restrictions and safeguards.

Public hostility toward private police steadily declined through the mid-twentieth century.[134] Although the number of private police stagnated during that time,[135] it reversed course and increased dramatically through the 1960s and 1970s.[136] Shifting public attitudes described private police as "complementary"[137] forces that "do not usurp public authority, but provide much-needed aid to the public police."[138] This shift presaged a return to the arms of the state model: the allocation of private police forces to fulfill a public desire for order and security.

At the turn of the twenty-first century, private police forces have engaged in explicit partnerships with official police[139] and have also resumed their nineteenth century role as national—and even transnational—security forces employed by corporations

131. Joh, *supra* note 2, at 369 (describing West Point Manufacturing Company).

132. *Id.* (citing ROBERT M. LA FOLLETTE, JR., S. COMM. ON EDUC. & LABOR, STRIKEBREAKING SERVICES, S. REP. NO. 76-6, pt. 1, at 45 (1939)).

133. *Id.* at 371 (quoting ROBERT M. LA FOLLETTE, JR., ON PRIVATE POLICE SYSTEMS, S. REP. NO. 76-6, pt. 2, at 2 (1939)).

134. *Id.* at 375.

135. *Id.*; *see also* Sklansky, *supra* note 60, at 1219–20 (arguing that much of the decline in private policing was "redeployment" into "the preventive patrol business"). Johnston cites several examples of the emerging guarding industry between World War I and World War II. *See* JOHNSTON, *supra* note 25, at 19.

136. Joh, *supra* note 2, at 375; *see also* Sklansky, *supra* note 60, at 1221 (noting that this "rapid expansion" of private police continued through the end of the twentieth century although the growth of public police plateaued).

137. Joh, *supra* note 2, at 377 (quoting INST. FOR LOCAL SELF GOV'T, PRIVATE SECURITY AND THE PUBLIC INTEREST 86 (1974)).

138. *Id.* (summarizing the findings of INST. FOR LOCAL SELF GOV'T, *supra* note 137, at 88).

139. *See supra* note 2 and accompanying text.

worldwide.[140] Definitional inconsistencies make tallying private police difficult, but, as of the early twenty-first century, there are far more private than public police in the United States.[141] Yet, modern society often takes the role of private police for granted and few people question the "delegation of the sovereign power of the state to private hands" that permeated the debates of the Homestead investigations.[142] Also taken for granted is the idea that public police must perform the role of the state, while private police perform some other function unrelated to the state. This public-private distinction, however, is belied by history.

IV. CONSTITUTIONAL LIMITS ON PRIVATE POLICE AUTHORITY IN LIGHT OF THE AMERICAN CONCEPTION OF THE STATE

The state uses its derived authority to effectuate its police power responsibilities by legitimizing and sustaining its monopoly on the allocation of legitimate force. The state may allocate force, explicitly or implicitly, to any mix of official police and arms of the state.[143] The state's social contract with its citizens prevents it from renouncing its responsibility to provide security and order in society.[144] Therefore, this Note argues that both official police and arms of the state should be constitutionally liable for their actions.[145]

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140. A few large companies dominate the transnational private security industry, focusing on general security and specialized services such as "airline security, drugs-testing, surveillance, executive protection, facility hardening and the monitoring of populations engaged in travelling, tourism and migration." Johnston, *supra* note 105, at 36–38; *see also supra* note 3.

141. Professor Ric Simmons estimates that private police spending is double public police spending. Simmons, *supra* note 3, at 920–21 & nn.34–38. Of note, *The Economist* magazine placed the ratio of private security to public law enforcement in the United States at three-to-one in 1997. *Policing for Profit: Welcome to the New World of Private Security*, ECONOMIST, Apr. 19, 1997, at 21. In 2008, the United States Department of Labor counted over one million security guards and private detectives, but only 633,710 police and sheriff's patrol officers with another 104,480 public detectives and criminal investigators. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NO. 09-0457, OCCUPATIONAL EMPLOYMENT AND WAGES, 2008, tbl.1 (2009), *available at* http://www.bls.gov/news.release/pdf/ocwage.pdf.

142. Joh, *supra* note 2, at 385 (quoting William T. Martin, Editorial, *Industrial Police Stir Pennsylvania*, N.Y. TIMES, Feb. 1, 1931, at 58); *see also* Clifford Shearing, *Reflections on the Refusal to Acknowledge Private Governments*, *in* DEMOCRACY, SOCIETY AND THE GOVERNANCE OF SECURITY, *supra* note 23, at 11, 11 (lamenting scholars' "refusal to acknowledge the existence of . . . 'private governments'"); Sklansky, *supra* note 60, at 1166–68 ("[L]egal scholars have tended to ignore private security.").

143. *See supra* Table 1: Models of Policing Authority.

144. *See supra* Part I.A.

145. *See supra* Part I.C.

The Supreme Court, in contrast, would characterize this constitutional liability under its state action doctrine by distinguishing public and private actions. In brief, the state action doctrine holds that private actions remain unrestricted by the Constitution unless the state is intimately involved in the action in question.[146] This Note seeks to reconceptualize this doctrine[147] and move beyond the public-private state action debate[148] by defining action in terms of function. The functional argument is that an actor fulfilling a public demand for force is constitutionally liable, whereas an actor fulfilling a private demand for force is not. Support for this definition of action can be found by contrasting the facts and holdings of what have been traditionally considered state action cases.

The three categories of private police authority highlighted in Part I.C guide the determination of when the Bill of Rights should apply to private police actions. First, constitutional restrictions should apply to de facto official police who have become public suppliers by responding to a public demand for force. Second, constitutional restrictions should apply to arms of the state. Third, constitutional restrictions should *not* apply to private mercenaries. Put simply, any actor whose function it is to answer to a public demand for security and order should be constitutionally liable for his actions. This scheme's largest departure from traditional state action analysis is in the arms of the state category, in which an ostensibly private actor fulfills a public demand for force.

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146. *See, e.g.*, Chemerinksy, *supra* note 26, at 508.

147. Professor Laurence Tribe and Dean Erwin Chemerinsky offer two critical reconceptualizations of state action doctrine. *See* TRIBE, *supra* note 117, at 246–66 (suggesting that state action cases can be interpreted by (1) examining the closeness of the tie between the state and the actor who committed the alleged constitutional violation and (2) examining the substantive law involved); Chemerinksy, *supra* note 26, at 550 ("The effect of discarding the concept of state action is that the Constitution would be viewed as a code of social morals, not just of government conduct, bestowing individual rights that no entity, public or private, could infringe without a compelling justification.").

148. *See, e.g.*, Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 378 (1995) ("It is fair to say that 'our cases deciding when private action might be deemed that of the state have not been a model of consistency.'" (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting))); Sklansky, *supra* note 60, at 1225, 1246 & n.451 (echoing Charles Black's critique that the state action doctrine is a "conceptual disaster area" and indentifying other critiques (quoting Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: State Action, Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967))).

A. *Private Police as De Facto Official Police (Public Demand, Public Supply)*

In the first category of private police authority, private police have become agents of the state, effectively de facto official police. "[W]hen private individuals or groups are endowed by the state with powers or functions governmental in nature, they become agencies or instrumentalities of the state and subject to its constitutional limitations."[149] Two related Supreme Court doctrines recognize this concept: the under color of law doctrine and the state action doctrine.[150]

The under color of law doctrine originates in 42 U.S.C. § 1983, which provides for civil litigation when a "person who, *under color of* any statute, ordinance, regulation, custom, or usage, of any State . . . [deprives any person] of any rights, privileges, or immunities secured by the Constitution and laws."[151] Even when an actor is not a state officer, he is liable under the Constitution if he willfully participates jointly with the state or with state agents.[152] "[A] person acts under color of state law only when exercising power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'"[153]

Similarly, a finding of state action will bring the actor under constitutional limitations.

> If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken that same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law.[154]

Here, both the state action doctrine and the under color of law doctrine reflect the notion that the individual possessing state authority transforms into an official state actor—a public supplier of force.

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149. Evans v. Newton, 382 U.S. 296, 299 (1966).

150. *See, e.g.*, Lugar v. Edmondson Oil Co., 457 U.S. 922, 928 (1982) (noting that the two doctrines are "obviously related" and "until recently this Court did not distinguish between the two requirements at all").

151. 42 U.S.C. § 1983 (2006) (emphasis added).

152. Dennis v. Sparks, 449 U.S. 24, 27 (1980).

153. Polk County v. Dodson, 454 U.S. 312, 317–18 (1981) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).

154. Griffin v. Maryland, 378 U.S. 130, 135 (1964).

For example, in *Griffin v. Maryland*,[155] a private amusement park security guard deputized as a county sheriff personally arrested five black men and charged them with criminal trespass in furtherance of the park's racial segregation policy.[156] Chief Justice Warren, writing for the Court, found that the arrest was "state action forbidden by the Fourteenth Amendment."[157] The security guard supplied force in a racially discriminatory manner. In doing so, the security guard answered a demand not only from the private amusement park but also from the park's customers, whose attitudes echoed a cultural prejudice that equated segregation with order and security. The security guard's actions thus constituted a *public* supply of force—making him a de facto official police officer; as the Court explained, arresting the men instead of calling the (public) police transformed the deputized security guard into a state actor.[158] Similarly, in *Williams v. United States*,[159] the Court held that a private detective using "a special police officer's card issued by the City of Miami" acted under color of law when he intimidated and beat four men.[160] As in *Griffin*, the Court treated the private detective as a de facto official police officer.

The state action doctrine, however, goes well beyond a simple state actor test. In *Lugar v. Edmondson Oil Co.*,[161] Justice White explained how the deprivation of a constitutional right must "be fairly attributable to the State" to meet the state action requirement:

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible. . . . Second, the [actor] must . . . fairly be said to be a state actor.[162]

155. Griffin v. Maryland, 378 U.S. 130 (1964).

156. *Id.* at 131–32.

157. *Id.* at 137.

158. *See id.* at 137–38 (Clark, J., concurring) (distinguishing *Griffin* from a hypothetical case in which a security guard did not arrest the supposed trespassers but rather contacted the police). Had an officer been dispatched to arrest the five men for trespass in *Griffin*, their constitutional claim would have been against that arresting officer. The state instead allocated the use of legitimate force to the deputized private security guard. *Id.*

159. Williams v. United States, 341 U.S. 97 (1951).

160. *Id.* at 98–100.

161. Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982).

162. *Id.* at 937.

Under this test, the "attributable to the state" concept is much broader than the "possessed of state authority" concept, as demonstrated by Justice White's long list of various tests and factors.[163] Tests like the public function test[164] or the state compulsion test[165] reflect situations in which private actors function as arms of the state. The next subsection focuses on this type of situation.

B. Private Police Reliance on Implicit Underlying State Authority: Arms of the State (Public Demand, Private Supply)

This Note contends that, under two related theories, a private actor may be answerable for violations of constitutional rights when he supplies force related to a societal demand for security and order. Under an absolute arm of the state theory, an initial action may violate the victim's constitutional rights regardless of any subsequent, explicit state legal intervention. The public function test described in *Lugar* and exemplified by both *Marsh v. Alabama*[166] and *Terry v. Adams*[167] provides an apt analogy to this absolute theory.[168] Under a qualified arm of the state theory, it is a subsequent state intervention or sanction following the initial action that is considered the true *constitutional* violation that may make a private actor liable. This theory of liability is analogous to the state compulsion test described in *Lugar*.[169] Admittedly, the distinction between the *absolute* arm of the state theory and the *qualified* arm of the state theory is not a bright line, but, under either theory, a private actor should fall under the arm of the state model.

1. *Absolute Arm of the State Theory*. Whenever a private supplier acts as an arm of the state by fulfilling a public demand for order and security, that private supplier should be held to constitutional standards, regardless of whether the state subsequently

163. *Id.* at 939.

164. *See id.* (citing Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946)); *Terry*, 345 U.S. at 469 (plurality opinion) ("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.").

165. *See Lugar*, 457 U.S. at 939 (citing Adickes v. S. H. Kress & Co., 398 U.S. 144, 170 (1970)); *Adickes*, 398 U.S. at 151–52 ("[A] State must not . . . act to compel or encourage racial segregation.").

166. Marsh v. Alabama, 326 U.S. 501 (1946).

167. Terry v. Adams, 345 U.S. 461 (1953).

168. *See supra* note 164.

169. *See supra* note 165.

intervenes. This initial wrongdoing by the private actor is itself a constitutional violation because the private actor, functioning as an absolute arm of the state, provides a public service for which the state retains ultimate responsibility.

The Court's use of the public function test in *Marsh v. Alabama* illustrates the parallels between that test and this Note's absolute arm of the state theory. A corporation owned and rented out the buildings, owned the paved street and sidewalk, and paid a deputy sheriff to police the town of Chickasaw, Alabama.[170] The deputy sheriff arrested Marsh, a Jehovah's Witness, for distributing religious literature on the sidewalk in violation of the corporation's policy.[171] The *Marsh* opinion does not depend on this arrest per se.[172] Instead, the Court's opinion primarily concerns the private actions and constitutional liability of the Gulf Shipbuilding Corporation, which, while engaging in classic private policing reminiscent of that of company police or the nineteenth-century Pinkertons,[173] violated Marsh's First Amendment rights.[174]

In *Marsh*, the state had allocated the provision of certain public trust concerns—namely public common areas, highways, and security—to a private corporation. Justice Black analogized the company town to "bridges, ferries, turnpikes and railroads . . . [whose] operation is essentially a public function."[175] Justice Black's examples of public functions are each based in the public trust and security responsibilities of the state.[176] These services satisfy public demands, and they should fall under the auspices of

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170. *Marsh*, 326 U.S. at 502–03.

171. *Id.* at 503.

172. *See id.* at 511 (Frankfurter, J., concurring) ("[T]he technical distinctions on which a finding of 'trespass' so often depends are too tenuous to control decision [*sic*] regarding the scope of the vital liberties guaranteed by the Constitution.").

If Gulf Shipbuilding had merely excluded Marsh from the town by a private show of force, the outcome would likely have been the same; Justice Black's majority opinion largely focuses on the application of the First Amendment to the company town. *See, e.g.*, *id.* at 509 (majority opinion) ("[W]e balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion . . . .").

173. *See supra* notes 118–19 and accompanying text.

174. *Marsh*, 326 U.S. at 506.

175. *Id.*

176. In Justice Black's highway analogy, "even had there been no express franchise but mere acquiescence by the State in the corporation's use of its property as a segment of the four-lane highway, operation of all the highway, including the segment owned by the corporation, would still have been performance of a public function and discrimination would certainly have been illegal." *Id.* at 507 (footnote omitted).

state regulation and constitutional restrictions whether the ultimate supplier is public or private.

Terry v. Adams provides another example of a public function—elections—that can be reconceptualized under the absolute arm of the state theory. A plurality of the Supreme Court applied constitutional restrictions to a privately run county primary that, in practical terms, determined the subsequent county elections.[177] By describing the private Jaybird Association as "an integral part . . . of the elective process," the Court effectively found the association to be an arm of the state.[178] The Jaybird Association therefore incurred constitutional liability for its violation of the Fifteenth Amendment.[179]

The analysis of the *Terry* Court parallels this Note's absolute theory because the Court focuses on the immediate violation by the private actor. Even though, as Justice Frankfurter noted in his concurrence, "formal State action, either by way of legislative recognition or official authorization, is wholly wanting,"[180] the plurality needed to ensure that Texas could not "cast[] its electoral process in a form which permits a private organization to practice racial discrimination in the election."[181] Both Justice Black's plurality opinion and Justice Clark's concurrence recognized that elections, like the state's police power responsibilities, are an essential state characteristic.[182] Thus, even when supplied by private organizations, the provision of elections, like the provision of force, necessarily answers to a societal demand.

Later Court opinions expound upon the concept of a public function, relating it to the sovereign's police power responsibilities. For example, Justice Rehnquist, writing for the Court in *Jackson v. Metropolitan Edison Co.*,[183] summarized *Marsh* and its brethren as teaching that private entities may perform public functions (that is,

177. *See* Terry v. Adams, 345 U.S. 461, 469 (1953) (plurality opinion) ("The only election that has counted in this Texas county for more than fifty years has been that held by the Jaybirds . . . .").

178. *Id.* at 469.

179. *Id.* at 470.

180. *Id.* at 471 (Frankfurter, J., concurring).

181. *Id.* at 466 (plurality opinion) (quoting Smith v. Allwright, 321 U.S. 649, 664 (1944)).

182. *See id.* at 468–69 (recognizing in the Fifteenth Amendment a public demand in "any election in which the public issues are decided or public officials selected," regardless of the scope of the electorate or the nature of the organization running the election); *id.* at 484 (Clark, J., concurring) (emphasizing how the Jaybird Association exerted state power and effectively acquired "those attributes of government which draw the Constitution's safeguards into play").

183. Jackson v. Metro. Edison Co., 419 U.S. 345 (1974).

fulfill a public demand) when the state delegates to the private entity "some power . . . which is traditionally associated with sovereignty."[184] One example is the publicly accessible park, which, as the Court recognized in *Evans v. Newton*,[185] may not segregate even if run by a private entity. The Court reasoned that the private entity supplied the community with a "municipal" service.[186] This municipal service satisfied a public demand because oversight of public trust lands is a quintessential, traditional government responsibility similar to the government's responsibility for the police power.

2. *Qualified Arm of the State Theory*. Often, initial private security action precedes later public action, usually in the form of an arrest or explicit sanction of the initial action. Under the qualified private supply theory, the subsequent intervening action of the state is what brings the antecedent action of the private supplier of force under constitutional scrutiny. Courts have used a similar test—the state compulsion test—to identify when a state compels or encourages unconstitutional actions.[187]

For example, in *People v. Zelinski*,[188] department store security detained a woman for suspected shoplifting and found heroin while searching her purse and pill vial.[189] Police charged the suspected shoplifter with drug possession.[190] The California Supreme Court excluded the drug evidence obtained through the search because "[i]n arresting the offender, the store employees were utilizing the coercive power of the state to further a state interest."[191] The security guards' actions went beyond "the vindication of the merchant's private interests [that is, the return of the stolen merchandise]."[192] In other words, the store security fulfilled a public demand for order and security beyond the store's private interests. The *Zelinski* opinion implied that the security guards could have conducted an unreasonable search to merely recover the stolen merchandise

184. *Id.* at 352–53.
185. Evans v. Newton, 382 U.S. 296 (1966).
186. *Id.* at 301.
187. *See supra* note 165 and accompanying text.
188. People v. Zelinski, 594 P.2d 1000 (Cal. 1979) (en banc).
189. *Id.* at 1002.
190. *Id.*
191. *Id.* at 1006.
192. *Id.*

without being constitutionally liable.[193] Because it was the subsequent arrest that brought constitutional scrutiny, the *Zelinski* opinion rejects an absolute arm of the state theory but affirms the qualified arm of the state theory.[194]

The Supreme Court, often hesitant to ascribe constitutional liability to the initial private action directly,[195] will instead resort to a particularly attenuated under color of law argument. For example, in *Adickes v. S. H. Kress & Co.*,[196] Kress, a private restaurant, refused to serve a white woman in the company of six young black students; she was then arrested for vagrancy upon leaving the restaurant.[197] Justice Harlan's opinion held that, regardless of actual police involvement,[198] Ms. Adickes "would show an abridgement of her equal protection right, if she proves that Kress refused her service because of a state-enforced custom of segregating the races in public restaurants."[199] Accordingly, the Kress restaurant was playing the role of arm of the state by allegedly enforcing the state's discriminatory customs.

Other segregation cases similarly find constitutional liability only when a private actor turns to explicit state authority.[200] In

193. *See id.* (noting that "[h]ad the security guards sought only the vindication of the merchant's private interests they would have simply exercised self-help and demanded the return of the stolen merchandise").

194. Analogizing to *Zelinski*, a New York state court held that an unconstitutional search of an employee by private hotel security required the suppression of evidence in a criminal larceny case. People v. Stormer, 518 N.Y.S.2d 351, 352–53 (Warren County Ct. 1987). Hotel security officers went beyond the hotel's "private interests" (acquiring the stolen money and firing the employee), and were instead "promoting society's interest and, as such, the safeguards provided by the Fourth Amendment were activated." *Id* at 353. *But see* Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (holding that the Fourth Amendment is only applicable to government action); United States v. Francoeur, 547 F.2d 891, 892–94 (5th Cir. 1977) (refusing to apply Fourth Amendment protections to a search of two alleged counterfeiters conducted by Disney World security that led to the defendants' arrest and prosecution); Commonwealth v. Leone, 435 N.E.2d 1036, 1041–42 (Mass. 1982) (distinguishing a public officer's investigatory duties from his duties as a private security officer).

195. *See, e.g.*, *supra* notes 156–58 and accompanying text.

196. Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).

197. *Id.* at 146–47.

198. Writing for the Court, Justice Harlan found material issues of fact concerning a possible conspiracy between the policeman and the restaurant owner. *See id.* at 153 (stating that the respondent restaurant "failed to carry its burden of showing the absence of any genuine issue of fact").

199. *Id.* at 171.

200. *See, e.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991) (holding that the peremptory challenge system had "its source in state authority," which prevented a private litigant from racially excluding jurors); Burton v. Wilmington Parking Auth., 365 U.S. 715, 716–17 (1961) (finding the city parking authority liable for discriminatory actions of its lessee).

Peterson v. City of Greenville,[201] black children were convicted of violating a state trespass statute after another Kress restaurant manager "asked them to leave because integrated service was 'contrary to local customs' of segregation at lunch counters and in violation of [a] Greenville City ordinance."[202] Crucial to the Court's reasoning was the concept that "[w]hen the State has commanded a particular result, it . . . 'to a significant extent' has 'become involved' in it, and, in fact, has removed that decision from the sphere of private choice."[203] In *Shelley v. Kraemer*,[204] the Supreme Court held that private, voluntary, racially restrictive covenants did not themselves violate the Fourteenth Amendment.[205] The Court, however, distinguished the covenants themselves from court *enforcement* of those agreements, holding such enforcement to be unconstitutional.[206]

Issues of racial discrimination and segregation have become, in essence, part of the police power responsibility for which the state must allocate its resources accordingly. That is not to say that search and seizure is not part of the general police power,[207] but rather that the Thirteenth, Fourteenth, and Fifteenth Amendments bring the issues of slavery, segregation, and discrimination to the forefront of state and federal security and welfare concerns. *Adickes*, *Peterson*, and *Shelley* each involve subsequent state action—namely, arrest or sanction—that exemplifies the qualified nature of the private actor as an arm of the state.

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201. Peterson v. City of Greenville, 373 U.S. 244 (1963).

202. *Id.* at 245–46.

203. *Id.* at 248.

204. Shelley v. Kraemer, 334 U.S. 1 (1948). *Shelley* is a unique and problematic case that, according to Dean Chemerinsky, has led to "a set of precedents that cannot possibly be reconciled," Chemerinksy, *supra* note 26, at 526, because it leads to the sweeping declaration that judicial action equals state action, *id.* at 525. But *Shelley* is not concerned with all court action; it is specifically focused on racial discrimination—a police power concern. *See* Henry J. Friendly, *The Public-Private Penumbra—Fourteen Years Later*, 130 U. PA. L. REV. 1290, 1295 (1982) ("I cannot escape the conclusion that it was Missouri's maintenance of a rule of common law permitting the enforcement of racially restrictive covenants, not the action of its courts in enforcing that rule, that was the unconstitutional state action in *Shelley*.").

205. *Shelley*, 334 U.S. at 13.

206. *Id.* at 13–14, 23.

207. For example, private carrier searches of packages for contraband may fall under the state's general police power responsibility and therefore require closer examination under this Note's theory that the private carriers may be acting as qualified arms of the state. *But see* United States v. Jacobsen, 466 U.S. 109, 111–12, 126 (1984) ("[By searching a package] the federal agents did not infringe any constitutionally protected privacy interest that had not already been frustrated as the result of [a prior private carrier search of the package].").

C. *Private Police Outside the Scope of State Interests: Private Mercenaries (Private Demand, Private Supply)*

The third model of private police authority—private mercenaries—by definition falls outside the scope of state police power concerns. Private mercenaries, who answer private demand for force with private supply of force, therefore do not invoke constitutional restrictions.[208] Although private demand can at times be difficult to distinguish from public communal demand for order and security,[209] the La Follette Committee's definition is apt: private demand reflects the "economic needs and desires of private interests" separate from broader community interests in security.[210] Private mercenaries answer to what Professor Elizabeth Joh describes as a "client-driven mandate."[211]

Courts typically place individual or corporate needs outside the scope of traditional state police power responsibilities. Within this Note's framework, these needs are private demands, in contrast to the public demand for order and security. For example, Medicare funding of private nursing homes, although a legitimate state *interest*, falls outside the scope of functions that are "traditionally the exclusive prerogative of the State."[212] In his dissent to *Flagg Bros. v. Brooks*,[213] Justice Stevens argued that the state authorized a warehouseman's enforcement of a lien via private sale of storage goods.[214] Justice Rehnquist, specifically rejecting Justice Stevens's contention,[215] cited elections, *Marsh*, education, fire, police, tax, and antidiscrimination as examples of state administered functions "with a greater degree of exclusivity by States"[216] than this private property concern, which he

208. Note that, as a separate matter, if the state were to act as an official mercenary, supplying force in response to a private demand, then the state would still be held to constitutional limitations because the state is a public actor. *See supra* Parts I.C and IV.A.

209. *See supra* Part I.B.

210. *See supra* note 133 and accompanying text.

211. Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 62 (2004).

212. Blum v. Yaretsky, 457 U.S. 991, 1011 (1982) (quoting Jackson v. Metro. Edison Co., 419 U.S. 345, 456–57 (1974)).

213. Flagg Bros. v. Brooks, 436 U.S. 149 (1978).

214. *Id.* at 169–70 (Stevens, J., dissenting).

215. *See id.* at 160 n.9 (majority opinion) ("[T]his case does not involve state authorization of private breach of the peace.").

216. *Id.* at 163.

consequently placed outside the scope of these traditional public demands.[217]

Private shopping centers provide an interesting example of the often difficult distinction between public and private demand. Initially, the Supreme Court concluded in *Amalgamated Food Employees Union v. Logan Valley Plaza*[218] that "[t]he shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*."[219] *Logan Valley* represents a view of the private shopping mall as equivalent to a community, necessarily supplying force in response to a communal need for order and security. Four years later, the Court backed away from that view, however, finding in the shopping mall "no comparable assumption or exercise of municipal functions or power."[220] Recognizing the shift in description, the Court officially overruled *Logan Valley* in its 1976 *Hudgens v. NLRB*[221] opinion, while reaffirming that "[i]f a large self-contained shopping center *is* the functional equivalent of a municipality . . . then the First and Fourteenth Amendments [would apply]."[222] *Hudgens* splits the difference along the public-private demand continuum: according to the Court, a private shopping mall—like a small business—focuses only on private corporate economic needs whereas a larger shopping mall may need to function as an arm of the state to provide a necessary level of order and security to its customers. The private nature of the shopping mall does not constitute an impediment to the imposition of constitutional liability.

CONCLUSION

Throughout English and American history, the distinction between public and private policing has been blurred. The system of governance embodied in the U.S. Constitution maintains the traditional English concept that the sovereign retains an obligation and responsibility to ensure order and security in society. Through its derived authority, the state holds a monopoly on the allocation of

217. *See id.* at 160 n.10.

218. Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968).

219. *Id.* at 318.

220. Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972).

221. Hudgens v. NLRB, 424 U.S. 507 (1976).

222. *Id.* at 520.

legitimate force. Constitutional restrictions, in turn, should apply to the state's explicit or implicit allocation of force through either public or private supply. The Bill of Rights, as interpreted through the state action doctrine, imposes restrictions on how the state may fulfill its obligation and responsibility to ensure security and order in society. These restrictions should follow function over form: both official police and private police functioning as arms of the state should be held to constitutional standards because they have been legitimized, directly or indirectly, by the state, to fulfill a public demand for order and security. In contrast, private mercenaries who fulfill merely a private demand for force unrelated to communal order and security do not fall within the purview of the Bill of Rights. An examination of classic state action doctrine case law demonstrates that, in most cases, courts indeed look to function over form. Determining exactly when a private police force has moved beyond fulfilling mere private demands for force and instead has taken on the state's responsibility for order and security will continue to be a difficult line to draw.