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FORGING AHEAD FROM FERGUSON: RE-EVALUATING THE RIGHT TO ASSEMBLE IN THE FACE OF POLICE MILITARIZATION

Ashley M. Eick*

Somewhere I read that the greatness of America is the right to protest
for right.¹

—Martin Luther King, Jr.

INTRODUCTION

Stark images of protesters squaring off against police officers dominated the evening news for several weeks in August 2014.² For many around the world, it was almost impossible to reconcile the pictures of police mounted on armored vehicles rolling towards civilian protesters with modern American society.³ At the time, the images appeared to be anything but twenty-first-century America; however, in the months that followed the Ferguson unrest, police and protesters continued to clash throughout the country.⁴ Baltimore burned;⁵ the Mall of America shut down;⁶ and New York City traffic halted as thousands marched across the Brooklyn Bridge.⁷

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¹ Martin Luther King, Jr., *I've Been to the Mountaintop* 3 (Apr. 3, 1968) (transcript available at *Wednesday, April 3, 1968*, KING CTR., <http://www.thekingcenter.org/archive/document/I've-been-mountaintop-0#> [<http://perma.cc/PJV7-YH88>]).

² See, e.g., *Michael Brown Protests in Pictures: Ferguson Police Use Tear Gas to Clear Streets*, TELEGRAPH, <http://www.telegraph.co.uk/news/picturegalleries/worldnews/11040522/Michael-Brown-protests-in-pictures-Ferguson-police-use-tear-gas-to-clear-streets.html> (photo album).

³ See Adam Taylor & Rick Noack, *How the Rest of the World Sees Ferguson*, WASH. POST: WORLDVIEWS (Aug. 18, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/08/18/how-the-rest-of-the-world-sees-ferguson/> [<http://perma.cc/6E9A-662P>] (“[T]he chaotic situation in Ferguson, Mo., seems like something that shouldn’t happen in America.”).

⁴ See generally Alex Altman, *Black Lives Matter*, TIME, Dec. 2015, <http://www.time.com/time-person-of-the-year-2015-runner-up-black-lives-matter/> [<http://perma.cc/EQ2E-39B9>] (explaining how the civil rights movement, Black Lives Matter, propelled a protest cry into a political force in 2015).

⁵ See, e.g., Scott Shane, *Baltimore Riots Are Another Scar on a City Long Battered by Neglect*, N.Y. TIMES (Apr. 28, 2015), <http://www.nytimes.com/2015/04/29/us/baltimore-riots-are-another-scar-on-a-city-battered-by-neglect.html>.

⁶ See, e.g., Christina Capocchi, *‘Black Lives Matter’ Protesters Gather; Mall Is Shut in Response*, N.Y. TIMES (Dec. 23, 2015), <http://www.nytimes.com/2015/12/24/us/black-lives-matter-protesters-gather-mall-of-america-is-shut.html>.

⁷ See, e.g., Oliver Laughland et. al, *Eric Garner Protests Continue in Cities Across America*

Beyond the Black Lives Matter movement, several other national, attention-drawing demonstrations also have ended with standoffs between police forces and protesters.⁸ In 2003, police aggressively prohibited thousands of anti-war protesters from even traveling to a rally in New York City.⁹ The Los Angeles Police Department took full responsibility for injuring 246 journalists during a May Day immigration rally in 2007.¹⁰ And, more recently, police physically evicted Occupy Wall Street protesters from Zuccotti Park in 2011.¹¹ Although the police are responsible for protecting public safety, are they equally responsible for protecting constitutional rights? If they are not, then who is? Who watches the watchmen?¹²

Founded on protest, revolution, and liberty,¹³ America has endorsed the freedoms of speech, press, and assembly as bedrock values of our society.¹⁴ Protests, however, do not easily fall within one of the delineated First Amendment buckets—they are a combination of physical presence, symbolic speech, and verbal chants. As one of

Through Second Night, GUARDIAN, <http://www.theguardian.com/us-news/2014/dec/05/eric-garner-case-new-york-protests-continue-through-second-night> [<http://perma.cc/CJ4X-C89U>] (last updated Dec. 8, 2014, 6:00 AM).

⁸ See *infra* notes 9–11 and accompanying text.

⁹ See Joyce Purnick, *Metro Matters; The Right to Assemble Hits Detours*, N.Y. TIMES (Feb. 20, 2003), <http://www.nytimes.com/2003/02/20/nyregion/metro-matters-the-right-to-assemble-hits-detours.html> (discussing potential barriers to the constitutionally protected right to assemble during the February 15, 2003, anti-war protest in New York City). For a detailed explanation of the protesters' allegations against the police, see Shaila K. Dewan, *Protesters Say City Police Used Rough Tactics at Rally*, N.Y. TIMES (Feb. 19, 2003), <http://www.nytimes.com/2003/02/19/nyregion/19RALL.html>.

¹⁰ See Richard Winton & Duke Helfand, *LAPD Takes Blame for Park Melee*, L.A. TIMES (Oct. 10, 2007), <http://articles.latimes.com/2007/oct/10/local/me-melee10> [<http://perma.cc/CG4B-NG34>] (critiquing the May 1, 2007, immigration rally in Los Angeles that ended in violence).

¹¹ See Colleen Long & Verena Dobnik, *Zuccotti Park Eviction: Police Arrest 200 Occupy Wall Street Protesters*, HUFFINGTON POST, http://www.huffingtonpost.com/2011/11/15/zuccotti-park-eviction-po_n_1094306.html [<http://perma.cc/3P44-9P6B>] (last updated Jan. 14, 2012). For a detailed explanation of the Occupy Wall Street movement, see Mattathias Schwartz, *Pre-Occupied: The Origins and Future of Occupy Wall Street*, NEW YORKER, Nov. 28, 2011, <http://www.newyorker.com/magazine/2011/11/28/pre-occupied> [<http://perma.cc/MN9Q-35MG>].

¹² “Who watches the watchmen?” is a popular English translation of the Latin phrase “*Quis custodiet ipsos custodes?*” from Roman poet Juvenal in *Satire VI*. See, e.g., David Isenberg, *Quis Custodiet Ipsos Custodes?*, HUFFINGTON POST: THE BLOG, http://www.huffingtonpost.com/david-isenberg/quis-custodiet-ipsos-cust_b_595304.html [<http://perma.cc/BFV2-2CC2>] (last updated May 25, 2011).

¹³ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“[W]hen a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce [the people] under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.”).

¹⁴ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

the most organic and effective avenues to demonstrate discontent, however, protests are both intrinsic to American democracy and the natural products of exercising one's First Amendment rights.¹⁵

As such, the right to protest must be protected, especially as police tactics become more aggressive due to militarization. Given the increased occurrence of public protests,¹⁶ police forces must balance the protesters' constitutional rights with the police's responsibility to ensure public safety. Recent events show how this balance has sometimes fallen too heavily toward public order at the expense of First Amendment freedoms.¹⁷ The presence of militarized police at public demonstrations can create a chilling effect that unconstitutionally infringes upon individuals' constitutional rights of speech and assembly.

This Note argues that, in the face of police militarization, the right to assemble must be re-evaluated and reclaimed as an affirmative constitutional right that protects public protests. Part I provides a brief history of police militarization in the United States, explaining why it is a newfound threat to the right to assemble. Part II analyzes how militarization affects public protests using the events of Ferguson as a case study. Part III argues that the twentieth-century Supreme Court has misinterpreted the freedom of assembly by examining the historical origins of the Assembly Clause. Finally, Part IV provides three different constitutional solutions for how the Court may use the right to assemble to protect public protests from the negative effects of police militarization.

I. THE HISTORY OF POLICE MILITARIZATION

A. Enacting the *Posse Comitatus Act*

Fearful of tyranny, the Founding Fathers outlined various fundamental rights intended to prevent the United States from becoming a police state.¹⁸ Concerned that

¹⁵ See, e.g., Christopher Dunn, *Balancing the Right to Protest in the Aftermath of September 11*, 40 HARV. C.R.-C.L. L. REV. 327, 328 (2005) ("The right to protest plays an important role in free and democratic societies The significance of [this right] . . . is reflected in its enshrinement in our Federal Constitution, most directly through the First Amendment's free speech, free press, and free exercise clauses.").

¹⁶ See, e.g., J. Dana Stuster, *Mapped: Every Protest on the Planet Since 1979, From Cairo to Wall Street to the West Bank, Plotting a World of Upheaval*, FOREIGN POL'Y (Aug. 23, 2013), <http://foreignpolicy.com/2013/08/23/mapped-every-protest-on-the-planet-since-1979/> [<http://perma.cc/6U5X-PEEV>] (mapping the monthly increase in number of protests in the United States since 1979); see also GDELT *Global Conflict Dashboard*, GDELT PROJECT, <http://gdeltproject.org/globaldashboard/> (mapping the frequency of protests from August 2014 to February 2016).

¹⁷ See *infra* Part III.

¹⁸ See generally U.S. CONST. amend. I (preventing Congress from making laws prohibiting the free exercise of religion, or restricting freedom of speech, press, or assembly); *id.* amend. II (providing the "right of the people to keep and bear arms"); *id.* amend. III (forbidding

a military force threatened basic fundamental liberties such as those outlined in the First Amendment, New York proposed a distinct constitutional amendment that would prohibit a standing army.¹⁹ Although this idea was discussed at length by Brutus in the *Anti-Federalist Papers*,²⁰ the prohibition against a standing army was not an included safety valve. Nevertheless, scholars often point to the Third Amendment as proof of the uneasiness that the Founding Fathers felt in regard to allowing military forces to enshroud themselves in local communities.²¹ Whether the Constitution allows for militarized police forces, however, is irrelevant to this Note because the Posse Comitatus Act has forbidden the use of the military to enforce domestic laws since 1878.²²

During the 1876 election, President Grant utilized the United States Army to enforce the Fifteenth Amendment.²³ He stationed soldiers at polling locations to protect blacks who voted.²⁴ Southerners felt that the use of federal troops to supervise polls was “unlawful” and that their presence in the South was not only hostile, but kept the wounds of the war open.²⁵ In order to appease the Southern Democrats after the contentious 1876 election, President Hayes agreed to end Reconstruction and remove federal troops from the South in an informal deal now known as the Compromise of 1877.²⁶

the quartering of soldiers during peacetime in private houses); *id.* amend. IV (protecting “against unreasonable searches and seizures”); *id.* amend. V (providing for a grand jury and due process of law); *id.* amends. VI, VII (providing for jury trials); *id.* amend. VIII (protecting against “excessive fines” and “cruel and unusual punishments”); *id.* amends. IX, X (reserving all other rights, unless prohibited, to the people).

¹⁹ *Convention Debates and Proceedings, 17 July 1788*, in 23 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 2191, 2201 (John P. Kaminski et al. eds., 2009) [hereinafter *N.Y. Convention Debates*].

²⁰ THE ANTI-FEDERALIST NO. 10, at 158–62 (Brutus) (Herbert J. Storing ed., 1985) (Storing attributed the Brutus essays to Robert Yates).

²¹ See generally Tom W. Bell, *The Third Amendment: Forgotten but Not Gone*, 2 WM. & MARY BILL RTS. J. 117, 117 (1993) (explaining the historical origins of the Third Amendment); Gordon S. Wood, Nat’l Constitution Ctr., *Common Interpretation: The Third Amendment*, INTERACTIVE CONST., <http://constitutioncenter.org/interactive-constitution/amendments/amendment-iii> [<http://perma.cc/3AZU-2KHM>] (discussing the British’s fear of a standing army).

²² Act of June 18, 1878, ch. 263, § 15, 20 Stat. 152 (1878) (“From and after the passage of this act it shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws . . .”).

²³ U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

²⁴ See Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done*, 175 MIL. L. REV. 86, 108–10 (2003) (“The President’s actions to supervise polling places during the 1876 election were harshly criticized by many members of the democratically controlled House in early 1877.”).

²⁵ See *id.* at 100, 112–13.

²⁶ See Tsahai Tafari, *The Rise and Fall of Jim Crow—A National Struggle: The Congress*,

Wanting protection against the return of federal troops, congressional Southern Democrats pushed through the Posse Comitatus Act.²⁷ Although Southern Democrats initially introduced the Act, Northern Democrats agreed with their southern compatriots that the Act was an important legislative move for the country. Senator Kernan from New York explained that “[i]t would be an entire overthrow . . . of a fundamental principle of the laws of this country, of all our traditions, to . . . call a body of the Army as a *posse comitatus* and order it about the polls of an election.”²⁸ He went on to explain that such precedent could lead to the “entire overthrow of the rights of citizens at the polls.”²⁹

Since 1877, courts have interpreted the Posse Comitatus Act much broader than Congress’s original intent to keep the army away from the polls. In modern jurisprudence, the Act “preclude[s] the Army from assisting local law enforcement officers”³⁰ and “prevent[s] the direct active use of federal troops, one soldier or many, to execute the laws.”³¹ Such a strict standard is necessary because of the inherent danger of the military to civilian freedom. Unlike the police, the military is “trained to operate under circumstances where the protection of constitutional freedoms cannot receive the consideration needed in order to assure their preservation.”³² The Founding Fathers, Congress, and courts all seem to agree that the U.S. military, with all of its power, should not execute civilian law.³³ Instead, police officers who both work with local communities and are trained to respect constitutional rights are charged with upholding civilian law.

B. The Modern Erosion of the Posse Comitatus Act

Although both the legislative history and the judicial interpretation of the Posse Comitatus Act prohibit the comingling of military and police duties, this once bright-line standard is beginning to blur in several ways due to the recent development of police militarization. Police militarization is the increasingly common use

PBS, http://www.pbs.org/wnet/jimcrow/struggle_congress.html [<http://perma.cc/DQ2Y-TD3Q>] (explaining the connection between the 1876 election and the Compromise of 1877).

²⁷ See *Chandler v. United States*, 171 F.2d 921, 936 (1st Cir. 1948) (clarifying that the immediate purpose of the Posse Comitatus Act was to prevent federal troops from policing former Confederate states once civil order was restored), *cert denied*, 336 U.S. 918 (1949).

²⁸ 7 CONG. REC. 4240 (1877) (statement of Sen. Kernan).

²⁹ See *id.*

³⁰ *Gillars v. United States*, 182 F.2d 962, 972 (D.C. Cir. 1950).

³¹ *United States v. Red Feather*, 392 F. Supp. 916, 923 (D.S.D. 1975).

³² *United States v. McArthur*, 419 F. Supp. 186, 193–94 (D.N.D. 1976).

³³ See *People v. Burden*, 288 N.W.2d 392, 393 (Mich. Ct. App. 1979), *rev’d*, 303 N.W.2d 444 (1981) (holding that “the Posse Comitatus Act . . . prohibit[s] the use of military personnel as agents for the enforcement of civil law”); *State v. Nelson*, 260 S.E.2d 629, 639 (N.C. 1979) (holding that “the Posse Comitatus Act . . . preclude[s] the direct active use of federal troops in aid of execution of civilian laws”).

of military-grade equipment and wartime tactics by local police departments, as typically demonstrated by Special Weapons and Tactics (SWAT) teams.³⁴

One way that local police forces are becoming militarized is through the acquisition of military-appropriated materials. In 1989, Congress expanded the role of the Department of Defense in the national “war on drugs.”³⁵ This expansion included the 1991 National Defense Authorization Act,³⁶ which gave the U.S. Department of Defense permission to “transfer excess property to federal and state law enforcement agencies.”³⁷ From this Act, Congress developed the 1033 Program, whereby law enforcement agencies both review excess Department of Defense property and submit requests for that property along with a description of its intended use.³⁸

Currently, more than 8,000 federal and state law enforcement agencies actively participate in the program, and more than \$5.1 billion worth of property has been provided to those agencies since 1990.³⁹ Just in 2011 and 2012, it is “estimated that an [sic] 63 police departments received 500 Mine-Resistant Ambush-Protected vehicles [(MRAPs)],” which “were designed to defeat enemy roadside bombs in Afghanistan and Iraq.”⁴⁰ The Pentagon also gave “435 other armored vehicles, 533 aircraft and nearly 94,000 machine guns” to police departments.⁴¹ In assigning these resources, the Department of Defense neither evaluated true need⁴² nor required local officials to receive any training on how or when to use such specialized military equipment.⁴³

³⁴ See, e.g., Paul D. Shinkman, *Ferguson and the Militarization of Police*, U.S. NEWS & WORLDREP., <http://www.usnews.com/news/articles/2014/08/14/ferguson-and-the-shocking-nature-of-us-police-militarization> [<http://perma.cc/G9YR-X8TH>] (last updated Aug. 14, 2014). For an extensive history of police militarization in the United States, see RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA’S POLICE FORCES* (2013).

³⁵ See *Oversight of Federal Programs for Equipping State and Local Law Enforcement Agencies: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. 3 (2014) (statement of Hilary O. Shelton, Washington Bureau Director & Senior Vice President for Advocacy, NAACP) (explaining the history and impact of the 1033 Program).

³⁶ National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485 (1990).

³⁷ *Oversight of Federal Programs for Equipping State and Local Law Enforcement Agencies: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. 1 (2014) [hereinafter Statement of Alan Estevez] (statement of Alan Estevez, Principal Deputy Under Secretary of Defense for Acquisition, Technology, & Logistics, U.S. Dep’t of Defense).

³⁸ See *id.* (explaining how the 1033 Program works).

³⁹ See *id.* at 3.

⁴⁰ See Mark Thompson, *Why Ferguson Looks So Much Like Iraq*, TIME (Aug. 14, 2014), <http://www.time.com/3111455/ferguson-missouri-michael-brown-iraq/> [<http://perma.cc/KCV5-BAX6>] (detailing the extent of police militarization in the United States).

⁴¹ See *id.*

⁴² See Statement of Alan Estevez, *supra* note 37, at 3–5 (“Law enforcement agencies determine their need for types of equipment and they determine how it is used. The Department of Defense does not have *expertise* in police force functions and *cannot assess* how equipment is used in the mission of an individual law enforcement agency.” (emphasis added)).

⁴³ See *Oversight of Federal Programs for Equipping State and Local Law Enforcement Agencies: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th

The distinction between the military and police is also being blurred through the increasingly common use of SWAT teams. Police SWAT teams were first created after the 1965 Watts Riots for use in exceptional emergencies such as domestic terror and hostage situations.⁴⁴ In the last two decades, however, there has been a 1,500% increase in the use of SWAT teams.⁴⁵ An ACLU study even found that nearly 80% of SWAT team raids are comprised of drug-related warrant searches.⁴⁶ SWAT teams also are no longer unique to large urban areas; 80% of small towns now have a SWAT team.⁴⁷ Because most of these small towns have no other special forces team, they deploy the local SWAT teams whenever special forces are needed even to peaceful events such as protests.⁴⁸

Finally, police militarization goes beyond just equipment and the increased use of SWAT teams. Police militarization is unintentionally changing the fundamental nature of how civilian police officers interact with community members, especially marginalized populations who already distrust police officers.⁴⁹ Some police forces are even wearing military-style uniforms on the streets.⁵⁰ One scholar argues that the “[m]ilitary gear and garb changes . . . reinforce[] a war fighting mentality among civilian police, where marginalized populations become the enemy and the police perceive of themselves as the thin blue line between order and chaos that can only be controlled through military model power.”⁵¹

The majority of police academies are also modeled after military basic training programs with a warrior-like orientation to policing.⁵² Scholars have argued that this

Cong. 5 (2014) [hereinafter Statement of Mark Lomax] (statement of Mark Lomax, Executive Director, National Tactical Officers Association) (arguing that special operation forces need extra training).

⁴⁴ See Rosa Brooks, Essay, *The Trickle-Down War*, 32 YALE L. & POL’Y REV. 583, 589–90 (2014) (citing BALKO, *supra* note 34) (discussing how domestic policing has become militarized).

⁴⁵ Al Baker, *When the Police Go Military*, N.Y. TIMES (Dec. 3, 2011), <http://www.nytimes.com/2011/12/04/sunday-review/have-american-police-become-militarized.html>.

⁴⁶ AM. CIVIL LIBERTIES UNION, *WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING* (2014) https://www.aclu.org/sites/default/files/field_document/jus14-warcomeshome-text-rel1.pdf [<http://perma.cc/F8FA-FP6W>].

⁴⁷ See *Oversight of Federal Programs for Equipping State and Local Law Enforcement Agencies: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. 3 (2014) [hereinafter Statement of Peter B. Kraska] (statement of Peter B. Kraska, Professor & Chair of Graduate Studies and Research, School of Justice Studies, Eastern Kentucky University) (detailing the history of police militarization).

⁴⁸ See Statement of Mark Lomax, *supra* note 43 (“There is also a general lack of training, regarding civil disorder events, for tactical commanders, planners, public information officers and first line supervisors.”).

⁴⁹ See Statement of Peter B. Kraska, *supra* note 47.

⁵⁰ Brooks, *supra* note 44, at 590–91 (discussing how domestic policing has become militarized).

⁵¹ Statement of Peter B. Kraska, *supra* note 47.

⁵² See The COPS Office, *Recruit Training: Are We Preparing Officers for a Community Oriented Department?*, 6 CMTY. POLICING DISPATCH (2013), <http://www.cops.usdoj.gov/html>

style of training produces police tactics that are “contrary to democratic governance” and community policing.⁵³ Instead of learning how to problem solve and work with community members, police officers focus on the “action-oriented aspects” of the job.⁵⁴ The Chicago Police Department even runs an off-the-books interrogation site, Homan Square, that is the “domestic equivalent of a CIA black site.”⁵⁵ Although the Chicago Police Department maintains that the site is not a secret facility, the U.S. Department of Justice has launched an investigation into whether the police department has habitually violated the Constitution in recent years.⁵⁶

Although both the military and the police serve and protect our communities, their respective roles in doing so are vastly different. Soldiers go to war, whereas police officers maintain the peace. In some circumstances, police militarization has simply gone too far. Congress passed the Posse Comitatus Act to control the inherent threat that the military poses to domestic society.⁵⁷ By wearing military fatigues, operating black sites, deploying SWAT teams for every and any reason, some domestic police forces have become a de facto military power. Conflating the distinct roles that the military and police serve has devastating consequences to American civil liberties, especially given the increased use of public protests as an outlet for political expression.

II. POLICE MILITARIZATION’S CHILLING EFFECT ON THE RIGHT TO ASSEMBLE

The most poignant way to assess how police militarization has affected the constitutional right to assemble is through a case study of the Ferguson protests that occurred during the summer of 2014. Of all the recent protests, Ferguson certainly has both led to the most debate on current policing tactics and served as an example of how not to respond to spontaneous public demonstrations.⁵⁸ The Department of

/dispatch/06-2013/preparing_officers_for_a_community_oriented_department.asp [http://perma.cc/L5EH-BCS2] (detailing the differences between community policing and warrior policing).

⁵³ Norman Conti, *Weak Links and Warrior Hearts: A Framework for Judging Self and Others in Police Training*, 12 POLICE PRAC. & RES. 410, 411 (2011) (citing Michael L. Birzer & Ronald Tannehill, *A More Effective Training Approach for Contemporary Policing*, 4 POLICE Q. 233 (2001)) (analyzing how police training affects community policing).

⁵⁴ See The COPS Office, *supra* note 52.

⁵⁵ Spencer Ackerman, *The Disappeared: Chicago Police Detain Americans at Abuse-Laden ‘Black Site,’* GUARDIAN, <http://www.theguardian.com/us-news/2015/feb/24/chicago-police-detain-americans-black-site> [http://perma.cc/HB35-28UH] (last updated Mar. 4, 2015, 12:29 PM); see also Spencer Ackerman & Zach Stafford, *Chicago Police Detained Thousands of Black Americans at Interrogation Facility*, GUARDIAN, <http://www.theguardian.com/us-news/2015/aug/05/homan-square-chicago-thousands-detained> [http://perma.cc/5LPC-P39P] (last updated Aug. 6, 2015, 7:38 AM) (asserting that Chicago police have detained 3,500 Americans at Homan Square).

⁵⁶ See Dana Ford et al., *Chicago’s Homan Square Police Complex Under Fire*, CNN, <http://www.cnn.com/2015/12/15/us/chicago-homan-square-hearing/> [http://perma.cc/FFZ9-XDY3] (last updated Dec. 22, 2015, 2:42 PM).

⁵⁷ See *supra* notes 27–31 and accompanying text.

⁵⁸ Associated Press in Wash., *Police in Ferguson Gave a Lesson in How Not to Respond to Protests, Says Report*, GUARDIAN (Sept. 2, 2015, 7:11 PM), <http://www.theguardian.com>

Justice's Office of Community Oriented Policing Services released an in-depth report criticizing Ferguson's police response to the demonstration, encouraging other police forces to learn from the events of Ferguson.⁵⁹

A. What Happened in Ferguson?

On Saturday, August 9, 2014, a police officer fatally shot eighteen-year-old Michael Brown in Ferguson, Missouri.⁶⁰ Throughout that evening, groups formed in protest at the location of the shooting.⁶¹ Over one hundred police officers responded to the scene with assault rifles and a SWAT vehicle.⁶²

Over the next few days, the protesters failed to quiet down and unrest continued to spill over into the streets. On Sunday, August 10, 2014, hundreds of police officers in military fatigues with K-9 units, rifles, and shields monitored a candlelight vigil.⁶³ As the night wore on, the protests turned violent when a group of rioters looted local stores, smashed the windows of a gas station, and attacked police vehicles.⁶⁴

On Monday night, there was a standoff between a dozen residents and a dozen officers who were outfitted in full riot gear.⁶⁵ The protesters refused to leave, repeatedly chanting "Don't shoot, my hands are up."⁶⁶ The police, moving down the main road toward residences, sprayed tear gas and shot rubber bullets at the demonstrators.⁶⁷ The clash lasted for hours until the protesters were forced home.⁶⁸

/us-news/2015/sep/02/police-ferguson-response-justice-department-report [http://perma.cc/L5YP-39VD].

⁵⁹ U.S. DEP'T OF JUSTICE, OFF. OF CMTY. ORIENTED POLICING SERVS., AFTER-ACTION ASSESSMENT OF THE POLICE RESPONSE TO THE AUGUST 2014 DEMONSTRATIONS IN FERGUSON, MISSOURI 117 (2015) [hereinafter DOJ REPORT], <http://www.ric-zai-inc.com/Publications/cops-p317-pub.pdf>. Neither the report nor this Note seeks to deride the Ferguson police for their action during an unprecedented and chaotic time and commend the police for sharing their experiences and rationale behind their actions in the days of the unrest to "prevent potential police-community conflicts from occurring" in the future. *Id.*

⁶⁰ See *Michael Brown Shooting: Anger at Crackdown on Protests*, BBC NEWS (Aug. 14, 2014), <http://www.bbc.com/news/world-us-canada-28781440> [http://perma.cc/2NPM-DZ2T].

⁶¹ See Elliott C. McLaughlin, *Fatal Police Shooting in Missouri Sparks Protests*, CNN, <http://www.cnn.com/2014/08/10/justice/missouri-police-involved-shooting/index.html> [http://perma.cc/NUN5-Z4ZF] (last updated Aug. 11, 2014, 12:13 AM).

⁶² See *id.*

⁶³ See Julie Bosman & Emma G. Fitzsimmons, *Grief and Protests Follow Shooting of a Teenager*, N.Y. TIMES (Aug. 10, 2014), <http://www.nytimes.com/2014/08/11/us/police-say-mike-brown-was-killed-after-struggle-for-gun.html>.

⁶⁴ See *id.*

⁶⁵ See Wesley Lowery, *Police Use Tear Gas on Crowd in Ferguson, Mo., Protesting Teen's Death*, WASH. POST: POST NATION (Aug. 12, 2014), <https://www.washingtonpost.com/news/post-nation/wp/2014/08/12/police-use-tear-gas-on-crowd/> [http://perma.cc/XST3-UGJS].

⁶⁶ See *id.*

⁶⁷ See *id.*

⁶⁸ See *id.*

Tensions remained high that Tuesday, leading to another explosive night that Wednesday. During altercations, journalists fled to a nearby McDonald's to report and work from their laptops.⁶⁹ The police's SWAT team invaded the restaurant, and demanded that the reporters leave and stop videotaping them.⁷⁰ The police took two reporters into custody when they failed to leave the building.⁷¹ Police officers also threw tear gas and shot rubber bullets at the protesters and reporters outside.⁷² Ryan Reilly, a *Huffington Post* reporter who was detained in the McDonald's, was identified as saying that "the police resembled soldiers more than officers, and treated those inside the McDonald's as 'enemy combatants.'"⁷³

B. The Effect of Militarized Police on the Ferguson Protests

Police militarization allowed the Ferguson police officers to respond to a potential peaceful protest with "military weaponry not often seen on city streets in the United States."⁷⁴ The Department of Defense's 1033 Program provided St. Louis County police departments with "6 pistols, 12 rifles, 15 weapons sights, 1 explosive ordnance disposal robot, 3 helicopters, 7 [humvees], and 2 night vision devices."⁷⁵ The police not only used military equipment that would "normally [be] seen on the national news during conflicts in Middle East war zones,"⁷⁶ but also wore military fatigues and used other military equipment before violence had even occurred.⁷⁷ Rather than providing a sense of protection to the protesters, the police's presence in such gear

⁶⁹ See Brian Stelter, *Journalists Covering Michael Brown Shooting Say They Were Arrested*, CNN, <http://www.cnn.com/2014/08/13/justice/missouri-teen-shooting-journalists/> [<http://perma.cc/P54R-BQQJ>] (last updated Aug. 14, 2014, 3:20 PM).

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See Catherine Taibi, *Ferguson Police Use Tear Gas on Al Jazeera America Team*, HUFFINGTON POST, http://www.huffingtonpost.com/2014/08/14/al-jazeera-ferguson-tear-gas-journalists_n_5678081.html [<http://perma.cc/LH3A-EVS5>] (last updated Aug. 14, 2014).

⁷³ Ryan Grim, *Statement on the False Arrest of Reporters Ryan Reilly and Wesley Lowery*, HUFFINGTON POST, http://www.huffingtonpost.com/2014/08/13/ryan-reilly-_n_5677060.html [<http://perma.cc/Y8XZ-EWXV>] (last updated Aug. 14, 2014).

⁷⁴ *Oversight of Federal Programs for Equipping State and Local Law Enforcement Agencies: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. (2014) [hereinafter Statement of Wiley Price] (statement of Wiley Price, Photojournalist, St. Louis American).

⁷⁵ Statement of Alan Estevez, *supra* note 37.

⁷⁶ Statement of Wiley Price, *supra* note 74.

⁷⁷ See *Oversight of Federal Programs for Equipping State and Local Law Enforcement Agencies: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 112th Cong. (2014) [hereinafter Statement of Sen. McCaskill] (statement of Sen. Claire McCaskill, Member, S. Comm. on Homeland Sec. and Governmental Affairs) ("I heard reports from my constituents about aggressive police actions being used against protesters, well before any violence occurred.").

“only escalated the understandably strong feelings felt by the very people police are sworn to serve and protect.”⁷⁸ Senator McCaskill of Missouri explained that “[o]fficers dressed in military fatigues will not be viewed as partners in any community. Armored military vehicles, even if they are painted black and used with the utmost discretion are, by definition, intimidating.”⁷⁹ As another scholar put it, “Ferguson was defined, in part, by the way in which militarized police behaved like soldiers in a war zone and reacted to potentially peaceful assembly accordingly.”⁸⁰ When officers treat all protesters as enemy combatants, even the peaceful protestors’ constitutional rights are at risk.⁸¹

Although the Department of Justice’s report points to a number of decisions that intensified hostility between the police and protesters, the report both reaffirms the testimony provided at the congressional hearings and highlights the role that militarization played in escalating the situation. The report found that “[t]he use of tactical units [such as SWAT teams] . . . can undermine the police’s peacekeeping role . . . [and] can anger and frighten citizens, resulting in greater animosity toward the police, which in turn may fuel more conflict.”⁸² The report also encourages police forces to restrict the use of “military-style uniforms, equipment, weapons, and armored vehicles . . . to limited situations that clearly justify their use.”⁸³ Finally, the report determined that the widespread use of sniper rifles, visible use of armored vehicles, and initial use of tactical equipment was inappropriate.⁸⁴

Although the Ferguson protests shocked the nation, many scholars predicted that the increasing militarization of police at public demonstrations would eventually explode. First Amendment scholar Timothy Zick anticipated that militarization tactics against protesters would eventually “backfire,” “reduce public goodwill toward authorities,” and lead to “escalated disruption” of public events,⁸⁵ which is exactly what occurred in Ferguson. Likewise, Timothy Lynch from the Cato Institute indicated that the extensive proliferation of militarization in local police forces may eventually create more confrontations with citizens.⁸⁶

⁷⁸ Statement of Wiley Price, *supra* note 74.

⁷⁹ Statement of Sen. McCaskill, *supra* note 77.

⁸⁰ Howard Wasserman, *Inevitable Conflict and the State of the First Amendment*, PRAWFSBLAWG (Nov. 17, 2014, 8:34 PM), <http://www.prawfsblawg.blogs.com/prawfsblawg/2014/11/inevitable-conflict-and-the-state-of-the-first-amendment.html> [<http://perma.cc/N3JV-WNQC>].

⁸¹ See Timothy Zick, *Zick on Public Protest and Ferguson*, PRAWFSBLAWG (Nov. 20, 2014, 5:18 PM), <http://www.prawfsblawg.blogs.com/prawfsblawg/2014/11/zick-on-public-protest-and-ferguson.html> [<http://perma.cc/B2C7-7N9G>] (“When officers divide streets into military-style grids and gird for battle, even peaceful protesters and reporters are at risk.”).

⁸² DOJ REPORT, *supra* note 59, at 124.

⁸³ *Id.* at 124 (emphasis omitted).

⁸⁴ *Id.* at 124–25.

⁸⁵ TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 254–55 (2009).

⁸⁶ Baker, *supra* note 45 (quoting Timothy Lynch).

By increasing the personal costs of gathering during protests through intimidation tactics,⁸⁷ militarized police are infringing on citizens' constitutional right to assemble. Aggressive police tactics are especially intimidating when occurring in a heightened social environment such as Ferguson.⁸⁸ Police forces are composed of ordinary individuals who are susceptible to the same prejudices and biases as everyone else; these biases often lead to a mental shortcut that "complicates the relationship between police and the communities they serve."⁸⁹ Ferguson's population is 67% black, yet there were only three black police officers on a force of fifty-three people.⁹⁰ In communities where a "gulf of mistrust" exists between the police officers and local citizens, police forces must be especially cognizant of the image that they portray to the community at times of protest.⁹¹ Through their reactions to public demonstrations, militarized police forces are effectively operating as "the social control of dissent," deciding which protests have merit and are allowed to continue and which ones should be suppressed.⁹²

III. RE-EVALUATING THE ASSEMBLY CLAUSE

Under the current interpretation of the Assembly Clause, there is little recourse for citizens who have been deterred from the streets by militarized police. In modern

⁸⁷ After tear gas and rubber bullets were fired near the Al Jazeera America crew, the news organization released a statement saying that the conduct was "clearly intended to have a chilling effect on [their] ability to cover [the Ferguson events]." Kate O'Brian, *Statement from the President*, AL JAZEERA AM. (Aug. 14, 2014), <http://america.aljazeera.com/tools/pressreleases/statement.html> [<http://perma.cc/3M9X-96TP>]; see also Taibi, *supra* note 72.

⁸⁸ See DOJ REPORT, *supra* note 59, at 116 (detailing the lack of relationship between much of the community of Ferguson and the police department).

⁸⁹ James B. Comey, Director, Federal Bureau of Investigation, *Hard Truths: Law Enforcement and Race* (Feb. 12, 2015) (transcript available at <https://www.fbi.gov/news/speeches/hard-truths-law-enforcement-and-race> [<http://perma.cc/UT9J-CY2Y>]).

⁹⁰ See Paulina Firozi, *5 Things to Know About Ferguson Police Department*, USA TODAY (Aug. 19, 2014, 2:30 PM), <http://www.usatoday.com/story/news/nation-now/2014/08/14/ferguson-police-department-details/14064451/> [<http://perma.cc/Y8TR-GREF>].

⁹¹ President Obama discussed the relationship between police officers and minorities in an address to the nation: "[I]n too many communities around the country, a gulf of mistrust exists between local residents and law enforcement. In too many communities, too many young men of color are left behind and seen only as objects of fear." President Barack Obama, *Remarks on Iraq and Ferguson* (Aug. 18, 2014) (transcript available at <https://www.whitehouse.gov/photos-and-video/video/2014/08/18/president-speaks-iraq-and-ferguson#transcript> [<http://perma.cc/TD99-TAL2>]). New York City Police Department Commissioner William J. Bratton also explained that police officers need to accept responsibility for the role their profession played in enforcing slavery and Jim Crow laws. See J. David Goodman, *Bratton Says New York Police Officers Must Fight Bias*, N.Y. TIMES (Feb. 24, 2015), <http://www.nytimes.com/2015/02/25/nyregion/new-yorks-police-commissioner-says-officers-must-fight-bias.html> ("Many of the worst parts of black history would have been impossible without police . . .") (quoting Commissioner William J. Bratton).

⁹² ZICK, *supra* note 85, at 242.

jurisprudence, the Assembly Clause does not grant a distinct right for in-person demonstrations, but works jointly with the Freedom of Expression Clause to grant the right of association.⁹³ The type of public protest like that which occurred in Ferguson is not an associational concern, nor does it appear to be a wholly free speech concern either. Although the Supreme Court has frequently used the Free Speech Clause to analyze public protests,⁹⁴ the existing constitutional jurisprudence fails to reach the heart of what is at issue—the physical protest. The time, place, and manner doctrine established under the Free Speech Clause grants localities a wide berth of power to regulate public demonstrations, but it fails to address the intimidation tactics that are chilling protesters’ constitutional right to be physically present during the public demonstration.

Despite its current incarnation, the Founding Fathers viewed the right to assemble as an individual right—one that is distinct from the freedoms of speech and association—that protected in-person, active gatherings of individuals just like the recent public protests.⁹⁵ In arguing the original intent of the Assembly Clause, we should “carry ourselves back to the time when the constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed.”⁹⁶

First, there is the most obvious fact that the Founding Fathers would not have included the Assembly Clause if it were merely a reiteration of the Free Speech

⁹³ The Court first enunciated the freedom of association with *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), in an effort to protect the NAACP’s membership list from Alabama’s confiscation. Because the freedom of association was not explicitly delineated as a First Amendment right, the Court combined the freedoms of speech and assembly. *Id.* at 460 (“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.”). As southern states continued to attack the NAACP during the Civil Rights Movement, the freedom of assembly was subsumed by the freedom of association. See John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 566 (2010); Nicholas S. Brod, Note, *Rethinking a Reinvigorated Right to Assemble*, 63 DUKE L.J. 155, 159 (2013).

⁹⁴ See *Cox v. Louisiana*, 379 U.S. 536, 555 (1965) (“We emphatically reject the notion . . . that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.”); Note, *Regulation of Demonstrations*, in *THE LAW OF DISSENT AND RIOTS* 319, 319 (M. Cherif Bassiouni ed., 1971) (“[I]t is generally recognized that demonstrations are within First Amendment protection.”).

⁹⁵ See GLENN ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION* 11–13 (4th ed. 1961) (explaining that there was general acceptance to the right of assembly at the First Congress).

⁹⁶ Letter from Thomas Jefferson to Judge William Johnson (June 12, 1823), in 12 *THE WORKS OF THOMAS JEFFERSON: CORRESPONDENCE AND PAPERS* 1816–1826, at 251, 254 (Paul Leicester Ford ed., 1905), <http://oll.libertyfund.org/titles/808>.

Clause. In fact, there was debate over whether the Assembly Clause was superfluous. Theodore Sedgwick of Massachusetts wanted to remove the Assembly Clause because it was “a self-evident unalienable right which the people possess.”⁹⁷ He felt that if the freedom of speech was recognized, then the freedom of assembly was obviously recognized as well, and to include that separately would be pejorative and trivial.⁹⁸ Six other delegates disagreed with Sedgwick, however, arguing that, even if the right to assemble appeared to be inherent, it was of such importance that it should be expressly provided to ensure against government infringement.⁹⁹ As Mr. Page put it, if a person is deprived of the freedom of assembly, then he can be deprived of any freedom.¹⁰⁰ Furthermore, several state constitutions included the Clause, and Virginia and North Carolina expressly advised the Convention to include it.¹⁰¹

The debate over the inclusion of the Assembly Clause also must take into account that the First Congress met in the shadow of Shay’s Rebellion, a fact that Elbridge Gerry of Massachusetts alluded to during the debate.¹⁰² Shay’s Rebellion was an armed uprising in 1786 that was one of the catalysts for the Constitutional Convention.¹⁰³ Gerry encouraged the inclusion of the freedom of assembly, despite its abuse by those involved in Shay’s Rebellion.¹⁰⁴ Sedgwick’s motion to abandon the Assembly Clause was defeated by a majority.¹⁰⁵

In addition to the legislative history, the language of the Assembly Clause also demonstrates the Founding Fathers’ intent to protect public protests. The founding-era meaning of “to assemble” is similar to our current understanding. It was understood to be a group of individuals getting together for face-to-face meetings.¹⁰⁶ The textual meaning has nothing to do with associational relationships or speech that the Court imparts on the clause today. Moreover, every other time the word “assemble” is used in the Constitution, it always refers to an in-person meeting, typically in a temporal nature.¹⁰⁷

The right to assemble must also be broadly interpreted, because the final draft of the First Amendment removes the phrase “for the common good” after “to

⁹⁷ 1 ANNALS OF CONG. 759 (1789) (Joseph Gales ed., 1834).

⁹⁸ *Id.*

⁹⁹ *Id.* (Mr. Benson, Mr. Tucker, Mr. Gerry, Mr. Page, Mr. Vining, and Mr. Hartley all argued to keep the clause as is).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*; see also Baylen J. Linnekin, “Tavern Talk” and the Origins of the Assembly Clause: Tracing the First Amendment’s Assembly Clause Back to Its Roots in Colonial Taverns, 39 HASTINGS CONST. L.Q. 593, 611–12 (2011).

¹⁰² 1 ANNALS OF CONG. 759 (1789) (Joseph Gales ed., 1834).

¹⁰³ See NEIL A. HAMILTON, REBELS AND RENEGADES: A CHRONOLOGY OF SOCIAL AND POLITICAL DISSENT IN THE UNITED STATES 55–56 (2002).

¹⁰⁴ 1 ANNALS OF CONG. 759 (1789) (Joseph Gales ed., 1834).

¹⁰⁵ *Id.*

¹⁰⁶ See Brod, *supra* note 93, at 164 (analyzing the textual understanding of the right to assemble).

¹⁰⁷ See *id.* at 164–65.

assemble.” Both Madison’s and New York’s original resolution include the phrase “for their common good,”¹⁰⁸ yet there was no mention of why or when this phrase was dropped.¹⁰⁹ Even if the drop was an accident, removal of the “common good” language means that citizens enjoy the right to peaceably assemble for any reason, not just for their common good.¹¹⁰

Finally, looking at the types of assemblies that occurred during the revolutionary era, it is clear that protests were just as chaotic and passionate then as they are now. As such, recent public protests fit into the same category of assemblies that the Founding Fathers experienced and sought to protect. During the revolutionary era, Americans regularly assembled in the streets to discuss public questions and demonstrate dissent.¹¹¹ Often, these “assemblies” would disrupt economic activity and block public roads, yet they were not considered uprisings, rather legitimate political activity.¹¹²

Although these protests tended to be peaceful, it was not uncommon for public officials to be targeted for tarring and feathering or private property to be damaged.¹¹³ For example, in response to the Stamp Act of 1765, John Adams led a group of protesters to the Liberty Tree outside of Boston, hoisted an effigy of the city’s tax collector, decapitated and burned it, and then attacked the collector’s home.¹¹⁴ When viewed in retrospect, even the Boston Tea Party was incredibly hostile.¹¹⁵

The intellectual elite who went on to write the First Amendment not only tolerated these demonstrations, but also generally supported them.¹¹⁶ Thomas Jefferson once wrote to James Madison that “a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical.”¹¹⁷

¹⁰⁸ *Madison’s Resolution for Amendments to the Constitution (June 8, 1789)*, CONSOURCE, <http://www.consource.org/document/madisons-resolution-for-amendments-to-the-constitution-1789-6-8/> [<http://perma.cc/W7VX-ZQUQ>]; *N.Y. Convention Debates*, *supra* note 19.

¹⁰⁹ *See Inazu*, *supra* note 93, at 571–73.

¹¹⁰ *See id.* at 571.

¹¹¹ *See ZICK*, *supra* note 85, at 26.

¹¹² *See Jason Mazzone*, *Freedom’s Associations*, 77 WASH. L. REV. 639, 730–31 (2002).

¹¹³ *See generally* Benjamin H. Irvin, *Tar, Feathers, and the Enemies of American Liberties, 1768–1776*, 76 NEW ENG. Q. 197 (2003).

¹¹⁴ Nat’l Constitution Ctr. Staff, *The Seeds of Revolution: The Stamp Act Protests in Boston*, NAT’L CONST. CTR.: CONST. DAILY (Mar. 22, 2015), <http://blog.constitutioncenter.org/2015/03/the-seeds-of-revolution-the-stamp-act-protests-in-boston/> [<http://perma.cc/85V6-NGZX>]; *see also* 1 REVOLTS, PROTESTS, DEMONSTRATIONS, AND REBELLIONS IN AMERICAN HISTORY: AN ENCYCLOPEDIA 131–32 (Steven L. Danver ed., 2011).

¹¹⁵ In December of 1773, several thousand Bostonians assembled in the streets to protest the unloading of tea from a British merchant ship. *See HAMILTON*, *supra* note 103, at 55–56. When the Massachusetts Governor refused to meet with a colonial representative, a small group of revolutionaries climbed on board and threw 342 chests of tea into Boston Bay, all while a large crowd watched and protected the law breakers. *See id.*

¹¹⁶ *See ZICK*, *supra* note 85, at 27.

¹¹⁷ *ZICK*, *supra* note 85 (quoting Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), in *THE PORTABLE THOMAS JEFFERSON* 414 (Merrill D. Peterson ed., 1975)).

Even after the Revolutionary War, public protests were an expected part of everyday life.¹¹⁸ Many felt that it was not only their right to protest, but also their duty, especially when no other political recourse was available. As Justice Brandeis eloquently wrote in his famous concurrence from *Whitney v. California*:¹¹⁹

Those who won our independence believed that the . . . freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.¹²⁰

Like today, public demonstrations in the revolutionary period provided a political outlet for the common man.¹²¹ It provided an accessible channel for those in the minority to demonstrate their outrage with the system and draw attention to their concerns. The spontaneity and widespread disruption of everyday life drew attention to the people who had few other avenues to demand change. One scholar noted that public mobbing “was a means by which ordinary people, usually those most dependent—women, servants, free blacks, sailors, and young men—made their power felt temporarily in a political system that was otherwise largely immune to their influence.”¹²² It was a way for the people “to bring wayward government to heel.”¹²³ Despite the overwhelming evidence that the Founding Fathers intended for the Assembly Clause to be a cornerstone of constitutional protection, we have reached a point in modern jurisprudence where the right to assemble has not formed the basis of a Supreme Court opinion for thirty years.¹²⁴ And, in an era where in-person public protests are continuously threatened by state intimidation in the form of police militarization, there is a serious gap in the constitutional protection of physical gatherings.

¹¹⁸ See ZICK, *supra* note 85, at 26 (stating that “[p]eople tended to spend substantial portions of their days in public places” and people appeared in streets as assemblies).

¹¹⁹ 274 U.S. 357 (1927).

¹²⁰ *Id.* at 375 (Brandeis, J., concurring).

¹²¹ See ZICK, *supra* note 85, at 27 (explaining that social movements in the revolutionary period were necessary to have a voice in the political process).

¹²² ZICK, *supra* note 85, at 30 (quoting GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776–1787*, at 319–28 (1969)).

¹²³ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 26 (1998).

¹²⁴ See Brod, *supra* note 93, at 160.

IV. USING THE RIGHT TO ASSEMBLE TO ATTACK THE PRESENCE OF
MILITARIZED POLICE AT PUBLIC PROTESTS

There are three different ways that the Court can revitalize the Assembly Clause to prevent the chilling effect of police militarization on public protest: (1) the Court can roll back its interpretation of the Assembly Clause to the Framers' original intent using existing principles of stare decisis; (2) the Court can apply the chilling effect doctrine to actions that deter citizens from exercising the right to assemble; or (3) the Court can shift the burden of ensuring a protest remains peaceful to the police.

A. Interpreting the Freedom of Assembly Through Originalism

Despite the current interpretation of the Assembly Clause that treats the freedom of assembly as an ancillary right to the freedom of association, the Supreme Court once correctly interpreted the Clause as the Framers originally intended—a protection of in-person public protests and dissident political thought. In *De Jonge v. Oregon*,¹²⁵ the Court incorporated the freedom of assembly and held that De Jonge had a constitutional right to speak at a peaceful assembly, even if he spoke of communist revolution.¹²⁶ The Court explained that, even though the right of assembly is susceptible to abuse, state action must target that abuse rather than the right itself.¹²⁷ The freedom of assembly must be protected against government infringement “in order to maintain the opportunity for free political discussion” and to ensure that the “government [continues to] be responsive to the will of the people.”¹²⁸ The Court even went so far as to say that “the very foundation of constitutional government” lies in ensuring that the government does not prevent a citizen’s right to assemble.¹²⁹

Protests, and public assemblies, are such an effective means of political speech because they attract widespread news coverage and can create a disruptive, yet visible disturbance to everyday life.¹³⁰ For those with minority opinions, a protest may be the only avenue to publicize a message and mobilize support in other parts of the country.¹³¹ The Court itself has pointed out that speech “may indeed best serve its high purpose when it *induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.*”¹³² Applying this reasoning to

¹²⁵ 299 U.S. 353 (1937).

¹²⁶ *See id.* at 364–66.

¹²⁷ *See id.* at 364–65 (“The people through their legislatures may protect themselves against that abuse. . . . The rights themselves must not be curtailed.”).

¹²⁸ *Id.* at 365.

¹²⁹ *Id.*

¹³⁰ *See Note, Regulation of Demonstrations, supra* note 94, at 319.

¹³¹ *See id.*

¹³² *Id.* at 320–21 (emphasis added) (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949)).

Ferguson, the black community of Ferguson was able to shine a light on race issues that mainstream society largely ignores by demonstrating in the streets. Nothing in recent memory has brought more attention to the intrinsic prejudices in our legal system or started a national movement like the events in Ferguson. To allow police militarization to chill the freedom of assembly ignores the rationale behind the right that both the Founding Fathers and the Court have articulated.

Two years after *De Jonge*, the Court announced, in *Hague v. Committee for Industrial Organization*,¹³³ another rationale for protecting a broad interpretation of the assembly clause—impartiality. In *Hague*, the Court struck down under the First and Fourteenth Amendment an ordinance that allowed a state actor to deny a permit for a public demonstration if he or she felt that such denial would prevent “riots, disturbances or disorderly assemblage.”¹³⁴ The Court was extremely worried that such an ordinance would allow local officials to arbitrarily decide which views were sanctioned and which were oppressed, as all public assemblies would potentially cause disturbances.¹³⁵

This same rationale applies to the public protests of today; instead of having a local official arbitrarily decide whether to grant a permit, police are arbitrarily deciding whether protests deserve either a militarized or standardized response. Although the Court later upheld public demonstration licenses in *Cox v. New Hampshire*,¹³⁶ it did so only on the condition that objective criteria is used to determine who receives a license.¹³⁷ Police departments can establish the same objective criteria that the Court upheld in *Cox*, as exemplified by the Camden police force which has initiated a new program of data collecting and community policing that attempts to remove the pernicious mental shortcut that police officers sometimes create in certain communities.¹³⁸

As outlined by the Framers and interpreted by the Court in the 1930s, the Assembly Clause was designed to provide a peaceful avenue for citizens to reproach majority opinion through public assemblies. President Abraham Lincoln once wrote that “the right of peaceable assembly . . . is the Constitutional substitute for revolution.”¹³⁹ Through public protests, even the most repressed group can be heard if it

¹³³ 307 U.S. 496 (1939).

¹³⁴ *Id.* at 516.

¹³⁵ *Id.* (arguing that the ordinance could “be made the instrument of arbitrary suppression of free expression of views on national affairs, for the prohibition of all speaking will undoubtedly ‘prevent’ such eventualities”).

¹³⁶ 312 U.S. 569 (1941).

¹³⁷ *Id.* at 574–76.

¹³⁸ Tanzina Vega, *Is Camden a Model for the Future of Policing?*, CNN POLITICS, <http://www.cnn.com/2015/06/27/politics/camden-police-technology/> [<http://perma.cc/SC76-2FMX>] (last updated June 27, 2015, 11:11 AM) (discussing the city’s new data initiative and its impact on the city’s crime rate).

¹³⁹ Letter from Abraham Lincoln to Alexander H. Stephens (Jan. 19, 1860), in UNCOLLECTED LETTERS OF ABRAHAM LINCOLN 127 (Gilbert A. Tracy ed., 1917).

creates enough of a disturbance. This allows a repressed group to air its grievances without resorting to violence.

By reinvigorating the original jurisprudence behind the freedom of assembly, protesters could seek constitutional protection from militarized police forces for two different reasons. First, public protests serve a greater democratic purpose that is inherent in the popular sovereignty of the First Amendment.¹⁴⁰ Second, allowing police forces to determine by themselves whether they arrive with militarized equipment or with standard equipment is an arbitrary use of state action that violates the Fourteenth Amendment.

If the Court interprets the Assembly Clause through originalism, protections for protesters would return to the 1930s level when the Court struck down state action that arbitrarily suppressed freedom of expression.¹⁴¹ As discussed in Part II.B, the aggressive tactics taken by Ferguson police officers likely suppressed individuals' right to freely express their political thought through public protests.¹⁴² By reviving the freedom of assembly as a fundamental right, the Court would apply strict scrutiny to the presence of militarized police at public gatherings. This would provide a much broader swath of constitutional protections to protesters.

B. Applying Speech Doctrine to Protest Cases

Even if the Court does not choose to reinvigorate the original interpretation of the Assembly Clause, it can apply the existing free speech doctrine of the chilling effect test to the militarized police response to public protests. Although physical demonstrations are subject to greater state regulation than pure speech, the recent phenomenon of police militarization and the erosion of the Posse Comitatus Act poses a significant and new threat to the right to assemble.¹⁴³ By applying existing free speech doctrine, the Court could protect protesters from the threat of police militarization without having to create new legal theories.¹⁴⁴ As such, the Court should still broaden the scope of the Assembly Clause, even if it chooses not to return the Clause back to its 1930s interpretation.

¹⁴⁰ Public assemblies and political societies “embod[y] an understanding of popular sovereignty and representation in which the role of the citizen [is] not limited to periodic voting, but instead entail[s] active and constant engagement in political life.” Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. 1525, 1539 (2004).

¹⁴¹ See *supra* notes 125–39 and accompanying text.

¹⁴² See *supra* notes 74–92 and accompanying text.

¹⁴³ See *Cox v. Louisiana*, 379 U.S. 536, 555 (1965); Note, *Regulation of Demonstrations*, *supra* note 94, at 319.

¹⁴⁴ Although rare, there is precedent for the application of free speech doctrine to general First Amendment cases. See *Lamont v. Postmaster General*, 381 U.S. 301, 307 (1965) (Brennan, J., concurring) (holding a law that required an addressee to affirmatively request delivery of communist political propaganda unconstitutional because it would be certain to have a “deterrent effect”).

In the past, the Court has found a number of government regulations and actions unconstitutional solely based on their chilling effect on an individual's exercise of his First Amendment rights, even if the government action was not facially unconstitutional itself.¹⁴⁵ A chilling effect occurs "when individuals seeking to engage in activity protected by the first amendment are deterred from so doing by governmental regulation not specifically directed at that protected activity."¹⁴⁶ Courts are typically quite deferential to state actions, but they have been willing to grant exemptions to otherwise constitutional laws if the plaintiff demonstrates that the regulation severely burdens his freedom of expression.¹⁴⁷ The Court uses a balancing test to decide whether there has been a chilling effect.¹⁴⁸ It weighs the substantiality of the state interest against the severity of the deterrent effect.¹⁴⁹ Originally, the Court only struck down invidious state actions.¹⁵⁰ Recently, however, the Court has recognized the chilling effect doctrine as a cognizable constitutional claim, even in the absence of targeted persecution.¹⁵¹

Given that the chilling effect doctrine is the direct product of the Court's desire to protect the communist and civil rights movements from governmental crackdown during the 1950s McCarthyism Era,¹⁵² the Court should be willing to apply the doctrine to a similar governmental crackdown on modern-day protest movements.¹⁵³ Public protest, which falls under the freedom of assembly, is a First Amendment right, which means that it is within the required protected class. To determine if an unconstitutional chilling effect occurs when militarized police preemptively swarm a public protest, the Court would weigh the deterrent effect—discussed in Part III¹⁵⁴—against the state interest of public safety.

Protecting public safety is a legitimate and strong state interest,¹⁵⁵ and it is often one of the major arguments offered by supporters of the utilization of militarized police at public protests.¹⁵⁶ Although public safety *is* an extremely lofty state interest,

¹⁴⁵ See *Laird v. Tatum*, 408 U.S. 1, 11 (1972) (discussing prior cases where constitutional violations may arise from deterrent effects).

¹⁴⁶ Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 693 (1978) (emphasis omitted).

¹⁴⁷ See Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1484–85 (2013).

¹⁴⁸ See *id.* at 1494.

¹⁴⁹ See *id.*

¹⁵⁰ See *id.* at 1491–92.

¹⁵¹ See *id.* at 1491.

¹⁵² See *supra* note 150 and accompanying text.

¹⁵³ See Youn, *supra* note 147, at 1486.

¹⁵⁴ See *supra* notes 93–124 and accompanying text.

¹⁵⁵ See *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768 (1994) (recognizing a threat to public safety as a legitimate government interest for regulating First Amendment rights).

¹⁵⁶ See Note, *Regulation of Demonstrations*, *supra* note 94, at 320–22 (explaining that protesters lose their constitutional protections if they become violent).

a state would have to prove that there is a “clear and present danger” of violence at the public protest in question.¹⁵⁷ There would only be a “clear and present danger” if the protest in question leads to “imminent lawless action.”¹⁵⁸ Assessing whether there is imminent lawless action is difficult with modern protests because the presence of militarized police often invites violence, not the other way around.

Given the freedom of assembly’s “preferred place” in our society, however, “[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.”¹⁵⁹ As such, the chilling effect doctrine would, at the very least, protect the preemptive presence of militarized police at public protests. SWAT teams would no longer act as first responders to public demonstrations.

Some local police forces have already recognized that prematurely deploying SWAT teams to public protests before there is imminent lawless action not only constitutionally infringes upon protesters’ rights but does more harm than good. For example, the New York City Police Commissioner announced that he plans on reorganizing the NYPD’s special operations forces into two distinct teams: one for terrorist events and another for protests.¹⁶⁰ The terrorist team will continue to be heavily armed, whereas the protest team will be trained in community policing.¹⁶¹ Until a constitutional standard is applied to all of America, however, local police forces will still be able to intimidate protesters with the use of militarized police.

C. *Switching the Burden*

Finally, if the Court refuses to return the Assembly Clause back to its original meaning or apply the chilling effect doctrine to the freedom of assembly, as it does with the freedom of speech, the Court should apply the burden of peaceful assembly to the state actor rather than the individual. Traditionally, the presence of the word “peacefully” in the Assembly Clause acts as a limitation on the right to assemble; the idea being that, if the people cannot protest peacefully, they do not have a right to protest at all.¹⁶² There is, however, another interpretation of the word—where

¹⁵⁷ The Court established the “clear and present danger” standard in *Schenck v. United States*, 249 U.S. 47 (1919), to determine when a state may constitutionally restrict freedom of speech. *Id.* at 52 (“The question . . . is whether the words used are used . . . as to create a *clear and present danger* that they will bring about the substantive evils that Congress has a right to prevent.” (emphasis added)).

¹⁵⁸ See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

¹⁵⁹ *Thomas v. Collins*, 323 U.S. 516, 530 (1945).

¹⁶⁰ See J. David Goodman, *Bratton Says Terrorism and Protests Will Be Handled by Separate Police Units*, N.Y. TIMES (Feb. 2, 2015), <http://www.nytimes.com/2015/02/03/nyregion/bratton-says-terrorism-and-protests-will-be-handled-by-separate-police-units.html>.

¹⁶¹ See *id.*

¹⁶² See Note, *Regulation of Demonstrations*, *supra* note 94, at 320–22.

“peacefully” actually acts as a guarantee of the right, not a limit.¹⁶³ In this interpretation, individuals have a right to assemble free from any external interference.¹⁶⁴

With this interpretation, the acts of the militarized police in Ferguson were clearly a constitutional violation because police presence was actually interfering with *their* right to protest. Switching the burden in this way would place an infringement on the police, not on the protesters—the way the Framers wanted it.

In *De Jonge*, the Court took small steps toward switching the standard when Chief Justice Hughes wrote that “the constitutional rights of free speech, free press and free assembly” are needed to ensure that “changes, if desired, may be obtained by peaceful means.”¹⁶⁵ The Court believed that the Tree of Liberty did not need to be refreshed “with the blood of patriots & tyrants,” but instead hoped that public political assemblies, where dissidents could freely voice their opinions, would protect our democratic society.¹⁶⁶

Although the Court did not expand upon this standard in the 1930s, it should do so now, given the new wave of police militarization and its effect on public protests. With a simple shift in the burden of who is responsible for the peace—the police or the protesters—state officials would be forced to think twice when deploying militarized police to protests. If the state were held responsible for inciting violence, it would likely eliminate the premature presence of militarized police at public demonstrations.

Using Ferguson as a case study, it is clear that the government was not focused on protecting the rights of the protesters.¹⁶⁷ Instead, by sending in militarized police to oversee the protests, the city of Ferguson was ensuring that the protests were *not* peaceful.¹⁶⁸ To inject military-style police officers into an emotional situation where individuals are protesting police hostility is just asking for violence.¹⁶⁹ The state should still have the ability to regulate the right to assemble if there are legitimate public safety concerns, but the regulation must be *in reaction to* a developing violent protest.

Finally, the idea of switching the burden of maintaining a peaceful assembly to the police is not completely novel. In the 1930s when the Assembly Clause received more press attention,¹⁷⁰ the American Bar Association suggested in an amicus brief

¹⁶³ See Brod, *supra* note 93, at 167–69.

¹⁶⁴ See *id.*

¹⁶⁵ *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

¹⁶⁶ This is a reference to Thomas Jefferson’s famous quote: “[T]he tree of liberty must be refreshed from time to time with the blood of patriots & tyrants.” Letter from Thomas Jefferson to William Smith (Nov. 13, 1787) (on file with the Library of Congress, <http://www.loc.gov/exhibits/jefferson/105.html> [<http://perma.cc/H278-U6KE>]).

¹⁶⁷ See DOJ REPORT, *supra* note 59, at 53–59.

¹⁶⁸ See *id.* at 53–55, 59.

¹⁶⁹ See *id.*

¹⁷⁰ Until World War II, the freedom of assembly was a cornerstone of American constitutional landscape. It was even chosen as one of the “Four Freedoms” at the New York World’s Fair. See Inazu, *supra* note 93, at 601. Dorothy Thompson, the “First Lady of American Journalism,” called the freedom of assembly “the most essential right of the four,”

that the duty should be put on the *public officials* to ensure that “the right of free assembly prevail[s] over the forces of disorder if by any reasonable effort or means they can possibly do so.”¹⁷¹ The *New York Times* lauded this brief “as a landmark in American legal history” and encouraged police stations to read it and adopt its advice.¹⁷²

CONCLUSION

Although Representative Sedgwick argued in 1789 that the right to assemble “is certainly a thing that never would be called in question,” the events of recent social protests have certainly done just that.¹⁷³ For many of those who hold minority opinions, protests are the most effective way to challenge the status quo.¹⁷⁴ Police militarization, however, is making it much more costly for citizens to exercise their constitutional rights. In today’s world, activists have a choice between either sitting at home wishing they could protest or protesting with the potential police use of military weaponry. They are thus forced to play a zero-sum game.

Because the current interpretation of the Assembly Clause does not protect what the Founding Fathers originally envisioned with the First Amendment, there is no constitutional protection against this chilling effect on the right to assemble.¹⁷⁵ Current interpretation has made the right to assemble a secondary right, a lesser right, to that of speech and association.¹⁷⁶ The original intent of the Assembly Clause was to protect in-person meetings.¹⁷⁷ The Framers enunciated a right that would protect peaceful assemblies and protests¹⁷⁸—a way for minorities to draw attention to their causes. This right has all but disappeared in modern jurisprudence.

For the last thirty years, the Court has been able to get away with reclassifying freedom of expression cases as freedom of association or speech cases without any real repercussions.¹⁷⁹ But the erosion of the Posse Comitatus Act, the increasing

because “[t]he right to meet together for one purpose or another is actually the guaranty of the three other rights.” *See id.* at 601–02.

¹⁷¹ *Id.* at 600 (quoting Brief for the Committee on the Bill of Rights, of the American Bar Association as Amicus Curiae, *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939) (No. 651)).

¹⁷² *Id.* (quoting Editorial, *A Brief for Free Speech*, N.Y. TIMES, Dec. 23, 1938, at 18).

¹⁷³ Linnekin, *supra* note 101, at 611 (quoting *CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS* 159 (Helen E. Veit et al. eds., 1991)).

¹⁷⁴ If the citizens of Ferguson had not protested, Michael Brown’s death probably would not have made national news, and the resulting national conversation about police shootings of black males likely would not have occurred. *See generally* Emanuella Grinberg, *Why ‘Hands Up, Don’t Shoot’ Resonates Regardless of Evidence*, CNN, <http://www.cnn.com/2015/01/10/us/ferguson-evidence-hands-up/> [<http://perma.cc/EP8L-Y3F4>] (last updated Jan. 11, 2015, 9:43 AM) (detailing how “hands up, don’t shoot” has become a nationwide protest symbol for police mistreatment of minorities).

¹⁷⁵ *See supra* Part III.

¹⁷⁶ *See supra* Part III.

¹⁷⁷ *See supra* Part III.

¹⁷⁸ *See* HAMILTON, *supra* note 103, at 55–56; ZICK, *supra* note 85, at 27.

¹⁷⁹ *See* Brod, *supra* note 93, at 160.

extent of police militarization, and the large-scale return of political protests have left a serious breach of constitutional protections. By whittling away the freedom of assembly jurisprudence, the Court has left activists defenseless. The effects of police militarization on public protests are especially concerning for two reasons: (1) spontaneous political demonstrations are typically the result of dissident social movements, which should be protected;¹⁸⁰ and (2) Congress specifically passed the Posse Comitatus Act to protect citizens from the inherent threat of a domestic military force.¹⁸¹

This Note argues that reinvigorating the often forgotten right to assemble would be a constitutionally sound avenue to protect one of the most important features of society—political discourse in the form of protest—by reining in the negative effects of police militarization on public demonstrators. The Court can reinvigorate the freedom of assembly in three different ways. First, it could simply return to 1930s jurisprudence, which grounded its interpretation in originalism.¹⁸² Second, it could apply the chilling effect doctrine to prevent state actors from making aggressive decisions when the right to assemble is at risk.¹⁸³ Finally, it could place the burden on the *state* to ensure that the *protesters* may peacefully exercise their First Amendment right to assemble peacefully.¹⁸⁴ All three solutions would ensure that all citizens, no matter his or her place in society, are free to join together in an extemporaneous demonstration and voice their opinions on real-time events.

After all, one of the most iconic images of the twentieth century is a picture taken on the morning of the Tiananmen Square protest—a lone man standing in front of a column of tanks. If the Court does not protect the right to protest against police militarization, how long will it be before there is a column of tanks rolling towards a lone man in the United States?

¹⁸⁰ See *supra* Part III.

¹⁸¹ See *supra* Part I.A.

¹⁸² See *supra* Part IV.A.

¹⁸³ See *supra* Part IV.B.

¹⁸⁴ See *supra* Part IV.C.