NOTE

THE DISMANTLING OF DISSENT: MILITARIZATION AND THE RIGHT TO PEACEABLY ASSEMBLE

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INTRODUCTION: THE MILITARIZED RESPONSE TO A RISING BODY POLITIC

On September 17, 2011, a group of protesters congregated in Liberty Square, located in New York City's Financial District.[1] This group of protestors, known nationally as Occupy Wall Street,[2] took over the square and peacefully protested for

† B.A., Columbia University in the City of New York, 2013; J.D., Cornell Law School, 2016; Notes Editor, *Cornell Law Review*, Volume 101. To God be the glory. I would like to thank my family, especially my brother Hiram Marcos Arnaud and mentor Thomas Giovanni, for their influence and inspiration. I would also like to thank Sara G. Trongone, R. Kyle Alagood, and Professor John D. Inazu for their helpful edits, comments, and suggestions. I am also grateful to Mary Beth Picarella and Brian Eneoreuwu Jones for their hard work during the editing process. Hasta la victoria, siempre.

1 *About*, OCCUPY WALL STREET, http://occupywallst.org/about/ [http://perma.cc/U9UM-V5JB].

2 Occupy Wall Street was the beginning of a greater movement that spurred the creation of "occupy" movements throughout the United States in various cities. The movements would physically occupy a certain piece of public property and use that property to assemble and express themselves. *Background*, OCCUPY

several months. The movement, inspired by the popular uprisings in Egypt and Tunisia, focused on fighting against, and creating awareness of, economic inequality in the United States.[3] Police officers observed the Occupy protestors throughout the several months that they settled and lived in Liberty Square in Zuccotti Park. On November 15, at 1:00 A.M., the police raided and evicted the Occupy protestors from Zuccotti Park.[4] A few hours and nearly two hundred arrests later,[5] New York City Police Department (NYPD) officers cleared the park and the genesis of the only mass, class-based protest of the past decade was over. The way in which the NYPD forces dealt with the protestors and their subsequent eviction raises serious questions of human and civil rights violations, not least among which are the many incidents of police brutality.[6] The displacement of the New York City Occupy Movement sparked many questions regarding the nature and legitimacy of police power and the right to peaceable assembly: Why did the NYPD end a widely peaceful assembly? Do protestors have the right to voice their concerns, and the concerns of thousands of others, in a public space for a prolonged period? Should police be authorized to use or display machine guns, tear gas, and other military-grade equipment as tools for dispersing peaceably assembled groups?

The eviction of the New York City Occupy Movement is by no means an isolated incident. By 2015, militarized police units signified the norm when responding to prolonged periods of protest.[7] In fact, police brutality spurred substantially larger

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TOGETHER, https://web.archive.org/web/20130502073425/http://www.occupytogether.org/aboutoccupy/#background [http://perma.cc/6FXT-NRXM].

3 OCCUPY WALL STREET, *supra* note 1.

4 Brian Stetler, *Occupy Wall Street Protestors Kicked Out of Zuccotti Park*, MADELINE BRAND SHOW (Nov. 11, 2011), http://www.scpr.org/programs/madeleine-brand/2011/11/15/21399/occupy-wall-street-protesters-kicked-out-of/ [http://perma.cc/J59U-ZALS].

5 James Barron & Colin Moynihan, *City Reopens Park After Protesters Are Evicted*, N.Y. TIMES (Nov. 15, 2011), http://www.nytimes.com/2011/11/16/nyregion/police-begin-clearing-zuccotti-park-of-protesters.html [http://perma.cc/6GUG-XXPS].

6 PROTEST AND ASSEMBLY RIGHTS PROJECT, SUPPRESSING PROTEST: HUMAN RIGHTS VIOLATIONS IN THE U.S. RESPONSE TO OCCUPY WALL STREET 73–82 (2012) [hereinafter PROTEST AND ASSEMBLY RIGHTS PROJECT].

7 Pay especially close attention to the way in which police forces look. Police officers in Ferguson, Missouri, look like your neighborhood Robocop or SWAT team member. These are supposedly normal police officers. *See* Brian Ries, *Ferguson Police's '5 Second Rule' Is Unconstitutional, Court Finds*, MASHABLE (Oct. 6, 2014), http://mashable.com/2014/10/06/ferguson-5-second-rule-unconstitutional/ [http://perma.cc/R9AL-VB4A]. These tactics hit a deeper issue: the subconscious and subtle effects of police militarization. By just looking

protests across the country. Following the shooting of an unarmed black teenager, Michael Brown, by a local police officer in Ferguson, Missouri, community members and Americans from across the country took to the streets, the vast majority in a peaceful manner, demanding the arrest of the police officer for Michael Brown's death.[8] In Ferguson, police officers reacted with a great showing of force[9] through the employment of armored vehicles, military-grade rifles, and tactical raiding equipment.[10]

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menacing and overpowering, the police forces can greatly affect the manner in which citizens act around them. Citizens can feel less inclined to voice their opinions simply because they are afraid of getting hurt or arrested. The fact that the majority of protestors in Ferguson are people of color does not help their cause either. *See* Frank Roberts, *A Blues Ballad for Ferguson: Where Do We Go from Here?*, VIBE (Oct. 17, 2014, 8:57 PM), http://www.vibe.com/article/blues-ballad-ferguson-where-do-we-go-here [http://perma.cc/N5F5-KX34]. This is what constitutional scholars refer to as the "chilling effect." This occurs when an action by the government has the indirect effect of deterring someone from exercising his or her First Amendment rights. *See* Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1474 (2013). The Supreme Court first introduced the word "chill" into the First Amendment vernacular in 1952. *See* Wieman v. Updegraff, 344 U.S. 183, 195 (1955) (Frankfurter, J., concurring). The "chilling effect" soon became a widely used objection to legislation that had the incidental effect of deterring the exercise of First Amendment Rights. *See generally* Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1648 (2013) ("[T]he Supreme Court has explicitly invoked the chilling effect to explain defamation, obscenity, commercial speech, fraud, invasion of privacy, intentional infliction of emotional distress, and the Communist-affiliation cases." (footnotes omitted)).

8 *See* William M. Welch & Yamiche Alcindor, *Judge: Ferguson Police Violated Protesters' Rights*, USA TODAY (Oct. 7, 2014, 3:41 AM), http://www.usatoday.com/story/news/2014/10/06/judge-injunction-ferguson-police/16835217/ [http://perma.cc/7UVQ-Z5VT].

9 *A Look Back at the Outrage in Ferguson, Missouri After Police Shooting of 18-Year-Old Michael Brown*, N.Y. DAILY NEWS, http://www.nydailynews.com/news/violence-ferguson-missouri-michael-brown-shooting-gallery-1.1903203 [http://perma.cc/BN8C-B3R8]; Justin Baragona, *St. Louis Area Police Officers Harassing Ferguson Protestors at Places of Employment*, POLITICUSUSA (Oct. 17, 2014, 2:58 PM), http://www.politicususa.com/2014/10/17/st-louis-area-police-officers-harassing-ferguson-protesters-places-employment.html [http://perma.cc/2NCB-4723]; Sari Horowitz, Carol D. Leonnig & Kimberly Kindy, *Justice Dept. to Probe Ferguson Police Force*, WASH. POST (Sept. 3, 2014), http://www.washingtonpost.com/world/national-security/justice-dept-to-probe-ferguson-police-force/2014/09/03/737dd928-33bc-11e4-a723-fa3895a25d02_story.html [http://perma.cc/X8Y4-H39A]; Josh Levs, *Ferguson Violence: Critics Rip Police Tactics, Use of Military Equipment*, CNN (Aug. 15, 2014), http://www.cnn.com/2014/08/14/us/missouri-ferguson-police-tactics/ [http://perma.cc/Z46E-AQTE]; *Violence in Ferguson: Police Fire Tear Gas, Smoke Bombs at Demonstrators*, ABC NEWS (Aug. 14, 2014 7:05 AM), http://abcnews.go.com/US/violence-ferguson-police-fire-smoke-bombs-tear-gas/story?id=24973522 [https://perma.cc/QJ5E-N537].

10 Everett Rosenfeld, *Where Ferguson's 'Military' Police Get Their Gear*, CNBC (Aug. 14, 2014, 3:51 PM), http://www.cnbc.com/id/101920548# [http://perma.cc/76X4-LCT9].

Although protests dwindled in the weeks following the initial killing, protests increased steadily during the "Ferguson October" campaign, which drew protestors from across the country for one weekend in Ferguson.[11] Police officers arrested many peaceful protestors, including public academics such as Cornel West, bringing much media coverage to the area.[12] Community members eventually found some relief through the courts,[13] but the tension between protestors and law enforcement remained. The protestors faced many threats, such as the fear of arrest or abusive police tactics,[14] with the latter of which including the use of dangerous weapons against protestors. Furthermore, these types of police tactics pose the threat of having a "chilling impact" that undermines the right to peaceably assemble by "causing individuals to reasonably perceive that they cannot safely protest."[15]

Militarized police responses are now a staple[16] of local government's response to the body politic's exercise of its right to

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11 *Come to Ferguson*, HANDS UP UNITED, http://www.handsupunited.org/come-to-ferguson/ [https://perma.cc/AXR6-QYNS].

12 Brittney Cooper, *Cornel West Was Right All Along: Why America Needs a Moment of Clarity Now*, SALON (Oct 15, 2014, 2:55 PM), http://www.salon.com/2014/10/15/cornel_west_was_right_all_along_why_america_needs_a_moment_of_clarity_now/ [http://perma.cc/X5HW-TRW3]; *Knocked Down: Cornel West Arrested During Ferguson Protest*, NBC NEWS (Oct. 13, 2014, 3:02 PM), http://www.nbcnews.com/storyline/michael-brown-shooting/knocked-down-cornel-west-arrested-during-ferguson-protests-n224791 [http://perma.cc/GK6B-BKST].

13 Mem., Order, & Prelim. Inj. at 5, Abdullah v. St. Louis, 52 F. Supp. 3d 936 (E.D. Mo. 2014) (No. 4:14CV1436 CDP).

14 *Violence in Ferguson: Police Fire Tear Gas, Smoke Bombs at Demonstrators*, ABC NEWS (Aug. 14, 2014, 7:05 AM), http://abcnews.go.com/US/violence-ferguson-police-fire-smoke-bombs-tear-gas/story?id=24973522; Levs, *supra* note 9.

15 PROTEST AND ASSEMBLY RIGHTS PROJECT, *supra* note 6, at 81.

16 Shawn Musgrave made a Freedom of Information Act request to the states of Ohio, California, and New York. He asked for their 1033 inventory reports. The inventory report delivered, disclosed only after a very persistent Musgrave insisted, was astonishing. As of May 8, 2012, New York State acquired over 1000 pieces of equipment, including hundreds of rifles such as M-16, M-16a1, and M-14 rifles, many armored trucks, infrared laser pointers, image enhancers, helicopter pieces, night vision goggles, and various $90 pieces simply described as an "assault pack." *1033 MOU and Annual Inventory Form (New York)*, MUCKROCK, https://www.muckrock.com/foi/new-york-16/1033-mou-and-annual-inventory-form-new-york-13013/ [http://perma.cc/4S2N-NPD5] (Musgrave's 1033 inventory report requests); *see also* Shawn Musgrave, *New Data Provides First Detailed Look at Military Gear Held by New York Law Enforcement Agencies*, N.Y. WORLD (Oct. 14, 2014), http://www.thenewyorkworld.com/2014/10/14/new-data-provides-first-detailed-look-military-gear-held-new-york-law-enforcement-agencies/ [http://perma.cc/E8GF-CV2A]. It would make sense for a police department to get safety goggles, first aid kits, and helicopter pieces, which the NYPD did acquire through the 1033 program. However, why the NYPD is stocking

peaceably assemble.[17] In the wake of Michael Brown's death, the death of another unarmed black male at the hands of police officers made national headlines. NYPD officers choked and killed Eric Garner on the streets of Staten Island, New York.[18] A tremendous outpouring of exasperation,[19] indignation, and nationwide protest occurred before and subsequent to the grand jury's decision not to indict the police officers involved.[20] As a result of the continuing protests and in anticipation of more protests, militarized police forces quickly deployed. At the time of this writing, the death of unarmed citizens at the hands of police officers and the deployment of militarized police forces are commonplace,[21] especially in the context of gatherings of people of color.[22]

However, there has been little public discussion on the impacts of the militarization of local police forces and how the police's increasingly violent response to acts of protest may encroach on the protective intention of the right to peaceably assemble. The true meaning of the Assembly Clause has vanished from the American consciousness, and the manner in

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up on equipment as if they were defending against the Tet Offensive is a different story.

17 U.S. CONST. amend. I.

18 Press Release, LatinoJustice PRLDEF, LatinoJustice PRLDEF Calls on Department of Justice to Investigate the Killing of Eric Garner (Dec. 3, 2014), http://latinojustice.org/briefing_room/press_releases/latinojustice_prldef_calls_on_department_of_justice_to_investigate_the_killing_of_eric_garner/ [https://perma.cc/K9L7-MA57].

19 *See e.g.*, *id.*

20 *See* Peter Holley, *Eric Garner's Family Thanks Protesters as Nationwide Demonstrations Continue*, WASH. POST (Dec. 6, 2014), http://www.washingtonpost.com/news/post-nation/wp/2014/12/06/for-the-third-night-in-a-row-protesters-across-the-country-rally-against-police-involved-deaths/ [https://perma.cc/ZMD3-SS22].

21 *See* Levs, *supra* note 9 ("American policing has become unnecessarily and dangerously militarized, in large part through federal programs that have armed state and local law enforcement agencies with the weapons and tactics of war, with almost no public discussion or oversight." (quoting AM. CIVIL LIBERTIES UNION, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 2 (2014), https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rel1.pdf [http://perma.cc/PC6G-6YQF]).

22 During the premiere of the movie *Straight Outta Compton* in August 2015—a powerful biopic about the groundbreaking hip-hop group NWA—the Los Angeles Police Department sent police officers on patrol to movie theaters. It appears that even congregating at movie theaters triggers police activity. *See, e.g.*, Dennis Romero, *LAPD Beefs Up Patrols for* Straight Outta Compton *Premiere*, L.A. WEEKLY (Aug. 10, 2015), http://www.laweekly.com/news/lapd-beefs-up-patrols-for-straight-outta-compton-premiere-5901273 [http://perma.cc/9RTS-AG6K].

which militarized police forces quash protests is evident of that deteriorated vision.[23]

This Note argues that the ritualized use of extreme police force on peacefully assembled groups is a violation of the Assembly Clause as it was originally intended to function. Part I gives a general account of the Assembly Clause, its creation, and its original intention to safeguard minority views. Part II recounts part of the history behind the militarization of police forces. Part III suggests a balancing test the courts should use when evaluating violations of the freedom to peaceably assemble in order to conform to the original meaning of the First Amendment.

I
THE FIRST AMENDMENT AND THE DEATH OF ASSEMBLY

Navigating the waters of the Assembly Clause is no easy task. As Professor George P. Smith II astutely points out, "[t]he protection of the public peace must be carefully reconciled with the conflicting interests of allowing free expression of ideas in public places."[24] Thus, the balance between public peace and free expression necessitates peaceful assembly. The right to peaceably assemble is a powerful tool and formed the basis of the greatest social movements in our country.[25] In fact, it is impossible to create a movement without assembly.[26] For ex-

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23 As Supreme Court cases portray, the courts lost sight of the original concept of the Assembly Clause long before recent uprisings. *See infra* subpart I.B. This deteriorated memory within the courts projects onto police use of force when quashing protests. In 1999, for example, Seattle police violently quashed protests at the World Trade Organization meeting. The ACLU pegged the police responses as "flawed" and the Seattle police department noted flaws in their procedures. If the Assembly Clause is understood within the context of the original understanding, and if the original understanding of what a police force represents is what it is supposed to do, these forceful actions by police forces may be prevented. *See* ACLU OF WASHINGTON, OUT OF CONTROL: SEATTLE'S FLAWED RESPONSE TO PROTESTS AGAINST THE WORLD TRADE ORGANIZATION 5–10 (June 2000); *see also* THE SEATTLE POLICE DEPARTMENT, THE SEATTLE POLICE DEPARTMENT AFTER ACTION REPORT 3–9 (2000).

24 George P. Smith II, *The Development of the Right of Assembly—A Current Socio-Legal Investigation*, 9 WM. & MARY L. REV. 359, 377 (1967).

25 *See* Linda J. Lumsden, *Women and Freedom of Expression Before the Twentieth Century*, *in* THE FIRST AMENDMENT FREEDOM OF ASSEMBLY AND PETITION: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE 195, 195–97 (Margaret M. Russell ed., 2010).

26 The rise of the digital age poses an interesting argument for parallels to physical assembly. The act of "hactivism" sees groups of people gathering in digital space and may mean that they are not in fact "assembled" in the traditional sense. However, an assembly is essentially a conduit through which persons coalesce. Thus, the digital space simply provides another conduit through which

ample, the right to assembly was at the heart of the women's suffrage movement. There is a substantial probability that "American women would not have the vote today if their predecessors had not taken to the streets."[27] Without the right to peaceably assemble, women would not have been able to challenge beliefs about how women should behave or take "to the streets to speak, march, and picket."[28]

During the fight for women's suffrage, women faced many incredible obstacles. Today, however, protestors who assemble for a cause often face a police force that resembles an army. The common comparison between police departments and our nation's army is extremely interesting because the Framers intended the separation of a civil police force and a standing army.[29] If history is of any use—indeed, it is of utmost importance—it tells us that our founders were extremely wary of a standing army.[30] This fear led to the passage of the Posse Comitatus Act, which effectively banned the use of the Army of the United States to execute laws except when it is expressly authorized by the Constitution or an act of Congress.[31] Despite the Act's explicit prohibition of using federal armed forces for the execution of laws, it is hardly free of loopholes in practice, such as the use of military equipment by local police for the enforcement of laws. States also resorted to the use of their national guards as a way to circumvent the Act.[32] Although federal armed forces cannot enforce state laws, state national guards and police departments with federal military equipment can.

A. Right to Assembly: The Roots

The First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free

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persons assemble and, I suspect, poses no threat to the traditional notion of an assembly.

27 Lumsden, *supra* note 25, at 195.

28 *Id.* at 196.

29 RADLEY BALKO, RISE OF THE WARRIOR COP 15–16 (2013) ("Taken together, the Third, Second, and Tenth Amendments indicate the Founders' desire for the power to enforce laws and maintain order to be primarily left with the states. . . . . Ultimately, the Founders decided that a standing army was a necessary evil, but that the role of soldiers would be only to dispel foreign threats, not to enforce laws against American citizens.").

30 *Id.* at 12–13 (noting that the Framers instituted the Third Amendment as a safeguard against standing armies since standing armies pose a great threat to free societies).

31 Army Appropriations Act, ch. 263, § 15, 20 Stat. 145, 152 (1878) (codified as amended at 18 U.S.C. § 1385 (2012)).

32 *See* BALKO, *supra* note 29, at 35–36.

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."[33] From one perspective, the Amendment as a whole was a reaction to English colonial restrictions and suppression of speech and of the press.[34] The First Amendment "was meant to prohibit licensing of publication such as existed in England and to forbid punishment for seditious libel."[35] Prosecutions of writers and publishers in the colonial United States occurred often,[36] and many focused on seditious libel, at times for criticizing local government.[37] However, the First Amendment also served another purpose: the preservation of the "obvious" right to assemble.[38] Although First Amendment protections were a reaction to British colonial suppression, and although the intent of Congress in passing the First Amendment is not at all clear given scarce legislative history,[39] the First Amendment was a "conservatory" amendment, meant to safeguard the understanding

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

34 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 966–67 (5th ed. 2015). Chemerinsky goes on to note that ensuring protection of the press might have been all that the First Amendment was meant to do. *Id.* at 966 n.2 (noting that in *Patterson v. Colorado*, the Court clarified that "the main purpose of such constitutional provisions is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments'" (quoting 205 U.S. 454, 462 (1907))).

35 *Id.* at 952. Here, Professor Chemerinsky does not include the Religion Clause because he deals with religion in a separate section within the text.

36 Erwin Chemerinsky gives a plethora of reasons for why speech was protected following independence from England. These reasons include the fact that speech is essential in a democracy based on self-governance, that freedom of speech is essential in "discovering truth," that freedom of speech is an essential aspect of personhood and autonomy, and that freedom of speech promotes tolerance. *See id.* at 969–74.

37 *Id.* at 967.

38 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 (2012) (describing Massachusetts Representative Theodore Sedgwick's opinion that there should not be an inclusion of a right to assembly in a constitutional amendment because the right "would be too obvious as to warrant mention"); *see also* M. GLENN ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION 12 (2d ed. 1981) (quoting Representative Sedgwick in his belief that the right to assembly "is a self-evident, unalienable [*sic*] right which the people possess; it is certainly a thing that never would be called in question" (alteration in original) (quoting 1 ANNALS OF THE CONGRESS 759–61 (1789))).

39 ABERNATHY, *supra* note 38, at 11; *see also* Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, *in* THE FIRST AMENDMENT FREEDOM OF ASSEMBLY AND PETITION: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE 32, 34 (Margaret M. Russell ed., 2010) (describing the Assembly Clause's history as "ambiguous").

that citizens wanted their right to assembly protected.[40] Although legal scholarship on the freedom of religion and speech is plentiful,[41] the right to peaceably assemble does not have an extensive legal history. In fact, the right seems "forgotten";[42] indeed, Professor John D. Inazu argues that the right has been displaced by the fiction of the "freedom of association."[43] Though Congress had a relatively short debate before passing the Bill of Rights, scholars conserved the general history behind the Assembly Clause.[44]

Records of the House debate of any of the amendments are scarce.[45] However, the philosophical underpinnings—and the little surviving legislative history—inform the intention of the right to assemble. Scholarship suggests that the Framers of the Constitution applied their Enlightenment Era philosophies concerning "open inquiry and the search for truth" when they drafted the Constitution.[46] This influencing philosophy led to their emphasis on safeguarding dissenting opinions[47] and

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40 ABERNATHY, *supra* note 38, at 11–12 (referring to Justice Thomas Cooley's statements that the Bill of Rights is a "conservatory instrument[ ] rather than reformatory" (quoting Weimer v. Bunbury, 30 Mich. 201, 214 (1874))).

41 Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 547 (2009) ("Major treatises on constitutional and First Amendment law barely mention the right of assembly.").

42 *See* John D. Inazu, *The Forgotten Freedom of Assembly*, 84 TUL. L. REV. 565, 570 (2010) [hereinafter Inazu, *The Forgotten Freedom of Assembly*].

43 *Id.* at 565–68; *see also infra* subpart II.B; *cf.* Melvin Rische, *Freedom of Assembly*, 15 DEPAUL L. REV. 317, 331–32 (1965) (suggesting that the freedom of association is merely "another facet" of the freedom of assembly meant to protect groups that are controversial in nature). Rische's argument, although understandable, is not convincing because the purpose of the Assembly Clause in the first place was the protection of minority and dissenting groups. Some of these groups would necessarily be "controversial" because they are countermajoritarian.

44 ABERNATHY, *supra* note 38, at 11 ("The framers of the Constitution apparently spent little time in considering a bill of rights.").

45 Linnekin, *supra* note 38.

46 JOEL M. GORA ET AL., THE RIGHT TO PROTEST 3 (1991). Thomas I. Emerson suggests that the freedom of expression, seen as a whole, in a democratic society rests upon four premises: the freedom of expression is (1) essential as a means of assuring self-fulfillment; (2) an essential process of advancing knowledge and discovering truth; (3) essential to provide for participation in decision making by all members of society; and (4) a method of achieving a more adaptable and stable community, especially maintaining the "precarious balance between healthy cleavage and necessary consensus." THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1971). Thus, the Enlightenment Era ideals of truth seeking and reflective discourse survived from the enactment of the Constitution to 1971.

47 It is very interesting to see the complete opposite happening in the late twentieth century. As Balko points out, "progressives have been advocating for the use of more government force against political factions they find unsavory." BALKO, *supra* note 29, at 298.

counter-majoritarian views within the First Amendment.[48] Following the ratification of the Constitution and the uproar by the new states of the Union and Antifederalists for a bill of rights,[49] the Framers heeded the call and penned protections for dissenters and chauvinists alike through the First Amendment.[50]

The freedom to peaceably assemble is one of the most commonly practiced actions enumerated in the Bill of Rights.[51] The communication of ideas, social gatherings, and simple "off the cuff" interactions and coalescing occur within the framework of assembly. In fact, it is rather difficult to avoid assembling. The act of assembly was so widespread and simple to achieve that an assembly was often thought of as any time more than three people got together in public[52] or a variation of that sort. In early colonial times, assemblies occurred within churches, group clubs,[53] public parks, and taverns.[54] The tavern was an especially central locale in the history of the right to peaceably assemble; local taverns served "as the most common drinking and gathering place for colonists."[55] However, taverns served a broader purpose than inebriating the local residents. Taverns "were used for nearly every public purpose, including 'council and assembly meetings, social gatherings, merchants' associations, preaching, [and] the acting of plays.'"[56] Thus, the tavern was a special place within the colonial cities and towns.[57] In fact, the tavern was so central to colonial organizing that, following the French and Indian War, when Britain tried recovering from its economic losses at the cost of the colonies, groups of colonists assembled in taverns to discuss

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48 GORA ET AL., *supra* note 46, at 3.

49 ABERNATHY, *supra* note 38, at 11.

50 *See id.*

51 Linnekin, *supra* note 38, at 593.

52 ABERNATHY, *supra* note 38, at 22 (citing an old English case, Field v. Receiver of Met. Police, [1907] 2 K.B. 853, 860 (Eng.)) (noting that it takes at least three people to form an assembly under the law of riots). *Wharton's Criminal Law* definition mirrored the old English rule. *Id.* at 27. The British understanding of when an assembly turned into a riot was entrenched within the early colonial and American understanding.

53 Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 642 (2002) (describing how women in the 1635 Massachusetts Bay Colony used the ships they were on, their homes, and church, as a place to gather and discuss the weekly sermons the women heard).

54 Linnekin, *supra* note 38, at 595.

55 *Id.*

56 *Id.* at 596 (alteration in original) (quoting CHARLES M. ANDREWS, COLONIAL FOLKWAYS 109 (1919)).

57 *Id.* at 595–96 ("[T]hese establishments . . . existed from the southernmost to the northernmost colonies . . . .").

their grievances.[58] These meetings ranged from informal to formal assemblies where colonists organized boycotts, shared news, discussed politics, and even plotted the Revolution.[59]

These taverns, Baylen Linnekin suggests, played three especially key roles in forming the idea of the right to assembly. The taverns provided a place for informal talk, served as the primary news source in the colonies, and permitted participation from people in all social classes.[60] Thus, the tavern provided the space for the most basic expression of the right to assembly: a body of people meeting for the fair exchange and expression of ideas. As Linniken suggests, "[a]ssembling is both an act and a natural human tendency."[61] The tavern was the most basic manifestation of this human tendency—one that the new Union sought to conserve. Furthermore, taverns provided an opportunity for open assembly—simple unions of citizens without the fear of repercussions or consequence—a necessary condition for successful movements and sociopolitical change.[62] Therefore, the right to peaceably assemble acts as a tool: the "freedom of assembly is what checks government attacks on the right itself."[63]

The right of assembly was not just about the coalescing of different socioeconomic classes for the discussion of ideas and the planning of boycotts. The right of assembly was also an unlimited[64] conduit through which those assembled could critically reflect on their perceptions of reality and reach an end goal. It was, at times, an extremely intellectual endeavor in which all were welcome to participate. A strong indication of this unlimited right lies in the history of the First Amendment. When Congress convened to draft amendments to the

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58 *Id.* at 598–99.

59 *Id.*

60 *Id.* at 599–604.

61 *Id.* at 619.

62 *Id.* at 622–23.

63 *Id.* at 627.

64 I use the word "unlimited" to call attention to the fact that the Framers consciously chose to rid the Clause of any limitations, namely, the right to assemble in order to petition. Furthermore, the right is unlimited in the sense that the actual assembly's composition has almost infinite permutations. However, the clause was limited by its own language ("peaceably" to assemble) and common-law limitations, such as antiriot laws. As Justice Oliver Wendell Holmes noted,

> [a]ll rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

Hudson County Water Co. v. McCarter, 209 U.S. 349, 355 (1908).

Constitution, Virginia and North Carolina proposed a version of the First Amendment that provided for the people to "have a right peaceably to assemble together to consult for the common good."[65] Professor Inazu suggests that the most important aspect of the Assembly Clause that the convention eventually passed is the deletion of the three words "the common good." Inazu suggests that even though Virginia, North Carolina, New York, and Rhode Island proposed the use of the term "the common good" in reference to the right to peaceably assemble, the rejection of the phrase by Congress "signaled the possibility that the interests of the people assembled need not be coterminous with the interests of those in power."[66] In this manner, Congress safeguarded the right of assembly by conserving it as a means of protest or dissent and not limiting its purpose.[67]

A second textual note that Inazu calls to attention is the bifurcation of the right to assembly and petition in the First Amendment. He notes that after the striking of "the common good" language from the Amendment, it was "ambiguous whether the Amendment recognized a single right to assemble for the purpose of petitioning the government or whether it established both an unencumbered right of assembly and a separate right of petition."[68] From a textual analysis, the comma preceding the phrase "and to petition" appears to "be residual from the earlier text [the common good]" and thus acts as a separation between "assemble" and "petition" within the clause.[69] However, this textual analysis might not even be necessary given the fact that, during the House debates over the language of the Amendment, the representatives envisioned a "broader notion of assembly."[70] Inazu refers to the pointed exchange between Theodore Sedgwick of Massachusetts and John Page of Virginia during the House debates. Sedgwick believed that the right to assembly was too obvious and "self-evident" to merit inclusion in the Bill of Rights.[71] Page, how-

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65 THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 228 (Neil H. Cogan ed., 1997).

66 Inazu, *The Forgotten Freedom of Assembly*, *supra* note 42, at 572.

67 *Id.*

68 *Id.* at 573. Professor Smith points out the similar separation of the right to petition and to peaceably assemble. *See* Smith II, *supra* note 24, at 366. However, he did so by looking at the Supreme Court in *De Jonge v. Oregon*, 288 U.S. 364–65 (1937) ("The [right to peaceably assemble is] cognate to those of free speech and free press and is equally fundamental.").

69 Inazu, *The Forgotten Freedom of Assembly*, *supra* note 42, at 574.

70 *Id.*

71 JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 24 (2012) [hereinafter INAZU, LIBERTY'S REFUGE].

ever, responded by noting that "people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority."[72] In the same exchange, Page referenced an incident that occurred in 1670 in which William Penn, a Quaker, attempted to worship with his congregation in their meeting house. A new local law prohibited "nonconformist" worship in London. Thus, Penn took to the streets and held a religious meeting on a public street. The authorities arrested Penn and tried him for unlawful assembly. This act of assembly as a form of protest garnered significant attention and praise in the colonial United States.[73] Thus, the "allusion to Penn made clear that the right of assembly under discussion in the House encompassed more than meeting to petition for a redress of grievances."[74] Penn's gathering was not explicitly an act of petition. Thus, the "text handed down to us . . . conveys a broad notion of assembly."[75]

Under Inazu's analysis,[76] the Assembly Clause was intentionally not limited to the "common good," thus conserving minority and dissenting voices. Furthermore, the Assembly Clause does not limit assembly to the purposes of petitioning the government. The right of assembly, as envisioned in the House debates and by the crafters of the Clause, is an overarching and broad protection of the sanctity that citizens have to form groups and ideas and to present them in a peaceable manner.[77]

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72 *Id.*

73 *Id.*

74 *Id.* at 25; *see* Timothy Zick, *Recovering the Assembly Clause, Liberty's Refuge: The Forgotten Freedom of Assembly*, 91 TEX. L. REV. 375, 383–85 (2012) (book review) (describing Inazu's approach as "both eclectic and atomistic"). Zick argues that through an atomistic approach, Inazu isolates the Assembly Clause, which robs the analysis of an approach that views the First Amendment as four interrelated, protected freedoms. *Cf.* John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787 (2014). Inazu argues that twentieth-century jurists and politicians alike understood the Assembly Clause, along with its First Amendment companion clauses, both in isolation and as a single amendment. They were interwoven but distinct. *Id.* at 789, 852.

75 INAZU, LIBERTY'S REFUGE, *supra* note 71, at 25.

76 For a surgical, word-by-word analysis of the Assembly Clause, reaching the same conclusion as Inazu, see Nicholas S. Brod, Note, *Rethinking a Reinvigorated Right to Assemble*, 63 DUKE L.J. 155, 163–69 (2013).

77 Inazu explores the first attempt of a large dissenting voice to peaceably assemble during the late eighteenth century. "Democratic-Republican Societies" sprang up all throughout the Union. These societies were places where citizens assembled "to discuss with firmness and freedom all subjects of public concern." In essence, these were societies that critically reflected and attacked the government through discourse. Ironically, Sedgwick—who noted that the right to assembly was "self-evident" during the House debates—played a part in the formation of a large public opinion, also led by George Washington, which led to

B. Right to Assembly: The Judicial Evolution

Although not restricted in the text of the Constitution beyond the word "peaceable," in practice, the right to peaceably assemble is not absolute. The judicial branch functions as a safeguard of the First Amendment, and "with the operation of judicial review, the guarantee of freedom of assembly is more than just a pious hope—it represents a legal barrier, judicially enforceable, to excess of legislative and administrative action."[78] However, the right to peaceable assembly is open to legislative curtailment: in essence, the right functions within the parameters of its "unrestricted" origins, but it is not absolute because it is subject to subsequent legislative curtailments by Congress.[79]

Generally, the right to peaceably assemble is guaranteed in public spaces.[80] The traditional public forum "consists of places which by long tradition or by government fiat have been devoted to assembly and debate, such as streets[81] and parks."[82] Furthermore, "public streets and sidewalks may be used for public assembly and debate."[83] In terms of private spaces, it should be noted from the onset that "[s]tate constitutions may provide broader or more expansive speech rights with respect to private property than the Federal Constitution."[84]

The Supreme Court of the United States recognizes that the right to peaceably assemble is "among the most precious of the liberties safeguarded by the Bill of Rights."[85] The right is "not confined to verbal expression. [It] embrace[s] appropriate types of action which certainly include the right in a peaceable

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annihilation of these societies. *See* INAZU, LIBERTY'S REFUGE, *supra* note 71, at 26–29.

78 ABERNATHY, *supra* note 38, at 13.

79 *Id.* at 30.

80 *See generally* John D. Inazu, *The First Amendment's Public Forum*, 56 WM. & MARY L. REV. 1159, 1172–83 (2015) (describing the traditionally liberal use of public forums, such as parks and streets, for demonstrations and assemblies, and arguing that the meaning and use of the public forum has slowly decayed from its original use due to the shift in the public forum doctrine from its traditional Assembly Clause analysis to Speech Clause analysis).

81 *See* Hague v. CIO, 307 U.S. 496, 515–16 (1939) (recognizing the right to peaceably assemble in streets).

82 628 AM. JUR. 2D *Constitutional Law* § 559 (2014).

83 *Id.*

84 *Id.* (citing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980); Albertson's, Inc. v. Young, 107 Cal. App. 4th 106 (3d Dist. 2003); United Food & Commercial Workers Union, Local 919 v. Crystal Mall Assocs., L.P., 270 Conn. 261 (2004)).

85 United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 222 (1967).

and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities."[86] For the purposes of this Note, I only refer to the federally guaranteed right to peaceably assemble, a right that extends to the states through its incorporation via the Due Process Clause of the Fourteenth Amendment in 1937.[87]

As a result of legislative curtailments enforced by the courts, the absolute right to peaceably assemble does not exist in all locations.[88] Nevertheless, "[t]he power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government."[89] The Supreme Court also makes clear that "[n]o one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot."[90]

Like most areas of American law, Assembly Clause jurisprudence shares a history with British jurisprudence.[91] However, its present nature has long departed from the British jurisprudential meaning of assembly and the Framers' concep-

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86 Brown v. Louisiana, 383 U.S. 131, 141–42 (1966).

87 De Jonge v. Oregon, 299 U.S. 353, 364 (1937).

88 Greer v. Spock, 424 U.S. 828, 836 (1976); *see also* Knight v. Anderson, 480 F.2d 8, 10 (9th Cir. 1973).

89 Herndon v. Lowry, 301 U.S. 242, 258 (1937); *see also* Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) ("Accordingly, we are here confronted with a statute which, by its own words and as applied, purports to punish mere advocacy and to forbid, on pain of criminal punishment, assembly with others merely to advocate the described type of action. Such a statute falls within the condemnation of the First and Fourteenth Amendments."). *Brandenburg* is especially illustrative of First Amendment protections and shows the lengths to which the Court protects them. In that case, the Court protected a Ku Klux Klan leader from an Ohio law which forbade "voluntarily assembl[ing] with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism." *Id.* at 445 (alteration in original) (quoting OHIO REV. CODE ANN. § 2923.13 (repealed 1974)).

90 Carroll v. President & Comm'rs of Princess Anne, 18 U.S. 175, 180 (1968) (alteration in original) (quoting Cantwell v. Connecticut, 310 U.S. 296, 308 (1940)).

91 *See* ABERNATHY, *supra* note 38, at 19–40 (describing the shared jurisprudential history between U.S. legislative curtailments of assembly and British ones); *see also* Smith II, *supra* note 24, at 361–66 (describing the development of the right of assembly in England). Interestingly, in 1844, the only major difference between British and American freedom to peaceably assemble was that "[p]ermission and sanction by public authorities [was] not necessary in the United States." Abu El-Haj, *supra* note 41, at 567. However, even in 1844, a measure was thought to be justified "if reasonable grounds exist for apprehending a disturbance." *Id.* at 567–68 (quoting *Riots, Routs, and Unlawful Assemblies*, 3 AM. L. MAG. 350, 364 (1844)).

tion. This transition began when the Supreme Court set the stage for early Assembly Clause litigation in the seminal case *United States v. Cruikshank*.[92] In this case, the Court dismissed an indictment against individuals who allegedly conspired to hinder certain people from peaceably assembling. The Court found that the general right to hold a lawful meeting rested in the hands of the States. Thus, a grievance against citizens could not be brought under the federal law at issue.[93] The holding stated that "private citizens could not be prosecuted for denying the First Amendment's freedom of assembly to other citizens."[94] However, Chief Justice Waite's dictum[95] "could be erroneously construed as limiting assembly to the purpose of petitioning Congress for a redress of grievances."[96] The decision in *Cruikshank* led to the only case in which the Supreme Court expressly limited the Assembly Clause to petitioning: *Presser v. Illinois*.[97]

However, the decision in *Presser* did not persist after the body politic claimed the broader purpose of the Assembly Clause envisioned by the Framers of the First Amendment through mobilization and litigation.[98] In fact, the early twentieth century saw a rise in the use and power of the Assembly Clause. The use of the Assembly Clause empowered the women's suffrage movement in the early twentieth century by

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92 92 U.S. 542 (1876). The *Cruikshank* decision led to a separation between the state and federal rights to peaceably assemble. Prior to incorporation of the Assembly Clause, the States could vastly limit the right of their citizens to peaceably assemble. *See* Davis v. Massachusetts, 167 U.S. 43, 46–48 (1897) (upholding an ordinance that required the issuance of a permit by the Mayor of Boston before persons could address a public assembly upon public property because the State had control over the property much like a person controls their own private property). Post incorporation, these types of limitations through state legislatures were restricted by the Supreme Court. *See* Hague v. CIO, 307 U.S. 496 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938). However, permit requirements for the use of public property are now generally permissible under the time, place, and manner test.

93 The federal law at issue in this case was the Enforcement Act of May 31, 1870, ch. 114, § 16, 16 Stat. 140–46.

94 Inazu, *The Forgotten Freedom of Assembly*, *supra* note 42, at 589. It should be noted that this case occurred before the incorporation of the Assembly Clause through the Due Process Clause of the Fourteenth Amendment.

95 *Cruikshank*, 92 U.S. at 552 (discussing "[t]he right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances").

96 Inazu, *The Forgotten Freedom of Assembly*, *supra* note 42, at 589.

97 116 U.S. 252, 267 (1886). Inazu further notes that this ruling contaminated the reasoning behind decades of Assembly Clause scholarship. Inazu, *The Forgotten Freedom of Assembly*, *supra* note 42, at 590.

98 See Inazu, *The Forgotten Freedom of Assembly*, *supra* note 42, at 590 n.124 (citing both judicial decisions and public action that contributed to the expansion of the Assembly Clause).

providing the constitutional protections to gather, deliberate, plan, and act through massive, peaceful demonstrations.[99] The Assembly Clause was also crucial in the successes of the Civil Rights Movement.[100] The right to—and tradition of—peaceable assembly allowed groups to coalesce, exchange ideas, and eventually express those ideas through peaceful marches and silent demonstrations. These advances owed their success to the "growing importance of assembly in political and legal discourse during the 1920s."[101] Justice Brandeis articulated this notion as follows:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that 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. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones.[102]

These words by Justice Brandeis encapsulate the perception of the right to assembly during the 1920s and well into the post-World War II era.

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99 *Id.* at 591–92.

100 *Id.* at 592–93. It should be noted that I am not taking the "long movement" approach, which characterizes the civil rights movement chronologically from the Reconstruction Era into the 1960s. Here, I refer to the time period within the long Civil Rights Movement contained within the 1950s and 1960s. I do not mean to minimize or simplify the long movement, but rather to simply call attention to those two decades.

101 Inazu, *The Forgotten Freedom of Assembly*, *supra* note 42, at 596.

102 Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (footnote omitted).

American jurisprudence generally looked at the right to peaceably assemble through a protective lens. The courts tended to first examine an act of assembly and then seemingly retroactively decide[103] whether or not that assembly was unlawful. Even at the end of World War II, in 1945, the Supreme Court held that legislative restrictions on assemblies, such as obtaining a permit to speak in front of a crowd, could only be justified under the "clear and present danger" standard.[104] In *Thomas v. Collins*, the Supreme Court of Texas upheld Collins's commitment for contempt of a temporary restraining order. The restraining order restrained Thomas, while he remained in Texas, from soliciting membership in labor unions and in other groups affiliated with industrial organizations without first obtaining an organizer's card from the local government.[105] After Texas issued the restraining order, Thomas addressed a mass meeting of workers and asked those at the meeting to join a union. As a result, a local court held Thomas in contempt of the restraining order, and the Supreme Court of Texas affirmed the conviction.[106] The Supreme Court of the United States, however, had a different opinion. The Court viewed the requirement of acquiring an organizer's card as an unnecessary restriction.

Writing for the majority, Justice Rutledge rejected the state's argument of applying rational basis review to the organizer's card requirement,[107] and he instead opted for applying the clear and present danger standard. The Court clarified that any restriction on a citizen's liberty under the First Amendment must be justified by "clear public interest, threatened not doubtfully or remotely, but by clear and present danger."[108] Furthermore, there must be a stronger connection between the law and "the evil to be curbed" than a merely rational connection that otherwise "might support legislation against attack on due process grounds."[109] The Court further noted that First Amendment rights "rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear sup-

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103 Abu El-Haj, *supra* note 41, at 562 ("The law could intervene only after an assembly had gathered if through its behavior it could be charged with unlawful assembly, riot, or breach of the peace.").

104 Thomas v. Collins, 323 U.S. 516, 527–28 (1945).

105 *Id.* at 518.

106 *Id.*

107 *Id.* at 527 ("In short, the State would apply a 'rational basis' test . . . .").

108 *Id.* at 530.

109 *Id.*

port in public danger, actual or impending."[110] In *Thomas*, the organization's card requirement did not meet the clear and present danger standard precisely because Thomas merely attempted to exercise his right to assemble and solicit membership at an appropriate time and place.[111]

As a natural progression of the "peaceable" restriction in the text of the Assembly Clause, the federal government and many states had already recognized the right to stop any "riotous" assemblies.[112] Regardless of this natural bar, the Assembly Clause analysis remained holistic. In 1961, when analyzing a restriction that forced public registration of members of certain political parties, the Court applied a protective balancing test, by which it balanced the harm of an assembly to the public against the infringement of an individual's right.[113] *In Communist Party v. Subversive Activities Control Board*, the Court reviewed a law that required the Communist Party of the United States to register as a Communist-action organization.[114] The term "Communist-action organization" under the Subversive Activities Control Act (Control Act) meant that the organization was substantially directed or controlled by a foreign government or organization that controlled the "world Communist movement."[115] At question in the case was whether the United States Communist Party was under the control of a foreign government controlling the world Communist movement and whether the registration requirement violated the First Amendment.[116]

After finding that the Communist Party satisfied the definition within the Control Act, the Court turned to the issue of the First Amendment. The Court applied a balancing test that began with a "rational relation" analysis.[117] The Communist Party argued that the registration requirement was an unconstitutional bill of attainder that made it impossible to register anyone in the party due to the consequences of any affiliation

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110 *Id.*

111 *Id.* at 533–34.

112 *See* Abu El-Haj, *supra* note 41, at 567–68.

113 *See* Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 90–91 (1961) (balancing the harms that the state saw and the individual's right to assemble under the Communist Party). It should be noted that even in this case, the Court uses the freedom of association and freedom to peaceably assemble almost interchangeably and dilutes the original meaning of the clause. *See id.*

114 *Id.* at 4.

115 *Id.* at 8.

116 *Id.* at 35, 70.

117 *See id.* at 92.

with the party.[118] The Court noted that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground."[119] Furthermore, the Court noted that the consequences of registration, when weighed in the constitutional balance, were not devoid of rational relation to the purpose of the Control Act.[120] Thus, the Court found that without compelling evidence of an intent to bar registration, coupled with a rational relation to the overall purpose of the Control Act, the section of the Control Act in question defeated part of the Communist Party's primary constitutional claim. This passage also made clear that one piece of the "constitutional balance" requires a "rational relation" between a section of the law and its overall purpose. The Court then moved on to balance the right of "[f]reedoms of [e]xpression," which Justice Frankfurter used interchangeably with the assembly clause language, on the other side of the scale.[121] In this part of the balance, the Court cited to *Thomas v. Collins* and noted that *Thomas* stood for the proposition that registration before the "exercise of liberties protected by the First Amendment" is simply part of the balancing test but is not dispositive.[122] Although the Communist Party eventually lost in the balancing test because of the risk their organization posed to national security coupled with the rational relation test,[123] the Court made clear that a law concerning the Assembly Clause must pass a "constitutional balance" that weighs the rational relation of the legislation against the cost of implementing the citizen's right.[124]

The Court also applied a "purpose test" in determining whether an assembly is protected by the First Amendment. In *De Jonge v. Oregon*,[125] the Court looked at the purpose of an assembly when deciding whether or not defendant De Jonge's conviction for attending a meeting under the auspices of the Communist Party violated the First Amendment. The Supreme Court of Oregon upheld De Jonge's conviction under the Criminal Syndicalism Law of Oregon.[126] The law defined "criminal syndicalism" as "the doctrine which advocates crime, physical violence, sabotage or any unlawful acts or methods as a means

118 *Id.* at 79, 82.
119 *Id.* at 83 (quoting Flemming v. Nestor, 363 U.S. 603, 617 (1960)).
120 *Id.*
121 *Id.* at 88.
122 *Id.* at 90 (citing Thomas v. Collins, 323 U.S. 516 (1945)).
123 *Id.* at 103.
124 *Id.* at 90.
125 299 U.S. 353 (1937).
126 *Id.* at 356–58.

of accomplishing or effecting industrial or political change or revolution."[127] The Supreme Court of Oregon held that the Communist Party was an advocate of criminal syndicalism; thus, De Jonge's participation by attending a meeting violated the law.[128] The Supreme Court of the United States reversed the conviction, noting that when reviewing the right to peaceably assemble, a court must look "to [the assembly's] purpose."[129] In this case, the purpose of the assembly was not unlawful because its purpose was informative. Those assembling wanted to discuss and exchange ideas; therefore, their actions were well within the protections of the Assembly Clause.[130]

Justice Hughes, writing for the majority, noted that "peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score."[131] Justice Hughes also pointed out that if local governments think that those in the meetings planned on committing crimes either during the meeting or afterward, the law provides for other forms of prosecution: conspiracies.[132] Thus, if governments are concerned with the subject matter of assemblies, they should not try to disassemble the assembly because meetings themselves are not illegal. The government should go after the alleged illegal agreements through conspiracy law.[133]

By the mid-twentieth century, the Supreme Court had a stable Assembly Clause jurisprudence. The Court began to dismantle the otherwise strong and established Assembly Clause during the Red Scare.[134] The first explicit recognition of

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127 *Id.* at 357.

128 *Id.* at 357–58.

129 *Id.* at 365.

130 *Id.* at 365–66.

131 *Id.* at 365.

132 *Id.*

133 In fact, it appears that the federal government eventually dismantled dissent through the use of the Seditious Conspiracy law, 18 U.S.C. § 2384 (2012), when it charged and convicted Puerto Rican revolutionaries, notably the currently incarcerated Oscar Lopez Rivera, in the late 1970s and early 1980s. William Crawford, *FALN Leader Convicted*, CHI. TRIB., July 25, 1981, at S1.

134 As Inazu explains, the "four freedoms" of the First Amendment were almost sacred. They merited celebrations at the New York World's Fair, and even New York Mayor Fiorello la Guardia called a group of four statues embodying the four freedoms the "heart of the fair." Inazu, *The Forgotten Freedom of Assembly*, *supra* note 42, at 601–03. However, this romantic view of the Assembly Clause started fading when President Roosevelt presented his "four essential human freedoms" and included all the First Amendment protections except for the right to peacea-

a "right of association" (the phrase that courts eventually replaced for the assembly clause language) occurred in the 1958 Supreme Court decision *NAACP v. Alabama*.[135] In *NAACP*, the Court entertained another case dealing with publicly listed names of members of an organization. In this case, Alabama required any foreign corporation to publically list its members.[136] Justice Harlan "could have grounded his decision in the freedom of assembly. But he instead shifted away from assembly . . . ."[137] Justice Harlan based his decision on the "freedom to engage in association for the advancement of beliefs,"[138] and held that this right of association protected the NAACP member list. Soon thereafter, the focal point of First Amendment litigation was around the freedom of association rather than the freedom of assembly. By the 1960s, the Court narrowly construed the Assembly Clause to encompass public gatherings like protests and demonstrations.[139] Justice White put the final nail in the coffin[140] in *Perry Education Ass'n v. Perry Local Educators' Ass'n* when he applied the free speech[141] standard of scrutiny in a freedom of assembly case.[142] In *Perry*, the Court looked at whether the First Amendment is

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bly assemble and the right to petition. Thus, even from a public policy perspective, the Assembly Clause started, slowly, to be "forgotten." *Id.* at 603.

135 357 U.S. 449 (1958).

136 *Id.* at 451.

137 Inazu, *The Forgotten Freedom of Assembly*, *supra* note 42, at 609.

138 *NAACP*, 357 U.S. at 460.

139 *See* Inazu, *The Forgotten Freedom of Assembly*, *supra* note 42, at 610.

140 Following the Perry decision, the Supreme Court has not addressed a freedom of assembly claim in over thirty years. INAZU, LIBERTY'S REFUGE, *supra* note 71, at 62.

141 Abu El-Haj, *supra* note 41, at 585 ("[A]ssembly cases are framed as cases involving free expression and analyzed within a doctrinal framework developed to address all aspects of the individual right of free expression.").

142 *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) ("For the State to enforce a content-based exclusion, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." (citation omitted)). The Court recognized the created right of freedom of association on previous occasions. For example, in 1961, the Supreme Court balanced the public interest and the freedom of individual action when reviewing a statute that compelled members of the Communist Party to disclose its membership list. *See* Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 90–91 (1961). It should also be noted that the Court may have moved in this direction as "many scholars regard the right of peaceable assembly as vital but essentially submerged within the other expressive freedoms of the First Amendment." MARGARET M. RUSSELL, FREEDOM OF ASSEMBLY AND PETITION: ITS CONSTITUTIONAL HISTORY AND THE CONTEMPORARY DEBATE 185 (Margaret M. Russell ed., 2010).

violated when a public school district and its teachers' bargaining representative grant a teacher-chosen union access to certain physical means of communications (in this case, school mailboxes) while denying those means to others.[143] The Court "made slight mention of the right of assembly" and instead used "doctrinal language . . . straight out of [its] free speech cases."[144] The Court noted that a public school's modes of communication were in a sense a private right for the school itself, and thus the school could curtail speech rights within its private property.[145] The Court further noted that "limited public forum" analysis would be the incorrect standard to apply in a case concerning limiting spaces where groups could communicate. Rather, restricting the use of the modes of communications was appropriate so long as the restriction was "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[146] However, the Court never explained how a public school had a *private* right when shifting its decision away from a limited public forum analysis. Since the *Perry* decision, "even cases involving protests or demonstrations could now be resolved without reference to assembly."[147]

The Court eventually recognized the freedom of *expressive* association as a First Amendment right, although the right is not specifically enumerated.[148] When reviewing the claims under the freedom of expressive association, the Court focuses on whether "the inclusion of a particular individual would impair the message the organization seeks to impart."[149] In essence, the freedom of expressive association forces the courts to make ad hoc determinations as to whether a government's regulation undermines an organization's message.[150] The Court replaced the broad protections envisioned by the Framers that would safeguard both the sanctity of the unified collective and the manifestations of their collective consciousness with the fictional "freedom of expressive association," which

143 *Perry*, 460 U.S. at 44.

144 INAZU, LIBERTY'S REFUGE, *supra* note 71, at 61.

145 *Perry*, 460 U.S. at 47–48.

146 *Id.* at 46–47, 55 (accusing the Court of Appeals of "misapplying our cases that have dealt with the rights of free expression on streets, parks and other fora generally open for assembly and debate").

147 Inazu, *The Forgotten Freedom of Assembly*, *supra* note 42, at 610–11.

148 Mazzone, *supra* note 53, at 644; *see also* Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (2002) (describing two lines of decisions that have recognized a "constitutionally protected 'freedom of association'").

149 Mazzone, *supra* note 53, at 644.

150 *See id.* at 646.

only protects the expressive manifestations of the assembly. The manifestations and use of the collective consciousness created through the assembly then fall within the purview of the Speech Clause.[151]

The *Perry*[152] decision left the Assembly Clause void of an identity, deficient in nature, and standardless.[153] The militarization of police forces made possible through the National Defense Authorization Act often leaves dissenting and minority views staring down the barrel of a gun, or rather an armored tank traveling down Main Street, ready to suppress an otherwise peaceable protest. The simultaneous dismantling of the Assembly Clause and the creation of the militarized police force leaves United States history poised for a great story: David v. Goliath.

II
1208, 1033, AND THE RISE OF THE LOCAL MILITARIZED POLICE FORCE[154]

A. Legislative-Historical Outline

With the current understanding of the Assembly Clause in mind, it is useful to explore how local law enforcement acquires

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151 *See* Brod, *supra* note 76, at 184–85. Brod describes how the shift from the right to peaceably assemble to outright ignoring it brings manifestations, such as the Occupy Wall Street protests in New York City, under the "confines of free speech jurisprudence." *Id.* at 184. This is extremely alarming because if a manifestation does not constitute "speech," "the moving party has no basis upon which to launch a First Amendment challenge." *Id.* at 184–85. Therefore, assembly itself does not have any true protections. It either falls under the protections of the freedom of speech or it gets the speech-like protections provided by the freedom of expressive association.

152 460 U.S. 37 (1983).

153 As I previously noted, the standard for assessing freedom of assembly cases is now the one applied for freedom of association, which is that of free speech. Thus, the freedom of assembly is standardless because the Court conflates the two freedoms.

154 It should be noted from the onset that the 1208 and 1033 programs are not the beginning or the end of the militarization of local police forces. As Radley Balko explains in his book, the militarization of police was a long political, legislative, and judicial movement based on a rising national crime rate and national fixation on narcotics prohibitions. *See* BALKO, *supra* note 29. The rise of militarization began with military-trained police SWAT teams in Los Angeles meant to combat the apparent danger that drug crimes posed to police forces. *See id.* at 51–64. Over time, due to the War on Drugs and obsession over crime rates, politicians on both sides of the aisle fought for tougher crime bills in Congress and eventually partnerships between the federal government and state law enforcement agencies that provided military equipment to local state law enforcement agencies. *See generally id.* at 81–136 (detailing the progression of police-force militarization in the 1970s). Thus, the militarization of police forces forms part of a longer progression that intersects with politics. The 1208 and

military equipment. This Note argues that the use of military equipment by police forces violates peaceful protestors' right to peaceably assemble. The manner in which police forces acquire that equipment is salient to this analysis.

Every year, the U.S. Congress approves and passes the Department of Defense's yearly budget through the National Defense Authorization Act.[155] Aside from specifying the budget and expenditures used by the department, there are usually earmarked bills accompanying the Act.[156] In 1990, section 1208 of the National Defense Authorization Act[157] included a provision authorizing the transfer of surplus military equipment from the Department of Defense to law enforcement agencies throughout the United States.[158] The provision provided, in pertinent part, that "the Secretary of Defense may transfer to Federal and State agencies personal property of the Department of Defense, including small arms and ammunition, that the Secretary determines is—(A) suitable for use by such agencies in counter-drug activities; and (B) excess to the needs of the Department of Defense."[159] Furthermore, it conditioned the transfer of the materials on the respective local police forces paying for the retrieval and transportation of the equipment requested.[160] The program lasted for a year, until its reauthorization in 1991.[161] Originally, the Department of Defense, by way of the Pentagon, operated the 1208 program, with

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1033 programs form just a small part of that historical trajectory, but they are extremely illuminating as they facilitate the smooth transfer of military equipment to the local state agencies without many obstacles and in a quantifiable manner. *See generally id.* (describing historical trajectory of police-force militarization).

155 This seems like a pretty important issue, especially since there is a new version of the bill every year; however, the NDAA is so obscure that Secretary of Defense Chuck Hagel had to ask his staffers to explain it to him. Jon Harper, *How and Why Local Police Departments Get Military Surplus Equipment*, STARS AND STRIPES (Aug. 24, 2014), http://www.stripes.com/how-and-why-local-police-departments-get-military-surplus-equipment-1.299570 [http://perma.cc/4D4F-D4JA].

156 *See, e.g.*, OFFICE OF U.S. SEN. CLAIRE MCCASKILL, INVESTIGATION OF HOUSE FY 2012 NATIONAL DEFENSE AUTHORIZATION ACT EARMARKS 2 (2011) (finding 115 earmarks in the National Defense Authorization Act for Fiscal Year 2012 despite a formal ban on earmarks).

157 National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101–189, § 1208, 103 Stat. 1352 (1989).

158 Harper, *supra* note 155.

159 National Defense Authorization Act § 1208(a)(1).

160 *Id.* § 1208(b).

161 H.R. REP. NO. 104-724, at 788 (1997) (Conf. Rep.).

help from Regional Law Enforcement Support offices from 1990 to 1997.[162]

The Act was again amended to last indefinitely in 1997 by section 1033, from where the program derives its current name.[163] The amended section included the addition of the term "counter-terrorism" as a use suitable for the program and small changes to the manner in which the Department transfers the equipment.[164] The amendment also transferred program management duties to the Defense and Logistics Agency (DLA).[165] The year 1997 also saw the creation of the National Program Office at DLA Headquarters and consolidation activities.[166] However, this venture ended in 1999.[167] From 1999 to 2009, the DLA Law Enforcement Support Office ran the 1033 program.[168] However, beginning in 2009, the Transition of Function to Defense Reutilization & Marketing Service (DRMS), renamed DLA Disposition Services, took ownership.[169]

The legislative history behind the passage of section 1208, and later the amendment of section 1033, is not widely published or talked about. It appears, however, that two forces prompted the legislation: a continually surging U.S. Armed Forces with excess, aging equipment, and the local police departments' desire to expand their reach and effectiveness in various spheres such as the War on Drugs and gang violence for the greater protection of police officers.[170] Further evidence can be gleaned from the fact that section 1033 is found within

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162 DEF. LOGISTICS AGENCY, 1033 PROGRAM FAQS, http://www.dispositionservices.dla.mil/leso/pages/1033programfaqs.aspx [http://perma.cc/WM7D-GASD].

163 National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104–201, § 1033, 110 Stat. 2639 (1996); BALKO, *supra* note 29, at 209 ("'the 1033 program,' named for the section of US Code assigned to it"). Balko also provides some amazing statistics: in 1033's first three years, "the office handled 3.4 million orders for Pentagon gear from 11,000 police agencies in all fifty states. By 2005, the number of police agencies serviced by the office hit 17,000. . . . [B]etween 1997 and 1999 the office doled out $727 million worth of equipment, including 253 aircraft . . . ." *Id.* at 210.

164 National Defense Authorization Act for Fiscal Year 1997 § 1033.

165 DEF. LOGISTICS AGENCY, *supra* note 162.

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.*

170 *See* Taylor Wofford, *How America's Police Became an Army: The 1033 Program*, NEWSWEEK (Aug. 13, 2014), http://www.newsweek.com/how-americas-police-became-army-1033-program-264537 [https://perma.cc/P55C-WU93] ("Faced with a bloated military and what it perceived as a worsening drug crisis, the 101st Congress in 1990 enacted the National Defense Authorization Act. . . . The idea was that if the U.S. wanted its police to act like drug warriors, it should equip them like warriors . . . .").

Subtitle C in the index of the public law: the subtitle's designation is "Counter-Drug Activities."[171] Under the auspices of this program, the Department of Defense has already transferred $4.3 billion worth of property to police forces since 1997.[172]

The massive transfer of military equipment to local police forces is exactly what Congress foresaw with the 1997 NDAA. By 1996, counter-drug activities were not the only concerns on Congress' list. In the wake of the 1993 World Trade Center bombings,[173] counter-terrorism activities by local and federal law enforcement started increasing.[174] On June 18, 1996, then-Senator Sam Nunn of Georgia explained that the proposed amendments to the bill during its drafting by Senator Dick Lugar of Indiana, Senator Pete Domenici of New Mexico, and himself[175] "will strengthen the ability of the Department of Defense and the Department of Energy to assist local fire departments and police departments, local law enforcement, in terms of helping prepare them and equip them to deal with a possible chemical or biological attack by terrorists."[176] Mr. Nunn further explained on the floor, "We are talking about having [the Department of Defense] help prepare, in terms of

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171 National Defense Authorization Act for Fiscal Year 1997, Pub. L. 104–201, 110 Stat. 2430 (1996).

172 KARA DANSKY, ACLU, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 24 (2014), https://www.aclu.org/sites/default/files/assets/jus14-warcomeshome-report-web-rel1.pdf [http://perma.cc/W2S4-JYVG].

173 Senator Sam Nunn (D-GA) referred to this attack at the NDAA hearing:

> We had the World Trade Center attack. We have seen the devastation of that explosion. What many people do not realize, and what the judge noted in his findings, is that attack on the World Trade Center also included a chemical weapon that was consumed by the flames and, therefore, did not activate and did not cause damage. The damage was done by the conventional-type weapons.

S. Res. 142, 104th Cong., 90 CONG. REC. 6372 (1996) (enacted).

174 *See* LOIS M. DAVIS ET AL., RAND CORP., LONG-TERM EFFECTS OF LAW ENFORCEMENT'S POST-9/11 FOCUS ON COUNTERTERRORISM AND HOMELAND SECURITY, 15–17, 22–27, 48–51, 59–60 (2010), http://www.rand.org/content/dam/rand/pubs/monographs/2010/RAND_MG1031.pdf [https://perma.cc/W89V-MUD3].

175 The fact that this was a bipartisan amendment—Senator Nunn was a Democrat while Senator Lugar and Domenici were Republicans—further illuminates the rallying of political parties around the War on Drugs, and certainly foreshadows the country's fixation on the War on Terror. The 1997 NDAA was certainly different in nature from the previous NDAA. As Senator Nunn, who had worked on the Armed Services Committee for several years, was getting ready to leave the Senate, he was especially involved in the crafting of the 1997 NDAA. He was so involved that his colleague and then-Senator President pro tempore Senator Storm Thurmond (R-SC), had a "hope that this bill will serve as a clear legacy to Senator Nunn's enduring contributions to the U.S. Armed Forces and this Nation's security." S. Res. 142, 104th Cong., 90 CONG. REC. 6370 (1996) (enacted).

176 *Id.*

training, in terms of equipment, our local police, and fire officials around this country to deal with what almost all experts on terrorism believe is an inevitable kind of threat we face to our own country."[177] Thus, section 1033 found itself in a bill geared toward the mobilization of local police forces not just against counter-drug activities that occurred during the previous two decades but also against a new menace: domestic terrorism.

Interestingly, the section 1033 amendment was not even a focal point of the 1997 NDAA. On the Senate floor, then-President pro tempore Senator Storm Thurmond of South Carolina outlined the priorities of the bill:

> Ensuring national security and the status of the United States as the world's preeminent military power; protecting the readiness of our Armed Forces; enhancing the quality of life of military personnel and their families; ensuring U.S. military superiority by continuing to fund a more robust, progressive modernization program to provide required capabilities for the future; accelerating the development and deployment of missile defense systems; and preserving the shipbuilding and submarine industrial base.[178]

Thus, it appears that the amendment's purpose was to supplement the overall goals of the 1997 NDAA, namely modernizing the military (by getting rid of old equipment, given to the states at their request), and strengthening antiterrorism and antidrug capabilities of local law enforcement agencies. The 1997 NDAA then left the states with a choice as to how they would approach the War on Drugs, and eventually the War on Terror. The new section 1303 enabled the acquisition of military-grade equipment by local law enforcement agencies.[179] However, it was up to the agencies to request and acquire the equipment.

The types of equipment distributed included "[h]umvees, mine-resistant ambush-protected (MRAP) vehicles, aircraft (rotary and fixed wing), boats, sniper scopes and M-16s."[180] In essence, the materials transferred to law enforcement agencies are not the type that are seen as "necessary" in the traditional sense of law enforcement. The types of materials that the Department of Defense transfers to local law enforcement agencies are the types of materials used in wars and combat fields

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177 *Id.*

178 *Id.*

179 *See* Taylor Wofford, *How America's Police Became an Army: The 1033 Program*, NEWSWEEK (Aug. 13, 2014), http://www.newsweek.com/how-americas-police-became-army-1033-program-264537 [http://perma.cc/5EML-5RYW].

180 Harper, *supra* note 155.

in places such as Afghanistan and Iraq.[181] These same weapons are now in our very own backyards.

B. "You Got the Stuff?":[182] What, When, and How Local Enforcement Agencies Acquire Equipment

Distribution powers lay with the Department of Defense, and more specifically with the Secretary of Defense.[183] The Department of Defense is not an isolated actor, however. The DOD holds an annual conference at which the Secretary of Defense, "in cooperation with the Attorney General, shall conduct an annual briefing of law enforcement personnel of each State (including law enforcement personnel of the political subdivisions of each State) regarding information, training, technical support, and equipment and facilities available to civilian law enforcement personnel from the Department of Defense."[184] Thus, the government is, at least minimally, aware of the wishes of local law enforcement departments. Internally, the DOD follows the protocol set forth by the Defense Disposition Manual, section 4160.21-M.[185] In 1997, the manual underwent a "total revision" following the inception of the 1033 program.[186] The DLA provides its own guidance to the agency through DLA Instruction 1111.[187] This internal instruction "describes the processes used by DLA to provide support to

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181 *See, e.g.*, Paul McLeary, *US Donates More Abrams Tanks, Humvees to Iraq*, DEFENSENEWS (Jan. 6, 2015), http://www.defensenews.com/story/defense/policy-budget/warfare/2015/01/06/isil-iraq-abrams-Humvee/21341453/ [http://perma.cc/DN9Y-7VAJ].

182 SCARFACE (Universal Pictures 1983). Similar to the side effects of drugs, which often impair mental capacity, military weapons can lead to psychological pressures within high command of police forces—a sort of "high." Balko refers to Peter Kraska's criminal justice study where Kraska conducted an ethnography within various SWAT teams and police agencies. Balko states that "[o]ne general dynamic he observed was a kind of masculinity-infused arms race between police agencies that could often lead to an inferiority complex at smaller departments . . . . 'It's almost like they would get their own high off the money and the equipment.'" BALKO, *supra* note 29, at 210. Kraska eventually went to a shooting range with the SWAT members and took a couple of shots with a gun when the SWAT members suggested he try. Kraska noted that "what disturbed me most was how I, a person who had so thoroughly thought out militarism, could have so easily enjoyed experiencing it." Peter B. Kraska, *Playing War: Masculinity, Militarism, and Their Real-World Consequences*, *in* MILITARIZING THE AMERICAN CRIMINAL JUSTICE SYSTEM: THE CHANGING ROLES OF THE ARMED FORCES AND THE POLICE 142 (Peter B. Kraska ed., 2001).

183 10 U.S.C. § 2576(a) (2012).

184 *Id.* § 380.

185 U.S. DEP'T OF DEF., DEFENSE MATERIEL DISPOSITION MANUAL (1997).

186 *Id.* at i.

187 DEF. LOGISTICS AGENCY, U.S. DEP'T OF DEF., DEFENSE LOGISTICS AGENCY INSTRUCTION 1111, LAW ENFORCEMENT SUPPORT (LES) (as modified on Dec. 9, 2009).

Law Enforcement Activities (LEA)."[188] Furthermore, "[s]pecial request procedures are in place for the transfer of excess weapons and aircraft."[189]

When requesting equipment, law enforcement agencies need only ask for specific equipment through the DLA website. In this way, the DLA, and consequently the U.S. government, acts as a conduit through which local law enforcement agencies ask for high-tech, military-grade equipment. It is almost like a general utilities store: if you can afford to buy it (in this case, if you can afford to transport it), then it is yours! At the DLA website, law enforcement agencies may access the "Law Enforcement Agency (LEA) Application for Participation" form.[190] After filling out the one-page application, the LEA then awaits the DLA's approval. After obtaining the approval, the LEA works with the 1033 state coordinator in order to provide the equipment it desires.[191] *It is that easy.*

III
MILITARIZATION AND THE FIRST AMENDMENT: PRACTICAL RESPONSES BY THE U.S. COURTS

A. Assembly Redux

Militarized police activity in the midst of an otherwise peaceable protest is an implicit violation of the right to peaceably assemble. I arrive at this conclusion based on my proposed legal standard for "true" Assembly Clause cases: a balancing test.[192] I propose that when reviewing an Assembly Clause

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188 *Id.* at 1. The regulation sheds more light on the operation of the 1033 program. It provides the following:

> The DLA LES Office (LESO) administers and executes section 2576a, Title 10, United States Code, for the Director, DLA, at the direction of the Secretaries of Defense. The LESO transfers excess Department of Defense (DoD) personal property deemed suitable for use to Federal and state law enforcement activities. This process is known as the 1033 Program.

Id.

189 *Id.* at 3. They also note "see LESO Standard Operating Procedures (SOP), located on the LESO share drive." *Id.*

190 LAW ENFORCEMENT AGENCY (LEA) APPLICATION FOR PARTICIPATION, http://dispositionservices.dla.mil/leso/Documents/LESO%20Forms/application.pdf [perma.cc/3RG5-8AB2].

191 *See* U.S. DEP'T OF DEF., APPLICATION TO PARTICIPATE: DEPARTMENT OF DEFENSE 1033 EXCESS PROPERTY PROGRAM (June 23, 2015), http://dps.mo.gov/dir/programs/cjle/documents/dod/1033application.pdf [https://perma.cc/7P3R-T9HP]. Yes, participation is that easy.

192 There is a clear limitation to this approach. Like most legal tests, the balancing approach only provides a procedural right or protection. Someone claiming a violation relies on the judgment of a judge for the substantive protection. This requires a judge to understand the original aim of the Assembly Clause

case, courts should balance the plaintiff's interests against the defendant's, as they once did.[193] The courts should balance traditional factors such as whether or not the assembly is peaceable, whether the assembly is a minority or dissenting group,[194] whether the group is assembled or manifesting on a traditionally public area, such as a park, or whether the state has a permit requirement[195] or if they are on private land.[196] If the case involves a manifestation such as a parade or a march, the court should ask whether the state had a permit requirement,[197] and whether there was a police response to the mani-

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and the sanctity of an assembly. Without this understanding, this test will likely fail to provide adequate protection. This is especially troubling for dissenters or protestors because they already lack ample access to a certain substantive right (hence the protest). Adding another procedural protection may lead to some substantive right, but it is not guaranteed. This is a key pitfall of most tests and a common critique from critical race theorists. *See* Richard Delgado & Jean Stefancic, CRITICAL RACE THEORY: AN INTRODUCTION, 28–29 (2d ed. 2012).

193 *See, e.g.*, Communist Party of the U.S. v. Subversive Activities Control Bd., 367 U.S. 1 (1961). The balancing test in this case is different from the one I propose, and the Court applied it for a different purpose. In *Communist Party*, as I discuss in subpart I.B *supra*, the Court examined a section of the Control Act, balanced its "rational relation" to the goals of the overall act, and counterbalanced any civil liberties that would suffer consequences. The test I suggest deals with a police force that is the product of legislation. However, legislation is not at the heart of the issue, but rather the product of that legislation is. The fact that the Supreme Court made a balance of constitutional rights after finding that the section of the Control Act satisfied the Court's rational relation test shows the great amount of respect for the First Amendment protections. Thus, I draw inspiration from the balancing test in *Communist Party* in my proposed balancing scheme and weigh the purpose of the product of police militarization against the original meaning and vision for the Assembly Clause.

194 Being a majority group should not adversely affect a group in the balancing test. However, a dissenting group should have greater protections since the Assembly Clause was aimed, in part, at protecting their views.

195 A word is in order for the use of permits. At one point, the use of permits would be absurd; however, this is no longer the case. *See* Abu El-Haj, *supra* note 41, at 554–57. Extensive permit requirements for gatherings on public streets are very common within the states. *Id.* at 448 n.14. This change is usually thought to have started in Massachusetts in the case of *Davis v. Massachusetts*, 167 U.S. 43 (1897), where the U.S. Supreme Court upheld a Boston ordinance requiring a permit for parades. This decision was partially due to the fact that the Assembly Clause was not yet incorporated through the Fourteenth Amendment to the states, which happened in 1925. In 1939, after incorporation, the Supreme Court would strike down an ordinance requiring a permit because it gave unfettered discretion to the licensing official. Hague v. Comm. for Indus. Org., 307 U.S. 496, 516 (1939).

196 Assembling on private land leads to tort implications such as simple trespass and it is "assumed that, as a general proposition, there is no right under the First Amendment to engage in any form of expression upon private property without the consent of the owner, express or implied." EMERSON, *supra* note 46, at 298.

197 The court should also make an assessment of the permit requirement. The permit requirement must be limited to considerations of time, place, and manner.

festation. If there was a police response, the court should then assess whether or not the response was subjectively reasonable. The subjective standard is intended to protect minority views that would otherwise not be expressed because of the fear of a person with riot gear—such as a semiautomatic weapon—standing across the street. Finally, the court looks at the hardship or burden of a continuous and extended assembly. The court considers factors such as continuous time, size of assembly, noise, and any disturbances the assembly causes.

In making this balancing test, the court looks at the Assembly Clause's original purpose to protect the sanctity of the assembly, including its members, the ideas shared, the conclusions made, and the manifestations that grew from that process. An aggressive police force with tanks, rifles, and SWAT units that look like Navy SEALS[198] severely encroaches on that sanctity.

The question then arises as to what this balancing principle actually looks like in application. I turn to two situations in which I apply this new balancing test. The first is the eviction of the Occupy Wall Street protestors from throughout the country.[199] The Occupy Movement raised tents in public parks as they conducted twenty-four-hour occupations. The occupants chanted, sang songs, played musical instruments, and waved signs. Public parks are spaces where the Assembly Clause was traditionally protected.[200] Parks served as a center of congregation for the masses. By the twenty-first century, actions within public parks grew limited due to permit requirements and other legislative restrictions.[201] Under *Perry*, many courts viewed the Occupy Movement in light of freedom of speech jurisprudence, mainly through "intermediate scrutiny" of the

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Furthermore, the permit statute cannot authorize denial of a permit based on the content of the speaker's intended communication. *See* Cox v. New Hampshire, 312 U.S. 569, 575-78 (1941).

198 I make the comparison between SWAT teams and Navy SEALS because SWAT teams can be thought of as "police officers plus." As Balko explains, SWAT teams are often trained by the U.S. military. BALKO, *supra* note 29, at 208 ("Some 43 percent of police departments in Kraska's survey told him they had used active-duty military personnel to train the SWAT team when it was first started, and 46 percent were training on a regular basis 'with active-duty military experts in special operations,' usually the Army Rangers or Navy Seals."). This is just another way of getting around the Posse Comitatus Act, which forbids the U.S. military from conducting law enforcement.

199 *See* Brod, *supra* note 76, at 181–88 (describing the Occupy Movement).

200 *See generally* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985) (describing the obstacles governments face in terms of restricting speech in certain public fora).

201 *See id.*

expressions of the movements.[202] Other courts sided with the local governments by holding that governments had a substantial interest in the appearance and safety[203] of their parks, that their regulations against overnight sleeping were narrowly tailored to achieve that interest,[204] and that their content-neutral time, place, and manner regulations allowed the protestors to use other channels of expression.[205] The government moved hundreds of protesters from public parks and quashed the Occupy Movement throughout the country by using the intermediate scrutiny standard formulated for the Speech Clause, not the Assembly Clause.

Under my suggested balancing scheme, Occupy would likely meet the same fate but under a historically accurate logic. The first dispositive inquiry is whether or not the assembly was peaceable. One of the proudest characteristics of the Occupy Movements was their peaceable nature.[206] Once the court finds a peaceful assembly, it then should turn to balancing the parties' interests. Here, the plaintiffs have two goals in mind: (1) stopping a subjectively disruptive protest and (2) freeing the park for other uses. The defendants also have two main goals: (1) getting a message across and (2) assembling. At face value, the defendants' interests are higher because only a compelling interest should, in theory (and, at times, in practice), override the exercise of constitutional rights. Next, the court determines whether or not the assembly took place in a public or private location. Here, the Occupy Movement took place in different parks across the country. Those in public parks have the natural protection granted by the Assembly Clause. The protestors in New York City, however, were not protected because Zuccotti Park is privately owned. The next step is to examine prospective burdens. This is where the Occupy Movement fails. Although there is not, and likely should not be, a bright-line rule as to when assembly drags on "too long," a year of continuous occupation of a public park is certainly a burden on the state and on those not involved in the assembly. A

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202 Brod, *supra* note 76, at 188–89 (noting that the courts reviewing the Occupy protests applied "the deferential intermediate-scrutiny standard").

203 Mitchell v. City of New Haven, 854 F. Supp. 2d 238, 252 (D. Conn. 2012).

204 Occupy Sacramento v. City of Sacramento, 878 F. Supp. 2d 1110, 1120 (2012).

205 Occupy Minneapolis v. County of Hennepin, 866 F. Supp. 2d 1062, 1071 (D. Minn. 2011).

206 *See* Matt Sledge, *Homeland Security Tracked Occupy Wall Street 'Peaceful Activist Demonstrations*,' HUFFINGTON POST (Apr. 3, 2013), http://www.huffingtonpost.com/2013/04/02/homeland-security-occupy-wall-street_n_3002445.html [http://perma.cc/CF3V-TANS].

prolonged assembly such as the one in Zuccotti Park deprived other community members of their access to green areas in an urban metropolis. The City of New York deployed officers on the park for constant surveillance and could have used these officers elsewhere in the city. The last factor is the use of police force. However, since police action did not take place until after an injunction against eviction was denied, the revision of the last factor is not necessary here.

A situation where police force is relevant in the assembly clause query is the Ferguson, Missouri, protests in 2014. In Ferguson, many citizens took to the streets in an effort to raise awareness around, primarily, the killing of an unarmed black teenager, Michael Brown, by a white police officer.[207] Protesting in the streets is permissible under Assembly Clause jurisprudence as long as it is not dangerous and does not obstruct a highway. Neither of these two factors was present in the peaceable[208] Ferguson manifestations. Here, the balancing test takes a different turn. There is currently no court case pending to quash protests. However, under the proposed test for the enforcement of the Assembly Clause, the protestors have every right to sue the local government for an implicit infringement of their right to peaceably assemble. This conclusion is based entirely on two factors: (1) the fact that the protestors are assembled in a permissible area, as previously discussed, and (2) the use of militarized police tactics in quelling the peaceful protests. The Assembly Clause does not only protect the actual grouping of individuals and consequences of that grouping but also the sanctity of assembly itself. Essentially, if a group cannot peaceably assemble, then the Assembly Clause is violated on its face. Once the police force employs fear-mongering tactics, the Assembly Clause is violated in its traditional sense, and police forces must retreat to their original peace-keeping tasks.

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207 *See generally* N.Y. TIMES, *What Happened in Ferguson?*, http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html [https://perma.cc/WTX4-RXY9] (describing the Ferguson incident and the community response it engendered).

208 Despite the media's attempt at portraying the movement in Ferguson as a protest or riots, the movement is very peaceful. *See* Amanda Gutterman, *If You Think Looters and Arsonists Are the Only Ones Protesting Ferguson, Think Again*, HUFFINGTON POST (Nov. 30, 2014), http://www.huffingtonpost.com/2014/11/25/ferguson-peaceful-protests_n_6221234.html [http://perma.cc/6TK5-D6DH].

CONCLUSION[209]

The history of the Assembly Clause is set in stone. The current jurisprudence is not. With protests on the rise across the world,[210] and especially in our country,[211] it is time for the Supreme Court to turn from its recently mistaken reading of the Assembly Clause and reinstate the original meaning of the Clause. The Court must see the right to peaceably assemble "in its classical form: a group of individuals gathering together to discuss, debate, picket or demonstrate in order to further a lawful purpose."[212] The Court views that freedom, in its modern form, through the lens of the created freedom of association.[213] The current jurisprudence rids the Assembly Clause of its essential concept: unity, fellowship, and autonomy. The Assembly Clause should be viewed in light of the greater constitutional movement—as a revolution. The Constitution codified that revolution and attempted to capture and contain that kinetic energy and focus it into constantly creating itself anew through public discourse vis-à-vis the Assembly Clause and the rest of the Constitution's guarantees.[214] The First Amendment serves a unique purpose: it provides a voice to the voiceless and a platform for dissenters and minority views and it safeguards peaceable political discourse through human fel-

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209 Although the Supreme Court can remedy part of the problem retroactively—which might provide a form of deterrence—by reviving the Assembly Clause, legislation may be needed to curb the reach of local police forces when responding to assembled groups. Questions of possible overreach of police power are too far reaching to address in this Note; however, it is imperative to scrutinize the effects of the militarization of local police—and the legislative measures that allow for it—beyond how they relate to the Assembly Clause.

210 Government actions have spurred massive protests in the United States (recently concerning police brutality), Mexico (concerning corruption and the disappearance of student protestors), Spain, and countries involved in the Arab Spring. *See*, Ioan Grillo, *Are the Missing Students Protests Turning into a Mexican Spring?*, NBC NEWS (Dec. 5, 2014, 8:20 AM), www.nbcnews.com/news/latino/are-missing-stduents-protests-turning-mexican-spring-n262266 [http://perma.cc/CX5M-44Y5].

211 Simply take a look at the mass response in New York City to the non-indictment of Eric Garner and other police brutality-related protests in places like Berkeley, California. *See* Holley, *supra* note 20.

212 Rische, *supra* note 43, at 331.

213 *Id.*

214 As Emerson notes, "a system of free expression is designed to encourage a necessary degree of conflict within a society." EMERSON, *supra* note 46, at 11. Emerson goes on to explain, although not explicitly, the nature of the American legal system. He describes a cyclical system akin to my suggestion of the codified revolution. In essence, he describes a cycle of peaceable unrest, discourse, ultimate harmony through consensus, and then eventual unrest. This cycle is the very institution that the Constitution, the First Amendment, and the Assembly Clause were meant to safeguard.

lowship. The current jurisprudence effectively neutralizes the Assembly Clause and rids it of any effectiveness. In the year 2014, the Assembly Clause is nothing more than words on a page, which makes our own public dissents subject to a forceful, autonomous hand: police officers.