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UNDER SCHOOL COLORS: PRIVATE UNIVERSITY POLICE AS STATE ACTORS UNDER § 1983

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ABSTRACT—Under 42 U.S.C. § 1983, individuals may sue those who violate their constitutional rights while acting under color of state law. The Supreme Court has held that private actors may act under color of state law, and may be sued under § 1983 in some circumstances. However, courts have not been consistent in determining whether private university police forces act under color of state law. Private universities often maintain police forces that are given extensive police powers by state statutes but are controlled by private entities. Some courts have looked directly to the state statutes that delegate police power, but others have maintained a more fact-specific inquiry. The state enabling statutes themselves vary in their terms, but not their effects, and are thus partially responsible for this inconsistency. This Note proposes a model statute framework for delegating powers to private university police forces. Such a framework would better allow courts to apply the § 1983 color of law test consistently. A model statute would also clarify the role of campus police forces and would require minimal change in the operation of private campus police forces. The resulting consistency would ensure that no citizen is deprived of a remedy for a violation of constitutional rights.

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INTRODUCTION

Citizens should all have equal remedies under federal law, especially when being protected from unlawful state action. In the era of the modern university, states often no longer exercise such state action by directly policing private universities. Instead, private college and university police forces typically derive their authority to use police powers from state statutes.[1] Although these statutes often differ in a variety of ways, campus police forces are often granted broad authority to exercise police power.[2] As a result, there is general uniformity in the effective power of campus police forces, but not in the means states use to grant this power. This lack of uniformity can have significant impact when campus police forces act in ways that would violate individuals' constitutional rights if campus police were state actors. When state actors violate constitutional rights, individuals can seek redress under 42 U.S.C. § 1983, which provides a remedy for rights violations committed by persons acting under color of state law.[3] However, the remedy does not extend to actions by private parties.[4]

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[1] *See, e.g.*, 110 ILL. COMP. STAT. ANN. 1020/1 (2015).

[2] *See* Valerie L. Brown, *The Campus Security Act and Campus Law Enforcement*, 70 EDUC. L. REP. 1055, 1058–62 (1992).

[3] 42 U.S.C. § 1983 (2012).

[4] *See id.*; Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 50 (1999).

Some courts have considered the means of granting authority when determining whether campus police forces act under color of state law.[5] As a result, students' and individuals' ability to bring suits alleging that campus police violated their constitutional rights can depend upon the method states use to grant power to campus police forces, but not necessarily on the power exercised by the campus police force itself. Students at some universities cannot bring these suits, and therefore do not have the same remedy as students at universities in other states or in other universities in the same state, even for the same offense by campus police. This Note advocates for uniformity in state enabling statutes granting authority to campus police forces, which will remedy this patchwork granting of police powers—both to clarify that campus police forces derive power from the state itself and also to provide campus police forces more clarity as to their oversight and their role as state actors.

Equal access to federal remedies is an important touchstone of federal law, especially of § 1983, which provides citizens their only federal protection against rights infringements by the states. The disparate array of enabling acts and court treatment of enabling acts prevents all citizens from having equal remedies under § 1983. As this Note will demonstrate, these disparities result in citizens from different states, or even the same state, having different access to federal remedies. The solution proposed in this Note provides a model statute framework for states to adopt and interpretive guidelines for the courts to determine if a campus police officer is a state actor. This uniformity will ensure that all citizens have access to the same remedies under federal law and also adhere to § 1983's purpose—to provide citizens with federal remedies to protect them against unlawful state action.

To state a § 1983 claim, a plaintiff must show two things: that he or she has been deprived of a right, and that the party who caused the deprivation acted under color of state law.[6] This Note addresses the second element a plaintiff must prove: whether a campus police force depriving a citizen of his or her constitutional rights acts under color of state law. To demonstrate the party who deprives the plaintiff of his or her right has acted under color of state law, the plaintiff must show: (1) "the claimed deprivation has resulted from the exercise of a right or privilege having its

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[5] *See, e.g.*, Johnson v. Univ. of San Diego, No. 10CV0504-LAB (NLS), 2011 WL 4345842, at *6–7 (S.D. Cal. Sept. 16, 2011); Boyle v. Torres, 756 F. Supp. 2d 983, 993–94 (N.D. Ill. 2010).

[6] *See* 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .").

source in state authority,"[7] and (2) the party responsible for such deprivation "[is] a person who may fairly be said to be a state actor."[8] Enabling statutes make both these inquiries unclear because when private university campus police forces exercise their authority pursuant to state enabling statutes, they seem to exercise a power that has its source in state authority, but remain private actors. In fact, the method that states use to grant police authority to campus police forces can affect both how much power the campus police force is explicitly granted and how closely the campus police force works with the state. These factors impact the fact-specific tests for action under color of state law. As a result, courts have reached different results when applying § 1983 to private campus police forces.

Part I of this Note explains the history and purpose of § 1983 and the approaches courts have developed to discern whether an action was under color of state law. Part II explores the states' various methods of granting police authority to campus police departments and the ways courts have applied § 1983 tests to campus police forces in light of these different enabling statutes. Part III proposes a model statute framework, which states should adopt to create uniformity, make explicit the modern campus police force's role as a state actor, and clarify the campus police force's role in law enforcement and its state oversight.

Part III also demonstrates that making such police authority explicit in statutes will aid courts in determining when campus police forces act under color of state law. Regardless of the source of authority, campus police forces often act with the broad power of law enforcement, such as the ability to make arrests, carry firearms, and make traffic stops. When considering whether campus police forces are state actors, courts have struggled to reconcile the near-uniform exercise of power with the varying methods of granting such power. Explicit, uniform statutes will help courts clarify and understand campus police forces' role in law enforcement and make their status as state actors explicit. Encouraging states to adopt similar standards when granting authority to campus police will consequently solve a procedural difficulty courts face, as well as the substantive problem of ensuring that no citizen is deprived of his or her rights without a remedy. Although some might argue such a framework is contrary to the function of states as laboratories, uniformity is required because § 1983 is a federal law providing a remedy for rights deprivation by state actors.

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[7] Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982).

[8] *Id.* at 937.

I. SECTION 1983 COLOR OF LAW ANALYSIS FOR PRIVATE ACTORS

A. History of Action Under Color of State Law in § 1983

Over the past several decades, campuses have shifted from employing ordinary security guards to full-fledged professional police forces.[9] Along with their increase in power, campus police forces often face unique constitutional concerns, given their place within universities as they confront issues of privacy,[10] speech,[11] and arrests.[12] Furthermore, increasing levels of armament among campus police forces raise the specter of potential constitutional violations during arrests when campus police officers can exercise significant levels of force.[13] In many cases, campus police departments look no different than ordinary police departments, such as participation in the 1033 program, in which law enforcement agencies receive military surplus equipment from the Department of Defense.[14] Thus, determining whether private college police forces are state actors under § 1983 has become increasingly important, as this increased armament indicates that the distinction between public and private actors—and thus the availability of remedies—becomes less clear even as the potential for the use of force has increased.

Congress enacted § 1983 in 1871 under the authority of Section Five of the Fourteenth Amendment.[15] The purpose of the statute was to establish "the role of the Federal Government as a guarantor of basic federal rights against state power,"[16] providing a uniform guarantee of rights even in a federalist system. The statute creates a civil action, allowing for both injunctive relief and damages against individuals and state and local governments for "deprivation of any rights, privileges, or immunities

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[9] Jamie P. Hopkins & Kristina Neff, *Jurisdictional Confusion That Rivals* Erie*: The Jurisdictional Limits of Campus Police*, 75 MONT. L. REV. 123, 126 (2014).

[10] *See, e.g.*, Jones v. Houston Cmty. Coll. Sys., 816 F. Supp. 2d 418, 421 (S.D. Tex. 2011).

[11] *See, e.g.*, Felber v. Yudof, 851 F. Supp. 2d 1182, 1186–87 (N.D. Cal. 2011).

[12] *See, e.g.*, Johnson v. Univ. of San Diego, No. 10CV0504-LAB (NLS), 2011 WL 4345842, at *1 (S.D. Cal. Sept. 16, 2011).

[13] When courts consider campus police forces to be state actors, many cases of actual § 1983 liability involve campus police use of excessive force. *See, e.g.*, Boyle v. Torres, 756 F. Supp. 2d 983, 988–89 (N.D. Ill. 2010).

[14] Dan Bauman, *Campus Police Acquire Military Weapons*, N.Y. TIMES (Sept. 21, 2014), http://www.nytimes.com/2014/09/22/world/americas/campus-police-acquire-military-weapons.html?_r=1 [http://perma.cc/3Y8T-5FUT]. Critics have expressed concern that "the procurement of tactical gear doesn't help with the types of crimes that occur more frequently on college campuses, like alcohol-related incidents and sexual assault. Others worry that military equipment is an especially poor fit for college campuses and may have a chilling effect on free expression." *Id.*

[15] Monroe v. Pape, 365 U.S. 167, 171 (1961); 1 SHELDON H. NAHMOD, CIVIL RIGHTS & CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 §§ 1:1, 2:1 (4th ed. 1997).

[16] Mitchum v. Foster, 407 U.S. 225, 239 (1972).

secured by the Constitution and laws."[17] In particular, § 1983 provides a cause of action against persons acting "under color of" state law.[18] Although the statute was rarely used in the years after its passage, the 1961 U.S. Supreme Court decision *Monroe v. Pape* changed this by broadly interpreting the statute's reach.[19] In *Monroe*, police officers broke into the plaintiffs' home and ransacked it, forced the plaintiffs to stand naked in the living room, and subsequently detained Mr. Monroe for ten hours.[20] The Court affirmed that "under color of" state law included instances when state officials abused their position and power, not only when they acted pursuant to official state law or policy.[21] *Monell v. Department of Social Services* expanded § 1983 to include rights violations by local governments in addition to states.[22]

The *Monroe* Court's holding was supported by the Court's incorporation of Fourth Amendment protection against unreasonable searches and seizures into the Due Process Clause of the Fourteenth Amendment.[23] Incorporation is the process through which the Supreme Court has used the Fourteenth Amendment to apply various provisions of the Bill of Rights to the states, requiring states, in addition to the federal government, to guarantee those rights.[24] Fourteenth Amendment rights have therefore expanded as provisions of the Bill of Rights were incorporated into the Fourteenth Amendment and applied to the states.[25] As a result, § 1983 causes of action against state government actors include violations of those provisions of the Bill of Rights that have been incorporated into the Fourteenth Amendment, as well as other violations of Fourteenth Amendment rights, such as procedural due process and equal protection,[26]

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[17] 42 U.S.C. § 1983 (2012); *see also* 1 NAHMOD, *supra* note 15, at § 2:1 ("Section 1983 of Title 42 of the U.S. Code . . . creates an action for damages and injunctive relief against individuals and local governmental bodies who deprive a plaintiff of rights, privileges, or immunities 'secured by the Constitution and laws.'" (footnotes omitted)).

[18] 42 U.S.C. § 1983; 28 U.S.C. § 1343 (2012).

[19] 1 NAHMOD, *supra* note 15, at § 2:2.

[20] 365 U.S. at 169.

[21] *Id.* at 172, 184, 187 (adopting the approach of *Screws v. United States*, 325 U.S. 91 (1945), which addressed the same issue in criminal cases).

[22] 436 U.S. 658, 690 (1978).

[23] 365 U.S. at 171 (citing incorporation of the Fourth Amendment right in *Wolf v. Colorado*, 338 U.S. 25 (1949), and *Elkins v. United States*, 364 U.S. 206 (1960)).

[24] 1 NAHMOD, *supra* note 15, at § 2:3. Rights that have been incorporated into the Fourteenth Amendment include "[f]reedom of speech, press, assembly and petition[,] . . . [f]ree exercise . . . of religion[,] . . . [and p]rotection against unreasonable searches and seizures . . . ." *Id.*

[25] *See id.*

[26] *See* U.S. CONST. amend. XIV, § 1.

and process-based rights, such as privacy.[27] Section 1983 also creates causes of action for deprivation of those rights secured by federal statutes.[28] Because the Supreme Court has articulated a fact-specific test for which federal statutorily created rights have a § 1983 remedy,[29] this Note only addresses violations of rights found in the Constitution, applied to states via the Fourteenth Amendment, and will not address rights created by federal statute.

B. Tests to Determine if a Private Entity Acts Under Color of State Law

To state a cause of action under § 1983 for a Fourteenth Amendment violation, a plaintiff must show the defendant's conduct is (1) a state action, to satisfy the Fourteenth Amendment requirement, and (2) an action under color of state law, to satisfy the § 1983 statutory requirement.[30] The Supreme Court has held that these requirements are identical for practical purposes.[31] State action, and therefore action under color of law, can sometimes be attributed to private actors.[32] However, federalism[33] and liberty[34] concerns have made the Supreme Court reluctant to expand the Fourteenth Amendment's power to private actors. The Supreme Court has articulated ways that a private actor undertakes state action, or acts under

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[27] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 481, 485 (1965).

[28] *See* 42 U.S.C. § 1983 (2012).

[29] 1 NAHMOD, *supra* note 15, at § 2:27 ("As it turns out, the Court has articulated a test that is applied on a statute-by-statute basis. This test focuses both on the existence of a federal statutory right and on congressional intent to foreclose a § 1983 remedy.").

[30] *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 928 (1982).

[31] *Id.* at 929; *see also* Adickes v. S.H. Kress & Co., 398 U.S. 144, 162–69 (1970) (exploring the legislative history of § 1983 to show that its "under color of state law" requirement is an exercise of Congress's Fourteenth Amendment power to prevent constitutional violations perpetrated by the states). *But see Lugar*, 457 U.S. at 950 (Powell, J., joined by Rehnquist & O'Connor, JJ., dissenting) (arguing that there is a distinction between state action and action under color of state law); *Adickes*, 398 U.S. at 211–12 (Brennan, J., concurring) ("[T]he statutory term 'under color of any statute' has a narrower meaning than the constitutional concept of 'state action.' . . . [T]he word 'color,' . . . suggests a kind of holding out and means 'appearance, semblance, or *simulacrum*,' but not necessarily the reality. . . . [A] public official acting by virtue of his official capacity always acts under color of a state statute or other law, whether or not he overtly relies on that authority to support his action, and whether or not that action violates state law. A private person acts 'under color of' a state statute or other law when he, like the official, in some way acts consciously pursuant to some law that gives him aid, comfort, or incentive, . . . or when he acts in conjunction with a state official . . . ." (citations omitted)).

[32] *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) (indicating that the inquiry for determining whether a private actor engages in state action is fact-specific).

[33] *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883) ("[The Fourteenth Amendment] does not invest Congress with power to legislate upon subjects which are within the domain of [s]tate legislation . . . .").

[34] *Id.* at 14 ("[Legislation regulating private conduct] steps into the domain of local jurisprudence, and lays down rules for the conduct of individuals in society towards each other . . . . If [legislation regulating private conduct] is appropriate for enforcing the prohibitions of the amendment, it is difficult to see where it is to stop.").

color of law, but has declined to clarify if these are actually separate tests or "simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation."[35] Scholars have consolidated these approaches into three categories[36]: (1) when the private actor is coerced or encouraged by the state or local government;[37] (2) when the private actor and the state have a sufficiently symbiotic or mutually beneficial relationship;[38] or (3) when the private actor exercises a traditionally public function.[39]

The first approach, state coercion or encouragement of the private behavior, and the second approach, a symbiotic relationship between the state and the private actor, essentially inquire about the level of state involvement in the private activity. Courts generally hold these approaches to apply narrowly. For example, when applying this coercion or encouragement approach, courts have found government involvement when the state required the private action,[40] or when the "assistance" of the state was "overt" or "significant."[41] In other words, the state must actively

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[35] *Lugar*, 457 U.S. at 939 (majority opinion).

[36] *E.g.*, 1 NAHMOD, *supra* note 15, at § 2:4; Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 508 n.19 (1985); Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 Mich. L. Rev. 302, 314 (1995); Ronna Greff Schneider, *The 1982 State Action Trilogy: Doctrinal Contraction, Confusion, and a Proposal for Change*, 60 Notre Dame L. Rev. 1150, 1160 (1985). Some scholars split the tests into more categories, but in such cases those categories can be combined into the tests described here. *See, e.g.*, David D. Christensen, *Corporate Liability for Overseas Human Rights Abuses: The Alien Tort Statute After* Sosa v. Alvarez-Machain, 62 WASH. & LEE L. REV. 1219, 1254 (2005).

[37] Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) ("[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."); *see also* Lombard v. Louisiana, 373 U.S. 267, 273 (1963) (finding state action when store officials were coerced by the city to ask black petitioners to leave a segregated store counter).

[38] *See, e.g.*, Burton v. Wilmington Parking Auth., 365 U.S. 715, 723–24 (1961) (holding that public ownership and use, publicly funded maintenance, and intertwined financial benefits of the state and private actor were sufficient to constitute state action).

[39] *See, e.g.*, Evans v. Newton, 382 U.S. 296, 301–02 (1966) (relying on the public function approach as alternative ground for holding that a park with a private trustee is subject to the Equal Protection Clause); Marsh v. Alabama, 326 U.S. 501, 506 (1946) ("Since [company town] facilities are built and operated primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation."); Smith v. Allwright, 321 U.S. 649, 660 (1944) ("[S]tate delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the [s]tate.").

[40] *E.g.*, Adickes v. S.H. Kress & Co., 398 U.S. 144, 148 (1970) (holding that a § 1983 violation can be made out by showing state-enforced custom required racial segregation); Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (holding that judicial enforcement of discriminatory private covenants constitutes state action).

[41] *E.g.*, Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622 (1991). The question of how much participation by the state is sufficient to convert private action into state action remains contentious. *Compare* Lugar v. Edmondson Oil Co., 457 U.S. 922, 942 (1982) ("The Court of Appeals erred in holding that in this context 'joint participation' required something more than invoking the aid of state

participate in the conduct for it to constitute state action; passive acquiescence is not sufficient.[42] On the other hand, mere regulation, even extensive regulation, of a private actor is not considered to be such participation and is not sufficient involvement to constitute state action;[43] there must be "a sufficiently close nexus" between the state actor and the private action "so that the action of the [private actor] may be fairly treated as that of the State itself."[44] Like regulation, public funding is insufficient state involvement to turn the behavior of a private school into state action.[45]

The symbiotic relationship approach applies in similarly narrow situations. Although public funding may indicate that the government is paying for a benefit provided by the private actor, it does not trigger a symbiotic relationship.[46] Thus, courts only find state action using this approach when benefits are inured to the state beyond those a private business may provide as part of a state contract. For example, the Supreme Court found a symbiotic relationship when a local parking authority leased space to a restaurant that discriminated based on race.[47] Because the restaurant claimed that the discrimination increased traffic to the restaurant, and therefore also to the parking facility, the Court found the government parking facility received benefits from the restaurant's conduct beyond mere rent payments.[48] Therefore, the first two approaches—evaluating state coercion and a state symbiotic relationship—require a fairly high level of government involvement to convert private action into state action.[49]

officials to take advantage of state-created attachment procedures."), *with id.* at 943 (Burger, C.J., dissenting) ("Invoking a judicial process, of course, implicates the State and its officers but does not transform essentially private conduct into actions of the State." (citing Dennis v. Sparks, 449 U.S. 24 (1980))), *and id.* at 951 (Powell, J., joined by Rehnquist & O'Connor, JJ., dissenting) ("[O]ur cases do not establish that a private party's mere invocation of state legal procedures constitutes 'joint participation' . . . .").

[42] Flagg Bros. v. Brooks, 436 U.S. 149, 164 (1978) ("This Court . . . has never held that a State's mere acquiescence in a private action converts that action into that of the State.").

[43] Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974).

[44] *Id.* at 351 (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176 (1972)).

[45] Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982).

[46] *See id.* at 841 (holding that private corporations fulfilling government contracts do not engage in state action when performing those contracts).

[47] Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961).

[48] *Id.*

[49] *See* Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (holding that there is sufficient government involvement to constitute state action when "the State is *responsible* for the specific conduct"); *Rendell-Baker*, 457 U.S. at 842 (stating that the policy choice to provide services for special needs students does not make those services "the exclusive province of the State").

Third, courts have limited the public function approach to those functions that are traditionally exclusive to the state.[50] The Court has found few functions that satisfy this exclusivity requirement.[51] Furthermore, the Court has carefully avoided issuing general declarations of which public functions are traditionally exclusive to the state, and thus constitute state action when they are delegated to private actors,[52] preferring to rely on fact-specific inquiries.[53] Instead, the outcome of this approach often turns on how narrowly the state function is defined.[54] Turning to the topic of this Note, although some courts have held that explicit statutory delegation of all police powers indicates a public function that creates action under color of state law,[55] courts have also held that the power to arrest alone is not a power reserved exclusively to the state.[56] As a result, the amount of power explicitly delegated by the state can significantly impact whether private police actors perform a public function.[57] Thus, when a university employs its own private police force, the police force's status as a state actor can vary based on the state's delegation of power, even if the difference in power delegation is not apparent to students or other members of the university community.[58]

Alternatively, some campus police behavior may require the application of the state encouragement or symbiotic relationship

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[50] Jackson v. Metro. Edison Co., 419 U.S. 345, 352–53 (1974) (citing Evans v. Newton, 382 U.S. 296 (1966); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946); Nixon v. Condon, 286 U.S. 73 (1932)).

[51] *See* Flagg Bros. v. Brooks, 436 U.S. 149, 158 (1978) ("While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'"). In particular, establishing a system for "the resolution of private disputes" does not delegate a state function to private actors who make use of that system. *Id.* at 157, 163.

[52] *Id.* at 163–64 (1978) (declining to express a view as to whether certain state functions "administered with a greater degree of exclusivity by States and municipalities," such as "education, fire and police protection, and tax collection" would be considered to be state action if they were delegated to private actors).

[53] *See, e.g.*, Griffin v. Maryland, 378 U.S. 130, 135 (1964) (finding that a park security guard, who was also a deputy sheriff of the county, undertook state action when he ordered petitioners to leave the park and arrested them because he "purported to exercise" the "authority" of a deputy sheriff).

[54] *See, e.g.*, Chapman v. Higbee Co., 319 F.3d 825, 834–35 (6th Cir. 2003) (finding that detaining a suspected shoplifter is not a function reserved exclusively to the state).

[55] *E.g.*, Payton v. Rush-Presbyterian-St. Luke's Med. Ctr., 184 F.3d 623, 630 (7th Cir. 1999) ("[N]o legal difference exists between a privately employed special officer with full police powers and a regular Chicago police officer.").

[56] *E.g.*, Wade v. Byles, 83 F.3d 902, 906 (7th Cir. 1996).

[57] *See* Boyle v. Torres, 756 F. Supp. 2d 983, 996 (N.D. Ill. 2010) (contrasting the authority delegated to the University of Chicago Police Department with the security guards in *Wade v. Byles*).

[58] *Compare* Johnson v. Univ. of San Diego, No. 10CV0504-LAB (NLS), 2011 WL 4345842, at *6 (S.D. Cal. Sept. 16, 2011) (student arrested by campus security officer, whom the court found was not a state actor), *with Boyle*, 756 F. Supp. 2d at 996 (student was arrested by campus police, whom the court found to be a state actor).

approaches. In many cases, campus police forces are closely intertwined with local law enforcement. For example, certain campus police forces derive their authority from agreements with local law enforcement, either because the state's enabling statute is less explicit in its delegation of power, does not cover their school, or requires coordination with local law enforcement.[59] Additionally, when campus police officers must go outside their statutory jurisdiction, they may require a certain amount of coordination with local law enforcement, another situation that could require the state involvement approach.[60] Finally, states may confer authority on campus police forces by requiring them to fulfill state certification requirements.[61] Therefore, even when campus police forces do not have statutory authority, pursue private ends, and are employed by a private university, they remain intertwined with the state. This grant of power to campus police forces thus raises the question: Given campus police forces' ties to local law enforcement, are they private actors because of their employer, or are they state actors because of their certification?

Most scholarship regarding private police forces has grouped campus police forces with other private entities that attempt to take over law enforcement functions, such as private residential and retail security.[62] This Note, by contrast, examines the way courts have considered the explicit delegation of power to campus police from the state. When courts determine whether a private entity without this explicit delegation of power undertakes state action, the inquiry is based on the situation's particular circumstances, even when the private entity is staffed by off-duty law enforcement.[63] Moreover, these circumstances can include how the plaintiff

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[59] For an example of a statute that requires mutual aid agreements with local law enforcement, see VA. CODE ANN. § 23-234 (2015). For an example of a university that entered into a memorandum of understanding with local law enforcement, see *Johnson*, 2011 WL 4345842, at *6.

[60] Private security may act under color of state law with sufficient coordination with local law enforcement. *E.g.*, Smith v. Brookshire Bros., 519 F.2d 93, 94–95 (5th Cir. 1975) (per curiam) (finding that private security acted under color of state law when private security called local police, who arrested plaintiff using private security's information and made no independent investigation). *But see, e.g.*, Curtis v. Rosso & Mastracco, Inc., 413 F. Supp. 804, 808 (E.D. Va. 1976) (holding that police's arrest of plaintiff at defendant's request did not create state action).

[61] *See, e.g.*, 110 ILL. COMP. STAT. 1020/1 (2015); N.C. GEN. STAT. § 74G-8 (2015).

[62] *See, e.g.*, Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 919 (2007); M. Rhead Enion, Note, *Constitutional Limits on Private Policing and the State's Allocation of Force*, 59 DUKE L.J. 519, 520 (2009).

[63] Stengel v. Belcher, 522 F.2d 438, 441 (6th Cir. 1975) ("It is the nature of the act performed, not the clothing of the actor or even the status of being on duty, or off duty, which determines whether the officer has acted under color of law." (quoting Johnson v. Hackett, 284 F. Supp. 933, 937 (E.D. Pa. 1968)) (citing Robinson v. Davis, 447 F.2d 753 (4th Cir. 1971))); *see also* Huffman v. Cty. of Los Angeles, 147 F.3d 1054, 1058 (9th Cir. 1998) (holding that an off-duty police officer did not act under color of state law when he shot plaintiff because he was not in uniform and the gun used was defendant's own, not the police department's). *But see* Padover v. Gimbel Bros., 412 F. Supp. 920, 923

perceived the authority of the private entity.[64] But campus police forces differ from other private police entities because of a unique characteristic: their explicit delegation of power from the state. Courts typically do not look to the entity's empowering statute when determining whether an entity is a state actor. Even when a private entity's use of power is authorized by statute, such as a state prison, courts typically apply a functionalist approach to determine action under color of state law.[65] As a result, courts evaluate whether such entities engage in state action no differently than if there were no state statute. Furthermore, in *Lebron v. National Railroad Passenger Corp.*,[66] the Court held that even though Amtrak was characterized as private in the statute granting Amtrak's charter, this was not dispositive for determining whether the entity was a state actor.[67] This case raises questions as to what the role of authority-granting statutes should be in determining whether any entity, including a campus police force, acts under color of state law. As described below, however, certain courts have been more formalist in considering state enabling statutes as part of their state action analysis, resulting in more disparate remedies.

The three approaches to determine when private parties act under color of state law—the state involvement or encouragement, symbiotic relationship, and public function approaches—all require fact-specific inquiries into the public or private nature of the action itself. All of them also set high thresholds for private action to become state action. However, when a state explicitly delegates power to a private actor, as it often does in campus police enabling statutes, courts may turn their inquiry to how much power the statute explicitly delegates, affecting the public function test. Similarly, campus police forces that coordinate with local law enforcement have some state involvement in their activity that can be augmented by whether or not the state has "encouraged" the coordination by means of a statute.

(E.D. Pa. 1976) (refusing to dismiss the case for failure to state a claim because employment as both a police officer and a store security guard could indicate state action).

[64] *See* Chapman v. Higbee Co., 319 F.3d 825, 834–35 (6th Cir. 2003) (finding that whether a strip search conducted by an off-duty police officer who was privately employed as a security guard constituted state action turned on whether the circumstances could lead plaintiff to believe that the strip search was being conducted as part of the officer's official duties); Rogers v. City of Little Rock, 152 F.3d 790, 798 (8th Cir. 1998) (finding state action when defendant "relied on his authority as a police officer to facilitate the assault" of the plaintiff, and plaintiff "felt she had to cooperate with his demands because he was a police officer").

[65] *See, e.g.*, West v. Atkins, 487 U.S. 42, 55–56 (1988).

[66] 513 U.S. 374 (1995).

[67] *Id.* at 392.

II. APPLYING § 1983 COLOR OF LAW ANALYSIS TO CAMPUS POLICE OFFICERS

A. A Variety of State Enabling Statutes for Campus Police

While states often grant campus police authority through enabling statutes, those statutes vary widely across states.[68] These statutes granting authority to campus police usually include certain consistent elements, but these elements can differ in how statutes apply them, resulting in a patchwork of state enabling statutes granting campus police forces different levels of authority, oversight, and powers. State enabling statutes vary significantly in many ways: (1) oversight required for campus police forces, (2) training or certification requirements, (3) the geographical areas where campus police forces can operate, (4) coordination with local law enforcement, and (5) application to private universities as well as public universities.

Oversight—One important way in which these statutes differ is the party to whom the campus police force is accountable: the university, with which the police force shares a name and from which it will often take direction; or the state, from which the campus police force derives its authority to make arrests and perform other typical police functions. In some cases, states maintain clear control over the appointment and licensing of campus police officers. For example, in Massachusetts, while officers of the university may request police officer appointments, it is the state that gives campus police officers their police powers.[69] The state also retains the authority to set standards for campus police officers.[70]

However, in many instances, the university maintains a clear authority role in a variety of ways. In Florida, for example, universities are required to write a policy manual establishing rules for "routine and emergency law enforcement situations."[71] Additionally, decisions about firearms are also often left up to universities or individual police forces.[72] States that do allow firearms often require firearm-specific training or certification, much

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[68] See Brown, *supra* note 2, at 1058–62, for an overview of the powers granted to campus police by Florida, Kansas, Indiana, New Jersey, Oklahoma, Rhode Island, and South Carolina.

[69] MASS. GEN. LAWS ch. 22C, § 63 (2015).

[70] *Id.*

[71] FLA. STAT. § 1012.97(6) (2015).

[72] *See, e.g.*, N.C. GEN. STAT. § 74G-6(d) (2015) (allowing concealed firearms if authorized by individual campus police force); *see also* Brown, *supra* note 2, at 1064 (describing New Jersey law as allowing campus police officers to carry firearms when given authority from the university); Jeffrey S. Jacobson, Note, *The Model Campus Police Jurisdiction Act: Toward Broader Jurisdiction for University Police*, 29 COLUM. J.L. & SOC. PROBS. 39, 71 (1995) (advocating that the decision whether campus police carry firearms be made by each university).

like local law enforcement.[73] In North Carolina, the authority to enter into agreements with the relevant municipality to extend the campus police force's jurisdiction beyond campus remains with the university.[74] Especially for urban universities, decisions expanding campus police jurisdiction can affect the timeliness of law enforcement action. Leaving such decisions to university discretion empowers them to influence law enforcement results. For example, an urban university could expand its jurisdiction into nearby neighborhoods in an attempt to push crime away from the university.[75] Certain state enabling statutes give campus police the authority to enforce rules and regulations of the particular school, as well as the ordinary laws.[76] As a result, students could assume that failure to comply with a campus police directive may result in arrest when the campus police officers are merely enforcing university regulations, not local laws.

Training or Certification—Enabling statutes can also differ in the training or certification requirements the state imposes on campus police forces. Certain states, such as Illinois and North Carolina, require campus police officers to meet the same standards as some local law enforcement officers.[77] Other states go even further and consider campus police officers to be part of the same law enforcement apparatus as municipal law enforcement officers.[78] For example, Wyoming categorizes all law enforcement officers—such as sheriffs, municipal police officers, and campus police officers—uniformly as "peace officers," with the same powers, including to arrest and issue citations.[79] On the other hand, in Tennessee, while the state establishes minimum standards for campus police, individual schools can "establish additional qualifying factors, training standards, and policies" for campus police officers.[80] Qualifications of campus police officers can therefore vary not only across states, but also among individual schools within the state itself.

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[73] *See, e.g.*, 110 ILL. COMP. STAT. 1020/1 (2015) (requiring firearms training).

[74] N.C. GEN. STAT. § 74G-6(c).

[75] *See, e.g.*, Jordan Larson, *A Brief History of the UCPD*, CHI. MAROON (May 25, 2012), http://chicagomaroon.com/2012/05/25/a-brief-history-of-the-ucpd/ [http://perma.cc/W62D-85JW] (describing a campus police's jurisdiction expansion into surrounding neighborhoods).

[76] *See, e.g.*, 110 ILL. COMP. STAT. ANN. 1020/1 (2015) ("The Board [of Trustees of a private college or university] shall assign duties, including the enforcement of college or university regulations . . . ."); OKLA. STAT. tit. 74, § 360.17(B)(3) (2015) (granting campus police the authority to enforce "[r]ules and regulations of the school").

[77] *See* 110 ILL. COMP. STAT. ANN. 1020/1; N.C. GEN. STAT. § 74G-8.

[78] *See, e.g.*, WYO. STAT. ANN. § 7-2-101(a)(iv) (2014).

[79] *Id.* § 7-2-101 to -103.

[80] TENN. CODE ANN. § 49-7-118(b) (2014).

Definition of Jurisdiction—Another area where state enabling statutes vary widely is the definition of the physical areas within which campus police can legally operate. Some states limit the powers of campus police strictly to areas near the school's campus, though states define "campus" in a variety of ways.[81] This can result in even more ambiguity for urban schools, where a narrow definition of campus in terms of property owned or operated by a school could result in a patchwork jurisdiction for campus police in the absence of a clearly defined, contiguous campus.[82] Urban campuses may own the majority of buildings on a particular block, with private entities or individuals owning other buildings on the same block.[83] States sometimes resolve this issue by allowing police to pursue individuals beyond campus in specific law enforcement situations.[84] Other states ignore the difficulties of precise definition and give campus police officers broad physical jurisdiction, granting powers to campus police forces in an entire jurisdiction where the university is located, such as the surrounding county[85] or the entire state.[86] Defining the jurisdiction of campus police forces is important because courts can throw out campus police arrests made outside the physical jurisdiction granted by the state's enabling statute.[87] Furthermore, certain states allow a person who is not a law enforcement officer to make an arrest if the person observes a crime being committed or has probable cause to believe that the arrestee is guilty of a crime, known as a citizen's arrest.[88] In such states, campus police officers who go outside their jurisdiction may attempt to make a citizen's arrest if

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[81] *See, e.g.*, GA. CODE ANN. § 20-8-1 (2015) (defining "campus" for campus police jurisdiction as "grounds and buildings owned or occupied by a [public or private] college or university" as well as property within a certain radius of those buildings); N.C. GEN. STAT. § 74G-6 (granting jurisdiction to campus police in "[r]eal property owned by or in the possession and control of the institution employing the officer" as well as the roads connecting such property).

[82] Hopkins & Neff, *supra* note 9, at 134 (noting the various ways that campus police jurisdictions are defined in state enabling statutes, and the difficulties that can arise in determining jurisdiction for urban campuses).

[83] *See, e.g.*, George Washington Univ., George Washington University Campus, http://www.gwu.edu/sites/www.gwu.edu/files/downloads/Foggy%20Bottom%20Map%202014.pdf [http://perma.cc/W6C3-VW7M]; Georgetown Univ., Tour the Georgetown Campus, http://maps.georgetown.edu/ [http://perma.cc/GK4G-7GNR]; Univ. of Chi., University of Chicago Campus Map, https://maps.uchicago.edu/pdf/campus.pdf [https://perma.cc/3YF5-SV26].

[84] *See, e.g.*, N.C. GEN. STAT. § 74G-6 (describing situations when campus police also have jurisdiction on any property while they are pursuing a person who committed an offense in the campus police force's jurisdiction).

[85] *See, e.g.*, 110 ILL. COMP. STAT. 1020/1 (2015).

[86] *See, e.g.*, WYO. STAT. ANN. § 7-2-101 to -102 (2014).

[87] *See* Jacobson, *supra* note 72, at 44 (describing otherwise valid arrests that were thrown out "for lack of campus police jurisdiction").

[88] *See, e.g.*, KAN. STAT. ANN. § 22-2403 (2014); *see also* Jacobson, *supra* note 72, at 69–70 (describing universities' justification of some arrests made by campus police as citizen's arrests).

they are unable to use their statutorily granted power.[89] In such cases, it is unclear if those campus police officers are still exercising the authority granted by the states through statute.

Coordination with Local Law Enforcement—Some states do not grant authority to separate campus police forces directly by statute, but either substitute or supplement statutory grants of authority through mutual aid agreements with local law enforcement or by deputizing campus police forces directly into the local police force. Virginia, for example, gives broad police powers to campus police, but also requires the campus police force to be a party to a mutual aid agreement with local law enforcement.[90] Furthermore, campus police departments can supplement their jurisdiction by being deputized by local law enforcement, giving them police powers over a wider area.[91] Additionally, such deputation can be used to evade statutory limits on campus policing. For example, Connecticut's campus police statute covers only public universities,[92] but private universities have historically circumvented this by deputizing their campus security departments directly into local law enforcement.[93] Despite the statutory establishment of campus police only for public universities,[94] Yale maintains a police department whose officers have "full powers of law enforcement and arrest."[95] Yale's police officers "wear New Haven Police Department badges and are invested with their powers of arrest through the City of New Haven."[96] However, the Yale Police Department and New Haven Police Department are in fact two separate entities.[97] Thus, private colleges in Connecticut that maintain their own police forces through local law enforcement may effectively operate outside the standards Connecticut established for public university police forces, and instead adopt the standards of the individual municipalities where the colleges are located. Furthermore, their endorsement by the state is somewhat unclear, which raises the question of how much power the state intended private university

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[89] Jacobson, *supra* note 72, at 69–70 (describing a Kansas Supreme Court ruling that a municipal police officer could perform a citizen's arrest if acting outside the scope of his or her police authority).

[90] VA. CODE ANN. § 23-234 (2015).

[91] Hopkins & Neff, *supra* note 9, at 129–30; *see also* Jacobson, *supra* note 72, at 65–67 (describing examples of deputation of campus police).

[92] *See* CONN. GEN. STAT. § 10a-156b (2014).

[93] Hopkins & Neff, *supra* note 9, at 130; *see also Overview of the Yale Police Department*, YALE UNIV., http://publicsafety.yale.edu/police [http://perma.cc/29Z3-7T8U].

[94] *See* CONN. GEN. STAT. § 10a-156b.

[95] *Overview of the Yale Police Department*, *supra* note 93.

[96] Bharat Ayyar, *City, Campus Jurisdictions Overlap for Police Depts.*, YALE DAILY NEWS (Nov. 5, 2007), http://yaledailynews.com/blog/2007/11/05/city-campus-jurisdictions-overlap-for-police-depts/ [http://perma.cc/7MQQ-HXHW].

[97] *Id.*

police forces to exercise, if any. This disparate treatment of public and private universities may stem from state legislatures' desire to limit their involvement with private universities, but may also result from the state legislatures' inattention to and failure to recognize the law enforcement character of private university police forces.[98]

Public or Private—As indicated above, statutory grants of authority to campus police forces may be directed to private universities[99] or only to public universities.[100] Public campus police forces are arms of a state entity, and are therefore considered to be state actors regardless of whether the campus police force has separate statutory authority.[101] Private university police forces, as private actors, face a more complex analysis.[102] Some courts consider enabling statutes to be dispositive of state action.[103] In such cases, whether states have explicitly delegated police authority to private colleges, or only to public colleges, can impact whether citizens in those states have a remedy. Alternatively, other courts only inquire into the public or private nature of the university when determining state action.[104] There, a state's choice to delegate police powers to private colleges has no impact. Finally, including private colleges in enabling statutes can affect whether police forces at those schools have state oversight.

These examples demonstrate the variation among state enabling statutes. However, state statutes cannot be categorized as more or less likely to permit a court to find state action. As the next Section demonstrates, a standardized statute framework alone will not ensure a consistent federal remedy for all citizens. Courts considering very similar statutes have reached different conclusions regarding whether campus

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[98] In fact, Connecticut limits statutory establishment of special police forces to specific public universities. While this may be intentional, recent proposed legislation that would expand the statute to a community college, which is specifically pushing for expansion to include its campus but not other state community colleges, may indicate that the legislature selected the schools on a more ad hoc basis. *See* S.B. 1013, 2015 Gen. Assemb., Jan. Sess. (Conn. 2015); *Police at a Connecticut Community College Seek State Law for Guns*, NEW HAVEN REG. (Mar. 5, 2015), http://www.nhregister.com/general-news/20150305/police-at-a-connecticut-community-college-seek-state-law-for-guns [http://perma.cc/J3MF-3CMM].

[99] *See, e.g.*, 110 ILL. COMP. STAT. 1020/1 (2015).

[100] *See, e.g.*, CONN. GEN. STAT. § 10a-156b (2014).

[101] *See* Henderson v. Fisher, 631 F.2d 1115, 1118 (3d Cir. 1980) (finding that the fact a public university "derives its authority from the state . . . is itself persuasive of the presence of state action" of the university's campus police force).

[102] *See* Lacey Perkins, Note, *A Circumstantial Defense: Determining the Applicability of the Good Faith Defense for Campus Security in § 1983 Cases*, 19 SUFFOLK J. TRIAL & APP. ADVOC. 176, 190–91 (2013–2014).

[103] *See, e.g.*, Scott v. Nw. Univ. Sch. of Law, No. 98 C 6614, 1999 WL 134059, at *3, *5–6 (N.D. Ill. Mar. 8, 1999).

[104] *See Henderson*, 631 F.2d at 1118.

police forces are state actors because courts have placed different weights on state enabling statutes in their color of law analysis.

B. Applying the Color of Law Approaches to Campus Police

Partially as a result of the variety among state enabling statutes, court rulings have differed significantly in determining whether campus police officers act under color of state law. The method for determining whether a private actor acts under color of state law is traditionally a fact-based inquiry.[105] However, when courts consider the state's method of granting authority, they can create different remedies in different states. This Section reviews the different ways courts treat methods of granting authority to campus police. Courts' analyses of the state action question are affected by which method the states choose, which is often, but not always, an explicit enabling statute. First, some courts find explicit enabling statutes to be dispositive of state action. Second, courts may use explicit enabling statutes as one of many nondispositive factors in their analyses. Third, other courts must determine state action when states use nonstatutory methods of delegation, such as memoranda of understanding (MOU) with local law enforcement. Finally, certain courts must determine state action when states do not explicitly delegate power to campus police, but campus police forces effectively function as ordinary police forces. These differences impact whether citizens have § 1983 remedies and create inconsistent remedies across states.

1. Explicit Enabling Statutes that Courts Consider Dispositive of State Action.—Explicit statutory delegation of authority has been found to help satisfy the public function approach, eliminating or reducing the need for a fact-specific inquiry.[106] The Illinois enabling statute allows private universities to form police forces.[107] Federal courts have viewed the Illinois statute as an explicit delegation of state authority to private universities that satisfies the public function approach.[108] For example, in *Scott v. Northwestern University School of Law*, the court noted that the university police was no different from local law enforcement "because the

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[105] Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982) (describing "the necessarily fact-bound inquiry" of determining state action); Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.").

[106] *See, e.g.*, *Henderson*, 631 F.2d at 1118; Boyle v. Torres, 756 F. Supp. 2d 983, 993–95 (N.D. Ill. 2010); *Scott*, 1999 WL 134059, at *5 ("Because the police are vested with almost identical powers to those of county and municipal police, they exercise functions that are traditionally the exclusive prerogative of the state.").

[107] 110 ILL. COMP. STAT. 1020/1 (2015).

[108] *See, e.g.*, *Boyle*, 756 F. Supp. 2d at 993–95; *Scott*, 1999 WL 134059, at *5.

state has so authorized" the campus police.[109] As a result, in states that do grant police power to both private and public campus police forces, courts will consider private campus police forces state actors, and citizens will have § 1983 remedies.

2. Explicit Enabling Statutes that Courts Do Not Consider Dispositive of State Action.—However, other courts do not give such weight to methods of granting authority, even if the delegation of authority is explicitly through an enabling statute.[110] For those courts, an enabling statute is not dispositive when determining state action. For example, the Pennsylvania enabling statute is similar to the Illinois statute in delegating powers to both public and private universities.[111] However, the Third Circuit held police officers at the University of Pittsburgh to be state actors because the school was a public institution, noting the campus police enabling statute as a factor that merely "buttresse[d]" this conclusion.[112]

Unlike in Illinois, lower federal courts in Pennsylvania have split regarding the weight to be placed on the fact that enabling statutes apply to both public and private police forces. On one hand, campus police officers at Franklin & Marshall College and the University of Pennsylvania did not act under color of law,[113] even though campus police at these private universities also derive their authority from a state statute.[114] On the other hand, a federal court also found that Bucknell University's campus police could have acted under color of state law because of the delegation of police powers through statute.[115] As a result, courts have provided different remedies when considering the same Pennsylvania statute. While enabling

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[109] 1999 WL 134059, at *3, *5–6; *see also Boyle*, 756 F. Supp. 2d at 993–95 (holding that university police officers acted under color of state law when arresting the plaintiff, and noting that, in addition to carrying guns, patrolling territory, wearing police uniforms, demanding citizens' identification, and detaining citizens in handcuffs, the campus police force had a broad statutory grant of powers under Illinois law).

[110] *See, e.g.*, Harper v. Franklin & Marshall Coll., No. 10-2647, 2011 WL 2746644, at *5 (E.D. Pa. July 14, 2011) (holding that, despite plaintiff's detention by campus security officers, campus security did not act under color of state law even though they were appointed pursuant to state statute); Hargrove v. City of Philadelphia, No. CIV. A. 93-5760, 1995 WL 584490, at *2 (E.D. Pa. Oct. 3, 1995) (noting that allegations of action pursuant to statute did not make campus police officers' behavior state action).

[111] *See* 71 PA. STAT. AND CONS. STAT. ANN. § 646 (West 2015).

[112] Henderson v. Fisher, 631 F.2d 1115, 1118 (3d Cir. 1980).

[113] *Harper*, 2011 WL 2746644, at *5; *Hargrove*, 1995 WL 584490, at *2. In both cases, the courts rejected arguments that the campus police officers acted under color of state law without specifically evaluating the factual circumstances. In *Harper*, the court failed to consider the public function of the campus security officers as separate from the private college itself. 2011 WL 2746644, at *5.

[114] *See* 71 PA. STAT. AND CONS. STAT. ANN. § 646 (West 2015).

[115] Dempsey v. Bucknell Univ., No. 4:11-CV-1679, 2012 WL 1569826, at *6 (M.D. Pa. May 3, 2012).

statutes in Illinois and Pennsylvania delegate the same police powers to public and private universities, federal courts' disparate treatment of these enabling statutes has given students at Illinois private universities a remedy under § 1983, but students at Pennsylvania private universities do not always have the same remedy.

Courts in these cases look to other factors to determine whether campus police act under color of state law. In *Hargrove v. City of Philadelphia*, the court maintained the fact-specific inquiry typically found in state action analysis.[116] In *Henderson v. Fisher*, the court looked to the public or private nature of the university itself.[117] However, there are problems with both of these approaches. Enabling statutes explicitly granting police power to campus police are a useful proxy for comprehensive factual circumstances. A private police force that has been explicitly delegated power by statute is likely to exercise such power and comport itself in a way that an average person would perceive it no differently than ordinary police. An inquiry limited to the factual circumstances of each case may disregard the public perception of campus police forces as state actors.

Inquiring into the public or private nature of the university itself can ignore the state's policy choices delegating the exact same powers to public and private university police forces. Private universities themselves are rarely state actors, even when campus police are involved.[118] Many courts have held that for a private university actor to act under color of state law, the state must be involved in the particular activity that violates constitutional rights.[119] This standard places a high burden on the plaintiff. For example, when a student at a private university brought a claim arising from a local government internship, which she obtained through the school as part of a graduation requirement, the court declined to find sufficient state involvement.[120] As a result, if public university campus police forces are considered state actors because of their integration with state universities, private university campus police forces will rarely be considered state actors if the same formalist test is applied.

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[116] 1995 WL 584490, at *2.

[117] 631 F.2d at 1118.

[118] *See, e.g.*, Klunder v. Brown Univ., 778 F.3d 24, 32–34 (1st Cir. 2015).

[119] *See, e.g.*, Krohn v. Harvard Law Sch., 552 F.2d 21, 24 (1st Cir. 1977); Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968); *cf.* Isaacs v. Bd. of Trs. of Temple Univ. of the Commonwealth Sys. of Higher Educ., 385 F. Supp. 473, 490 (E.D. Pa. 1974) ("There are certain factual situations where a state's involvement with a formally 'private' educational institution is so significant that any activity of that institution or its officers may fairly be characterized as 'state action.'").

[120] Rinsky v. Trs. of Bos. Univ., No. 10CV10779-NG, 2010 WL 5437289, at *1, *4 (D. Mass. Dec. 27, 2010).

3. Nonstatutory Method of Granting Authority.—In some states, a campus police force may derive its power from a local law enforcement agency, but have no statutory recognition.[121] When determining if a campus police force has acted under color of state law, a court that puts heavy emphasis on the enabling statute may reach a different conclusion than a court that instead prioritizes the relationship between the campus police force and local law enforcement.

Where campus police officers perform the same police functions as local law enforcement, such as patrolling territory, asking for identification, and detaining individuals, without explicit statutory delegation of the authority to perform these functions, the same behavior might not be state action merely because of the method of delegation of power to the campus police force.[122] For example, in *Johnson v. University of San Diego*, the city government had delegated authority over misdemeanor enforcement to the university police via an MOU.[123] The court did not consider an MOU to be a sufficiently explicit delegation of police authority, and found there was no state action.[124] Therefore, when courts consider statutory grants of authority to be dispositive, they may ignore other kinds of collaboration between campus police and the state.

However, even if courts do not consider enabling statutes to be dispositive of state action, when states institute a patchwork of different levels of state involvement in campus police activity, it is difficult for courts to determine when the campus police activity crosses the line into state action. For example, Illinois requires campus police to meet the same law enforcement and firearms regulations as state law enforcement,[125] while Tennessee allows schools to determine additional qualifications for their campus police officers.[126] Even if campus police forces in these two states must ultimately meet the same qualifications, and both derive their power from state statutes, courts that place different weight on the elements of those statutes may reach different conclusions regarding the state's involvement. State statutes providing certification requirements for campus police officers raise the question of whether such certification requirements

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[121] *See* CONN. GEN. STAT. § 10a-156b (2014); *Overview of the Yale Police Department*, *supra* note 93.

[122] *See* Johnson v. Univ. of San Diego, No. 10CV0504-LAB (NLS), 2011 WL 4345842, at *6–7 (S.D. Cal. Sept. 16, 2011) (finding that an MOU between local law enforcement and campus police was not a sufficient delegation of police power to satisfy the public function approach). The University of San Diego is a private university. *Id.* at *6.

[123] *Id.* at *6.

[124] *Id.*

[125] 110 ILL. COMP. STAT. 1020/1 (2015).

[126] TENN. CODE ANN. § 49-7-118(b) (2014).

are a sufficient "coercive power" or "encouragement" of the campus police force's action to convert it into action under color of state law.

4. No Explicit Delegation of Authority to Campus Police.—Finally, certain states do not delegate any police powers to private universities;[127] instead, private universities form their own police forces outside of statutory or other state authority. For example, Connecticut grants police authority via statute to public universities, while the statute is silent about campus police forces at private universities.[128] However, some private universities within the state have their own sworn police officers and police forces.[129] If federal courts in Connecticut considered enabling statutes to be dispositive of state action, private university campus police would not be state actors because their power would not be explicitly delegated through statute. Students at those schools would not have § 1983 remedies, although the private campus police act in accordance with an agreement with local law enforcement and perform essentially the same functions as the public university's police.

Even if courts took none of these approaches and relied on a strictly fact-specific inquiry, the inquiry can ignore critical aspects of students' perceptions and interactions with campus police. In *Robinson v. Davis*, local police officers that were employed part-time for the university summoned a group of students for questioning at the request of the state law enforcement.[130] The Fourth Circuit did not consider the campus police officers to be state actors because the students were "cognizant" that the police officers were acting as employees of the university when summoning the students.[131] However, the court did not consider the impact of this cognizance: If the students had not obeyed the security officers, would they have been expelled or arrested?

These unresolved questions highlight the uncertainty plaguing students and residents in the communities surrounding universities regarding their relationship to the campus police force protecting them. The ways states delegate authority to campus police, and the ways courts treat these delegations of authority, impact whether citizens have § 1983 remedies. Taking the approach of federal courts in Illinois, and considering enabling statutes to be dispositive of state action, will not necessarily result

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[127] *See, e.g.*, CONN. GEN. STAT. § 10a-156b (2014) (granting police authority only to public universities); TENN. CODE ANN. § 49-7-118 (2014) (granting police authority only to private universities of a certain size).

[128] CONN. GEN. STAT. § 10a-156b; *see also supra* notes 92–97 and accompanying text.

[129] Hopkins & Neff, *supra* note 9, at 130; *Overview of the Yale Police Department*, supra note 93.

[130] 447 F.2d 753, 754–55 (4th Cir. 1971).

[131] *Id.* at 758.

in consistent remedies across states for a federal law. In states such as Illinois, private campus police are considered state actors, but in other states, other private university police forces may not be state actors, even if they act in exactly the same way. But states' choices of how to delegate authority to campus police can affect whether citizens have a § 1983 remedy as well. Given the variety of methods of delegating power to campus police forces in general, and the variances among enabling statutes in particular, an individual's ability to seek a § 1983 remedy may depend on what state he or she is in.

III. A PROPOSED UNIFORM CAMPUS POLICE ENABLING STATUTE FRAMEWORK

Courts' consistent treatment of state methods of delegating authority to campus police would be a start toward ensuring that all citizens have remedies for what is effectively police action. However, such consistent treatment will not result in uniform remedies for citizens if states continue to rely on a patchwork grant of authority to campus police, who can exercise that authority regardless of how it is delegated. A move toward uniformity could be accomplished through a model statute that states would be strongly encouraged to adopt,[132] especially because many states may not be aware of the implications of their legislative choices. The benefits of a model statute are not limited to ensuring that citizens have a § 1983 remedy. Such a model statute would also clarify the role of campus police, and give campus police forces themselves a clearer jurisdictional mandate than they currently have in many states. States would also benefit from a model statute that clearly delineates campus police certification requirements and oversight provisions.

A. Terms of the Proposed Model Statute Framework

This model statute framework[133] should have several key elements: (1) broad delegation of police power; (2) no distinction between public and private schools; (3) administrative, but not law enforcement, oversight by the university; (4) separating enforcement of laws and campus regulations; (5) flexible physical jurisdiction; (6) a codified relationship to law enforcement; and (7) optionality.

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[132] Model statutes and uniform state laws provide many benefits to states. *About the ULC*, UNIFORM L. COMMISSION, http://www.uniformlawcommission.com/Narrative.aspx?title=About%20the%20ULC [http://perma.cc/E27U-PSZR]. While this Note does not propose a specific statute, the following Section lays out general terms and their rationales.

[133] As noted throughout this Section, this framework draws on elements of several current campus police enabling statutes.

Broad Delegation of Police Power—First, the model statute should represent a broad delegation of police power. While some, especially students, might balk at the prospect of explicitly handing police power over to universities, it is clear that many university police forces already exercise this broad police power, even without statutory authorization.[134] The model police statute would benefit students and citizens by accompanying the delegation of police power with a strong training and certification requirement. Campus police officers should meet the same standards as local law enforcement, especially for firearm certification.

No Public–Private Distinction—Second, the model statute should make no distinction between public and private schools. Given that private schools effectively maintain their own campus police forces even in states that only explicitly grant police powers to public universities,[135] expanding the delegation of police power to all schools would codify existing practices. It would also bring state oversight to campus police forces in private schools, rather than relying on local law enforcement to provide such oversight. As a result, oversight of campus police forces will be more consistent, as opposed to disparate policies devised by municipalities. States that currently limit their campus police enabling statutes may do so because public colleges are more heavily regulated than private colleges. Alternatively, states may wish to provide more oversight to public university campus police forces.[136] However, such intentions have caused a two-tiered system where private universities in such states still operate campus police forces, but with less oversight than public universities. A model statute that covers both public and private schools will ensure that state legislatures do not allow private universities to slip through the cracks.

Oversight by the University—Third, the model statute should continue to allow for a base level of university oversight. For example, a university should be able to choose whom to hire for its campus police force. However, to the extent university administrators are involved in making law enforcement decisions,[137] they ought to be recognized as state actors

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[134] *See, e.g.*, CONN. GEN. STAT. § 10a-156b (2014); Stephanie Addenbrooke & Joey Ye, *After Thwarted Theft Attempt in Trumbull, YPD Arrests Intruder*, YALE DAILY NEWS (Jan. 25, 2015), http://yaledailynews.com/blog/2015/01/25/after-thwarted-theft-attempt-in-trumbull-ypd-arrests-intruder/ [http://perma.cc/2NT7-8T8D].

[135] *See, e.g.*, CONN. GEN. STAT. § 10a-156b; *Overview of the Yale Police Department*, *supra* note 93.

[136] *See* CONN. GEN. STAT. § 10a-156a (requiring biannual review of public college campus police security plans).

[137] *See, e.g.*, 110 ILL. COMP. STAT. 1020/1 (2015) ("The Board [of Trustees of a private college or university] shall assign duties . . . .").

when those decisions cause constitutional rights violations. Private university administrators should not be able to avoid liability when they direct law enforcement activity.

As noted above, it is rare for private universities themselves to act under color of state law.[138] However, some courts have recognized that when universities—especially private universities—employ campus police forces, university administrators may become involved in directing law enforcement activities. This direction could potentially result in university administrators, if not the universities, being state actors. In *Klunder v. Brown University*, the district court did not grant summary judgment against a private university and its president in the face of potential § 1983 violations by its campus police officer, indicating more facts were required to determine if the administrators were state actors.[139] On appeal, the First Circuit ruled the private university itself was not a state actor, but did not resolve on the merits whether the university president was a state actor.[140] Thus, it is unclear whether university supervisors can be held accountable when the universities themselves are not state actors. However, under the proposed model statute, authority for law enforcement activities would come from the state, not the university, limiting the university's role to enforcing school regulations. This would ensure that private campus police forces have strong state oversight.

Laws and School Regulations—Fourth, campus police forces must be allowed to enforce the rules and regulations of the college or university, because they will still be university employees and bound by those regulations, as are other members of the faculty and staff. However, the model statute must be clear that campus police cannot use their state-delegated police powers to enforce such university regulations. Instead, they must go through the proper channels of university rule enforcement. For example, the Supreme Court of North Carolina has held that the campus police force of a religious college has the statutory law enforcement authority to "enforce only the law, not campus policies or religious rules."[141] Campus policies and rules are instead enforced through the college's disciplinary proceedings, which are intentionally separated from legal proceedings and controlled by the college's administration.[142]

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[138] *See supra* notes 118–20 and accompanying text.

[139] 778 F.3d 24, 29 (1st Cir. 2015).

[140] *Id.* at 31–32.

[141] State v. Yencer, 718 S.E.2d 615, 620 (N.C. 2011).

[142] *See, e.g.*, DAVIDSON COLL., THE RED BOOK: STUDENT HANDBOOK 12–14 (2015), http://www.davidson.edu/Documents/Administrative%20Department/Dean%20of%20Students/Student-Handbook-Rev.081115.pdf [http://perma.cc/FP6U-T5Q2].

There are three justifications for separating law and regulation enforcement in the statutory police duties. First, members of the surrounding community should not be subject to arrest for violations of rules of a university that they are not a part of. Separating these duties lessens the risk that nonuniversity members are subjected to unnecessary, and potentially unconstitutional, police interactions. Second, private universities may have rules and regulations that would be unconstitutional if enforced by the state. For example, a private religious college can endorse the tenets of a specific religion, but the state cannot. The Supreme Court of North Carolina reinforced this rule when holding that North Carolina's campus police enabling statute was permissible because it did not allow religious colleges to enforce religious rules, but only state laws.[143] University police enforcing such regulations using their police power is both a clear constitutional rights violation and, under the model statute, would be action under color of state law. The model statute would make these two roles clearly distinct.

Third, students generally feel beholden to the university they attend, and are aware that failure to comply with university regulations can result in the school taking disciplinary action. However, the same students will probably be even more inclined to comply with the laws and directives of law enforcement agents. When campus police officers have the authority to enforce both local statutes and university regulations, the line between the two can be blurred.[144] Because campus police are representatives of their university, students may feel compelled to obey police directives, even if the directives violated students' rights. Because citizens' perception of private actors can affect whether they act under color of state law,[145] this additional layer of power can potentially alter the state action analysis.

Flexible Physical Jurisdiction—Fifth, the model statute should require universities that establish police forces to define "campus" in coordination with local law enforcement. Rather than promulgating a bright line for

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[143] *Yencer*, 718 S.E.2d at 620. To allow campus police forces to enforce university regulations in addition to laws could lead to arrests for failure to comply with religious colleges' codes of conduct, which would effectively render such campus police enabling statutes unconstitutional for violations of the Establishment Clause. *See* Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 215–17 (1963) (explaining that the Establishment Clause applies to the states through the Fourteenth Amendment).

[144] *See, e.g.*, NW. UNIV., NORTHWESTERN UNIVERSITY STUDENT HANDBOOK 2013–14, at 8–9 (2013), http://www.publichealth.northwestern.edu/docs/TGS_Student_Handbook_2013-14_.pdf [http://perma.cc/FB9S-5GWR]; *see also* Asher Klein, *Student Arrested in Reg*, CHI. MAROON (Feb. 26, 2010), http://chicagomaroon.com/2010/02/26/student-arrested-in-reg/ [http://perma.cc/XJ8T-FMX5] (describing a college student being arrested for trespass and resisting arrest after police originally were called because the student was making noise in the library).

[145] *See* Rogers v. City of Little Rock, 152 F.3d 790, 798 (8th Cir. 1998).

what buildings or sidewalks constitute a campus,[146] such decisions ought to be made on a case-by-case basis, reflecting individual schools' geographical character. Significant confusion can arise when jurisdictions change from block to block. While local law enforcement agencies are still state actors even if they abuse their power,[147] this conclusion has not been tested for campus police forces that operate outside their jurisdiction; if invalid arrests are thrown out, will those arrested still have a § 1983 remedy? Similarly, campus police forces may attempt to use the power of citizens' arrests when outside their statutory jurisdiction.[148] Citizens' arrests have generally been considered a power not exclusive to the state.[149] As when campus police forces enforce university regulations, most students would likely not think that campus police forces are using a citizen's arrest when outside their jurisdiction; they would probably assume the individual who looks like a police officer and acts like a police officer, is in fact a police officer. Although there will still be jurisdictional boundaries, outside which campus police forces must yield to local law enforcement, the explicit police status of campus police that the model statute creates will make these transitions seamless because both territories are patrolled by statutorily recognized law enforcement.

Relationship to Law Enforcement—Sixth, schools should not be able to circumvent the statute's grant of authority by instead being deputized through local law enforcement. Schools accepting the police powers delegated should automatically receive the accompanying privileges and responsibilities. This would not prevent campus police forces from coordinating logistically with local law enforcement, especially where jurisdictions overlap or are adjacent. The statute should therefore allow such coordination in the same manner that two ordinary law enforcement agencies with adjacent jurisdictions would cooperate. In fact, confusion regarding physical jurisdiction of campus police could be lessened if campus police are explicitly recognized as state law enforcement agencies with police power. The proposed model statute would thus promote uniformity among states, and also resolve the areas of uncertainty in many of the current state enabling statutes.

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[146] Currently, some states have implemented such bright-line rules. *See* Jacobson, *supra* note 72, at 43 (describing the various ways that states define the physical jurisdiction of campus police forces).

[147] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978); Monroe v. Pape, 365 U.S. 167, 172, 184, 187 (1961).

[148] *See, e.g.*, Johnson v. Univ. of San Diego, No. 10CV0504-LAB (NLS), 2011 WL 4345842, at *6 (S.D. Cal. Sept. 16, 2011); *see also* Jacobson, *supra* note 72, at 69–70 (exploring the possibility of campus police officers justifying off-campus arrests as citizen's arrests).

[149] *E.g.*, Payton v. Rush-Presbyterian-St. Luke's Med. Ctr., 184 F.3d 623, 629 (7th Cir. 1999).

Optionality—Finally, the formation of campus police forces should be optional. Many colleges may lack the size, resources, or inclination to support a police force, while others may simply choose to rely on local law enforcement to enforce the law.[150] However, the provision in the statute describing the option to create such a force should also clarify that schools which do "opt out" would not be able to circumvent the rules by creating a private, armed security force with the power to arrest. The privileges that come with law enforcement, such as the power to arrest or carry firearms, must be accompanied by adherence to the statute.

B. Judicial Treatment of Campus Police Officers Under the Proposed Model Statute Framework

While some scholars have urged the abandonment of the state action doctrine altogether,[151] and others have advocated for a recalibration of this doctrine specifically for private policing,[152] this Note provides a solution that retains existing jurisprudence while also protecting individual liberties by ensuring a uniform § 1983 remedy. In fact, the proposed model statute framework would bring color of law analysis for campus police forces closer to the fact-specific analysis used for other private actors.

A model statute framework adopted by many states would assist the courts in standardizing their approach toward campus police forces and state action and conserving federal § 1983 remedies. Courts should accompany a consistent state statute framework with affirmation of the fact-specific inquiry typical of § 1983 cases;[153] even explicit statutory delegation of broad police powers should not be dispositive of state action. However, such a broad, explicit statutory delegation of police power would be one of the factors, and courts should adopt the approach of federal courts in Illinois, effectively treating campus police officers who receive their broad power through statute the same as ordinary law enforcement officers:

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[150] Many small rural colleges have private security officers but not full-fledged police departments with the power to make arrests. *See, e.g.*, *The Department of Public Safety*, MIDDLEBURY COLL., http://www.middlebury.edu/offices/health/publicsafety/about [http://perma.cc/CM2F-Z3KH]. Alternatively, urban schools with a strong local police force may simply rely on local law enforcement to carry out arrests. *See, e.g.*, COLUMBIA UNIV. PUB. SAFETY, 2014 ANNUAL SECURITY AND FIRE SAFETY REPORT 4 (2014), http://www.columbia.edu/cu/publicsafety/SecurityReport.pdf [http://perma.cc/8LWW-S54K]. Columbia University's relationship with the NYPD may also be a product of New York's campus police enabling statute, which is limited to public universities. *See* N.Y. Educ. Law § 355 (Consol. 2014).

[151] *E.g.*, Chemerinsky, *supra* note 36, at 550–56.

[152] *E.g.*, Enion, *supra* note 62, at 545.

[153] For a discussion of the fact-specific inquiry that is typical of § 1983 actions, see *supra* notes 52–53 and accompanying text.

> By accepting this authorization, [a university] and its police must also accept the grave responsibility to protect an individual's constitutional rights, the same responsibility that § 1983 enforces against municipal and other police forces. To permit the state to delegate its police powers to [a university] and then shield the [university] police force from liability when, in exercising these powers, it violates the rights of 'students, employees, [and] visitors' would pervert the language and intent of § 1983.[154]

Therefore, campus police forces would act under color of state law whenever ordinary police forces would. This model statute framework would formalize the effective relationship students and citizens have with campus police forces as extensions of law enforcement.

1. Public Function Approach.—One key result of a model campus police enabling statute and consistent judicial treatment of that statute is a finding of state action when campus police act in their official capacity. In particular, campus police action would satisfy the public function approach and would be under color of state law. The analysis of *Scott*[155] and *Boyle*,[156] two federal cases in Illinois, best exemplified this outcome using the public function approach. The Illinois enabling statute shares many features with the proposed model statute framework, including explicit delegation of broad police power, such as the ability to arrest and carry firearms; application to private universities; and training and certification requirements.[157] The court in *Scott* noted the statute's broad delegation of police power was effectively the delegation of the state's entire police power to private university police forces: "Because the police are vested with almost identical powers to those of county and municipal police, they exercise functions that are traditionally the exclusive prerogative of the state."[158] Similarly, the court in *Boyle* emphasized the broad powers delegated to the private university police force:

> [The university police officers] carry guns, they wear police uniforms, and they patrol their territory in squad cars; they have the ongoing authority to detain citizens and place them in handcuffs; they have the authority to demand that individuals furnish them with ID. When the ensemble of the officers'

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[154] Scott v. Nw. Univ. Sch. of Law, No. 98 C 6614, 1999 WL 134059, at *6 (N.D. Ill. Mar. 8, 1999) (fourth alteration in original).

[155] *Id.*

[156] 756 F. Supp. 2d 983 (N.D. Ill. 2010).

[157] 110 ILL. COMP. STAT. 1020/1 (2015). Note that while many of these elements are featured in multiple enabling statutes, Illinois is used as an example because of the way federal courts have considered the statute in the their public function analysis.

[158] *Scott*, 1999 WL 134059, at *5.

> powers and functions is kept in view, there can be no doubt that they are state actors.[159]

Thus, when statutes explicitly delegate broad police power, courts can clearly identify exclusive government functions performed by private campus police forces. Even if any one of these functions alone is not necessarily exclusive to the state,[160] their combination in campus police forces shows a private entity that acts in a manner shared only by state actors. Additionally, while delegating broad police powers to campus police may effectively only codify the status quo, making the delegation explicit by statute illustrates that the delegated powers are exclusive to the state. After all, states would not need statutes to allow campus police forces to exercise such broad power if that power could be exercised by an entity other than the state.

An explicit enabling statute which describes the police powers delegated would further help courts determine specifically which police powers have been delegated, a task made more difficult when campus police forces rely on other means of gaining authority.[161] Explicit granting of broad police power would also accurately reflect citizens' perception of—and relationship to—campus police. Therefore, in addition to providing uniformity, oversight, and clarity, this model framework would more accurately reflect campus police forces' exercise of traditionally exclusive government functions.

2. State Coercion and Symbiotic Relationship Approaches.—While the proposed model statute framework would indicate action under color of law through the public function approach, it is also likely to satisfy the other two approaches: the state encouragement approach and the symbiotic relationship approach. First, a statute delegating these functions would indicate state encouragement of the campus police forces. While some might argue that a model statute would represent mere regulation of, or acquiescence to, campus police activity, which do not indicate state action,[162] explicitly delegating police powers to colleges or universities would be "significant" assistance to the university's mission of enforcing laws on its campus and ensuring the safety of members of its community.[163]

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[159] 756 F. Supp. 2d at 995.

[160] *See* Wade v. Byles, 83 F.3d 902, 906 (7th Cir. 1996).

[161] *See* Johnson v. Univ. of San Diego, No. 10CV0504-LAB (NLS), 2011 WL 4345842, at *6 (S.D. Cal. Sept. 16, 2011) (finding that an MOU between local police and campus security "is not a total delegation of police powers").

[162] *See* Flagg Bros. v. Brooks, 436 U.S. 149, 164 (1978) (acquiescence); Jackson v. Metro. Edison Co., 419 U.S. 345, 350 (1974) (regulation).

[163] *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 622 (1991).

By enforcing the state's law on the state's behalf, the campus police force would effectively be an agent of the state. In addition, the fact that the campus police could only use the delegated power to enforce state laws, not university regulations, strengthens the campus police forces' position as an arm of the state. Acting as an agent of the state would be a sufficiently close "nexus" between campus police and the state because the campus police may be "fairly treated as that of the [s]tate itself."[164] As a result, the statute would satisfy the state encouragement test.

Second, the proposed statute framework would create a symbiotic relationship between the state and the universities. Universities would obtain the benefits of clear delegated statutory authority to maintain a police force and protect its students, faculty, staff, and visitors, while the state would no longer have to spend money, time or manpower on territory now patrolled by campus police. These mutual benefits between the state and the campus police force would satisfy the symbiotic relationship test because each would derive a benefit from the other's action.[165]

C. Additional Benefits to the Proposed Model Statute Framework

The proposed framework would result in a number of benefits for universities, states, and members of university communities. First, individuals whose constitutional rights were violated by campus police will uniformly be ensured a remedy, regardless of what school the campus police represent. Consistency and uniformity in this remedy will align with the intent of § 1983 to provide a remedy to all citizens, especially in light of the original purpose of § 1983 to promote uniform enforcement of civil rights across states.[166] Second, the explicit nature of the statute will make powers of campus police officers clear to all parties. Students and citizens will clearly benefit from understanding their relationship to campus police as one of citizens to law enforcement. Clear statutory guidelines will also help campus police departments understand their own role. In states where campus police do not currently have clear statutory authority, or an unclear degree of statutory authority, clearer guidelines will ensure that campus police forces know they have state authority when they purport to exercise it.

Third, students, citizens, universities, and campus police officers will be able to more clearly separate law enforcement activities from the university's educational mission. Currently, because of a university's

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[164] *Jackson*, 419 U.S. at 351; *see also supra* notes 40–45 and accompanying text.

[165] *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 724 (1961).

[166] *See* Monroe v. Pape, 365 U.S. 167, 172–73 (1961).

unique authority relationship to students, students may view campus police exclusively as university agents and not consider them state actors. If campus police take different approaches to enforcing laws and university regulations, students and citizens will be able to better grasp their own constitutional rights and understand the authority role of both the university and the campus police. Finally, the proposed framework would not require a drastic shift in the way current campus police forces operate. Many university police forces that do not have the broad statutory delegation of authority already operate the way the proposed model statute envisions.[167] The statute would thus provide a number of benefits while minimally intruding on the states' discretion and requiring minimal change in campus police behavior.

D. Limitations of the Proposed Model Statute Framework

The proposed model statute framework does create federalism concerns, especially if states only want to grant limited police power to university police departments. Allowing states to experiment with state-specific solutions to different problems, as opposed to rigid national uniformity, has often been invoked as a benefit of federalism.[168] For example, perhaps states intend to provide more state oversight of public-university campus police forces than private-university campus police forces. Some scholars have also argued standardization is sometimes best achieved through using the states as outlets for experimentation, through which the best policies can become clear.[169] Even if this model statute were not forced on states, it would not achieve its uniformity benefits without widespread adoption, which would likely require strong encouragement. On the practical side, states may also be resistant to change their varied methods of enabling campus police forces to a standardized regime, as has been the case with even now-popular model statutes, such as the Uniform Commercial Code.[170]

However, this resistance can be overcome because the need to impose national uniformity can outweigh the value of experimentation.[171] In this case, these concerns are outweighed by the fact that § 1983 gives citizens a

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[167] *See, e.g.*, *Overview of the Yale Police Department*, *supra* note 93.

[168] *E.g.*, New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[169] *E.g.*, Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PA. L. REV. 1745, 1746 (2004) ("There are times for the national government to stand back and let policies emerge at a lower level of decision making . . . .").

[170] Sean Michael Hannaway, Note, *The Jurisprudence and Judicial Treatment of the Comments to the Uniform Commercial Code*, 75 CORNELL L. REV. 962, 968 (1990).

[171] *See* Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1789 (2006).

uniform remedy, regardless of what state they live or attend college in. Moreover, current campus police enabling methods present a particular problem because of the wide variety of solutions adopted by states creating disparity in federal remedies. There is so little uniformity among states' solutions that an effective solution is found by taking the best elements from existing state statutes, as opposed to choosing one particular option of existing state enabling regimes. This uniformity is needed to protect the remedies secured by § 1983; the purpose of § 1983 has always been to ensure that federal rights are guaranteed for all, even if the states themselves infringe upon them.[172] When these federal rights become less uniform because of the patchwork analysis of campus police, states can usurp these uniform federal rights.

Furthermore, in many cases the proposed model statute would merely be a codification of the status quo. Even in states where there is no enabling statute for private campus police, private universities maintain police forces anyway.[173] The statute's primary result would be guaranteeing remedies for rights violations, rather than altering campus police behavior. States will still maintain discretion in how they certify and train local law enforcement. Furthermore, federalism implies that different states take different approaches to a particular issue, in this case, campus police authority. However, there already is a level of uniformity in campus police behavior, regardless of the method of granting authority. Campus police forces exist at schools that are not covered by existing enabling statutes and behave like ordinary police forces, very similar to schools that are covered by such statutes.[174]

Additional limitations may result from university hesitation to get too entangled with the state. However, accepting broad power gives the university a level of accountability for its police force, which it must have if it undertakes to provide law enforcement on its own campus. Finally, small or rural schools that have a minimal local law enforcement presence may want to increase security around their campuses, but may not have the infrastructure to provide the supervision or support for a police force envisioned by the model statute. However, such schools will likely require a smaller campus police presence than large urban universities. Furthermore, because the creation of a campus police force is optional, schools will always be able to rely on local law enforcement if they are not willing to bear the costs of a regulated campus police force. To have such a

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[172] Monroe v. Pape, 365 U.S. 167, 180 (1961).

[173] *See, e.g.*, *Overview of the Yale Police Department*, *supra* note 93.

[174] *See, e.g.*, Addenbrooke & Ye, *supra* note 134; *Overview of the Yale Police Department*, *supra* note 93.

police force, universities should bear that cost because the alternative would have individuals bearing the cost of a rights violation without a § 1983 remedy.

CONCLUSION

The lack of uniformity and consistency among state enabling statutes for campus police can lead to different results when courts determine whether those campus police forces act under color of state law under § 1983. Courts may consider campus police forces to be state actors in certain states, but not others, even for very similar behaviors. Different results in tests for state action can effectively prevent some students and citizens from seeking a remedy when campus police violate their constitutional rights. This Note has considered the various inconsistencies among state statutes and the results courts have reached as a result of those inconsistencies. This Note then proposed a model uniform statute framework for states to grant broad police power to campus police, which would codify the existing behaviors of many campus police forces. Such a statute would provide additional clarity to courts, states, and universities themselves, while also ensuring that no student or citizen is deprived of a remedy under § 1983.