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BREATHING ROOM FOR THE RIGHT OF ASSEMBLY

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ABSTRACT

This Article explores the legal and political fault lines that the wave of protests highlighting police violence and systemic racism in the summer of 2020 reveal. It focuses in depth on Detroit, Michigan, as a window into the ways that the First Amendment, as currently construed, under-protects those seeking political change and racial reckoning by demonstrating in the streets.

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INTRODUCTION

But somewhere I read of the freedom of assembly. Somewhere I read of the freedom of speech. Somewhere I read of the freedom of press. Somewhere I read that the greatness of America is the right to protest for rights.¹

On May 25, 2020, George Floyd was murdered, at age forty-six, by a Minneapolis police officer during an arrest for allegedly using a counterfeit \$20 bill.² The video of Officer Derek Chauvin, callously kneeling on Floyd's neck for nearly nine minutes while he lay face

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1. *Alsaada v. City of Columbus*, No. 2:20-cv-3431, 2021 WL 1725554 at *1 (S.D. Ohio Apr. 30, 2021) (citing Martin Luther King, Jr., *I've Been to the Mountaintop* (Apr. 3, 1968)).

2. Evan Hill, Ainara Tiefenthäler, Christiann Triebert, Drew Jordan, Haley Willis & Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (Apr. 20, 2021), <https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html> [<https://perma.cc/E46W-X4AL>].

down and handcuffed, went viral, and Americans around the country poured into the streets to demand accountability.³ How many more police killings would it take for authorities to do something? Would the nation finally reckon with the continuous effects of racism? With all aspects of the pandemic's starkly disproportionate impact on people of color?⁴ In Michigan, a state with a population that is approximately 14% Black, 40% of those who had died of COVID-19, at the time, were Black.⁵

While the outpourings were to some degree predictable, their scope and duration were extraordinary.⁶ Amid a global pandemic, and at the tail-end of an unprecedented national shutdown, the slaying sparked a solid month of demonstrations across the country.⁷ More than 15 million Americans gathered in public.⁸ As U.S. District Court Judge Richard A. Jones recognized only two weeks into the demonstrations, “[o]ne would be missing the point to conclude that the protests . . . are only about George Floyd. His death just happens to be the current tragic flashpoint in the generational claims of racism and police brutality in America.”⁹

The Floyd protests provide an opportunity to reflect on the scope of First Amendment rights for political protesters and the

3. *Id.*; Patti Waldmeir, *Four Generations of Black Detroiters on the Legacy of George Floyd*, FIN. TIMES (June 5, 2020), <https://www.ft.com/content/9032a5f5-71f4-4573-8a9e-1afc4308906e> [<https://perma.cc/ZC6M-YMXD>].

4. Brita Belli, *Racial Disparity in Police Shootings Unchanged Over 5 Years*, YALE NEWS (Oct. 27, 2020), <https://news.yale.edu/2020/10/27/racial-disparity-police-shootings-unchanged-over-5-years> [<https://perma.cc/TU2Y-BQTT>].

5. Enrique Neblett, *Covid-19 and the Disproportionate Impact on Black Americans*, UNIV. MICH. SCH. PUB. HEALTH (July 1, 2020), <https://sph.umich.edu/news/2020posts/covid-19-and-the-disproportionate-impact-on-black-americans.html> [<https://perma.cc/W7FD-MGYF>] (reporting that “in Michigan, where African Americans are roughly 14% of the population, yet they represent 33% of the cases, and 41% of deaths”); Rashawn Ray, Jane Fran Morgan, Lydia Wileden, Samantha Elizondo & Destiny Wiley-Yancy, *Examining and Addressing Covid-19 Racial Disparities in Detroit*, BROOKINGS RPT. (Mar. 2, 2021), <https://www.brookings.edu/research/examining-and-addressing-covid-19-racial-disparities-in-detroit> [<https://perma.cc/M9CC-FZVS>] (reporting that the “state of Michigan has the fourth highest COVID-19 mortality rate for Black Americans” but also documenting the disparate economic impact on Black residents in Detroit, including food and housing insecurity and struggles with virtual school).

6. See Larry Buchanan, Quoc Trung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/J4LF-XV9R>].

7. *Id.*

8. *Id.* For an analysis of the similarities and differences between today's anti-police brutality protests and those in 1968, see Thomas Sugrue, *Stop Comparing Today's Protests to 1968*, WASH. POST (June 11, 2020), <https://www.washingtonpost.com/outlook/2020/06/11/protests-1968-george-floyd> [<https://perma.cc/4Q3M-BZYS>].

9. *Black Lives Matter Seattle–King Cnty. v. City of Seattle*, 466 F. Supp. 3d 1206, 1210 (W.D. Wash. 2020).

value of outdoor assemblies as a political practice today. The First Amendment's role in our constitutional system is to defend its democratic foundations.¹⁰ The sad truth, however, is that it consistently under-protects those seeking political change and racial reckoning by demonstrating in the streets.

2020 perfectly encapsulated the First Amendment's shortcomings. Rather than talk in generalities, however, this Article zooms in on Detroit to look closely at the protests that took place on the streets and the litigation that followed. The experiences of Black Lives Matter protesters in Detroit vividly illustrate the pressures on Americans who seek change through political action, specifically on the streets—and the limited protection, practically speaking, that they are provided by our First Amendment.

The First Amendment failed to show up for those seeking an end to police violence and a reckoning against the continued prevalence of racial bias and systemic racism in Detroit. Sure, protesters were allowed to take to the streets, but what happened when they arrived (or more importantly, when they stayed “too long”) should shock us.¹¹

To explain why, this Article focuses on key moments in this story. First, it describes the Floyd protests in Detroit. Next, it turns to the civil rights suit filed by Detroit Will Breathe, a local Black Lives Matter group organized during the first weeks of protests.¹² It explores how the local federal court resolved the allegation that Detroit police were violating protesters civil rights by repeatedly responding to peaceful protests with violence.¹³ Then, it will turn to the counter-suit against Detroit Will Breathe filed by the City of Detroit after the organization won a temporary restraining order restricting the police department's use of so-called “less than lethal weapons.”¹⁴ Finally, the Article tracks what happened to those who were charged during the protests. Taken together, these stories reveal not just a feeble right of peaceable assembly, but also how this limited First Amendment protection fuels ominous political backlash that threatens

10. See U.S. CONST. amend. I.

11. See Darcie Moran, Angie Jackson, Joe Guillen & Branden Hunter, *Demanding Justice*, DETROIT FREE PRESS, May 30, 2020, at A.6 [hereinafter Moran et al., *Demanding Justice*].

12. See Darcie Moran, *Protesters Promise to Bring Civil Lawsuit Against Detroit*, DETROIT FREE PRESS, Aug. 25, 2020, at A.9 [hereinafter Moran, *Protesters Promise*], <https://www.freep.com/story/news/local/michigan/detroit/2020/08/24/detroit-will-breathe-protesters-civil-lawsuit/5628309002> [<https://perma.cc/DW5B-KK5S>]; see also Jamie Pfeiffer, *The Blurry Line Between Protesting And Occupying: What The Difference Means To Your Civil Rights*, 72 OR. STATE BAR BULL. 36, 38 (2012).

13. See *infra* Part II; *Detroit Will Breathe v. City of Detroit*, 484 F. Supp. 3d 511 (E.D. Mich. 2020); *Detroit Will Breathe v. City of Detroit*, 524 F. Supp. 3d 704 (E.D. Mich. 2021).

14. See *infra* Part II.

to render dissent, especially in the form of outdoor protest, criminal, un-American, and a threat to legitimate political processes.

I. PROTESTERS ON THE STREETS OF DETROIT

For some, the fact that large and extended demonstrations for police accountability and racial justice occurred during the summer of 2020 confirms that the right of assembly is robust and freely exercised by all who are willing to participate peaceably.¹⁵ For large numbers of participants in those protests, however, the First Amendment was nowhere to be seen. Detroit was no exception.

Protests in Detroit began on May 29, 2020, and continued in full force for five solid days.¹⁶ Although the crowds were largely peaceful, nightly skirmishes between some protesters and police dominated the headlines.¹⁷ Marches would continue in the city for more than eighty days, organized by Detroit Will Breathe, a local Black Lives Matter group founded on June 4, 2020.¹⁸ Overtime, conflict between police and protesters settled, except for a handful of nights when tensions flared—such as when local police fatally shot twenty-year-old Hakim Littleton on July 10.¹⁹ Following the death of Littleton, the Police Chief exercised his discretion to permit activists more leeway in their marches, and Detroit Will Breathe organized a street safety team to keep intersections clear when marchers were on city streets.²⁰ But tensions resurfaced in late August, and in early September,

15. *See infra* Part III.

16. *See* Waldmeir, *supra* note 3 (writing on Friday about protests that began on Monday).

17. *See id.*

18. Detroit Will Breathe v. City of Detroit, 524 F. Supp. 3d 704, 706 (E.D. Mich. 2021) (noting it was incorporated a few weeks later); Ryan Garza, *We've Had 100 Days of Protests. And it's Just the Beginning*, DETROIT FREE PRESS (Sept. 4, 2020), <https://www.freep.com/in-depth/news/2020/09/04/detroit-protests-police-brutality-george-floyd/3450280001> [<https://perma.cc/ZUU4-HFVM>].

19. M.L. Elrick, *A Turf Fight for City Streets*, DETROIT FREE PRESS, Aug. 25, 2020, at A.9 [hereinafter Elrick, *Turf Fight*]. Police in riot gear clashed with protesters later that day. Darcie Moran, *Police Video: What We Know*, DETROIT FREE PRESS, July 12, 2020, at A.1 [hereinafter Moran, *Police Video*]. Detroit Will Breathe organized a rapid response to assembly at the street corner where the shooting took place. *Id.* Accounts differ as to how violent the subsequent protests were. *See id.* Detroit police have emphasized that participants ignored their orders and frequently threw objects, including rocks, at police officers. *See id.* Meanwhile, protesters have insisted their actions were peaceful. *See id.* The facts of the killing itself are murky, with police alleging that Littleton, a suspect in a deadly shooting at a July 4th block party, had fired a shot at an officer prior to the shooting. Moran, *Police Video, supra*. Video footage from police sources appears to corroborate their account. *See id.* However, others recounted a different scenario and conflicting photos emerged. *See id.*

20. Elrick, *Turf Fight, supra* note 19.

when the organization requested, and won, a temporary restraining order in its federal case.²¹

When tensions did flare, the story usually fit the pattern of the first night: local reporters would describe peaceful nonviolent protests during the day, and nightly clashes between police and protesters.²²

The first Floyd rally was scheduled to start around 4 PM on Friday, May 29.²³ But a crowd of about one hundred gathered in front of the city's police headquarters beforehand.²⁴ They chanted, "No justice, no peace, no racist police."²⁵ Within the hour, the crowd had grown tenfold.²⁶ Some proceeded to march through the center of Detroit, past the federal courthouse and toward the city's main square—the Campus Martius.²⁷ A few police officers joined the crowd in its first march.²⁸

By evening, a smaller more restless crowd took center stage and the tone changed.²⁹ Some protesters began to throw objects at police while others attacked police cars.³⁰ The local press reported the following day that "[t]hroughout the night and early Saturday morning, the heart of Detroit sporadically boiled over with violence."³¹ Police deployed tear gas to disperse the crowd multiple times.³² Sixty individuals were arrested.³³ Seven police cars were damaged, and at least one police officer was concussed after being hit by a flying rock.³⁴

21. See George Hunter, *Judge Bans Detroit Police From Using Tear Gas, Batons or Rubber Bullets Against 'Peaceful Protesters'*, DETROIT NEWS (Sept. 8, 2020), <https://www.detroitnews.com/story/news/local/detroit-city/2020/09/04/judge-bars-detroit-police-tactics-against-peaceful-protesters/5722973002> [<https://perma.cc/2AL5-DVFU>].

22. See, e.g., *Peaceful Protest Against Police Brutality Leads into Night of Unrest in Downtown Detroit*, DETROIT FREE PRESS (May 31, 2020), <https://www.freep.com/story/news/local/michigan/detroit/2020/05/31/police-brutality-protest-detroit-police-george-floyd-protest/5297704002> [<https://perma.cc/M9YY-K864>].

23. Moran et al., *Demanding Justice*, *supra* note 11.

24. *Id.*

25. *Id.* Signs at protests ranged, focusing on police killings but also "institutional racism and widening income inequality." Louis Aguilar, *Protests Continue in Detroit More Than a Week After George Floyd's Death*, BRIDGEMICH. (June 3, 2020) [hereinafter Aguilar, *Protests Continue*], <https://www.bridgemi.com/urban-affairs/protests-continue-detroit-more-week-after-george-floyds-death> [<https://perma.cc/RTV3-J8J8>].

26. Moran et al., *Demanding Justice*, *supra* note 11.

27. *Id.*

28. Waldmeir, *supra* note 3.

29. See Louis Aguilar, *Pain, Strength and Agitation Underlie Detroit Protests Against Police Brutality*, BRIDGEMICH. (May 30, 2020), <https://www.bridgemi.com/urban-affairs/pain-strength-and-agitation-underlie-detroit-protests-against-police-brutality> [<https://perma.cc/G4JQ-AVK4>].

30. See *id.*

31. *Id.*

32. M.L. Elrick & Meredith Spelbring, *'Don't Bring Chaos'*, DETROIT FREE PRESS, May 31, 2020, at A.7 [hereinafter Elrick & Spelbring, *Don't Bring Chaos*].

33. *Id.*

34. *Id.*

On Sunday, May 31, Detroit's Mayor, Mike Duggan declared a state of emergency.³⁵ Unlike in other cities, local protests had “stopped short of causing serious destruction or injuries.”³⁶ Nevertheless, Mayor Duggan's justified his order as necessary to prevent unrest: “[t]he City of Detroit has experienced two consecutive nights in which large and unruly crowds have threatened the safety of police officers, members of the public, and property, creating a state of emergency.”³⁷

The curfew prompted clashes, precipitated by demonstrators refusing to comply with the orders to go home.³⁸ The police response to this defiance, as elsewhere in the country, was unrelenting—tear gas, pepper spray, and rubber bullets.³⁹ The curfew was extended through much of the week that followed.⁴⁰ The injured included many protesters, but also some police.⁴¹

Broad summaries of events in Detroit (like the one above) reinforce an overly optimistic view of the strength of the First Amendment and the right of assembly in particular: The First Amendment protects

35. M.L. Elrick, *Detroit Mayor Mike Duggan Imposes Curfew, Blames Outside Agitators for Unrest*, DETROIT FREE PRESS (May 31, 2020), <https://www.freep.com/story/news/local/michigan/detroit/2020/05/31/mayor-mike-duggan-police-chief-james-craig-protests/5299422002> [<https://perma.cc/QAS9-5ZL6>] (noting Mayor's curfew starting May 31 forbid people from being out between 8:00 PM and 5:00 AM “until further notice”).

36. M.L. Elrick, *Detroit Curfew Curbs Violence*, DETROIT FREE PRESS, June 2, 2020, at A.7.

37. *Id.*

38. *See id.*

39. *Id.*; Liz Szabo, *Fractured Skulls, Lost Eyes: Police Break Their Own Rules When Shooting Protesters with ‘Rubber Bullets’*, USA TODAY NEWS (Sept. 11, 2020), <https://www.usatoday.com/in-depth/news/nation/2020/06/19/police-break-rules-shooting-protesters-rubber-bullets-less-lethal-projectiles/3211421001> [<https://perma.cc/M5H3-48CL>]. A recent report by a watchdog group criticized the Chicago Police Department and the City's mayor for their handling of massive Floyd protests in the city. Mark Guarino, *New Watchdog Report Condemns Chicago Police, Mayor for Responses to Protests, Riots*, WASH. POST (Feb. 20, 2021), <https://www.washingtonpost.com/nation/2021/02/20/chicago-police-lightfoot/> [<https://perma.cc/N4SQ-YMBG>]. Most protesters acted within the law, but Chicago did experience looting in its downtown areas at night for nearly a week. *Id.* Mayor Lori Lightfoot, like Mayor Duggan, issued a curfew and authorized the use of pepper spray to disperse protesters after the city experienced looting in its downtown the previous night. *Id.* The new report criticizes her for the breadth of that authorization, issued on May 30. *Id.* It also highlights a range of impediments to police accountability, including a pattern of covering police badges and missing body camera footage. *Id.* Meanwhile, New York's Attorney General sued the New York City Police Department for its aggressive policing tactics, including beating protesters with batons, ramming them with bicycles, and kitting strategy that many consider dangerous. Aaron Katersky, *New York AG Sues NYPD Over Handling of Black Lives Matter Protests*, ABC NEWS (Jan. 14, 2021, 3:15 PM), <https://abcnews.go.com/US/york-ag-sue-nypd-handling-black-lives-matter/story?id=75251212> [<https://perma.cc/36VK-D25G>].

40. Corey Williams, *Floyd Protesters in Detroit Stay Put as City's Curfew Begins*, AP NEWS (May 31, 2020), <https://apnews.com/article/197a3e4cb0c7c12790038f0d7005f494> [<https://perma.cc/VZ8C-Z5DN>].

41. *See id.*

peaceful assemblies, and police tactics appear largely targeted at violent disruptive protesters. But the devil is in the details, which are much less comforting.⁴²

The one indisputable fact is that those who took to the streets demanding police accountability were met with tear gas, pepper spray, and rubber bullets regularly.⁴³ Some to be sure were violent.⁴⁴ Many, however, were not.⁴⁵ For example, Chief Judge Algenon L. Marbley, of the U.S. District Court for the Southern District of Ohio concluded, on the basis of witness testimony corroborated by video and photographic evidence, that “most congregants [in Columbus] were peacefully protesting, observing, reporting, passing by, or providing medical aid when they fell victim to the use of these less-lethal munitions.”⁴⁶

Indeed, for protesters on the street, the right of peaceful assembly proved to be a mere parchment barrier—routinely shredded by police tactics, even in situations where police themselves described protesters as peaceful.⁴⁷ One recent study found that 96.3% of protests for racial justice in 2020 involved no injuries to property and 97.7% involved no injuries among participants.⁴⁸ Yet around the country, protesters were routinely dispersed and arrested.⁴⁹ Indeed, the Attorney General of the United States himself ordered the forcible removal of Americans peacefully protesting in Lafayette Square.⁵⁰

What happened in Detroit on the night of August 22, 2020, is typical. Tristan Taylor, a leader of Detroit Will Breathe, explained to reporters that the evening began when a group of 400 gathered to listen to speeches and presentations outside the McNamara federal building; the group proceeded to march through downtown; thereafter, about a quarter of them occupied Woodward Avenue to

42. For a detailed description of the policing of Floyd protests see Rep. of the H. R. C., U.N. Doc. A/HRC/47/CRP.1 67–71 (2021).

43. See, e.g., Szabo, *supra* note 39.

44. See, e.g., Williams, *supra* note 40.

45. See *id.*

46. *Alsaada v. City of Columbus*, No. 2:20-cv-3431, 2021 WL 1725554 at *39.

47. See Szabo, *supra* note 39.

48. Erica Chenoweth & Jeremy Pressman, *This Summer’s Black Lives Matter Protesters Were Overwhelmingly Peaceful, Our Research Finds*, WASH. POST (Oct. 16, 2020), <https://www.washingtonpost.com/politics/2020/10/16/this-summer-black-lives-matter-protesters-were-overwhelming-peaceful-our-research-finds> [<https://perma.cc/423U-SBJY>].

49. See Anita Snow, *AP Tally: Arrests at Widespread US Protests Hit 10,000*, AP NEWS (June 4, 2020), <https://apnews.com/article/american-protests-us-news-arrests-minnesota-burglary-bb2404f9b13c8b53b94c73f818f6a0b7> [<https://perma.cc/F4YH-UYWW>].

50. Carol D. Leonnig, *Barr Personally Ordered Removal of Protesters Near White House, Leading to Use of Force Against Largely Peaceful Crowd*, WASH. POST (June 2, 2020), https://www.washingtonpost.com/politics/barr-personally-ordered-removal-of-protesters-near-white-house-leading-to-use-of-force-against-largely-peaceful-crowd/2020/06/02/0ca2417c-a4d5-11ea-b473-04905b1af82b_story.html [<https://perma.cc/4CLU-QF3P>].

protest the presence of federal officers in the city.⁵¹ Taylor described the gathering as “peaceful—even festive,” with a D.J. playing music prior to the dispersal.⁵² The activists’ sense of calm was understandable. Detroit Police Chief James Craig had been allowing “protesters to march freely” since mid-June, even when “they . . . occasionally [took] over intersections for brief periods as they traverse the city.”⁵³

Around midnight, however, Craig ordered police in riot gear to forcibly disperse around one hundred protesters for occupying Woodward Avenue.⁵⁴ Craig explained his change of heart to reporters.⁵⁵ Detroit Will Breathe’s decision to occupy a stretch of Woodward Avenue to protest the presence of federal officers in the city had gone too far.⁵⁶ The crowd was in violation of a local ordinance and this justified his order.⁵⁷ The crowd was dispersed with tear gas by police in riot gear.⁵⁸ Witnesses reported several police officers “holding down and beating a girl with their batons”; being rammed with shields and batons; and “an unrelenting use of tear gas.”⁵⁹ Forty-four individuals were arrested for disorderly conduct, blocking traffic, and disobeying police orders.⁶⁰

Aggressive forms of policing, arbitrary enforcement of permit requirements, and mass arrests for public order offenses were common around the country.⁶¹ One week after the murder of George Floyd, on the afternoon of June 1, 2020, hundreds gathered outside Philadelphia police headquarters.⁶² Accounts differ, and there is video footage showing individuals throwing water bottles and a small crowd surrounding a police SUV.⁶³ Still, it is undisputable that when the crowd entered the Vine Street Expressway (a local highway that

51. M.L. Elrick & Meredith Spelbring, *Detroit Police Arrest 42 People as Protesters, Authorities Clash After Weeks of Calm*, DETROIT FREE PRESS (Aug. 23, 2020).

52. *Id.*

53. Elrick, *Turf Fight*, *supra* note 19.

54. *Id.*

55. *See id.*

56. *See id.*; *see also* Elrick & Spelbring, *Don’t Bring Chaos*, *supra* note 32.

57. Elrick, *Turf Fight*, *supra* note 19.

58. Moran, *Protesters Promise*, *supra* note 12.

59. *Id.*

60. Elrick, *Turf Fight*, *supra* note 19.

61. For a vivid description of what policing looked like on the ground for the average protester, see *Alsaada v. City of Columbus*, No. 2:20-cv-3431, 2021 WL 1725554, at *11 (S.D. Ohio Apr. 30, 2021).

62. Justine McDaniel, Ellie Rushing, Sean Collins Rush & Chris Palmer, *Philadelphia Protesters Gassed on I-676, Leading to ‘Pandemonium’ as They Tried to Flee*, PHILA. INQUIRER (June 1, 2020), <https://www.inquirer.com/news/george-floyd-protests-philadelphia-gas-police-vine-street-expressway-20200601.html> [<https://perma.cc/8VWD-4993>].

63. *See* Christoph Koettl, Nilo Tabrizy, Muye Xiao, Natalie Reneau & Drew Jordan, *How the Philadelphia Police Tear-Gassed a Group of Trapped Protesters*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/interactive/2020/admin/100000007209446.embedded.html> [<https://perma.cc/SZT6-MM2C>].

bisects the city), the city's own police were characterizing it as peaceful and non-threatening on their radios.⁶⁴ Nevertheless, the police ordered the crowd of 5,000 to disperse because it lacked a permit to march on the expressway.⁶⁵ The initial dispersal order was issued verbally, and some participants later claimed they didn't hear the warning.⁶⁶ Throngs of Philadelphians continued to make their way on to the highway.⁶⁷ The scene became confused, but it did not turn to mayhem until officers deployed pepper spray and tear gas, trapping many within the clouds of chemicals by blocking off exit ramps.⁶⁸ The city is still healing from these events, and many participants remain angry at the way they were treated.⁶⁹

In October 2020, police in Graham, North Carolina, dispersed a nonviolent crowd for infractions of local ordinances.⁷⁰ The incident took place on the last day of early voting, when over a hundred people marched from a local church to the county courthouse to encourage people to vote.⁷¹ The crowd was subsequently pepper sprayed and tear-gassed by Graham police.⁷² By way of justification, police claimed that the march had become "unsafe and unlawful" when members decided to silently kneel in front of a Confederate monument in honor of George Floyd.⁷³ A second round of tear gas and pepper spray was launched when the group later congregated before the courthouse to hear speeches.⁷⁴ This time police said the crowd was unlawful because the organizer, a local Reverend, had missed the deadline for requesting a street closure to accompany the permit he had obtained for the march.⁷⁵

64. McDaniel et al., *supra* note 62; Michael Tanenbaum, *Philly Officials Apologize for 'Unjustifiable' Use of Tear Gas During I-676 Protest*, PHILLY VOICE (June 25, 2020), <https://www.phillyvoice.com/philly-police-tear-gas-unjustified-i-676-protest-protesters> [<https://perma.cc/9L29-PCTB>].

65. *See Mass Protest Erupts on 3rd Day Following 400 Arrests, Looting Over Weekend*, NBC10 PHILA. (June 2, 2020), <https://www.nbcphiladelphia.com/news/local/national-guard-now-patrolling-philadelphia-in-hopes-of-quelling-violent-unrest/2415105> [<https://perma.cc/G78U-JSKK>].

66. *'Why Did This Just Happen?' Philly's Escalating Protests*, NPR: THE WHY (June 2, 2020), <https://whyy.org/episodes/why-did-this-just-happen-phillys-escalating-protests> [<https://perma.cc/4WPJ-4GKQ>].

67. McDaniel et al., *supra* note 62.

68. *See id.*

69. *Id.*

70. Christian Galvano & Kyra O'Connor, *Multiple Marchers Arrested, Pepper Strayed in Graham at March for Voting Rights and Justice*, ELON NEWS NETWORK (Oct. 21, 2020), <https://www.elonnewsnetwork.com/article/2020/10/march-in-graham-ends-with-police-pepper-spraying> [<https://perma.cc/E6KV-V4V7>].

71. *See id.*

72. *See id.*

73. *Id.*

74. *Id.*

75. *Id.*

II. DETROIT WILL BREATHE: FEDERAL LITIGATION

Police tactics such as those described above resulted in the filing of at least seventy-three federal cases in the past year.⁷⁶ Detroit was no different.⁷⁷ By late August, under political pressure, the Detroit Board of Police Commissioners revised its use-of-force policy.⁷⁸ Nevertheless, Detroit Will Breathe sued on behalf of those injured by tear gas, rubber bullets, and sound cannons.⁷⁹

The First Amendment guarantees “the right of the people *peaceably* to assemble, and to petition the government for a redress of grievances.”⁸⁰ Federal courts, however, were largely silent about the provision.⁸¹

Indeed, the Assembly Clause played no role in the Detroit litigation.⁸² On August 21, 2020 fourteen individuals who had participated in protests over the summer filed a lawsuit.⁸³ They challenged the constitutionality of the Detroit police department’s policing tactics.⁸⁴ The primary argument was that police had used excessive force in dispersing crowds in violation of the Fourth Amendment.⁸⁵ Secondarily, the suit maintained that these forced dispersals were undertaken in retaliation for the anti-police views being expressed by protesters, thus, violating the First Amendment.⁸⁶ Detroit Will Breathe requested a temporary restraining order (TRO), enjoining the department’s use of “tear gas, pepper spray, rubber bullets, sound cannons, flash grenades, chokeholds, and mass arrests without probable cause.”⁸⁷ They won. The final round of conflict between

76. *Alsaada v. City of Columbus*, No. 2:20-cv-3431, 2021 WL 1725554, at *26 (S.D. Ohio Apr. 30, 2021) (noting particular cases raising challenges under the First and Fourth Amendments).

77. *See* *Detroit Will Breathe v. City of Detroit*, 484 F. Supp. 3d 511, 514–15 (E.D. Mich. 2020), *order clarified*, No. 20-12363, 2020 WL 8575150 (E.D. Mich. Sept. 16, 2020).

78. Miriam Marini, *No Chokeholds Under Revised Police Policy*, DETROIT FREE PRESS, Sept. 2, 2020, at A.9 (adopting eight policy revisions aimed at minimizing reliance on force and emphasizing de-escalation tactics).

79. *Detroit Will Breathe*, 484 F. Supp. 3d at 515. For an overview of the various narratives see M.L. Elrick, *Detroit Protests Sue Police, Duggan*, DETROIT FREE PRESS (Sept. 2, 2020), at A.5.

80. U.S. CONST. amend. I (emphasis added).

81. *Detroit Will Breathe*, 484 F. Supp. 3d at 515 (citing the First Amendment right to free speech and Fourth Amendment right against excessive force).

82. *See id.*

83. *Detroit Will Breathe v. City of Detroit*, 524 F. Supp. 3d 704, 706 (E.D. Mich. 2021).

84. *Detroit Will Breathe*, 484 F. Supp. 3d at 515.

85. *Id.*

86. *Id.*

87. *Detroit Will Breathe*, 524 F. Supp. at 706. The court never ruled on the plaintiffs’ subsequent preliminary injunction motion because the parties quickly agreed to a settlement. *Id.* (noting parties’ agreement to a Joint Order to Preserve the Status Quo).

Black Lives Matter protesters in Detroit and police occurred on the night after the District Court issued the requested TRO.⁸⁸

The District Court's TRO is revealing of the feeble standing of the constitutional right of assembly today. The Court enjoined Detroit police from, *inter alia*, using batons, chemical agents, or rubber bullets "against any individual peacefully engaging in protest or demonstrations who does not pose a physical threat to the safety of the public or police."⁸⁹ That is, it enjoined Detroit from using force while dispersing peaceful protesters, but not from dispersing peaceful protesters *per se*. Indeed, the TRO makes no explicit reference to the text of the First Amendment. This is because Detroit Will Breathe did not claim that Detroit police had violated their First Amendment rights simply *because* they had forcibly dispersed nonviolent protesters—despite the fact that they had.⁹⁰ Instead, the basis for the First Amendment challenge, as explained above, was unconstitutional retaliation: City officials and the Detroit police acted unconstitutionally because they had dispersed crowds in retaliation for their objectionable views using excessive force.⁹¹

Around the country this was typical of how First Amendment claims were pled. In Seattle, Judge Jones went so far as to characterize the right "guaranteed by the Constitution" as a right to "the freedom of assembly *without fear of retaliation or disruption* by . . . police," who "disagree with the content of the *speech*."⁹²

The elusiveness of the right to peaceable assembly in constitutional challenges arising out of the 2020 Floyd protests is striking. In Ohio, Judge Marbley was clearly taken aback by the tactics engaged in by Columbus police, after hearing testimony that a police officer stomped on one plaintiff's kneecap and then shouted at her, "That's what you get for being down here, you black protesting bitch."⁹³ The woman was unequivocally not a violent agitator.⁹⁴ She had come to the scene not to protest, but to locate her twenty-one-year-old

88. Darcie Moran, *Protesters Still Seeking End to Police Brutality*, DETROIT FREE PRESS (Sept. 6, 2020), at A.5 (noting gathering began with dancing and singing in the streets, with balloons released overhead, to mark both the 100th day of protests and a victory in federal court the previous day).

89. *Detroit Will Breathe v. City of Detroit*, 484 F. Supp. 3d 511, 520 (E.D. Mich. 2020) (emphasis added).

90. *See Detroit Will Breathe*, 524 F. Supp. 3d at 706.

91. *See id.*

92. *Black Lives Matter Seattle-King Cnty.*, 466 F. Supp. 3d at 1211 (emphasis added) (noting plaintiffs sued on grounds that they had been "deprived . . . of their right to protest and to be free from excessive force" under the First and Fourth Amendments, respectively).

93. *Alsaada v. City of Columbus*, 2:20-cv-34-3431, 2021 WL 1725554, at *13–14 (S.D. Ohio Apr. 30, 2021).

94. *Id.* at *13.

daughter.⁹⁵ She was, then, sprayed in the face with a chemical agent while she was asking an officer for help, and then twice more, before the officer smashed her knee.⁹⁶ And this was not an isolated incident.⁹⁷

Judge Marbley's order offered a broadly protective definition of "nonviolent protesters," covering "individuals who are chanting, verbally confronting police, sitting, holding their hands up when approaching police, *occupying streets or sidewalks, and/or passively resisting police orders.*"⁹⁸ The definition appears to imply that violent protesters are those who threaten physical harm or property destruction—or pose an actual and imminent threat of doing so.⁹⁹

Still, his order only limited the ability of the department to disperse nonviolent protesters *using non-lethal force*.¹⁰⁰ It did not, for example, ban police from dispersing nonviolent protesters *per se*.¹⁰¹ The record regarding the behavior of crowds in Columbus, as elsewhere, is mixed.¹⁰² While there certainly were incidents of violence and looting,¹⁰³ there is solid evidence that Columbus police dispersed crowds that were overwhelmingly peaceful.¹⁰⁴ Judge Marbley, for example, credited the testimony of an incident commander, who testified that "99% of these people are peaceful . . . whether they're yelling stuff at you or not, that's still peaceful there if they're not threatening you."¹⁰⁵ Under these conditions, his support for the department's decision to clear the streets was tepid—noting "[a]t most, this evidence shows that Plaintiffs, and many protestors alike, were engaging in minor property crime and offered only passive resistance" to police.¹⁰⁶

Given existing First Amendment law, however, Judge Marbley was not willing to go so far as to question the constitutionality of a dispersal order based on traffic concerns and minor property damage, relying instead for his injunction on the safer conclusion that under

95. *Id.*

96. *Id.* at *13–14.

97. *See id.* at *17–18.

98. *Id.* at *47 (emphasis added).

99. *See Alsaada*, 2021 WL 172554, at *47.

100. *Id.* at *46.

101. *See id.* at *47.

102. *See id.* at *15.

103. *See, e.g., id.* The Court described the chaos and vandalism on May 29, including evidence that some protesters arrived with backpacks of frozen water bottles and chunks of rocks to hurl at police and that looting did occur. *Id.* But it took care to note that "[i]n terms of which came first—protestors throwing items toward police or police spraying protestors with irritants and munitions—the record is mixed." *Id.*

104. *See Alsaada*, 2021 WL 172554, at *16.

105. *Id.* at *39 (alteration in original) (quotations omitted).

106. *Id.* ("That the CPD felt the need to clear the streets might be legitimate.") (quoting *Black Lives Matter Seattle–King Cnty. v. City of Seattle*, 466 F. Supp. 1206, 1215 (W.D. Wash. 2020)).

the Fourth Amendment “these traffic concerns cannot legitimize the application of force when it is not otherwise justified.”¹⁰⁷ When it came to the First Amendment, like other judges, he framed the First Amendment violation in terms of viewpoint discrimination, remarking that “[w]hat separates our nation from some others is the ability to criticize our leaders and those bearing the imprimatur of state authority without fear of retribution.”¹⁰⁸ The constitutional problem was the way police treated protesters with whom they disagreed: “It is understandable why an officer might take personally profane and provocative chants,” especially when crowds are “yelling stuff like fuck you . . . and fuck the police.”¹⁰⁹ But, he continued, “what is not comprehensible is why [they] would let that dictate . . . treatment of individuals exercising their First Amendment right, no matter how unkind their chants and signs might be.”¹¹⁰

Judge Dabney L. Friedrich of the U.S. District Court for the District of Columbia, a Trump appointee, in some ways went the furthest in allowing the claims of protesters dispersed on Lafayette Square to go forward (at least against local officials).¹¹¹ She held that *if* the Lafayette plaintiffs could prove that they “were engaged in a peaceful protest” at the time of their dispersal with tear gas, pepper spray, rubber bullets, and flash bangs by officers from Arlington and the District of Columbia, they would have “alleged an unconstitutional restriction on protected speech.”¹¹² This is because, she explained, the police would have constructively closed Lafayette Square, a quintessential public forum, to all expressive activities “by violently clearing all of the peaceful protestors.”¹¹³ Most importantly, Judge Friedrich found that “any reasonable officer would have been aware that it is a violation of foundational First Amendment rights to forcibly end a peaceful protest in a traditional public forum without any legitimate justification for doing so.”¹¹⁴ While her ruling is significant, it should not be overplayed. The question of whether the

107. *Id.* at *39.

108. *Id.* at *26 (concluding ultimately that “there is a live issue of whether Defendants have a policy, practice, or custom of using excessive force and retaliatory infliction of pain on peaceful protestors”).

109. *Id.* at *25 (quotations omitted).

110. *Alsaada*, 2021 WL 1725554, at *25.

111. See Spencer S. Hsu, *Federal Judge Tosses Most Claims Against Trump, Barr and U.S. Officials in Clearing of Lafayette Square*, WASH. POST (June 21, 2021), https://www.washingtonpost.com/local/legal-issues/lafayette-square-lawsuit-claims-dismissed/2021/06/21/8c0e8416-d2ce-11eb-ae54-515e2f63d37d_story.html [<https://perma.cc/8LE8-QYZ3>].

112. *Black Lives Matter D.C. v. Trump*, No. 20-cv-1469, No. 20-cv-1542, No. 20-cv-2163, No. 20-cv-1622, 2021 WL 2530772, at *33–34.

113. *Id.* at *17. This is right. The government is precluded from prohibiting speech in parks or public streets (so-called quintessential public fora) unless it can show that the prohibition is narrowly tailored to a compelling state interest. *Id.*

114. *Id.* at *35 (ruling that the officers lacked qualified immunity).

government indeed lacked a legitimate reason is yet to be resolved.¹¹⁵ Defendants in the case argued “the clearing of [Lafayette] Square was justified by a significant government interest—the national interest in presidential security.”¹¹⁶

In all, despite the flurry of litigation, federal courts reviewing cases arising out the Floyd protests failed to clearly delineate the line between constitutionally protected and unlawful assembly.¹¹⁷ Instead, in opinion after opinion, federal judges balked at the task of drawing a line that law enforcement cannot cross when policing disruptive protests. In Detroit, Judge Laurie J. Michelson fretted over “the difficulty in drawing an enforceable line that permits police officers to use appropriate means in response to violence and destruction of property but that also does not chill free speech or abuse those who wish to exercise it.”¹¹⁸ Indeed, she began her opinion with “a short detour . . . to stand with many of its sister courts” to recognize that, on the one hand, “demonstrators have a right to protest the actions of the police and other members of the government without fear of government retaliation;” and on the other, “police officers, especially in their duty to protect person and property, have difficult and often dangerous jobs that require them to make split-second decisions.”¹¹⁹ Judge Jones, in Seattle, also emphasized the tight balance he was being asked to enforce:

First, as other courts have recently expressed, people have a right to demonstrate and protest government officials, police officers being no exception. Their right to do so, without fear of government retaliation, is guaranteed by the First and Fourth Amendments. Second, to protect person and property, police officers must make split-second decisions, often while in harm’s way. Third, the Court hopes that the parties see the kinship in their arguments—not all protestors seek destruction; not all officers seek violence.¹²⁰

115. *See id.* at *39.

116. *Id.* at *35. Judge Friedrich also allowed plaintiffs’ First Amendment retaliation claim to proceed. *See id.* at *38.

117. Garrett Epps, *The Whole Concept of Unlawful Assembly Is a Mess*, ATLANTIC (Aug. 9, 2020), <https://www.theatlantic.com/ideas/archive/2020/08/the-whole-concept-of-unlawful-assembly-is-a-mess/615079> [<https://perma.cc/76FB-MVGE>]; *see* Kia Rahnama, *How the Supreme Court Dropped the Ball on the Right to Protest*, POLITICO (Aug. 17, 2020), <https://www.politico.com/news/magazine/2020/08/17/portland-crackdown-freedom-of-assembly-supreme-court-397191> [<https://perma.cc/RF2V-LZU5>].

118. *Detroit Will Breathe v. City of Detroit*, 484 F. Supp. 3d 511, 516 (E.D. Mich. 2020), *order clarified*, No. 20-12363, 2020 WL 8575150 (E.D. Mich. Sept. 16, 2020).

119. *Id.* (adding “just as not all protestors seek destruction, not all officers seek violence”).

120. *Black Lives Matter Seattle–King Cnty. v. City of Seattle*, 466 F. Supp. 3d 1206, 1212 (W.D. Wash. 2020).

III. POLITICS OF BACKLASH

The City's response to the TRO was to countersue.¹²¹ The countersuit was quite bold, initially accusing Detroit Will Breathe of defamation.¹²² This charge, which got a fair amount of media coverage, was plainly frivolous. But the point of the countersuit was not to win—certainly, not on the defamation claim given that both Mayor Duggan and Police Chief Craig are public figures, and the First Amendment sets an extremely high bar for defamation suits brought by public figures.¹²³ Rather, the point was to recast political activists seeking racial justice and an end to police brutality in one of the country's poorest primarily black cities as criminals.¹²⁴

The retaliatory countersuit, brought by the City, Mayor Duggan, Police Chief Craig, and several officers, alleged that Detroit Will Breathe had engaged in a civil conspiracy to harm the Detroit Police Department and its officers while also defaming the Department and its officials.¹²⁵ Defendants accused Detroit Will Breathe of being an organization “distinguished by its militant culture and promotion of lawlessness” and alleged that they had engage in a conspiracy to undertake “unlawful action, including violence” against Detroit police.¹²⁶

More brashly, Detroit argued that “reliance on the First Amendment” was misplaced because plaintiffs had engaged in “concerted unlawful activity.”¹²⁷ Violence does nullify the protections of the First Amendment.¹²⁸ And the City's allegations were broadly that Detroit

121. Defendant/Counter-Plaintiffs' Response in Opposition to Plaintiffs/Counter-Defendants' Motion to Dismiss Counterclaim, *Detroit Will Breathe v. City of Detroit*, No. 2:20-cv-12363, 2020 WL 9889708, at *1 (filed Dec. 4, 2020) [hereinafter *Detroit Countersuit*].

122. *Id.* at *11.

123. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Unsurprisingly, the claim was quickly dropped. *Detroit Countersuit*, *supra* note 121, at *11.

124. *Detroit City, Michigan*, U.S. CENSUS BUREAU (July 1, 2019), <https://www.census.gov/quickfacts/detroitcitymichigan> [<https://perma.cc/YH33-TJGH>].

125. *Detroit Countersuit*, *supra* note 121, at *11.

126. *Id.* at *1–*2.

127. *Id.* at *10–*11 (emphasis removed). Typical of First Amendment arguments today, the complaint made no mention of the Assembly Clause. *Id.* Instead, it emphasized that it was immaterial that the conspiracy “is evidenced by certain speech.” *Id.* at *10. The First Amendment “does not permit Plaintiffs to use the First Amendment shield to hide their unlawful agreement.” *Id.* The ACLU filed an amicus brief exhaustively laying out the First Amendment challenges to the city's counter suit. Brief for American Civil Liberties Union, as Amici Curiae Supporting Respondents at 3 *Detroit Will Breathe v. City of Detroit* No. 2:20-cv-12363, *(E.D. Mich. Nov. 6, 2020) (arguing among other things that there was not even evidence of incitement to unlawful activity). It too, however, focused exclusively on Detroit Will Breathe's protected speech. *Id.*

128. *See Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (“When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.”).

Will Breathe had conspired to “disturbing the peace, engaging in disorderly conduct, inciting riots, destroying public property, resisting or obstructing officers in charge of duty, and committing acts of violence against Detroit police officers.”¹²⁹ The evidence proffered for the unlawful activity, however, primarily rests on events on August 22, when the group occupied the intersection around Woodward Avenue “thereby obstructing traffic,” (at midnight, remember).¹³⁰ The complaint charged the occupation was unlawful because the group lacked the requisite permit to congregate at the intersection and that they unlawfully refused to disperse when ordered.¹³¹

The District Court dismissed the countersuit in March.¹³² Once again, the decision did not rely on the First Amendment.¹³³ Its only mention is on the final page, stating vaguely, “if protesters fail to heed lawful orders to disperse, law enforcement has recourse. A speculative lawsuit that this may have been the result of a civil conspiracy to commit unlawful acts, with the attendant risks to First Amendment freedoms, is not one of them.”¹³⁴ The court, however, got it—implicitly recognizing the suit for what it was—a publicity stunt aimed to chill constitutionally protected activity.¹³⁵

The countersuit, though unusual—indeed spectacular—is indicative of the way that limited First Amendment protections for protesters create opportunities for political backlash.¹³⁶ Emboldened by the weak protections afforded by existing law to disruptive protests, legislatures are furiously rushing to criminalize a wide swath of nonviolent protest tactics.¹³⁷

Republican legislatures around the country have introduced and, in some cases, passed anti-protest statutes aimed at disruptive, but nonviolent, protesters.¹³⁸ Tennessee, for example, recently made

129. *Breathe v. City of Detroit*, 524 F. Supp. 3d 704, 709 (E.D. Mich. 2021).

130. *Detroit Countersuit*, *supra* note 121, at *4.

131. *Detroit Will Breathe*, 524 F. Supp. 3d at 706–08.

132. Tresa Baldas, *Detroit Will Breathe Scores Win in Legal Fight with the City*, DETROIT FREE PRESS (Mar. 10, 2021), <https://www.freep.com/story/news/local/michigan/detroit/2021/03/10/countersuit-dismissed-against-detroit-will-breathe/6943347002> [<https://perma.cc/YDB2-5X4B>].

133. *Detroit Will Breathe*, 524 F. Supp. 3d at 709–13.

134. *Id.* at 712.

135. *See* Baldas, *supra* note 132. These types of suits are becoming a trend. *See, e.g., Doe v. Mckesson*, 945 F.3d 818, 840 (5th Cir. 2019) (Willet, J., dissenting in relevant part), *vacated*, 141 U.S. 48 (2020).

136. *See* Baldas, *supra* note 132.

137. *See, e.g., Alleen Brown & Akela Lacy, State Legislatures Make “Unprecedented” Push on Anti-Protest Bills*, THE INTERCEPT (Jan. 21, 2021), <https://theintercept.com/2021/01/21/anti-protest-riot-state-laws> [<https://perma.cc/HD76-GDZL>].

138. Sophie Quinton, *Republicans Respond to Black Lives Matter with Anti-Protest Bills*, STATELINE (Feb. 4, 2021), <https://www.pewtrusts.org/en/research-and-analysis>

it a felony to camp on the grounds of the state Capitol—a tactic used for several months by Black Lives Matter protesters in the state.¹³⁹ The Maryland legislature recently defeated a bill that sought to establish a new misdemeanor offense for knowingly and unlawfully obstructing or blocking the use of a highway, punishable by three years confinement and a \$2,500 fine.¹⁴⁰ The term highway was defined in such a way as to include bicycle and walking paths.¹⁴¹ While obstruction bills have been defeated in several states, Arkansas passed one in April 2021.¹⁴² And Florida has established two new felonies, “aggravated rioting” and “aggravated inciting or encouraging a riot.”¹⁴³ The Florida law also increases penalties for assault and theft during a riot as well as for vandalizing historic monuments and forbids bail pending a first court appearance for individuals arrested for riot-related offenses.¹⁴⁴

According to the U.S. Protest Law Tracker hosted by the International Center for Not-for-Profit Law, thirty-six bills have been enacted and fifty-two are pending.¹⁴⁵ The recent round of anti-protest legislation follows a similar legislative backlash after the Black Lives Matter protests in response to the shooting of Michael Brown in Ferguson, Missouri, in 2014.¹⁴⁶

IV. DISMISSALS AND THE CHILLING OF POLITICAL PARTICIPATION

What, then, happened to those in Detroit who were arrested during the summer’s protests? Their cases were largely dismissed.¹⁴⁷

[/blogs/stateline/2021/02/04/republicans-respond-to-black-lives-matter-with-anti-protest-bills](https://blogs.stateline.com/2021/02/04/republicans-respond-to-black-lives-matter-with-anti-protest-bills) [<https://perma.cc/NC2P-E2CC>].

139. *U.S. Protest Law Tracker*, INT’L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/usprotestlawtracker/?location=47&status=&issue=&date=&type=> [<https://perma.cc/HQC7-WS3U>] (last visited Nov. 4, 2021). It also increased its penalties for a variety of existing riot and unlawful assembly offenses. *Id.*

140. H.B. 645, 2021 442nd Sess. (Md. 2021).

141. *Compare* H.B. 645, 2021 442nd Sess. (Md. 2021), *with* M.D. CODE ANN. TRANSP. § 8-101 (West 2018).

142. *See* H.B. 1508, 2021 93rd Gen. Assemb. (Ark. 2021).

143. *U.S. Protest Law Tracker: Florida*, INT’L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/usprotestlawtracker/?location=12&status=&issue=&date=&type=> [<https://perma.cc/HQC7-WS3U>] (last visited Nov. 4, 2021); Iowa passed a similar law on June 16, 2021. *Id.*

144. *Id.*

145. *U.S. Protest Law Tracker*, INT’L CTR. FOR NOT-FOR-PROFIT L., <https://www.icnl.org/usprotestlawtracker> [<https://perma.cc/HQC7-WS3U>] (last visited Nov. 4, 2021).

146. *See, e.g., id.*

147. *See, e.g.,* Steve Neavling, *Detroit Drops Charges Against 238 Anti-Police Brutality Protesters*, DETROIT METRO TIMES (Jan. 26, 2021), <https://www.metrotimes.com/news-hits/archives/2021/01/26/detroit-drops-charges-against-238-anti-police-brutality-protesters> [<https://perma.cc/ML7W-XQ5X>].

In city after city, charges from Black Lives Matter protests have been dropped as prosecutors concluded the demonstrators had been exercising their basic First Amendment rights.¹⁴⁸ Dallas announced on June 4, 2020 that it would not formally charge 674 of the approximately 800 individuals who had been arrested in the first two weeks of unrest.¹⁴⁹ In October, the Manhattan District Attorney announced that charges against demonstrators arrested for unlawful assembly and disorderly conduct would be dropped.¹⁵⁰ A month later, District Attorney Mike Schmidt in Oregon admitted that “[s]eventy to 80 percent [of the charges] would not survive constitutional challenges.”¹⁵¹ Meanwhile, in Philadelphia, District Attorney Larry Krasner went further, deciding to grant even those who had engaged in looting a way to avoid conviction—and the long-term costs of a criminal record.¹⁵² Nearly 500 individuals arrested for looting would have the option of being diverted to a restorative justice process.¹⁵³

The dismissals came slower in Detroit.¹⁵⁴ The process started in January 2021, when a local judge dismissed all criminal cases on his docket arising out of the Floyd protests.¹⁵⁵ The charges were dismissed without prejudice.¹⁵⁶ But the City ran into evidentiary problems,¹⁵⁷ and shortly thereafter, the law department announced that it would voluntarily dismiss 238 misdemeanor charges arising out events on May 31, June 1, and June 2, 2020.¹⁵⁸ A few months later, a second Detroit judge dismissed all of the misdemeanor charges on her

148. See Tom Perkins, *Most Charges Against George Floyd Protesters Dropped, Analysis Shows*, THE GUARDIAN (Apr. 17, 2021), <https://www.theguardian.com/us-news/2021/apr/17/george-floyd-protesters-charges-citations-analysis> [<https://perma.cc/6DTS-WD7H>].

149. Meryl Kornfield, Austin R. Ramsey, Jacob Wallace, Christopher Casey & Veronica Del Valle, *Swept up by Police*, WASH. POST (Oct. 23, 2020), <https://www.washingtonpost.com/graphics/2020/investigations/george-floyd-protesters-arrests> [<https://perma.cc/5964-6SQK>]. Most of the remaining charges were dismissed shortly thereafter. *Id.*

150. *Id.*

151. Neil MacFarquhar, *Why Charges Against Protesters Are Being Dismissed by the Thousands*, N.Y. TIMES (Feb. 11, 2021), <https://www.nytimes.com/2020/11/19/us/protests-lawsuits-arrests.html> [<https://perma.cc/C3P9-D9BL>] (announcing he would be dismissing 721 charges against Floyd protesters while pursuing 144 cases and reviewing 165).

152. Samantha Melamed, *Hundreds Arrested in Uprisings Given a Bit of a Break*, PHILA. INQUIRER (Mar. 26, 2021), <https://www.inquirer.com/news/philadelphia-unrest-restorative-justice-george-floyd-larry-krasner-20210326.html> [<https://perma.cc/2EG6-TC36>].

153. *Id.* (stating that those charged with premeditated burglaries—such as blowing up ATMs or renting a U-Haul truck to carry off loot—would not be offered this alternative and would be prosecuted as usual).

154. See Neavling, *supra* note 147.

155. *Id.*

156. *Id.*

157. See *id.*

158. *Id.* (noting 245 arrests were made during the early days of protest and the city was keeping seven cases alive).

docket—these were mostly for disorderly conduct and loitering.¹⁵⁹ This pattern of arrest and dismissal is typical, at least, since Occupy.¹⁶⁰

Estimates are that, nationally, upward of 90% of charges arising out of the Floyd protests have been dropped or dismissed.¹⁶¹ As of March 2021, Detroit maintains its suit against Detroit Will Breathe leader, Tristan Taylor, for various misdemeanors.¹⁶²

From a First Amendment perspective dropping charges against individuals *ex post* does nothing to remedy the nullification of the constitutional right at the time.¹⁶³ Taking individuals who are not causing mayhem off the streets at the moment they wish to register their protest undermines their constitutional right to peaceably assemble. It also creates fear and reticence to participate again. This effect is particularly problematic given evidence that order-maintenance charges, like disorderly conduct, are levied against Black protesters at higher rates than their white counterparts.¹⁶⁴

V. REFLECTIONS ON THE RIGHT OF ASSEMBLY

What light, then, do these stories arising out of protests for racial justice in Detroit shed on the state of the right to peacefully assemble in the United States?

Foremost, they illustrate that a reinvigorated and disruptive form of protest is a central tactic in twenty-first century American politics for movements seeking to vindicate the interests of everyday Americans. The size of the initial week of Floyd protests was remarkable.¹⁶⁵ The iconic civil rights marches in the 1960s involved hundreds of thousands—not millions—of protesters.¹⁶⁶

159. Miriam Marini, *Charges Dismissed Against Summer Protesters, Detroit Will Breathe Leader's Hearing Remains*, DETROIT FREE PRESS (Mar. 3, 2021), <https://www.freep.com/story/news/local/michigan/detroit/2021/03/03/detroit-will-breathe-hearing-charges-dismissed/6905542002> [<https://perma.cc/M2VR-FG69>].

160. See Tabatha Abu El-Haj, *Defining Nonviolence as a Matter of Law and Politics*, in *PROTEST AND DISSENT: NOMOS LXII* (Melissa Schwartzberg, ed. 2020) [hereinafter Abu El-Haj, *Defining Non-Violence*].

161. Perkins, *supra* note 148.

162. *Id.*

163. District Attorney Krasner's decision to divert those who had crossed the constitutional line to restorative processes is entirely different—a quintessential exercise of prosecutorial discretion.

164. See, e.g., MacFarquhar, *supra* note 151; Sam Levin & Maanvi Singh, *America's Protest Crackdown: Five Months after George Floyd, Hundreds Face Trials and Prison*, THE GUARDIAN (Oct. 27, 2020), <https://www.theguardian.com/us-news/2020/oct/27/america-protest-crackdown-five-months-after-george-floyd-hundreds-face-trials-and-prison> [<https://perma.cc/DY3H-KWFM>].

165. See Buchanan et al., *supra* note 6.

166. *Id.*

In a world where money is the usual key to political access, persistent protests force elected officials to engage with constituents, sometimes literally drawing leaders to the streets.¹⁶⁷ This was true in Portland, Oregon, where Mayor Ted Wheeler joined protesters critical of both his handling of the situation and the federal presence in the city, only to be shouted at by the crowd and, then, tear-gassed by police.¹⁶⁸ But it was also true in Pensacola, Florida, which also experienced a wave of demonstrations in the aftermath of George Floyd's murder.¹⁶⁹ A week into the protests, a crowd occupied the Pensacola Bay Bridge, linking arms and demanding a meeting with the city's Mayor.¹⁷⁰ Mayor Grover Robinson showed up, ultimately negotiating with the group and agreeing to appoint one of its leaders to a newly created citizens' police advisory board.¹⁷¹

As Black Lives Matter activist, DeRay Mckesson told a *N.Y. Times* reporter in 2015, about a year after Ferguson:

[T]he heart of the movement is in the actions. It's in shutting down streets, shutting down Walmarts, shutting down any place where people feel comfortable. We want to make people feel as uncomfortable as we feel when we hear about Mike, about Eric Garner, about Tamir Rice. We want them to experience what we go through on a daily basis.¹⁷²

The ability to bring a city to a standstill is the ability to make elected officials take notice.¹⁷³ As Jeremy Waldron recently observed, "something about a demonstration—*any* demonstration—seems to convey

167. See Anna Griffin, Dirk VanderHart & Rebecca Ellis, *Portland Mayor Ted Wheeler Faces Boos, Calls to Resign and Tear Gas*, OPB (July 23, 2020), <https://www.opb.org/news/article/portland-mayor-ted-wheeler-faces-protesters-and-tear-gas-head-on> [https://perma.cc/93TT-6NZB].

168. *Id.*; see also *Portland Mayor Ted Wheeler Joins Protesters Downtown, Holds Listening Session*, FOX 12 OREGON (July 22, 2020), https://www.kptv.com/news/portland-mayor-ted-wheeler-joins-protesters-downtown-holds-listening-session/article_0990b4fc-cca1-11ea-ada0-fb3cc2e01fe8.html [https://perma.cc/WLJ7-L9GF]. In Houston, Texas, where Floyd was born, Police Chief Acevedo marched with protesters against police brutality. Rebecca Hennes, *Viral Video Shows Acevedo Making Passionate Plea To George Floyd Protesters*, HOUSTON CHRON. (June 1, 2020), <https://www.houstonchronicle.com/news/houston-texas/article/Acevedo-Houston-George-Floyd-protest-viral-video-15308172.php> [https://perma.cc/A25C-JA9R].

169. Amelia Pollard, *Florida Is Latest Hot Spot for Anti-Protest Legislation*, AM. PROSPECT (Apr. 14, 2012), <https://prospect.org/civil-rights/florida-is-latest-hot-spot-for-anti-protest-legislation> [https://perma.cc/C67M-R4SE].

170. *Id.*

171. *Id.*

172. Jay Caspian Kang, *'Our Demand Is Simple: Stop Killing Us'*, N.Y. TIMES (May 4, 2015), <https://www.nytimes.com/2015/05/10/magazine/our-demand-is-simple-stop-killing-us.html> [https://perma.cc/W6FV-QD38].

173. Pollard, *supra* note 169.

at least to its targets and opponents that things *might* get out of hand if its demands are not listened to. Patience is evaporating, it seems to say.”¹⁷⁴

The summer of 2020, even more than the protests in the wake of Michael Brown’s killing, demonstrate how taking to the streets remains a critical source of political power for everyday Americans. Social media cannot replace the public square. When people gather with their fellow citizens to voice concerns about important public policies, politicians pay attention.¹⁷⁵ This most recent wave of Black Lives Matter marches, like those before it, has succeeded in placing police reforms onto state and local legislative agendas.¹⁷⁶ More than thirty states have passed more than 140 new police oversight and reform laws since May 2020.¹⁷⁷ A fundamental rethinking of policing is now squarely on the legislative agenda, and politicians around the country are actually debating the pros and cons of defunding the police.¹⁷⁸

While disruption is central to the efficacy of public assemblies as political acts, it is often met with disapproval and extreme responses from authorities, giving rise to escalating cycles of violence and backlash.¹⁷⁹ This is another lesson from 2020. Indeed, although there was widespread support early on for the Black Lives Matter protesters, across racial and ethnic groups, it has dropped off over the course of the year.¹⁸⁰ Even at its peak, Americans, by wide margins,

174. Jeremy Waldron, *What Demonstrations Mean* 11 (NYU Sch. L., Pub. L. Rsch. Paper No. 20-41).

175. See Austa Somvichian-Clausen, *What the 2020 Black Lives Matter Protests Have Achieved So Far*, THE HILL (May 21, 2021), <https://thehill.com/changing-america/respect/equality/502121-what-the-2020-black-lives-matter-protests-have-achieved-so> [<https://perma.cc/3RV4-36GZ>].

176. See, e.g., Molly Harbarger, *State, County Officials Commit to Proposals Aimed at Justice for Black Oregonians, Some with Timelines, Funding Attached*, THE OREGONIAN (July 28, 2020), <https://www.oregonlive.com/politics/2020/07/state-county-officials-commit-to-proposals-aimed-at-justice-for-black-oregonians-some-with-timelines-funding-attached.html> [<https://perma.cc/7FAA-KVT3>].

177. See Steve Eder, Michael H. Keller & Blacki Migliozi, *As New Police Reform Laws Sweep Across the U.S., Some Ask: Are They Enough?*, N.Y. TIMES (June 23, 2021), <https://www.nytimes.com/2021/04/18/us/police-reform-bills.html> [<https://perma.cc/3HQ8-PMSJ>].

178. *Id.*

179. See Kornfield et al., *supra* note 149.

180. Compare Kim Parker, Juliana Horowitz & Monica Anderson, *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RSCH. CTR. 4, 13 (June 12, 2020), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2020/06/PSDT_06.12.20_protest_fullreport.pdf [<https://perma.cc/BB4A-FYSB>] (reporting 67% of U.S. adults support the movement, but also that support among Republicans is significantly lower at 40%), with Jennifer Chudy & Hakeem Jefferson, Opinion, *Support for Black Lives Matter Surged Last Year. Did It Last?*, N.Y. TIMES (May 22, 2021), <https://www.nytimes.com/2021/05/22/opinion/blm-movement-protests-support.html> [<https://perma.cc/H7KE-ZPJG>] (finding that “Republicans and white people have actually become *less* supportive of Black Lives Matter than they were before the death of George Floyd.”).

were of the view that protests are less preferable than a range of other political tactics for achieving equality.¹⁸¹

Views of the protests, and of the protesters and their rights, as with everything in American politics today, differ starkly across the political divide. A recent PEW poll found that only 60% of Americans agree that “people are free to peacefully protest” in the United States;¹⁸² and further that only just over half of Republicans agreed that “it is *very* important for the country that people are free to peacefully protest.”¹⁸³

The most important lesson, then, to be taken from 2020, is that we need to teach the public why public assembly was included in the First Amendment and why it still matters today.¹⁸⁴

Racialized policing and racial economic and health inequalities are not new crises.¹⁸⁵ Indeed, “[i]t is the protests that are making the longstanding crisis finally visible to mainstream policymakers and the public.”¹⁸⁶ Equally importantly, the Floyd protests, like others in recent years, engaged and energized individuals from various walks of life, bridged racial divides, and brought many who had never demonstrated before out into the streets.¹⁸⁷

Protests complement elections, which “are limited both as civic experiences and as vehicles for political change.”¹⁸⁸ Nowhere are the limitations of elections better understood than in the communities that have been at the center of the Black Lives Matter protests.¹⁸⁹ “Communities in which [B]lack men have a thirty percent lifetime

181. Parker et al., *supra* note 180, at 11 (reporting that 82% believe that “working directly with [B]lack people to solve problems in their local communities” is more effective; 74% that “bringing people of different racial backgrounds together to talk about race” is more effective; and 68% that “working to get more [B]lack people elected to office” is more effective).

182. Carroll Doherty, Jocelyn Kiley, Nida Asheer & Calvin Jordan, *In Views of U.S. Democracy, Widening Partisan Divides Over Freedom to Peacefully Protest*, PEW RSCH. CTR. 4–5 (Sept. 2, 2020), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2020/09/PP_2020.09.02_Democracy_FINAL.pdf [<https://perma.cc/SZ8J-TF4C>] (reporting this to be a drop from 73% the last time the question was asked).

183. *Id.* (reporting that among Democrats that percentage was 82%; overall 68% of Americans agreed with the statement).

184. See Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly*, 80 MO. L. REV. 961, 984–85 (2015) [hereinafter Abu El-Haj, *Defining Peaceably*].

185. *Id.* at 983.

186. *Id.*

187. See LaGina Gause & Maneesh Arora, *Not All of Last Year’s Black Lives Matter Protesters Supported Black Lives Matter*, WASH. POST (July 2, 2021, 6:00 AM), <https://www.washingtonpost.com/politics/2021/07/01/not-all-last-years-black-lives-matter-protesters-supported-black-lives-matter/> [<https://perma.cc/BF3Y-8B5X>].

188. Abu El-Haj, *Defining Peaceably*, *supra* note 184, at 981.

189. *Id.*

risk of imprisonment and where rates of felon disenfranchisement run high are well aware of the many limits of voting. Outdoor assemblies can compensate for these limits.”¹⁹⁰

Assembling outdoors with others for political ends provides a face-to-face experience of citizenship—one that tends to breed further political participation.¹⁹¹ This was clear in the civil rights movement that brought us the Civil Rights Act of 1964 and the Voting Rights Act of 1965, but it is also evident in more recent protests against economic inequality and systemic racism, including policing. The social aspects build camaraderie and can “generate in individuals a sense of political agency.”¹⁹² For some, this makes them more likely to vote.¹⁹³ For others, it encourages them to join, or even found, organizations.¹⁹⁴

Protests are also an essential part of building the organizational capacity necessary to make elections valuable.¹⁹⁵ It is not an accident that protest has been central to key social movements—from abolition and suffrage to the anti-war movement and Black Lives Matter.

That said, large angry protests come with risks.¹⁹⁶ While the overwhelming majority of participants in the Floyd protests exercised their constitutional rights in legitimate ways, some cities did experience rioting, particularly in the first few days at night.¹⁹⁷

For some Americans, the rioting confirms their fear of public protests and rationalizes support for a narrow construction of the right of peaceable assembly.¹⁹⁸ This explains the legislative backlash, discussed above. But it should be resisted and placed in context. In the wake of the highest turnout election in a century, these

190. *Id.*

191. *See id.*

192. *Id.* at 982.

193. *See id.* at 981.

194. *See* Abu El-Haj, *Defining Peaceably*, *supra* note 184, at 981–82.

195. For a general overview of the importance of face-to-face organizing and institution building to the Black Lives Matter movement, see Arwa Mahdawi, *Black Lives Matter's Alicia Garza: 'Leadership Today Doesn't Look Like Martin Luther King'*, THE GUARDIAN (Oct. 17, 2020), <https://www.theguardian.com/world/2020/oct/17/black-lives-matter-alicia-garza-leadership-today-doesnt-look-like-martin-luther-king> [https://perma.cc/26WU-QCXN].

196. *See, e.g.*, Brakkton Booker, Bill Chappell, David Schaper, Danielle Kurtzleben & Joseph Shapiro, *Violence Erupts As Outrage Over George Floyd's Death Spills Into A New Week*, NPR (June 1, 2020, 1:30 AM), <https://www.npr.org/2020/06/01/866472832/violence-escalates-as-protests-over-george-floyd-death-continue> [https://perma.cc/4DAL-2YCL].

197. *Id.*

198. *See, e.g.*, Joel Rose, *Americans Increasingly Polarized When It Comes to Racial Justice Protests, Poll Finds*, NPR (Sept. 3, 2020), <https://www.npr.org/2020/09/03/908878610/americans-increasingly-polarized-when-it-comes-to-racial-justice-protests-poll-f> [https://perma.cc/JD5Y-FKM8].

same legislatures are seeking to make it harder for individuals to vote.¹⁹⁹ These efforts too are fueled by weak First Amendment rights for voters.²⁰⁰

Even if it is debatable how much the changes will actually suppress voter turnout, it is worth pondering what it means for our democracy that when the people come out to exercise their political rights, the immediate response in many state legislatures is to limit, rather than lift up, the exercise of our political freedoms. Both trends reveal the importance of robust First Amendment rights at this moment when our democratic norms are being questioned and undermined at every turn.²⁰¹ They are symbolic of an increasingly anti-democratic trend where the response to Americans exercising their constitutional rights is to curtail them.²⁰²

If we want to shore up our democracy, state and local legislatures should be doing just the opposite. They should be using legislation to protect the constitutional rights that federal courts are reluctant to enforce. Local ordinances should be amended to clarify that participants in an assembly may not be dispersed from the streets for lack of a permit or otherwise violating time, place, or manner restrictions, absent an imminent threat of violence to persons or property. Policies should also be put in place to guide law enforcement in deciding how many participants in a crowd need to be posing an imminent threat of violence to justify dispersal of the entire crowd. State legislatures should rewrite their riot and unlawful assembly acts to make violence, or a credible imminent threat, an element of the crime—at least for crowds exercising First Amendment rights. Finally, legislatures should address the largest and most consistent threat to protesters' rights in the last decade: the overuse of individual arrests for catch-all public order offenses.²⁰³ They should pass laws that clarify that individuals engaged in public assemblies may only be charged with low-level criminal offences, like disorderly

199. See Amy Gardner, Kate Rabinowitz & Harry Stevens, *How GOP-Backed Voting Measures Could Create Hurdles for Tens of Millions of Voters*, WASH. POST (Mar. 11, 2021), <https://www.washingtonpost.com/politics/interactive/2021/voting-restrictions-republicans-states> [<https://perma.cc/N6PW-59T6>].

200. *Id.* (compiling bills to curtail access to vote and noting the trend as “potentially amounting to the most sweeping contraction of ballot access in the United States since the end of Reconstruction, when Southern states curtailed the voting rights of formerly enslaved Black men”).

201. See, e.g., Abu El-Haj, *Defining Nonviolence*, *supra* note 160, at 201, 203.

202. Gardner et al., *supra* note 199.

203. See, e.g., Ryan Lucas, *Review of Federal Charges in Portland Unrest Shows Most Are Misdemeanors*, NPR (Sept. 5, 2020), <https://www.npr.org/2020/09/05/909245646/review-of-federal-charges-in-portland-unrest-show-most-are-misdemeanors> [<https://perma.cc/GG4K-4JSF>].

conduct, when their actions pose an imminent threat of violence to persons or property. To do nothing is to condone the routine suppression of constitutionally protected activity.

VI. THE CAMPUS MARTIUS, DETROIT—CIRCA 1900

Conflicts over public spaces, policing, and the contours of the right of assembly were at the center of a two-year fight in Detroit at the turn of the twentieth century.²⁰⁴

Detroit was a bustling, vibrant city—the largest in Michigan at the end of the nineteenth century.²⁰⁵ Three criminal ordinances governed gatherings in its public streets and squares.²⁰⁶ The first prohibited disorderly conduct, defined as “making any noise, disturbance, or improper diversion, or any rout or riot, by which the peace and good order of the neighborhood are disturbed.”²⁰⁷ A second prohibited loitering, and the third prohibited obstructing travel on the Campus Martius, among other specified places.²⁰⁸ The city did not require permits to gather in public, and there was no regulation of assemblies in city parks.²⁰⁹

Then, in 1900, the City passed an ordinance aimed to discourage noisy crowds in the Campus Martius and the central business district—particularly those singing or drumming to the inconvenience of patrons of local businesses.²¹⁰ Singing and drumming activities were associated with the Salvation Army and other outdoor evangelical preachers.²¹¹ The ordinance, as passed, was unenforceable because its penalty provision was removed at some point during the legislative process.²¹²

204. The following account is taken from my dissertation, Tabatha Abu El-Haj, *Changing the People: Transformations in American Democracy (1880–1930)* 282–341 (2008) (PhD Dissertation New York University) (ProQuest) [hereinafter Abu El-Haj, *Changing the People*]. All primary citations are in the dissertation. Parts of this story were previously published in *All Assemble: Order and Disorder in Law, Politics and Culture*, 16 U. PA. J. CONST. L. 949, 992–93 (2014) [hereinafter Abu El-Haj, *All Assemble*].

205. Abu El-Haj, *Changing the People*, *supra* note 204, at 289. Detroit was also the site of one of Martin Luther King, Jr.’s largest and deadliest civil rights marches; drawing a crowd of about 125,000 to the streets, the 1967 march left 43 people dead. See Aguilar, *Protests Continue*, *supra* note 25. The city has one of the largest chapters of the NAACP and is the home of a strong labor movement. *Id.*; Waldmeir, *supra* note 3.

206. Abu El-Haj, *Changing the People*, *supra* note 204, at 289.

207. Detroit, Mich., THE REVISED ORDINANCES OF THE CITY OF DETROIT tit. VI, *The Public Peace*, ch. LXIII, *The Public Peace*, § 2 (1884).

208. Abu El-Haj, *Changing the People*, *supra* note 204, at 289–90.

209. *Id.* at 290.

210. *Id.* at 291–92.

211. *Id.* at 194.

212. *Id.* at 292.

This did not please local business owners on the Campus Martius who objected to the open-air religious services on the square.²¹³ They contended that the religious crowds impeded their businesses and that regulating them was not an infringement of the right of public assembly because they were nuisances.²¹⁴ Their argument gained traction with the appointment of a new Republican police commissioner.²¹⁵ On his third day in office, Commissioner Frank C. Andrews announced his intention to exclude a single tax speaker from the Campus Martius in response to a petition from local businesses.²¹⁶ Public reaction was mixed.²¹⁷ The Salvation Army and the other regular speaker would be left alone for now.²¹⁸

The Detroit Free Press praised the action, but Tom Bawden, the single tax speaker, would have none of it.²¹⁹ Defying the new Commissioner, he spoke as usual that night on the Campus Martius.²²⁰ The police were flustered but eventually dispersed the crowd gathered around him without much incident.²²¹

The following morning, the City's Democratic Mayor was incensed, and announced his intention to be on the Campus Martius that night to secure the people's constitutional right of peaceable assembly:

When it comes to rushing people away, as I am told was done last night . . . I advise them to stay where they are and stand on their rights. The people have the right to assemble on the streets, and so long as they are not creating a disturbance the only province of the police is to see that a way is kept clear, so that traffic is not obstructed.²²²

Denying that the crowds on the Campus were a nuisance, he cautioned Commissioner Andrews against singling out Tom Bawden.²²³

That night a crowd of about ten to twelve thousand gathered, but the event descended into a riot.²²⁴ Trouble started when police

213. *Id.* at 296.

214. Abu El-Haj, *Changing the People*, *supra* note 204.

215. *Id.* at 295. The Republican police commissioner was appointed by Detroit's Common Council. *Id.*

216. *Id.* at 296.

217. *See id.* at 296–98.

218. *Id.* at 296.

219. Abu El-Haj, *Changing the People*, *supra* note 204, at 296.

220. *Id.* at 296, 298.

221. *Riot Raged in the Streets*, DETROIT FREE PRESS, May 11, 1901, at 1 [hereinafter *Riot Raged*].

222. *Maybury to Be There Tonight*, THE EVENING NEWS, May 10, 1901, at 1.

223. Abu El-Haj, *Changing the People*, *supra* note 204, at 299.

224. *Id.*

turned on the Salvation Army with water hoses.²²⁵ The Army did not fold. Instead, it cut the hose.²²⁶ Meanwhile, elsewhere on the Campus, Mayor Maybury gave a speech which characterized the Police Commissioners' actions as an attack on free speech and assembly, invoking memories of the American Revolution:

I will not uphold rioting and I disparage bitter speech. But, my friends, I will always be found upholding that right of every American citizen—free speech. (Cheers.) The birth of our republic grew out of just such gatherings as this and gathered for the same causes. Sacred old Boston common had been used as a public meeting spot for years, until one day the minions of King George drove the crowds from it and—The American revolution followed, giving to us all the liberties which are now in jeopardy.²²⁷

After the Mayor's speech, everything quickly spun out of control.²²⁸ The riot lasted for four hours.²²⁹ Although no one died, seventeen people were injured.²³⁰

Commissioner Andrews made a formal statement the following morning. Announcing his “deep[] regret” about the “unfortunate occurrences of last night,” he blamed Mayor Maybury's irresponsible speech for the riot.²³¹ He also announced that he would not be enforcing the 1900 Campus ordinance without the Mayor's support.²³²

The Evening News, a Democratic paper, conceded that “gatherings which block the public highways may not be strictly within the constitutional rights of the populace,” but argued that “custom and long sufferance” had given rise to an expectation that they would not be dispersed for such obstruction.²³³ The editorial insisted, “It was not a disorderly mob which Mr. Andrews attempted to disperse. It was the people of the city of Detroit gathered to protest against official measures which they regarded as oppressive.”²³⁴ The debate about the contours of the right of assembly continued in the city papers for over a week, with competing views published in the two major papers.²³⁵

225. *Id.* at 299–300.

226. *Id.*

227. *Riot Raged*, *supra* note 221, at 7.

228. *Id.*

229. *See id.* at 1.

230. *See id.*

231. *Id.* (“The department carried out the order [to prevent the streets from being blocked] successfully until the interference of Mayor Maybury in his public suggestions and utterances to the gathering.”).

232. *Id.*

233. Editorial, *The Work of a Russian Cossack*, *THE EVENING NEWS*, May 11, 1901, at 2.

234. *Id.*

235. Abu El-Haj, *Changing the People*, *supra* note 204, at 296–302 (detailing the debate).

The entire controversy prompted the Common Council to consider, for the first time, passing a permit requirement for gatherings on the Campus Martius.²³⁶ The Koch ordinance, as it would come to be known, as amended, prohibited public gatherings within a half-mile radius of City Hall (including the Campus Martius) in the absence of advanced permission from the Mayor and laid out penalties for violating it.²³⁷ It also, however, prevented “the Mayor ‘from granting a permission to any one person for more than one night a week.’”²³⁸ The ordinance eventually passed after being vetoed by Mayor Maybury, who objected to the permit requirement as an infringement on free speech at odds with Americans’ customary tolerance of spontaneous addresses and political crowds.²³⁹

The day after passing, the ordinance was promptly violated by three religious speakers, including Ensign Crawford of the Salvation Army.²⁴⁰ The three were arrested and ordered to appear in the Recorder’s Court.²⁴¹ The case was continued.²⁴² About six weeks later, Tom Bawden was arrested for violating the ordinance.²⁴³ Bawden’s only argument in court was that the ordinance was:

[A]n unwarranted infringement of the personal liberty of the citizen of the city of Detroit, who has of common right the privilege of peaceably addressing his fellow citizens upon any subject they care to hear him upon, so long as said speaker does not produce disorder, nor conduce to or provoke riot, but behaves himself in a lawful manner.²⁴⁴

The Recorder’s Court agreed, dismissing the criminal charge.²⁴⁵ Judge Phelan held that the Campus Martius was not a public highway: “The name itself implies a home for the people. Its literal meaning being a field for the people.”²⁴⁶ In addition, “history shows that it was used for no one purpose oftener than the assembling of its citizens where any person whom the people would listen to was

236. *Id.* at 307.

237. *Id.* at 300–05 (describing in detail the public and legislative debate prior to passage).

238. *Id.* at 310–11.

239. *Id.* at 311–12.

240. *Id.* at 313.

241. Abu El-Haj, *Changing the People*, *supra* note 204, at 313.

242. *Id.* at 332.

243. *See id.*

244. *Judge Phalen [sic] Declares New Ordinance Unreasonable*, THE EVENING NEWS, Aug. 6, 1901, at 5 (as characterized in the opinion of the court). Bawden also argued that the ordinance was unreasonable. *Id.*

245. *Id.*

246. *Id.*

permitted to address them.”²⁴⁷ Therefore, “in this respect the people of this city have superior rights in the Campus Martius than in an ordinary highway, in that in a highway the public generally has only an easement or right [sic] of passage therein”²⁴⁸ The decision prompted another round of public debate—including nationally—about the scope of the right of assembly.²⁴⁹ During this entire period, the Mayor refused to issue any permits to any speakers on the Campus Martius.²⁵⁰

Ultimately, although Judge Phelan of the Recorder’s Court had precedent on his side, the Michigan Supreme Court reversed his decision in a trend that explains why today few question the constitutionality of permit requirements for public assemblies and marches.²⁵¹

But what is most striking is what happened next. Led by the Salvation Army, local speakers resisted—largely by engaging in gatherings that were not technically covered by the ordinance, such as those without music.²⁵² Two months later, “the Salvation Army had launched an all-out campaign, bringing Major Blanche Cox in from Indianapolis to lead the effort.”²⁵³ “As soon as she arrived, she defiantly held outdoor services at various locations within the half-mile circle without a permit”—although never on the Campus Martius itself.²⁵⁴ And it worked.

The Koch Campus Ordinance was amended at the beginning of April 1902.²⁵⁵ Between her arrival in January and that time, Major Cox had been arrested more than eight times and served several stints in the workhouse because the Salvation Army opposed paying fines on the principle that its money should be spent on the poor.²⁵⁶ She was not alone.²⁵⁷ The City arrested a number of other local street speakers and members of the Salvation Army for resisting the ordinance.²⁵⁸ During that time, various constituencies came to seek repeal.²⁵⁹ What they got was reform: the new ordinance “split the

247. *Id.* (quoting opinion of court) (internal quotation marks omitted).

248. *Id.* (quoting opinion of court) (internal quotation marks omitted).

249. *See, e.g.*, Abu El-Haj, *Changing the People*, *supra* note 204, at 311–16.

250. *Id.* at 324.

251. *See id.* at 324, 328–29 (detailing the constitutional arguments and the basis of the Michigan Supreme Court’s decisions); *see also* Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009).

252. Abu El-Haj, *Changing the People*, *supra* note 204, at 330.

253. *Id.* at 331.

254. *Id.*

255. Abu El-Haj, *All Assemble*, *supra* note 204, at 1023.

256. Abu El-Haj, *Changing the People*, *supra* note 204, at 334–35.

257. *Id.*

258. *Id.*

259. *See id.* at 335.

covered half-mile radius from City Hall into two regulatory spaces.”²⁶⁰ No permits would be granted in the first location, which included the Campus Martius and a small part of Woodward Avenue.²⁶¹ The other portion, did allow permits for regular speakers.²⁶² The new ordinance, importantly, did not apply to processions—a concession to both the Salvation Army and prior precedent.²⁶³ The newspapers were generally satisfied.²⁶⁴ The Salvation Army was not.²⁶⁵

The story of the Campus Martius and the Salvation Army’s struggles to challenge it reveals how contemporary conceptions of the scope of First Amendment rights for protesters stand in stark contrast to the attitudes of previous generations of Americans—something that originalists, textualists, and conservatives should duly note. As the above shows, Americans in the late nineteenth century largely displayed a broad constitutional commitment to a right of assembly and willingness to accommodate unruly and disruptive crowds. They understood that to serve its unique function in our democracy, outdoor assemblies must be permitted to be spontaneous and to have access to public spaces—even when inconvenient.²⁶⁶

A 1901 editorial in *The Evening News* reflects this high tolerance for the irritations that come with the people outdoors:

When the people at large want to assemble to discuss public affairs, they are not under any obligation to “hire a hall.” The open public squares are theirs to use for such a purpose. . . . When they come out in their thousands, and fill the public squares for a peaceful and orderly purpose, they literally take possession of and make use of their own property, *and, for the time being, the ordinary law of the road is suspended.* . . . Some lawyers might cavil at this, but the custom is universal in free countries, and the well-established custom is law.²⁶⁷

What is most striking is that while the editorial acknowledged that the main purpose of a road is travel, and, as such, the roadways should not be obstructed, it emphasized that the gatherings of citizens have traditionally been exempted from that general principle.²⁶⁸ No

260. *Id.* at 340.

261. *Id.*

262. See Abu El-Haj, *Changing the People*, *supra* note 204, at 341.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. Editorial, *The Law of the Road*, THE EVENING NEWS, May 20, 1901, at 2 (emphasis added).

268. See *id.*

one sanctioned rioting.²⁶⁹ Previous generations of Americans understood, however, the value of public assembly as a political practice—and expected a customary constitutional right to protect disorder short of violence.²⁷⁰ They understood that the right of peaceable assembly preserves the promise of fundamental political or social change—ensuring the people’s power to end colonial oppression, to end a despised international conflict, or to demand fairness and racial justice in citizenship, voting, and employment, but also for racial minorities in their encounters with the police.²⁷¹ As revolutionaries, the Framers understood that this “First Amendment freedom[] need[s] breathing space to survive” and that public assemblies, in particular, need license to be disorderly.²⁷²

269. *See id.*

270. *See id.*

271. *See id.*

272. *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 468–69 (2007) (citing *NAACP v. Button*, 371 U.S. 415, 433 (1963)).