

**SO WHEN DID PUBLIC ORDER START TRUMPING
FUNDAMENTAL CONSTITUTIONAL RIGHTS?
RETHINKING THE MODERN INTERPRETATION OF
THE RIGHT TO ASSEMBLE AND THE ROLE POLICE
SHOULD PLAY IN PROTECTING THAT RIGHT**

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ABSTRACT

The Assembly Clause of the First Amendment of the United States Constitution was created to protect what early Americans saw as a fundamental right at the heart of what it meant to be a free and democratic society. Throughout the eighteenth and nineteenth centuries, public assemblies played an integral part in American politics and society. These assemblies varied between planned and organic, controlled and chaotic. Whatever characteristics could be attributed to any particular assembly, they were all protected by the Assembly Clause, both in the eyes of law enforcement and the judiciary. Over the last century, however, the right of assembly has taken a back seat to safety concerns and a desire to maintain the status quo. The militarization of America's local police departments throughout the country has exacerbated this phenomenon.

This Note contends that the militarization of police has created an atmosphere that is inherently at odds with the freedoms guaranteed by the Constitution. To rectify the mistakes of the past, the Note advocates for three different approaches to the problem. First, it advocates for judicial review of the constitutionality of the current model of police-protester interaction during public assemblies and the modern judicial interpretation of the Assembly Clause. Second, it advocates for an introduction of legislation that would first cease the flow of weapons and training from the military to local police forces and then reverse this failed experiment altogether. Third, this note suggests a rethinking of how police interact with the communities they are called to serve and protect, suggesting that the community polic-

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ing model best balances the need for maintaining safe communities while still protecting individual freedoms.

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INTRODUCTION

On the morning of November 30, 1999, thousands of demonstrators gathered in Seattle, Washington, to protest the World Trade Organization Ministerial Conference.¹ These protesters came to speak out against the Organization's disregard for the environment, its promotion of globalization at the expense of third world countries, and its toleration of poor working conditions in favor of an overzealous commitment to capitalism.² The demonstrators protested in relative peace despite media coverage that made suggestions to the contrary and numbers that far exceeded the highest original estimations.³ Life in Seattle was significantly disrupted and much local property was damaged, including the property of large national and

1. *Menotti v. City of Seattle*, 409 F.3d 1113, 1121-22 (9th Cir. 2005).

2. See John Vidal, *Real Battle for Seattle*, GUARDIAN (Dec. 4, 1999), <http://www.theguardian.com/world/1999/dec/05/wto.globalisation>.

3. See *Menotti*, 409 F.3d at 1160 (Paez, J., concurring and dissenting); see also David Graeber, *The Myth of Protest Violence*, THE NATION, Aug. 26, 2004, available at <http://www.alternet.org/story/19676>.

worldwide business chains.⁴ However, the only injury to anyone other than a protester came in the form of a heart attack suffered by an aging police officer who was safely evacuated to a hospital.⁵

The crowd gathering to exercise their fundamental right to assemble was relatively peaceful in spite of their unprecedented size; however, the city of Seattle did everything in its power, both before and during the demonstrations, to restrain the movement and influence of the people. Streets were cordoned off with the intent to restrict access between protesters and conference attendees.⁶ As the crowds grew and began to move toward those restricted areas, the Seattle police utilized measures “out of proportion to the threats faced,” such as tear gas, pepper spray, beanbag guns, and rubber bullets.⁷ However, no authority reported anything more militant than the breaking of a plate-glass window.⁸ The City’s decision to treat protesters as enemy aggressors and use riot control weaponry and military tactics against those protesters created a state of emergency that “was to a large extent an emergency of the City’s own making.”⁹

This Note considers the history that has led police to treat protesters as an opposition force rather than as American citizens exercising their constitutionally protected right to assemble. Moreover, this Note asserts that the militarization of America’s law enforcement has resulted in police forces that are fundamentally at odds with the right to assemble as ascribed by the Constitution. Part I discusses the intentions of the Constitution’s Framers in creating the Assembly Clause of the First Amendment.¹⁰ Part I also explains how the judiciary has misconstrued this originalist interpretation over the last century, thus paving the way for an increase in regulations pertaining to public demonstrations.¹¹ Finally, Part I calls for a return to an interpretation of the Assembly Clause that affords protesters the rights and protections originally construed upon them.¹²

4. *Menotti*, 409 F.3d at 1122.

5. *Id.*

6. *Id.* at 1117, 1167.

7. *Id.* at 1122 (citing Seattle City Council, Rep. of the WTO Accountability Review Comm. 4 (2000), available at <http://depts.washington.edu/wtohist/documents/arcfinal.pdf>).

8. Graeber, *supra* note 3.

9. *Menotti*, 409 F.3d at 1171 (Paez, J., concurring and dissenting) (citing Seattle City Council, Rep. of the WTO Accountability Review Comm. 4 (2000), available at <http://depts.washington.edu/wtohist/documents/arcfinal.pdf>).

10. See *infra* Part I.

11. *Id.*

12. *Id.*

Part II examines the American tradition of separation of military and police forces.¹³ This analysis will focus on the reasons behind that purposeful separation, as well as the ways in which it has been enforced and made into law.¹⁴ Part III discusses how the principle of military and police separation has slowly eroded both in theory and fact.¹⁵ The effects of the War on Drugs, the War on Terror, and the numerous legislative acts that grant local police forces unprecedented access to military equipment and training have blurred the line between these two traditionally separate institutions and raise a number of important constitutional questions.¹⁶ Part III further looks at how police militarization has been utilized as a direct infringement upon the right to assemble.¹⁷

The Note goes on to explore and analyze possible solutions to the problems presented by the militarization of law enforcement.¹⁸ Part IV calls for a judicial response to the unconstitutional effects police militarization has on the right of assembly.¹⁹ Although courts have previously considered the unconstitutionality of police militarization, too often courts review interactions between police and protesters under the lenses of freedom of speech and the Fourth Amendment.²⁰ Instead, the courts must emphasize the political origins and public function of the right to assemble in order to rectify previous interpretive errors and address the inherent conflict between the Assembly Clause and a militarized police force.²¹

Part V endorses a call for legislative action to correct the mistakes of police militarization and explores both the positives and negatives of current propositions; specifically, the bipartisan legislation put forth in the wake of the events that took place in Ferguson, Missouri.²² Part VI submits that local law enforcement agencies must refocus police-community interaction.²³ Using the city of Camden, New Jersey, as a model, this section analyzes the benefits of a

13. *See infra* Part II.

14. *Id.*

15. *See infra* Part III.

16. *Id.*

17. *Id.*

18. *See infra* Part IV.

19. *Id.*

20. *Id.*

21. *Id.*

22. *See infra* Part V.

23. *See infra* Part VI.

“community policing” model on both the civilian population and police force.²⁴

I. THE FOUNDING FATHERS’ INTERPRETATION OF THE FREEDOM TO ASSEMBLE AND SUBSEQUENT HISTORY

Along with the other promises enshrined in the Bill of Rights, the right to assemble was intended to be a robust guarantee and cornerstone of the young Republic.²⁵ “The Framers enshrined the right to assemble in the First Amendment for a reason, and that right played a critical role in shaping the nation’s founding.”²⁶ During the period before the Revolution, assemblies were viewed as an integral part of everyday life, at the heart of both politics and culture.²⁷ On a typical street during the founding era, countless assemblies could be found comprised of “‘mobs,’ rioters, soapbox orators, pamphleteers, proselytizers, provocateurs, and press agents.”²⁸ The assemblies often took the form of demonstrations against England that consisted of marches, songs, chants, and the burning of effigies and were “not only tolerated but generally supported.”²⁹ These demonstrations were both planned and spontaneous, though rarely violent.³⁰ Furthermore, the demonstrators themselves were members of every social class, including marginalized groups, such as women and free blacks, and thus the demonstrations united an entire society in their common cause against the British.³¹ Public assemblies, taking place on “[r]udimentary streets and town squares[, were] critical to the revolutionary spirit and cause,” and included protests against the Stamp Act, Tea Act, and other British actions perceived as abuses, including the infamous Boston Massacre, the ultimate catalyst to the Revolutionary War.³²

Both the English legal tradition and the oppression at the hands of the British contributed to the Framers’ view of the right to assemble

24. *Id.*

25. Nicholas S. Brod, Note, *Rethinking a Reinigorated Right to Assemble*, 63 DUKE L.J. 155, 160, 168, 175 (2013).

26. *Id.* at 160.

27. *See id.* at 178–79.

28. TIMOTHY ZICK, *SPEECH OUT OF DOORS* 26 (2009).

29. *Id.* at 27.

30. *Id.* at 27–28.

31. *Id.* at 30. On the rare occasion that these assemblies did grow violent, that violence was generally aimed at British tax collectors and other officials, who often suffered “assault, tarring and feathering, and binding.” *Id.* at 29.

32. Brod, *supra* note 25, at 179.

as fundamental to a society based on popular sovereignty.³³ “[P]rotecting dissent colored the motivation behind the Assembly Clause.”³⁴ The Framers designed the right of assembly, “at least in part, to protect gatherings that ran against the status quo, even if their message was not inherently political.”³⁵ This right was fundamentally ingrained in the consciousness of the founding generation; indeed five state constitutions explicitly protected the people’s right to assemble.³⁶ Some representatives at the First Congress argued against including the Assembly Clause, claiming it was, as a right, already “self-evident” and “would never be called into question.”³⁷ It has also been argued that the Founders were so concerned with the right of assembly that the choice of the word “peaceably,” which was historically construed as a limitation, is actually a guarantee.³⁸ Under this lens, “the Assembly Clause promises those gathered that they may do so without interference from external pressures, that they have a right to assemble in peace, a condition that the government . . . bears the burden of safeguarding.”³⁹

During the early years of our nation’s history, assemblies were a part of everyday life, most prominent on election days and national holidays in which people of every background could gather together in public spaces “to eat, drink, and parade and by implication to affirm their role as participants in this new nation.”⁴⁰ Indeed, “[b]y the mid-nineteenth century, workers, poor people, racial minorities, and social movements all used city streets to further their political goals.”⁴¹ The right of assembly was considered an integral part of the democratic process and was constrained only by criminal law on

33. *Id.* at 175.

34. *Id.* at 176.

35. *Id.* at 175.

36. *Id.* at 177. These states were Massachusetts, New Hampshire, Vermont, Pennsylvania, and North Carolina. *Id.* The Massachusetts constitution stated “[t]he people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them.” MASS. CONST. of 1780, pt. I, art. XIX.

37. Brod, *supra* note 25, at 173–74 (citing 1 ANNALS OF CONG. 731 (1789)).

38. Brod, *supra* note 25, at 167–68 (arguing that the text and language of the Assembly Clause, along with the early history of assemblers in the United States, indicate the Founders conceptualized the assembly right broadly and as a means to protect gatherings that ran against the status quo).

39. *Id.* at 168 (emphasis omitted).

40. Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 555 (2009) [hereinafter *The Neglected Right of Assembly*].

41. *Id.* at 559 (citing SUSAN G. DAVIS, PARADES AND POWER: STREET THEATRE IN NINETEENTH CENTURY PHILADELPHIA 33 (1986)).

rare occasions when an assembly devolved into a riot and threatened the welfare of others.⁴² Even in such instances, “it must [have been] *evident* (on account of this constitutional provision) that it [was] *not* a peaceable assembly, before any such course [could] be adopted.”⁴³

By the late nineteenth century, some cities attempted to restrict the right to assemble by increasing regulatory controls over public spaces, particularly by requiring organizers to obtain permits.⁴⁴ However, with the exception of the Supreme Judicial Court of Massachusetts, the courts of the day rejected these regulations, holding that “[t]he risks of disorder and of interfering with the rights of passersby were not considered sufficiently serious to justify the ordinances.”⁴⁵ In 1899, the Illinois Appellate Court upheld this view in deciding a Chicago ordinance case. The court affords a glance at the typical judicial perspective of the day:

Processions and parades through the streets are not nuisances, and have never been so considered. True, a procession may become disorderly or riotous, and degenerate into a mob, or a parade may be so conducted . . . as to invite a breach of the peace, or to render itself a nuisance, but this would be under exceptional circumstances, and the individuals so disporting themselves would be subject to punishment, and are thus under restraint of law. Under a popular government like ours, the law allows great latitude to public demonstrations, whether religious, political or social, and it is against the genius of our institutions to resort to repressive measures which have a tendency to encroach on the fundamental rights of individuals or of the general public.⁴⁶

42. See *The Neglected Right of Assembly*, *supra* note 40, at 562 (quoting *In re Frazee*, 30 N.W. 72, 75 (Mich. 1886)).

43. *The Neglected Right of Assembly*, *supra* note 40, at 568 (quoting LAURENS DAWES, HOW WE ARE GOVERNED: AN EXPLANATION OF THE CONSTITUTION AND GOVERNMENT OF THE UNITED STATES 309 (1885) (emphasis added)).

44. *The Neglected Right of Assembly*, *supra* note 40, at 570.

45. *Id.* at 570–71. See, e.g., *City of Chicago v. Trotter*, 26 N.E. 359 (Ill. 1891); *Anderson v. City of Wellington*, 19 P. 719 (Kan. 1888); *In re Frazee*, 30 N.W. 72 (Mich. 1886); *In re Garrabad*, 54 N.W. 1104 (Wis. 1893).

46. *Trotter v. City of Chicago*, 33 Ill. App. 206, 208 (1889), *aff'd*, 26 N.E. 359 (Ill. 1891). The city prosecuted Trotter for violating a city ordinance that required all “parades and processions” to occur only after the obtaining of a valid permit. *Id.* at 206–07. The court found the ordinance invalid, as the city was not authorized to require such permits under its charter powers. *Id.* at 207–08.

Thus, the early judiciary endorsed the positive interpretation of the First Amendment's Assembly Clause intended by the Founders, and as such, it was the predominant interpretation for more a hundred years after our nation's founding.⁴⁷

However, around the turn of the twentieth century, the judiciary slowly began to alter and misrepresent this interpretation. For example, in 1897, the United States Supreme Court decided that the Boston Common, a public area in downtown Boston since its colonial inception, was no longer to be considered "common."⁴⁸ The Court found there was no evidence that the "Boston Common [was] the property of the inhabitants of the city of Boston, [nor was it] dedicated to the use of the people of that city," concluding that "the common was absolutely under the control of the legislature."⁴⁹ The Court stated that "[f]or the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."⁵⁰

This reasoning allowed for the enactment of city ordinances throughout the country requiring assemblers to have to apply for and obtain permits before demonstrating in public areas, bringing to an end the era of organic assemblies and public gatherings that were once a fundamental part of the American experience.⁵¹ In order "[t]o demonstrate, parade, or make a speech in public in the United States today, a person or organization must generally go (often well in advance) to the local police department, or to some other municipal department, to fill out required paperwork and to obtain a permit from government officials."⁵² A recent survey of twenty American cities revealed that permit requirements for gatherings in public spaces are a fixture throughout the country, with only one of the surveyed cities having no permit requirement for assemblies in its parks.⁵³ Moreover, the judiciary's continuing misinterpretation of

47. See generally *The Neglected Right of Assembly*, *supra* note 40.

48. *Id.* at 583-84 (discussing *Davis v. Massachusetts (Davis III)*, 167 U.S. 43 (1897)).

49. *Id.* at 583 (quoting *Davis III*, 167 U.S. at 46).

50. *Davis III*, 167 U.S. at 47. The city prosecuted Davis for giving sermons to the public in the Boston Common without first obtaining a permit. *Id.* at 44.

51. See *The Neglected Right of Assembly*, *supra* note 40, at 548-50.

52. *Id.* at 548.

53. *Id.* at 548 n.14. "The sample included the ten largest American cities in 2005 as well as ten cities selected at random with populations analogous to the ten largest American cities in 1880." *Id.* Only "San Jose has no permit requirement for assemblies in its parks. A permit is . . . required[, however,] if sound amplification devices will be used or equipment will be brought into the park." *Id.*

the Assembly Clause has transformed the way that ordinary citizens view their right to assemble:

[O]ur contemporary attitudes, as evidenced in law, practice, and public discourse, stand in stark contrast to the attitudes of previous generations of Americans . . . [O]ur fears of the disorder associated with outdoor gatherings are undermining the right of peaceable assembly and the critically important form of political participation it safeguards.⁵⁴

Recently, however, there has been scholarly and real-world pushback calling for a return to the original and broader interpretation of the right of assembly. Scholars advocate for the return of disruptive and spontaneous outdoor assemblies.⁵⁵ Calling for an end to the regulation of public assembly, Professor Tabatha Abu El-Haj contends that “[i]f outdoor assembly is not to be sapped of its worth, we must even tolerate some risk that violence will break out, although the evidence is that most protest events are orderly and peaceful.”⁵⁶ Citizens have also begun to show a renewed recognition of the inherent power of assembly, as evidenced by the recent Occupy Movement⁵⁷ and protests in Ferguson, Missouri, following the death of Michael Brown.⁵⁸ These dissenters hope to remind the Supreme Court of the words it used to describe the right of assembly in *Hague v. Committee for Industrial Organization*:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of

54. Tabatha Abu El-Haj, *All Assemble: Order and Disorder in Law, Politics, and Culture*, 16 U. PA. J. CONST. L. 949, 950 (2014) [hereinafter *All Assemble*].

55. See Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1 (2011) [hereinafter *Changing the People*]; *All Assemble*, *supra* note 54; Tabatha Abu El-Haj, *Fundamental Right to Disrupt*, PHILA. INQUIRER, August 28, 2014 [hereinafter *Fundamental Right to Disrupt*]; *The Neglected Right of Assembly*, *supra* note 40.

56. *All Assemble*, *supra* note 54, at 1033.

57. See Claire Howard, *A New First Amendment Battleground: Challenges Facing Local Governments by the Occupy Movement and Proactive Responses to Future Movements*, 45 URB. LAW. 473, 473 (2013).

58. See Wesley Lowery & Arelis R. Hernandez, *Protesters Take to St. Louis Streets as Part of Weekend of Resistance*, WASH. POST, Oct. 11, 2014, http://www.washingtonpost.com/politics/protesters-take-to-st-louis-streets-as-part-of-weekend-of-resistance/2014/10/11/1aab8e3a-5185-11e4-babe-e91da079cb8a_story.html.

a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.⁵⁹

II. A HISTORY OF THE SEPARATION OF THE MILITARY AND LOCAL LAW ENFORCEMENT

To the Framers, there was no question that military involvement in civilian affairs was a major impediment to the establishment of a democratic nation.⁶⁰ They had first-hand experience in dealing with the ramifications of housing a standing army amongst the civilian population. The stationing of British troops in Boston, and their subsequent interactions with the local populace, was perhaps one of the most important factors in the decision to declare independence.⁶¹ At the very least, the quartering of troops in the heart of the city inevitably led to the formation of the mob involved in the Boston Massacre.⁶² John Adams famously said of the British troops in Boston: “[S]oldiers quartered in a populous town, will always occasion two mobs, where they prevent one. They are wretched conservators of the peace!”⁶³ Five years later, Thomas Jefferson specifically cited this improper and malicious use of the British army as an example of King George’s tyranny when he penned the Declaration of Independence.⁶⁴ Jefferson justified separation from England because the king rendered the “Military independent of and superior to the Civil power”⁶⁵ and “quarter[ed] large bodies of armed troops among us,” acting “totally unworthy . . . of a civilized nation.”⁶⁶

This sentiment carried over into the establishment of the government. Despite being a young nation facing threats both externally

59. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–516 (1939).

60. *Perpich v. Dep’t of Def.*, 496 U.S. 334, 340 (1990). The Supreme Court stated that the Founders “widespread fear that a national standing army posed an intolerable threat to individual liberty and the sovereignty of the separate States” deeply influenced the Constitution’s drafting. *Id.*

61. THE DECLARATION OF INDEPENDENCE para. 27 (U.S. 1776).

62. DAVID McCULLOUGH, JOHN ADAMS 65 (2001).

63. John Adams, Argument in Defense of the British Soldiers in the Boston Massacre Trial (Dec. 3, 1770).

64. See THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776).

65. *Id.*

66. *Id.* at para. 16, 27.

and internally, the Articles of Confederation originally restricted states from raising armies during times of peace.⁶⁷ Just how deeply this notion was ingrained in the collective consciousness of the young nation is demonstrated by the fact that seven out of the thirteen colonies stated in their constitutions that standing armies “are dangerous to liberty”⁶⁸ In the Federalist No. 8, Alexander Hamilton said this of the risks to freedom associated with having a standing army involved in civilian affairs:

The continual necessity of their services enhances the importance of the soldier, and proportionably degrades the condition of the citizen. The military state becomes elevated above the civil. The inhabitants of territories . . . are unavoidably subjected to frequent infringements on their rights, which serve to weaken their sense of those rights; and by degrees the people are brought to consider the soldiery not only as their protectors, but as their superiors.⁶⁹

During the Constitutional Convention, delegates deliberated over whether there should be a standing army at all.⁷⁰ After much contentious debate,⁷¹ the Convention decided to allow for an army, so long as that army adhered to certain conditions that kept it under civilian control.⁷² In the end, the constitutional safeguards included making the military subordinate to the President,⁷³ reserving the power to raise a standing army and declare war to Congress,⁷⁴ and expressly stating that the army’s only domestic role would be to

67. ARTICLES OF CONFEDERATION OF 1781, art. VI, para. 4.

68. These states were Pennsylvania, North Carolina, Virginia, Delaware, New Hampshire, Vermont, and Maryland. 7 CONG. REC. 3579 (1878).

69. THE FEDERALIST No. 8 (Alexander Hamilton). James Madison, the other author of the Federalist Papers, agreed with Hamilton, artfully pointing out that “the liberties of Rome proved the final victim to her military triumphs.” THE FEDERALIST No. 41 (James Madison).

70. Sean J. Kealy, *Reexamining the Posse Comitatus Act: Toward a Right to Civil Law Enforcement*, 21 YALE L. & POL’Y REV. 383, 391 (2003).

71. Nathan Canestaro, *Homeland Defense: Another Nail in the Coffin for Posse Comitatus*, 12 WASH. U. J.L. & POL’Y 99, 108–09 (2003) (“New York, Virginia, North Carolina, and Rhode Island wanted an explicit clause in the Constitution establishing the military’s subordinate to civil authorities, while North Carolina and Virginia demanded a limit on how long soldiers could serve in peacetime New Hampshire, Virginia, New York, North Carolina and Rhode Island clamored for constitutional protection against the quartering of soldiers. They also sought to require legislative approval for maintaining a standing army.”).

72. David E. Engdahl, *Soldiers, Riots, and Revolution: The Law and History of Military Troops in Civil Disorders*, 57 IOWA L. REV. 1, 41–42 (1971).

73. U.S. CONST. art. II, § 2, cl. 1.

74. *Id.* at art. I, § 8, cl. 11, 12.

quell insurrections.⁷⁵ Additionally, the Second and Third Amendments of the Bill of Rights allowed for state militias, secured citizens' right to bear arms, and protected citizens from the unlawful quartering of soldiers.⁷⁶ These amendments were established to ensure that the People, as the controlling force behind this new Republic, would always hold a higher position in society than and be protected from the military.

As time moved forward, however, the principle of separation of military forces from civilian life and, more specifically, civilian law enforcement, began to disappear. It started as a small break from the norms established by the Founders, with military personnel oftentimes serving in marshals' posses to the detriment of the civilian population,⁷⁷ but soon became one of the central debates of the late nineteenth-century, as the military actually governed the defeated Confederate states during the Reconstruction Era.⁷⁸ This excessive military presence led to the election of Rutherford B. Hayes as president, who promised southern congressmen an end to Reconstruction in return for their votes during a contested presidential election.⁷⁹

One of Hayes' first post-Reconstruction reforms was the Posse Comitatus Act (PCA).⁸⁰ Today, the act reads:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus⁸¹ or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years or

75. *Id.* at art. I, § 8, cl. 15. This clause has been invoked on a handful of occasions, including Shay's Rebellion (1786), the Whiskey Rebellion (1794), and the Civil War (1861).

76. *Id.* at amends. II-III.

77. Over 100 people were killed when the Army was used to combat rioters in 1863 in New York City and again when they were used in 1877 to suppress the Pullman Railroad strike. Raj Dhanasekaran, *When Rotten Apples Return: How the Posse Comitatus Act of 1878 Can Deter Domestic Law Enforcement Authorities from Using Military Interrogation Techniques on Civilians*, 5 CONN. PUB. INT. L.J. 233, 249 n. 119 (2006).

78. Kealy, *supra* note 70, at 393.

79. *Id.* at 394. Samuel J. Tilden actually won the popular vote in the 1876 presidential election, but the electoral votes in three southern states and Oregon were disputed. *Id.* The election was ultimately given to Congress to decide. *Id.*

80. Army Appropriations Act, ch. 263, § 15, 20 Stat. 145, 152 (1878) (codified as amended at 18 U.S.C. § 1385 (2006)); Kealy, *supra* note 70, at 394.

81. "The pejorative term 'posse' is short for 'posse comitatus,' and refers to the ability of a county sheriff to requisition able-bodied men to help maintain law and order." Dhanasekaran, *supra* note 77, at 245. "Posse comitatus" translates directly from Latin as "power of the country." BLACK'S LAW DICTIONARY (10th ed. 2014).

both.⁸²

The PCA not only worked to bring Reconstruction to an immediate end, but was also a way to statutorily guarantee that the principles of the Revolution would no longer be violated at the expense of the people.⁸³ It was created to ensure that soldiers, who are trained to be instruments of war meant to inflict maximum damage on their enemy, would not be used as civilian police, who are expected to adhere to constitutional procedures and keep the peace by de-escalating situations and inflicting as little damage as possible in doing so.⁸⁴ The PCA allowed for criminal prosecution of anyone, military or civilian, who used Army or Air Force personnel to execute the law of the land without express consent from Congress.⁸⁵ Though rarely referenced or interpreted for nearly the first hundred years of its existence, that “obscurity may have been a result of the Act’s effective curtailment of military involvement in law enforcement.”⁸⁶ Over the course of the last thirty years, however, the protections offered by the PCA have started to erode.

III. THE MILITARIZATION OF AMERICA’S LOCAL LAW ENFORCEMENT AND ITS EFFECT ON PUBLIC ASSEMBLY

The first modern police force to utilize a preventative model of law enforcement, a precursor to the current American model, was the Metropolitan Police Force of London, created in 1829 by Robert Peel, England’s Home Secretary and future Prime Minister.⁸⁷ Peel was able to convince the citizens of London of his force’s legitimacy “by selecting officers who were reserved in demeanor; choosing uniforms that were unassuming; insisting that the officers be restrained and polite; and by barring officers from carrying guns.”⁸⁸ In honor of Robert Peel, the London citizenry affectionately referred to their new police officers as “bobbies.”⁸⁹

82. 18 U.S.C. § 1385.

83. See Kealy, *supra* note 70, at 394.

84. See Diane Cecilia Weber, *Warrior Cops: The Ominous Growth of Paramilitarism in American Police Departments*, 50 CATO INST. BRIEFING PAPERS 1, 2–3 (1999).

85. Kealy, *supra* note 70, at 396–97.

86. *Id.* at 398.

87. See Cynthia A. Brown, *Police and Corrections Officers Serving in the Military: Divided Loyalties: Ethical Challenges for America’s Law Enforcement in Post 9/11 America*, 43 CASE W. RES. J. INT’L L. 651, 666–67 (2011).

88. *Id.* at 667.

89. *Id.* Those that were not as happy with this new institution derogatively referred to the officers as “Peelers.” See *id.*

Though early American police forces adopted the British model of preventative patrolling and were rarely heavily armed, the American and British models differed in the fact that the American model was more decentralized and directly tied to the local political machines, with the officers themselves appointed by local ward bosses.⁹⁰ The officers were generally from the neighborhoods they patrolled and often acted as both law enforcer and social worker because they felt they had a stake in the community.⁹¹ These early police forces did not impose national or even statewide standards and “did not consider themselves a self-contained body of law officers set apart from the general populace.”⁹² Though well integrated with their respective communities and often able to solve crimes simply by knowing the right people to talk to, this early version of American law enforcement was prone to corruption due to the strong loyalties the officers held toward the politicians and political entities that put them in power.⁹³

In an effort to eradicate the rampant corruption of the previous era of law enforcement, between the 1920s and the 1960s, police forces across the country experienced major overhauls in order to become more professional, including “the adoption of a code of ethics, improved police behavior and performance, better selection and training of officers, and enhanced management of police agencies.”⁹⁴ These reformed police departments resembled “centralized, depersonalized, hierarchical bureaucracies” that assigned military ranks to their personnel and established a nationally unified outlook to the profession of law enforcement, as indicated by the occupation’s unionization.⁹⁵ Philadelphia police superintendent James Robinson said of his department in 1912: “Military methods have been adopted and military discipline enforced.”⁹⁶ These new-look departments even resorted to recruiting officers from outside of their own communities to ensure that the officers had no ties that could compromise their police work.⁹⁷ Recently, police departments throughout

90. *Id.* at 667–68; Weber, *supra* note 84, at 5.

91. *See* Weber, *supra* note 84, at 5. For instance, jails, in addition to housing criminals, often provided overnight lodging, soup kitchens, and a safe haven for tramps, lost children, and other destitute individuals. *Id.*

92. *Id.* at 6.

93. *Id.* at 5–6.

94. Brown, *supra* note 87, at 668–69.

95. Weber, *supra* note 84, at 6.

96. *Id.*

97. *See* Weber, *supra* note 84, at 6. The Pennsylvania State Police were the first true modern state police force. *Id.* Members were recruited from throughout the state to ensure that they had no ties to the communities in which they served. *Id.* They were considered so militant that

the country have adopted a philosophy of “community policing,” which emphasizes a return to developing relationships between the police and the citizens.⁹⁸ The idea of “community policing,” however, has been interpreted in many different ways.⁹⁹

One interpretation of community policing is characterized by the intense militarization of local law enforcement and wide-scale surveillance tactics.¹⁰⁰ Although the modern era of policing is generally accepted as having started in the early 1980s, with the advent of the “War on Drugs,” it can actually be traced back to 1966 to the infamous mass shooting incident that occurred at the University of Texas in Austin.¹⁰¹ Charles Whitman, an emotionally-imbalanced veteran, climbed to the top of the University of Texas clock tower, armed with a sniper rifle and military training, and proceeded to shoot at the people below, killing fifteen and wounding another forty-six.¹⁰² It took the Austin police over ninety minutes to storm the clock tower’s observation deck and put an end to Whitman’s rampage.¹⁰³ “The Austin episode was so blatant that it ‘shattered the last myth of safety Americans enjoyed [and] was the final impetus the chiefs of police needed’ to form their own SWAT teams.”¹⁰⁴ Capitalizing on the fear inspired by the Whitman shooting and the general upheaval of 1960s America, former Los Angeles Police Chief Daryl Gates, then a patrol area commander, created the nation’s first SWAT team.¹⁰⁵ Gates famously displayed SWAT’s elite capabilities to the rest of the nation during the Los Angeles race riots that marked the decade.¹⁰⁶

some took to referring to them as the “Cossacks.” *Id.* Despite the negative reaction of the public to these militant police officers, other states throughout the country began to adopt their methods. *Id.*

98. Brown, *supra* note 87, at 669.

99. See *id.* at 673. This Note will later address the two very different interpretations of community policing: one in which the police take a proactive and aggressive approach to law enforcement, including street sweeps and no-knock searches and seizures; and the other in which police attempt to empower the communities they work in by cultivating relationships with the populace and establishing partnerships with the public. See *infra* Part VI. This Note will advocate for a nationwide implementation of the latter. See *infra* Part VI.

100. See John W. Whitehead, *Problems of Community Policing*, THE DAILY PROGRESS (Sept. 28, 2014), http://www.dailyprogress.com/news/local/opinion-column-problems-of-community-policing/article_6592fe0a-4709-11e4-a940-0017a43b2370.html.

101. See Karan R. Singh, *Treading the Thin Blue Line: Military Special-Operations Trained Police SWAT Teams and the Constitution*, 9 WM. & MARY BILL RTS. J. 673, 675 (2001); Weber, *supra* note 84, at 6.

102. *Id.*

103. *Id.*

104. Weber, *supra* note 84, at 6 (quoting ROBERT SNOW, *SWAT TEAMS: EXPLOSIVE FACE-OFFS WITH AMERICA’S DEADLIEST CRIMINALS* 7 (1996)).

105. See Singh, *supra* note 101, at 675–79; Weber, *supra* note 84, at 6.

106. See Singh, *supra* note 101, at 675; Weber, *supra* note 84, at 6.

The rise of the SWAT team signaled the beginning of police militarization, but it was President Ronald Reagan's War on Drugs in the 1980s that provided the financial backing and longevity that made it a nationwide phenomenon. Because of the rise of drug smuggling and civil authorities' seemingly impossible task of trying to stop the deluge of drugs into their communities, Reagan declared a War on Drugs, and, like all other wars, he intended to involve the military in the fight.¹⁰⁷ In 1981, Congress passed the Military Cooperation with Law Enforcement Agencies Act.¹⁰⁸

[This] law amended the Posse Comitatus Act insofar as it authorized the military to "assist" civilian police in the enforcement of drug laws. The act encouraged the military to (a) make available equipment, military bases, and research facilities to federal, state, and local police; (b) train and advise civilian police on the use of the equipment; and (c) assist law enforcement personnel in keeping drugs from entering the country. The act also authorized the military to share information acquired during military operations with civilian law enforcement.¹⁰⁹

Since the Act's passage, the relationship between the military and police has become stronger and, consequently, the line between the two has become blurred. In the late 1980s, Congress established an apparatus to facilitate transactions between the military and civilian law enforcement, directed the National Guard to assist in the War on Drugs by taking part in counterdrug law enforcement operations, and President Bush created joint task forces charged with coordinating activities between the military and local police forces in the drug war, including joint training.¹¹⁰ The National Defense Authorization Act of Fiscal Year 1997,¹¹¹ otherwise known as the 1033 Program, has transferred over five billion dollars' worth of military equipment to local law enforcement departments (including over twenty school districts that have their own police forces¹¹²) since its

107. See Canestaro, *supra* note 71, at 114.

108. Military Cooperation with Civilian Law Enforcement Agencies Act, Pub. L. No. 97-86, 95 Stat. 1099 (1981) (codified as amended at 10 U.S.C. §§ 371-74 (1994)).

109. Weber, *supra* note 84, at 4.

110. *Id.* at 5.

111. National Defense Authorization Act of Fiscal Year 1997, Pub. L. No. 104-201, § 1033, 110 Stat. 2422 (1996).

112. "A CBS News review of available public data from more than 30 states found that law enforcement agencies affiliated with educational institutions have obtained more than \$13 million worth of military gear from the program. Among the items received: 145 pistols, 780 rifles and nine of the mine resistant vehicles." *Local School Districts Got Military Gear from Pen-*

inception and 980 million dollars' worth of equipment in 2014 alone.¹¹³

Perhaps the most telling statistic regarding police militarization is the dramatic increase in SWAT teams and their usage. Over ninety percent of police departments now have some form of paramilitary unit, more than a three hundred percent increase since 1980.¹¹⁴ While SWAT teams were originally designed for use in only the most extreme situations, such as riots, terrorist attacks, hostage situations, and barricaded suspects, they are now commonly used in everyday police activity, such as serving warrants and conducting street patrols.¹¹⁵ These paramilitary units are often equipped with an abundance of military-grade weaponry and technology, including Heckler and Koch MP5 submachine guns, semi-automatic shotguns, sniper rifles with laser sights, percussion and stinger grenades, tear gas grenades, rubber bullets, C4 explosives, battering rams, camouflage "battle dress uniforms," Kevlar helmets and body armor, infrared goggles, combat boots, and military armored personnel carriers.¹¹⁶

Since September 11, 2001, the movement toward police militarization that began with the War on Drugs has expanded, now also incorporating a War on Terror. In the wake of the tragedy, "President George Bush declared that '[e]very American is a soldier,' including the domestic civilian police forces, further endorsing a national warrior culture."¹¹⁷ Others in the government have continued to blur the line between police and military by advocating for soldiers to operate on American soil as a police force, with the power to arrest citizens.¹¹⁸ In response to a letter from Senator John Warner, former Defense Secretary Donald Rumsfeld went so far as to call for the "ac-

tagon, CBSNEWS.COM (Sept. 26, 2014, 7:00 AM), <http://www.cbsnews.com/news/k-12-schools-recvied-weapons-from-pentagon/>.

113. *About the Program*, DEFENSE LOGISTICS AGENCY DISPOSITION SERVICES, <http://www.dispositionservices.dla.mil/leso/pages/default.aspx> (last visited Oct. 1, 2015).

114. See Peter B. Kraska & Victor E. Kappeler, *Militarizing American Police: The Rise and Normalization of Paramilitary Units*, 44 SOCIAL PROBLEMS 1, 5-6 (1997). While this report is now nearly two decades old, Dr. Kraska has continued this line of research and concluded that the trend of militarization has only continued to rise. Randy Balko, *New ACLU Report Takes a Snapshot of Police Militarization in the United States*, WASH. POST (June 24, 2014), <https://www.washingtonpost.com/news/the-watch/wp/2014/06/24/new-aclu-report-takes-a-snapshot-of-police-militarization-in-the-united-states/>.

115. Kraska and Kappeler, *supra* note 114, at 4.

116. *Id.* at 3-4.

117. Brown, *supra* note 87, at 672 (quoting Elisabeth Bumiller, *A Nation Challenged: President Bush Announces a Crackdown on Visa Violators*, N.Y. TIMES, Oct. 30, 2001, at A1).

118. Joyce Howard Price, *Biden Backs Letting Soldiers Arrest Civilians*, WASH. TIMES (July 22, 2002), available at www.prisonplanet.com/news_alert_072202_martial.html.

tive-duty military to more fully join [their] domestic assets in this war against terrorism."¹¹⁹ The military has played a domestic part in countering terrorism by working alongside local law enforcement in the transportation of suspected terrorists and patrolling the nation's borders and airports.¹²⁰ Military personnel have also played a role in non-terrorist crimes, such as the search and capture of the D.C. Sniper in 2002.¹²¹ The question then becomes: When the police are trained by the military, are given military equipment, work side-by-side with the military, and are told by their elected officials that they are soldiers on the "front lines," how can they then be expected not to approach their job with the mentality of a soldier, whose mission is in diametric opposition to that of a peace officer?

This blurring of the lines between military and police has proven inherently dangerous. "The military is not a police force; it is trained to engage and destroy the enemy, not to protect constitutional rights."¹²² In 1993, law enforcement agents in Waco, Texas, were trained and advised by Army Special Forces and Delta Force commanders in preparation for their fifty-one day siege of the Branch Davidian compound, which housed a fanatical and heavily armed religious cult.¹²³ The operation resulted in over seventy civilian deaths, "the largest number of civilian deaths ever arising from a law enforcement operation."¹²⁴ Small cities, such as Albuquerque, New Mexico, have seen the number of people killed by police officers rise dramatically, many of them at the hands of paramilitary teams partaking in activities as innocuous as serving bench warrants.¹²⁵ The city of Albuquerque hired Professor Sam Walker, a professor of criminal justice at the University of Nebraska at Omaha, to study its police department's practices. He found that "[t]he rate of killings by the police was just off the charts They had an organizational culture . . . that led them to escalate situations upward rather than de-escalating."¹²⁶ "It is the militarization of Mayberry," declared Dr. Peter B. Kraska, a researcher and professor of criminal

119. *War Prompts Debate on Military Law: Posse Comitatus Act of 1878 Bans Use of Troops for Many Actions on U.S. Soil*, HOUSTON CHRONICLE, Nov. 11, 2001, at 39.

120. Kealy, *supra* note 70, at 387.

121. *Id.*

122. Canestaro, *supra* note 71, at 100.

123. Weber, *supra* note 84, at 2.

124. *Id.*; CBS.com News Staff, *What Really Happened at Waco*, CBS.COM (Jan. 25, 2000), <http://www.cbsnews.com/news/what-really-happened-at-waco/>.

125. See Timothy Egan, *Soldiers of the Drug War Remain on Duty*, N.Y. TIMES, Mar. 1, 1999.

126. *Id.*

justice at Eastern Kentucky University, widely regarded as the foremost authority on the phenomenon of police militarization.¹²⁷

The militarization of America's local law enforcement has also affected the way police interact with protesters at public gatherings and has dramatically encumbered the once sacred right of assembly. The recent Occupy movement "evoked the specter of founding-era assemblies by calling for a thorough rethinking of the political order. Like the Antifederalists before them, Occupy protesters understood assembly as an element of civic responsibility . . ." ¹²⁸ The movement has forced courts and academics to reevaluate the historical adjudication and interpretation of the First Amendment.¹²⁹ However, the Occupy movement has also been met with brutal opposition by "front-line" police forces on the ground.¹³⁰ As discussed below, the city of Oakland, California, settled with Occupy protesters who became the victims of police brutality for 1.17 million dollars.¹³¹

In October of 2011, protesters assembled in front of Oakland City Hall to raise awareness about economic inequality and advocate for social and political change as part of the nationwide Occupy movement.¹³² Many protesters erected tents and other necessities of living in order to occupy the public space for an extended period of time.¹³³ While it is acknowledged that this long-term assembly transpired generally without incident, the city of Oakland nevertheless presented the occupiers with an eviction notice.¹³⁴ In an attempt to enforce the notice, the city sent advancing lines of riot-gear-clad officers into the public space.¹³⁵ Numerous peaceful assemblers were

127. *Id.* Dr. Kraska has written seven books on the subject of police militarization and is frequently asked to present his research to academics and policy audiences, including providing testimony to the United States Senate. *Dr. Pete Kraska*, EASTERN KENTUCKY UNIVERSITY, <http://justicestudies.eku.edu/people/kraska> (last visited Oct. 1, 2015).

128. Brod, *supra* note 25, at 183.

129. *See id.* at 184.

130. *See id.* at 156-67.

131. Matthew Artz, *Oakland Approves \$1.17 Million Occupy Settlement*, OAKLAND TRIB. (July 3, 2013), http://www.mercurynews.com/breaking-news/ci_23589592/oakland-approves-1-million-occupy-settlement [hereinafter *Oakland Approves*].

132. *Campbell v. City of Oakland*, No. C 11-5498RS, 2011 U.S. Dist. LEXIS 132525, at *2-3 (N.D. Cal. Nov. 16, 2011).

133. *Id.* at *3.

134. *Id.* at *2-3.

135. Matthew Artz, *Oakland Settles with Iraq War Veteran Beaten at Occupy Protest*, OAKLAND TRIB. (Dec. 11, 2013), http://www.mercurynews.com/crime-courts/ci_24698962/oakland-settles-iraq-war-veteran-beaten-at-occupy [hereinafter *Oakland Settles*].

seriously injured, and as a result of out-of-court settlements with the victims, the city of Oakland lost millions of dollars.¹³⁶

During the course of the Oakland Police Department's attempted eviction of the protesters from a public plaza, "the plaintiffs . . . were struck either by beanbags or flash-bang grenades fired by officers during Occupy protests."¹³⁷ Two victims, military veterans Kayvan Sabeghi and Scott Olsen, were injured when they were beaten with a baton and struck in the head by a rubber bullet, respectively.¹³⁸ The police used crowd-control weapons, "including flash-bang grenades, tear gas, rubber bullets, and pepper[]balls, on crowds or non-threatening individuals."¹³⁹

All of this happened despite the fact that "Oakland's Crowd Control and Crowd Management Policy is generally designed to uphold constitutional rights of free speech and assembly while relying on the minimum use of force and authority needed to address a crowd management or crowd control issue."¹⁴⁰ Additionally, the Oakland police are supposed to be prohibited from dispersing "a demonstration or crowd event before demonstrators have acted illegally or before the demonstrators pose a clear and present danger of imminent violence."¹⁴¹ The policy also limits the very weapons used in dispersing the crowd, members of which claim they were attacked indiscriminately and without warning.¹⁴²

More recently, Americans watched as one of their own cities became engulfed in clashes between police and protesters, who are angry at what they perceive as mistreatment at the hands of those sworn to protect them. The public was bombarded with pictures and videos of police armed in military-inspired uniforms riding down Ferguson's streets in mine-resistant, ambush-protected vehicles (MRAPs) while pointing loaded assault rifles at protesters.¹⁴³

136. *Oakland Approves*, *supra* note 131.

137. *Id.*

138. *Oakland Settles*, *supra* note 135.

139. *Campbell*, No. C 11-5498RS, 2011 U.S. Dist. LEXIS 132525, at *5. Pepper balls are nonlethal projectiles utilized by law enforcement for "crowd control, barricade busting, or [to] more quickly achieve individual suspect compliance." *Pepperball Technologies*, LESS LETHAL PRODUCTS, http://www.lesslethalproducts.com/Pepperball_Technologies.php (last visited Aug. 15, 2015). Their use results in both a painful impact, such as that delivered by a rubber bullet, and the release of a hot pepper irritant in powder form. *Id.*

140. *Campbell*, 2011 U.S. Dist. LEXIS 132525, at *3-4 (internal quotations omitted).

141. *Id.* at *4.

142. *See id.*

143. *See* Matt Apuzzo & Michael S. Schmidt, *In Washington, Second Thoughts on Arming Police*, N.Y. TIMES (Aug. 23, 2014), <http://www.nytimes.com/2014/08/24/us/in-washington-second-thoughts-on-arming-police.html> [hereinafter *Second Thoughts on Arming Police*].

Those images looked frighteningly more like a news report from some distant war-zone than that of an American suburban city. In Ferguson, local authorities met protesters “with a show of military-style force” during the protests that followed the killing of an unarmed black teenager by a police officer.¹⁴⁴ As experienced by many protesters before them, the demonstrators in Ferguson were met with rubber bullets, tear gas, flash grenades, and numerous other military-inspired “peace-keeping” weapons, all as a result of a decades-old strategy of outfitting local police departments with military-grade weaponry and training.¹⁴⁵ This time, however, the public and politicians are taking note, and the beginnings of a bipartisan movement against this militarization of local law enforcement has seemingly gained ground, marked by the opining of numerous legislators on both sides of the aisle and the introduction of various demilitarization bills.¹⁴⁶

Since the advent of this new age of police militarization, incidents similar to the protests in Ferguson have occurred all over the country, notably in Seattle, Washington, during the 1999 World Trade Organization conference. In many, if not all of these instances, the police have utilized the weaponry and tactics traditionally employed by the military to disperse crowds. They have acted not as protectors of the people’s constitutional right to assemble, but rather as an opposition force, engaged in a mission against those they are sworn to serve and protect, escalating rather than de-escalating tensions. As evidenced by popular reactions throughout the country in the wake of the events in Ferguson, however, it seems that a change might be in the air.

IV. JUDICIAL RESPONSE AS A MEANS TO END POLICE MILITARIZATION BY RETURNING TO THE ORIGINAL INTERPRETATION OF THE FIRST AMENDMENT RIGHT OF

144. Matt Apuzzo & Manny Fernandez, *Justice Department Inquiry to Focus on Practices of Police in Ferguson*, N.Y. TIMES (Sept. 3, 2014), <http://www.nytimes.com/2014/09/04/us/politics/justice-dept-to-investigate-ferguson-police-practices.html> [hereinafter *Justice Department Inquiry*].

145. *Second Thoughts on Arming Police*, *supra* note 143.

146. See, e.g., Stop Militarizing Law Enforcement Act, H.R. 5478, 113th Cong. (2014); Andrew Grossman, *Senators Criticize Growing Militarization of Local Police Departments*, WALL ST. J. (Sept. 9, 2014), <http://www.wsj.com/articles/senators-criticize-militarization-of-local-police-departments-1410287125>; see also Rand Paul, *Rand Paul: We Must Demilitarize the Police*, TIME (Aug. 14, 2014), <http://www.time.com/3111474/rand-paul-ferguson-police> (contending that the militarization of American police forces combined with the racial disparities in the criminal justice system have created an environment in which many Americans feel that those institutions meant to protect them are actually targeting them).

ASSEMBLY

As originally interpreted, the First Amendment right to assemble prohibits police militarization insofar as that militarization is utilized to curb the constitutional rights of American citizens. In order to return to the Founders' intent, American courts must be willing to reevaluate how the right of assembly has been construed for the last century, as well as the role assembly plays in American culture and politics in general. Since the end of the nineteenth century and the Supreme Court's ruling in *Davis III*, all three branches of government at both the federal and state levels have moved increasingly toward a view of public assembly as a nuisance that as a right is inferior to the government's interest in maintaining public order.¹⁴⁷ Although permit requirements that place restrictions upon the time and place a group is allowed to assemble were once viewed as inherently unconstitutional, they are now a fixture in almost every major American city, town, and municipality, and fully supported and enforced by the local judiciaries.¹⁴⁸ Recently, this view was made clear in *McCullen v. Coakley*:

Even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech [and assembly], provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.¹⁴⁹

At first glance it may seem that these restrictions serve to balance the most fundamental aspects of the First Amendment with the interests of the community at large. However, when viewed through the lens of the early Americans, the Supreme Court is at best paying lip service to what was once a fundamental right, and at worst stripping the freedom of assembly of any meaning or constitutional authority.

147. See generally *The Neglected Right of Assembly*, *supra* note 40 (explaining that changes in attitudes toward assembly turned a once robust right utilized as a check and balance on representative democracy into a symbolic performance and ritualized act lacking any substantive political relevance); *Changing the People*, *supra* note 55 (outlining the changes in the way municipalities regulate outdoor gatherings, situating the change in a pattern of similar regulatory changes with respect to other political practices, such as voting); *All Assemble*, *supra* note 54 (analyzing how the changes in public attitudes toward assembly and the current nature of public assembly has affected the right and practice of this constitutional mandate).

148. *The Neglected Right of Assembly*, *supra* note 40, at 548.

149. *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014).

Further gutting the freedom of assembly of any constitutional protection, police conduct once held by the judiciary to be a clear violation of the First Amendment is now commonly understood as necessary to the maintenance of public order.¹⁵⁰ On the occasions that courts have seen fit to evaluate police conduct as a possible violation of protesters' constitutional rights, the judiciary has often chosen to do so through a lens other than that of the right of assembly. An example of this can be seen in *Menotti v. City of Seattle*, in which the Ninth Circuit upheld the city of Seattle's use of police force to restrict protesters from accessing certain areas, holding that the restriction of speech in order to maintain public safety is permissible so long as individuals retain the right to communicate effectively by other means.¹⁵¹ By making its determination solely in terms of the right to freedom of speech, the court completely disregarded the fact that the police also violated the protesters right to assemble, a right that garners its own protections, similar to but separate from the free exercise of speech.

As common citizens have begun to reclaim the power of assembly in the public and political spectrum, evidenced by the recent Occupy and Ferguson movements, the judiciary should follow suit and reexamine its flawed understanding of this once robust constitutional right. Like the Framers of the Constitution, the judiciary must realize that a moment of public disorder is not to be feared and avoided at all costs, but must be understood as an ingredient of the great democratic experiment and expression of the will of the people, as much a part of the fabric of the United States as the right to vote. "To serve its unique function in our democracy, outdoor assembly must be allowed to be disruptive"¹⁵² because "[t]he ability to bring a city to a standstill is the ability to make elected officials take notice."¹⁵³

The judiciary must do this not only on paper, but also in practice. The commonly accepted practice of requiring permits must be understood as an infringement of a right that by its very nature, as evidenced by its early history, is organic and spontaneous. Police departments must be made to recognize that their responsibilities under the Constitution are only to stop the real risks of violence, not the disorder that is an inherent characteristic of public assembly.

150. See *Menotti v. City of Seattle*, 409 F.3d 1113 (9th Cir. 2005) (upholding a city order that allowed police to use force and arrests to physically exclude all protesters from entering the downtown area of Seattle during the 1999 World Trade Organization conference).

151. *Id.* at 1138 n.48.

152. *All Assemble*, *supra* note 54, at 1032.

153. *Fundamental Right to Disrupt*, *supra* note 55.

Any militarization of America's local law enforcement that leads to restricting the right of assembly rather than protecting it is in direct opposition to the Constitution. "In order to protect the important avenue of political participation it was established to protect, the right of assembly must be reconceived to require the public to tolerate the irritations posed by outdoor assembly, including the associated risks."¹⁵⁴ The judiciary has a constitutional responsibility to turn away from the false idol of public order and remember the "huge debt this nation owes to its 'troublemakers.'"¹⁵⁵

V. THE NECESSITY OF LEGISLATIVE ACTION TO DEMILITARIZE LOCAL LAW ENFORCEMENT

Although congressional acts, like the 1033 Program, allowed for the militarization of America's local law enforcement, following the Ferguson protests, many members of Congress, on both sides of the aisle, have supported the call for demilitarization.¹⁵⁶ Along with an executive order by President Obama calling for "a comprehensive review of the government's decade-old strategy of outfitting police departments with military-grade body armor, mine-resistant trucks, silencers[,] and automatic rifles,"¹⁵⁷ government pushback in Ferguson has brought the concerns over police militarization to the forefront of American consciousness for the first time.¹⁵⁸

One state has taken matters into its own hands by enacting legislation to curb the militarization of local police departments. In March of 2015, New Jersey became the first state to require local governmental approval for the acquisition of military equipment

154. *All Assemble*, *supra* note 54, at 1038.

155. *Garcia v. Bloomberg*, 865 F. Supp. 2d 478, 482 (S.D.N.Y. 2012).

156. *See Grossman*, *supra* note 146.

157. *Second Thoughts on Arming Police*, *supra* note 143. Most recently, the Obama administration announced plans to ban the transfer of certain military equipment through the 1033 Program, specifically "tracked armored vehicles, bayonets, grenade launchers, ammunition of .50-caliber or higher and some types of camouflage uniforms." David Nakamura & Wesley Lowery, *Obama Administration Bans Some Military-Style Assault Gear from Local Police Departments*, WASH. POST (May 18, 2015), <http://www.washingtonpost.com/blogs/post-politics/wp/2015/05/18/obama-to-visit-camden-n-j-to-tout-community-policing-reforms/>. While this action has the potential to change the national landscape in terms of police militarization and has been lauded by lawmakers on both sides of the aisle, it is still too early to determine what, if any, effect this executive action will have and if it will be implemented without challenge, as it arguably violates congressionally enacted law. *See id.*

158. *See Mike Lillis, Obama Orders Review of Police Militarization*, THE HILL (Jan 16, 2015, 4:37 PM), <http://thehill.com/homenews/administration/229816-obama-orders-review-of-police-militarization>.

through the 1033 Program.¹⁵⁹ While this legislation was only recently enacted, it has effectively ended the practice of police departments directly applying for military equipment from the federal government.¹⁶⁰ The law ensures that the people of New Jersey have a say in this process, and ultimately the extent, if any, to which their local law enforcement is militarized.¹⁶¹ The bill passed unanimously in both legislative chambers.¹⁶² A number of other states, including California and Montana, have proposed similar legislation.¹⁶³ While police powers have traditionally been reserved for the states, only federal action by Congress can end the effects of the 1033 Program on a nationwide level. Legislation similar to that passed in New Jersey would certainly aid in the eventual goal of demilitarizing America's police forces.

Senator Claire McCaskill, a Democrat from Missouri, recently said of the events in Ferguson "that while she respected police working to provide safety, 'my constituents are allowed to have peaceful protests, and the police need to respect that right and protect that right.'"¹⁶⁴ Representative Hank Johnson, a Democratic congressman from Georgia, seconded this sentiment when he stated that "[o]ur main streets should be a place for business, families, and relaxation, not tanks and M16s."¹⁶⁵ Senator Tom Coburn, a Republican from Oklahoma, even invoked the Founding Fathers in his assessment of the situation: "It's hard to see a difference between the militarized and increasingly federalized police force we see in towns across America today and the force that Madison had in mind when he said 'a standing military force with an overgrown executive will not long be a safe companion to liberty.'"¹⁶⁶ Senator Rand Paul, arguably the most prominent politician to speak out against police militariza-

159. N.J. STAT. ANN. § 40A:5-30.1 (West 2015); N.J. STAT. ANN. § 40A:5-30.2 (West 2015).

160. Michael Symons, *Want that Tank? NJ Police Now Have to Ask*, COURIER-POST (March 22, 2015), <http://www.courierpostonline.com/story/news/local/south-jersey/2015/03/22/want-tank-nj-police-now-ask/25207159/>.

161. *Id.*

162. Jake Grovum, *States Face Uphill Battle over Growing Militarization of Police*, HUFFPOST (Mar. 24, 2015, 1:59 PM), http://www.huffingtonpost.com/2015/03/24/states-police-militarization_n_6932576.html.

163. *Id.*

164. Mario Trijillo & Jesse Byrnes, *Lawmaker Drafting Bill to Demilitarize Local Police*, THE HILL (Aug. 14, 2014, 1:48 PM), <http://thehill.com/policy/defense/215160-lawmaker-drafting-bill-to-stem-flow-of-tanks-and-m16s-to-police>.

165. *Id.*

166. Grossman, *supra* note 146.

tion, has said that the country is at a “near-crisis point” due to the sacrifice of “liberty for an illusive and dangerous, or false, security.”¹⁶⁷

Though these political overtures have not yet resulted in any substantive changes, Representative Johnson introduced legislation co-sponsored by a bipartisan mix of almost three dozen congressmen and women to curb the access local law enforcement has to military equipment.¹⁶⁸ The proposed act would force recipients of military property to certify that they have the personnel and technical capacity to operate the equipment; explain how they plan on using the property; and return any property deemed surplus to the recipient’s needs.¹⁶⁹ Additionally, it would require all recipients to keep a detailed inventory of all transferred property, with any failure to account for 100% of such property resulting in suspension from the program.¹⁷⁰ Most importantly, the bill puts strict limitations on the kind of equipment that can be transferred, disallowing the following: automatic weapons generally not recognized as appropriate for law enforcement; any weapons .50 caliber or greater; tactical vehicles, including armored and mine-resistant vehicles; armored or weaponized drones; combat aircraft; explosives, including grenades, grenade launchers, flash-bang grenades, and stun grenades; silencers; and long range acoustic devices.¹⁷¹

Unfortunately, as concern over the events that occurred in Ferguson is being replaced in the public consciousness by the latest news and trends, interest in the proposed bill—once seemingly breaking down partisan walls—now appears to have all but been forgotten. The momentum behind the 113th Congress’s push to combat police militarization has waned, and police lobbyists rallying around the 1033 Program have scared away many potential supporters who do not want to risk votes over such a controversial issue.¹⁷² Those left holding the banner are hopeful that the conversations produced by the protests in Ferguson have permanently brought the debate about police militarization into the Washington consciousness.

167. Paul, *supra* note 146.

168. Stop Militarizing Law Enforcement Act, H.R. 5478, 113th Cong. (2014). Representative Johnson actually began to question police militarization on December 10, 2013, when he grew concerned by the presence of a hulking military vehicle with police markings riding down the street alongside of a Christmas parade in a small town outside of Atlanta, Georgia. Evan McMorris-Santoro, *Washington Bails on Demilitarization After Ferguson*, BUZZFEED (Nov. 24, 2014, 7:33 PM), <http://www.buzzfeed.com/evanmcsan/washington-bails-on-police-demilitarization#.luR3wjXOK4>.

169. H.R. 5478.

170. *Id.*

171. *Id.*

172. McMorris-Santoro, *supra* note 169.

It is a mistake for the legislative branch to ignore this debate in hopes that another event like Ferguson simply will not occur. It inevitably will. The images of Ferguson police pointing automatic weapons at protesters from the back of military vehicles are not isolated. They are part of a national trend.¹⁷³ This militarization has stripped citizens of their right to assemble in Seattle, New York City, Oakland, and countless other locations in which the police have used their training to disperse the crowds they are sworn to protect.¹⁷⁴ The police are not the cause of this troubling trend; they are simply the instrument. Congress must correct the mistakes of its own past and demilitarize the police forces that they previously militarized.

VI. RETHINKING LOCAL LAW ENFORCEMENT AND A RETURN TO COMMUNITY POLICING

To best fulfill their duty to serve and protect the citizens of local communities, and to do so in a manner that does not violate the First Amendment rights of those citizens, police departments throughout the country must adapt to the changing social climate and respond to a civilian population that is more cynical about law enforcement now than it ever has been.¹⁷⁵ By abstaining from an “us versus them” mentality and focusing on working with, rather than against, the communities they are tasked with protecting, local law enforcement authorities throughout the country are finding that a militarized version of policing actually works as an impediment to affecting tangible positive change in their communities. There are a number of very different routes local agencies have taken to effect this necessary change.

Certainly, the least sought-after method of change is a mandatory investigation into police practices by the Department of Justice. After thirty-seven police shootings since 2010, twenty-three of them fatal, and a locally-held opinion that “the police operate under a deeply rooted culture of the ability to use force with impunity,” the

173. *See supra* Part III.

174. *Id.*

175. Susan Page, *Poll: Whites and Blacks Question Police Accountability*, USA TODAY (Aug. 26, 2014), <http://www.usatoday.com/story/news/nation/2014/08/25/usa-today-pew-poll-police-tactics-military-equipment/14561633/> (“A USA TODAY/Pew Research Center Poll finds Americans by 2-to-1 say police departments nationwide don’t do a good job in holding officers accountable for misconduct, treating racial groups equally and using the right amount of force. . . . More than four in 10 [sic] of those surveyed say they have little confidence in police departments to use the military equipment and weapons appropriately.”).

Department of Justice began one such investigation into the Albuquerque, New Mexico, Police Department.¹⁷⁶ The investigation found that the city's SWAT team, predominantly equipped with weapons obtained through the 1033 Program, was responsible for an unprecedented rate of police killings, largely due to their tendency towards violence rather than de-escalation.¹⁷⁷ The Department of Justice is also conducting a "pattern of practice" investigation by looking into civil rights abuses by the Ferguson Police Department due to both racial profiling and the use of military-style force in response to public protesters.¹⁷⁸ Under the Obama administration, the Justice Department has opened twenty such inquiries nationwide and is currently enforcing thirteen agreements that require the Department's oversight of local police departments, the largest number in its history.¹⁷⁹

However, there are police departments throughout the country that have actively demilitarized and changed policy based on public sentiment and a desire to maintain a positive image in the eyes of the citizens they are tasked with serving. One such department resides in San Jose, California. San Jose is one of the few American cities that maintains a strong sense of what it means to have a robust right of assembly by not requiring permits for public gatherings.¹⁸⁰ San Jose also has a long history of implementing a progressive approach to police work, most notably during the tenure of Police Chief Joseph McNamara, a strong proponent of community policing.¹⁸¹ McNamara displayed his progressive tendencies by hiring more minorities and women, taking a high-profile stand against the National Rifle Association, and condemning Los Angeles Police Chief Daryl Gates for his department's history of "Rambo-like" conduct after the videotaped beating of Rodney King.¹⁸² He also demonstrated his effectiveness as a crime fighter by reducing the

176. Trevor Hughes, *Albuquerque Police Face Hundreds of Protesters*, USA TODAY, (March 31, 2014), <http://www.usatoday.com/story/news/nation/2014/03/30/albuquerque-police-protests/7094819> (internal quotations omitted).

177. Egan, *supra* note 125.

178. *Justice Department Inquiry*, *supra* note 144.

179. *Id.*

180. See *The Neglected Right of Assembly*, *supra* note 40, at 548 n.14.

181. Elaine Woo, *Joseph McNamara Dies at 79; Progressive San Jose Police Chief*, LA TIMES (Sept. 23, 2014), www.latimes.com/obituaries/la-me-joseph-mcnamara-20140924-story.html. "Community policing is a philosophy that promotes organizational strategies, which support the systematic use of partnerships and problem-solving techniques, to proactively address the immediate conditions that give rise to public safety issues such as crime, social disorder, and fear of crime." U.S. DEP'T OF JUSTICE, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, COMMUNITY POLICING DEFINED, available at www.cops.usdoj.gov/pdf/vets-to-cops/e030917193-CP-Defined.pdf.

182. Woo, *supra* note 182.

number of major crimes by nine percent while the population of his city grew by forty percent.¹⁸³ Recently, the San Jose Police Department returned a mine-resistant armored vehicle it received from the 1033 Program due to insight from its citizen advisory board and what it viewed as rising fears over police militarization across the country.¹⁸⁴ The department showed the people of San Jose that it was more concerned about garnering the trust of the community than stockpiling hand-me-downs from the Pentagon.¹⁸⁵

Camden, New Jersey, is one city that has gone to great lengths to fix what was widely regarded as a broken police force; it eliminated its city police department and replaced it with a new county-run department.¹⁸⁶ In two years, shootings have gone down by forty-three percent and violent crime is down by twenty-two percent.¹⁸⁷ The new police force has hired more officers, implemented modern technology, and tightened alliances with federal agencies.¹⁸⁸ Most importantly, the Camden police have changed their culture.¹⁸⁹ “[W]hile the unrest in Ferguson, Mo., has drawn attention to long-simmering hostilities between police departments and minority communities, Camden is becoming an example of the opposite.”¹⁹⁰ Camden Police Chief J. Scott Thomson said this change did not occur by militarizing streets or intimidating local residents, but by interacting with the community, walking beats even in the dead of winter rather than just sitting in patrol cars, and enlisting unarmed civilians as “ambassadors.”¹⁹¹ Recently, “[a]t a meet-the-police fair, officers played teenagers in a hybrid of touch and tackle football, lumbering in their bulletproof vests and instinctively checking for their holstered guns when the boys toppled them. (The teenagers won).”¹⁹²

However, Camden’s revamped approach to law enforcement has not come without its fair share of growing pains. The American Civil Liberties Union (ACLU) of New Jersey issued a news release criti-

183. *Id.*

184. Robert Salonga, *San Jose Police Jettison Hulking Armored Transport*, SAN JOSE MERCURY NEWS (Aug. 28, 2014), http://www.mercurynews.com/crime-courts/ci_26427806/san-jose-amid-militarization-furor-sjpd-jettisons-hulking.

185. *Id.*

186. Kate Zernike, *Camden Turns Around with New Police Force*, N.Y. TIMES (Aug. 31, 2014), <http://nyti.ms/1ni3abR>.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

cizing the young police force for issuing tickets and citations for petty offenses, such as loitering and riding a bicycle without a bell, amounting to what the ACLU views as unnecessary harassment.¹⁹³ Additionally, since the Camden County Police Department's inception in May of 2013, nearly 120 officers have resigned or retired, making its turnover rate one of the highest in New Jersey.¹⁹⁴ The reasons given for such a high attrition rate are myriad: the heightened stress of serving in one of the nation's most violent cities; the disciplining of minor infractions, such as wearing the wrong jacket or neglecting to salute a supervisor; a low salary in comparison to other nearby police forces; and very long work hours.¹⁹⁵ The response to such naysaying, however, has been even more emphatic, culminating in a recent visit to the New Jersey city by President Obama, who called on other cities around the nation to look to Camden as a model of progress in a modern, community-oriented police force.¹⁹⁶

The Camden police force has begun to turn around one of the most crime-ridden American cities by emphasizing its role as a member of the community and working with people, rather than focusing on obtaining the latest military weaponry and tactics. By listening to the people they are duty-bound to protect, the San Jose Police Department has ensured that they possess the most valuable commodity a police force can have: the trust of the residents of their city. Both forces have done this by deemphasizing militarization and instead recognizing the importance of community police work. Moreover, both cities have reduced their crime rates by incredible percentages. Most importantly, neither city has found itself in the public spotlight as the poster child for police abuse of power and disregard of constitutional rights.

193. Julie Hirschfeld Davis & Michael D. Shear, *Obama Puts Focus on Police Success in Struggling City in New Jersey*, N.Y. TIMES (May 18, 2015), <http://nyti.ms/1JSTAYU>.

194. Michael Boren & Sam Wood, *Camden County Police Department Struggling to Keep Officers*, PHILA. INQUIRER (May 17, 2015), http://www.philly.com/philly/news/new_jersey/20150517_Camden_County_Police_Department_struggling_to_keep_officers.html.

195. *Id.* ("The starting salary on the Camden force, \$31,407, is far lower than in some nearby towns, such as Pennsauken, where it is \$47,000.").

196. Michael Boren et al., *Obama Lauds Policing in Camden, Holds It out as Model*, PHILA. INQUIRER (May 19, 2015), http://www.philly.com/philly/news/politics/20150519_Obama_to_recommend_Camden_policing_as_national_model.html. Camden Mayor Dana Redd called the department a "national model" of policing, while police union leader Bill Wiley explained that the reason for the high turnover was because "[g]oing from the academy to working for the Camden police department is like going from college to the NFL... It's a very fast-paced environment. It's not for everyone. Some find out late how hard it is." Boren & Wood, *supra* note 195.

CONCLUSION

The World Trade Organization protests of Seattle, Occupy Oakland, and the Ferguson demonstrations are just a handful of public movements that have revealed the incompatibility of police militarization with the constitutional rights guaranteed in the Assembly Clause. Freedom of assembly, like the other liberties found in the Bill of Rights, is a fundamental right and is no less important than freedom of speech or freedom of the press. The Founders intended the right of assembly to be a robust guarantee, not subject to the whims of the government and its desire to maintain the status quo.

In order to return the Assembly Clause to its rightful position the judiciary must overrule *Davis III* and embrace an interpretation of the Assembly Clause that is more than just lip service. Only when the Constitution is interpreted and protected in the manner in which the Founders intended will the citizens of the United States be afforded their fundamental right to assemble without fear of government interference and repression. Until that time comes, local police departments must demilitarize their forces to ensure that they work as protectors of the people's right to publicly assemble rather than as an opposition force. Legislators, at both the state and, more importantly, the federal level, must undo the damage wrought by the 1033 Program and the subsequent militarization of America's local law enforcement. Whether this change is implemented by judicial decree, legislative action, executive-imposed police reform, or a progressive rethinking by the police departments themselves, it must be total. This must not merely be a call for change in response to the popular issue of the day, to be forgotten at the beginning of the next news cycle.