

When Protest Is the Disaster: Constitutional Implications of State and Local Emergency Power

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ABSTRACT

The President's use of emergency authority has recently ignited concern among civil rights groups over national executive emergency power. However, state and local emergency authority can also be dangerous and deserves similar attention. This article demonstrates that, just as we watch over the national executive, we must be wary of and check on state and local executives—and their emergency management law enforcement actors—when they react in crisis mode. This paper exposes and critiques state executives' use of emergency power and emergency management mechanisms to suppress grassroots political activity and suggests avenues to counter that abuse. I choose to focus on the executive's response to protest because this public activity is, at its core, an exercise of a constitutional right. The emergency management one-size-fits-all approach, however, does not differentiate between political activism, a flood, a terrorist attack, or a loose shooter. Public safety concerns overshadow any consideration of protestors' individual rights. My goal is to interject liberty considerations into the executive's calculus when it responds to political activism. I use the case studies of the 2016 North Dakota Access Pipeline protests, the 2014 Ferguson protests, and the 1999 Seattle WTO protests to demonstrate that state level emergency management laws and structures provide no realistic limit on the executive's power, and the result is suppression of activists' First and Fourth Amendment rights. Under current conditions, neither lawmakers nor courts realistically restrain the executive's emergency management

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action. I suggest a better check on executive crisis and emergency actions undertaken in response to mass protest. *When the protest is the disaster*, more robust judicial review of executive emergency declarations and the establishment of a council to guide state and local executives' emergency/crisis response are crucial.

INTRODUCTION

On August 19, 2014, a police officer stands on the streets of Ferguson, Missouri, pointing an AR-15 semi-automatic rifle at an unarmed crowd of protesters.¹ “I am going to fucking kill you! Get back, get back,” he yells.² When the officer is asked his name, he responds, “Go fuck yourself.”³ Five days before, on August 15, 2014, a white police officer, Darren Wilson, shot an unarmed teenager, Michael Brown. Michael Brown was the fourth unarmed black man killed by a police officer that year.⁴ His death ushered in weeks of vigils and mass protests.⁵ In response, state officials turn to military tactics to suppress the protests, treating civilians like enemies of war. Police use military grade weaponry and war tactics for crowd control.⁶ The Missouri governor declares a state of emergency and enacts a curfew.⁷ Militarized policing continues. Arrest numbers balloon. People are arrested for expressing dissent outside a

1. AMNESTY INT’L, ON THE STREETS OF AMERICA: HUMAN RIGHTS ABUSES IN FERGUSON 10 (2014) [hereinafter AMNESTY INT’L FERGUSON REP.], <https://www.amnestyusa.org/wp-content/uploads/2017/04/onthestreetsofamericaamnestyinternational.pdf> [<https://perma.cc/N8DA-M7JC>].

2. *Id.*

3. *Id.* It was later discovered that the officer was Lieutenant Ray Albers. Sebastian Murdock, *Confirmed: Cop Who Threatened Ferguson Protesters is Lt. Ray Albers*, HUFFPOST (Aug. 20, 2014), https://www.huffingtonpost.com/2014/08/20/ray-albers-ferguson-protesters_n_5696715.html [<https://perma.cc/FEM4-RBGM>]; Linda Warren, *Veteran Police Officer Who Was Filmed Threatening to Kill Ferguson Protesters as He Raised His Gun Resigns*, DAILY MAIL ONLINE (Aug. 29, 2014), <https://www.dailymail.co.uk/news/article-2737819/Veteran-police-officer-filmed-threatening-kill-Ferguson-protesters-raised-gun-resigns.html> [<https://perma.cc/PPZ7-8JQ5>].

4. Nicholas Quah & Laura E. Davis, *Here’s a Timeline of Unarmed Black People Killed by Police Over the Past Year*, BUZZFEED NEWS (May 1, 2015), <https://www.buzzfeednews.com/article/nicholasquah/heres-a-timeline-of-unarmed-black-men-killed-by-police-over> [<https://perma.cc/8FJB-T5VU>]. This only accounts for the police killings that garnered media attention in 2014. Further, killings of black women and other minorities have not obtained the same media focus. *See, e.g.*, Kate Abbey-Lambertz, *These 15 Black Women Were Killed During Police Encounters. Their Lives Matter, Too*, HUFFPOST (Feb. 13, 2015), https://www.huffingtonpost.com/2015/02/13/black-womens-lives-matter-police-shootings_n_6644276.html [<https://perma.cc/NM6K-YPS7>].

5. U.S. DEP’T OF JUSTICE, AFTER-ACTION ASSESSMENT OF THE POLICE RESPONSE TO THE AUGUST 2014 DEMONSTRATIONS IN FERGUSON, MISSOURI, at xiii (2015) [hereinafter DOJ FERGUSON REP.], <https://ric-zai-inc.com/Publications/cops-p317-pub.pdf> [<https://perma.cc/GZ2R-K875>].

6. *Id.* at 53–59.

7. Mo. Exec. Order 14-08 (Aug. 16, 2014) [hereinafter Mo. Exec. Order 14-08], http://www.sos.mo.gov/library/reference/orders/2014/eo14_08 [<https://perma.cc/9HJ8-2X2S>].

police-designated zone or for simply standing in place in public.⁸ The Governor activates the National Guard⁹ one day before the nameless officer takes aim at protestors with his rifle. But this officer is just one of many. News reports fill with images of law enforcement officers pointing weapons at unarmed civilians in the streets of Ferguson.¹⁰ In August and early September, about 300 people are arrested—many violently so—as they engage in protests and demonstrations in Ferguson.¹¹ When questioned about the justification for the arrests, police on the ground reply “I don’t know,” “I can’t answer that,” or “this is a riot situation.”¹² This paper exposes and critiques state executives’ use of emergency power and emergency management mechanisms to suppress grassroots political activity and suggests avenues to counter that abuse.

Recently, the exercise of executive emergency power has become one of the great controversies of the day. Politicians and civil rights organizations rush to check the national executive as it engages in an unwise exercise of executive power, and justifies it through the rhetoric of emergency.¹³ Most recently, the President declared a national emergency

8. AMNESTY INT’L FERGUSON REP., *supra* note 1, at 7–8 (“[O]n August 18 that law enforcement began imposing a rule that protesters must keep walking or face arrest, unless they were in an approved protest area.”); *see also, e.g.*, Verified Complaint at 1, *Abdullah v. County of Saint Louis*, 52 F. Supp. 3d 936 (E.D. Mo. 2014) (No. 4:14-cv-1436) (alleging plaintiff was ordered, without lawful justification and in violation of his constitutional rights, to refrain from standing on public sidewalks in Ferguson for more than five seconds or risk being arrested).

9. Mo. Exec. Order 14-09 (Aug. 18, 2014) [hereinafter Mo. Exec. Order 14-09], https://www.sos.mo.gov/library/reference/orders/2014/eo14_09 [https://perma.cc/XW8H-UCMV].

10. DOJ FERGUSON REP., *supra* note 5, at 56; AMNESTY INT’L FERGUSON REP., *supra* note 1, at 10, 14, 17; *see also* images for “Ferguson officer pointing gun at protestors,” GOOGLE, https://www.google.com/search?q=Ferguson+officer+pointing+gun+at+protestors&source=lnms&tbm=isch&sa=X&ved=0ahUKEwj02r3u2KvkAhW1KX0KHXRmAHwQ_AUIEygD&biw=784&bih=768 [https://perma.cc/E8VH-WF8J]. Further, there were multiple reports of officers concealing their identities. AMNESTY INT’L FERGUSON REP., *supra* note 1, at 18.

11. DOJ FERGUSON REP., *supra* note 5, at 38.

12. AMNESTY INT’L FERGUSON REP., *supra* note 1, at 15.

13. *See, e.g.*, Peter Baker, *Trump Declares a National Emergency and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html> [https://perma.cc/9YHM-R4A5]; Tamara Keith, *If Trump Declares an Emergency to Build the Wall, Congress Can Block Him*, NPR (Feb. 11, 2019), <https://www.npr.org/2019/02/11/693128901/if-trump-declares-an-emergency-to-build-the-wall-congress-can-block-him> [https://perma.cc/Q23V-TYH3]; Nick Miroff, *Lawsuit Seeks to Block Trump From Restricting Asylum for Migrants Who Enter U.S. Illegally*, WASH. POST (Nov. 9, 2018), https://www.washingtonpost.com/world/national-security/trump-issues-decree-limiting-asylum-protection-for-migrants-crossing-illegally-into-the-us/2018/11/09/f856b4ec-e431-11e8-a1c9-6afe99ddd92_story.html?noredirect=on&utm_term=.a02361c5ef1b [https://perma.cc/877M-SJL7]; Benjamin A. Schupmann, *Emergency Powers and Trump: Lessons from Carl Schmitt*, PUB. SEMINAR (Mar. 22, 2019), <http://www.publicseminar.org/2019/03/emergency-powers-and-trump-lessons-from-carl-schmitt/> [https://perma.cc/ZXQ5-SR8F]; Michael D. Shear, *Trump Claims New Power to Bar*

to divert over \$6.5 billion to build a wall at the United States' southern border with Mexico.¹⁴ This is just one of many actions that this President has taken under the guise of a crisis. This Article demonstrates that, as with national executives, we must be wary when state and local executives—and their emergency management personnel—react in crisis mode and ultimately make use of expansive emergency powers. There is an existing body of scholarship examining national emergency powers.¹⁵ However, the reality is when crises occur, state and local executives are the first responders.¹⁶ Some state responses have received scholarly attention. Scholars criticized Louisiana state and local actors' aggressive, harmful, and rights-violating actions in the wake of Hurricane Katrina.¹⁷ Yet outside the context of natural disaster, the effect of state and local officials' emergency responses and policies on individual rights remains relatively unexamined in legal literature. This Article begins to fill that

Asylum for Immigrants Who Arrive Illegally, N.Y. TIMES (Nov. 8, 2018), <https://www.nytimes.com/2018/11/08/us/politics/trump-asylum-seekers-executive-order.html> [<https://perma.cc/86XR-H3NC>].

14. Peter Barker, *Trump Declares a National Emergency to Build a Border Wall*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html> [<https://perma.cc/9Q8H-TFG5>].

15. See Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029 (2004); Oren Gross, *Chaos and Rules: Should Responses to Violent Crisis Always be Constitutional?*, 122 YALE L.J. 1011 (2003); Lawrence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801 (2004); Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600 (2009). As an exception, after Hurricane Katrina some legal scholarship discussed the state and local response to that natural disaster. See MITCHELL F. CRUSTO, INVOLUNTARY HEROES: HURRICANE KATRINA'S IMPACT ON CIVIL LIBERTIES (2015) [hereinafter INVOLUNTARY HEROES]; Mitchell F. Crusto, *State of Emergency: An Emergency Constitution Revisited*, 61 LOY. L. REV. 471, 480–502 (2015) [hereinafter *State of Emergency*].

16. See GEORGE D. HADDOW ET AL., INTRODUCTION TO EMERGENCY MANAGEMENT 2, 99 (3d ed. 2008); AM. BAR ASS'N, A LEGAL GUIDE TO HOMELAND SECURITY AND EMERGENCY MANAGEMENT FOR STATE AND LOCAL GOVERNMENTS 151 (Ernest B. Abbot & Otto J. Hetzel, eds., 3d ed. 2018) [hereinafter ABA GUIDE]; CARMEN FERRO ET AL., NGA CENTER FOR BEST PRACTICES, A GOVERNOR'S GUIDE TO HOMELAND SECURITY, at v. (Nov. 2010); KEITH BEA, CONG. RESEARCH SERV., RL32287, EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES IN THE STATES, DISTRICT OF COLUMBIA, AND INSULAR AREAS: A SUMMARY 4 (2004) [hereinafter CRS REPORT SUMMARY]; *State of Emergency*, *supra* note 15, at 473–75 (discussing several emergency situations where state and local governments have experienced difficulty protecting civil liberties). State executives have statutory emergency management powers. See, e.g., Emergency Powers of Governor, MO. REV. STAT. §§ 44.022 (1998), 44.100 (2008); Powers and Duties of Governor, WASH. REV. CODE § 38.08 (2018); State of Emergency—Powers of Governor Pursuant to Proclamation, WASH. REV. CODE § 43.06.220 (2018). Some mayors also have statutory emergency powers at the local level. See, e.g., SEATTLE, WASH., MUNICIPAL CODE § 10.02.010 (1973) (prior to amendments) (giving the mayor of Seattle the power to declare a civil emergency); see also Brent Appel, *Emergency Mayoral Power: An Exercise in Charter Interpretation*, 65 CALIF. L. REV. 686 (1977).

17. See, e.g., INVOLUNTARY HEROES, *supra* note 15, at 11–12, 32; *State of Emergency*, *supra* note 15, at 488; PETER B. KRASKA, MILITARIZING THE AMERICAN CRIMINAL JUSTICE SYSTEM: THE CHANGING ROLES OF THE ARMED FORCES AND THE POLICE 12 (2001).

void by exposing the harsh and extreme tools that government actors use when they perceive mass protests as the emergency. I examine the actions of executive state officials, both before and after the declaration of an emergency, and demonstrate how they violate protestors' rights.

Even before executives declare a legal emergency, state and local first responders—namely the police—can utilize emergency management tools to suppress protests. However, the emergency declaration aggravates violations of protestors' rights. Once there is an emergency declaration, police are justified to use existing tools more harshly. Police can now engage in mass and arbitrary arrests. The arsenal of oppressive government tools expands because violations of emergency rules and procedures constitute cause for arrest. The executive institutes curfews and only permits expression in designated areas. Ultimately, I conclude that these emergency management tools—used by police and officials before and to a greater extent after the legal emergency—cause irreparable damage to the First and Fourth Amendment rights of protestors.

I choose to focus on the executive's response to protest because this public activity is, at its core, an exercise of a constitutional right. Protest activity is central "to the history and identity of the liberal, democratic nation state."¹⁸ In the words of Justice Brandeis,

Those who won our independence . . . believed that freedom to think as you will and to speak as you think are indispensable to the discovery and the spread of political truth; that, without free speech and assembly, discussion would be futile . . . that the greatest menace to freedom is an inert people; that public opinion is a political duty, and that it should be a fundamental principle of American government.¹⁹

State and local executives and the laws that govern their emergency powers ignore the centrality of speech in the American democratic state. Instead, executives utilize a "one size fits all" emergency management approach that does not distinguish among the events that precipitate the perceived crisis. Thus, state and local executives and law enforcement are free to and do utilize emergency management principles, mechanisms, and laws to respond to protests in the same manner they would a flood, earthquake, or tornado.

I conducted interviews with state and local emergency management officials and personnel and reviewed relevant materials to understand crisis response structures and mechanisms at the state and local levels. I learned that the prevailing emergency management all-hazards approach

18. LESLY J. WOOD, *CRISIS AND CONTROL: THE MILITARIZATION OF PROTEST POLICING* 126 (2014).

19. *Whitney v. California*, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring).

does not differentiate between the different types of emergencies. State laws do not distinguish between a purported emergency due to protest, civil unrest, natural disaster, accident, terrorist event, etc. Thus, the same rules and principles that give executives great discretion and latitude to deal with a hurricane, an oil spill, or a terrorist attack govern when dealing with a protest that the executive decides warrants emergency action or a state of emergency declaration.²⁰ This results in no realistic limit on the executive's power to deal with a purported crisis and no real protection of individual liberties. Emergency officials view protests as law-enforcement-centric events,²¹ which means that before and after a legal emergency is declared, officials give the police free rein to control protestors. This makes this expansive emergency management power dangerous, as the government equates protestors with a catastrophe and provides an executive—and derivatively, the police—the might of the state to quell individual protestors in the manner that the same would seek to quell a disaster.

Whenever executives respond to a crisis, they are driven by the need to maintain public safety. State constitutions and statutes clarify that the rationale for the executives' crisis and emergency management role stems from their duty as protectors of the state and its people.²² Thus, state and local officials cite public safety as a justification for state and local crisis response.²³ The rhetoric of emergency further serves to neutralize

20. See generally HADDOW ET AL., *supra* note 16, at chs. 4, 6; CRS REPORT SUMMARY, *supra* note 16, at CRS-4; FERRO ET AL., *supra* note 16.

21. I conducted phone interviews with emergency management officials and personnel in July 2018. These emergency management workers provided me with background and context to comprehend generally emergency management structures and mechanisms at the state and local level. Any inferences and analysis based on my research and these interviews are attributable completely to me and do not represent the opinions of these individuals. On July 1, 2018, I spoke to emergency management officials at the Missouri State Emergency Management Agency. On July 6, 2018, I spoke to an emergency management official at the Baltimore Mayor's Office of Emergency Management. On July 11, 2018, I spoke with an emergency management official at the North Dakota Department of Emergency Services. On July 12, 2018, I spoke with an emergency management official at the Virginia Department of Emergency Management. On July 16, 2018, I spoke to an attorney within the North Carolina Department of Public Safety. Out of respect for the individuals' privacy, their names have been omitted. [hereinafter Interviews] (notes on file with author).

22. MO. CONST. art. IV, § 2 ("The governor shall take care that the laws are distributed and faithfully executed, and shall be a conservator of the peace throughout the state."); N.D. CONST. art. V, § 7 ("The governor is the chief executive of the state. The governor shall have the responsibility to see that the state's business is well administered and that its laws are faithfully executed. The governor is commander-in-chief of the state's military forces . . . and the governor may mobilize them to execute the laws and maintain order."); WASH. CONST. art. III, § 8 ("[The governor] shall be commander-in-chief of the military in the state except when they shall be called into the service of the United States.").

23. Mo. Exec. Order 14-08, *supra* note 7; Mo. Exec. Order 14-09, *supra* note 9; N.D. Exec. Order 2016-04 (Aug. 19, 2016) [hereinafter N.D. Exec. Order 2016-04] (on file with author).

officials' and police's behavior that may regularly be perceived by the public and the courts as abusive and overreaching. While protection of public safety is an important value and an obligation of government, so is the protection of constitutional rights. Understanding the difficult tension between public safety and individual liberties is a consistent theme in legal and social sciences scholarship.²⁴ This examination contributes to that discussion where the purported crisis creates an extreme imbalance between the government's interest in maintaining order and individual freedom. State emergency constitutional provisions and statutes generally make no mention of protection of individual rights.²⁵ This Article interjects this concern and inquires how individual liberties are furthered or harmed by the state and local executive's crisis and emergency management when responding to public protest. This piece acknowledges that there is an important interplay between the state and federal actors in the area of emergency management,²⁶ but leaves others to explore that relationship. However, scholars have largely ignored the expanse of state and local emergency power and the harm that it can do to First and Fourth Amendment rights when protestors and community dissent *are* the catastrophe.

In this exploration, I use as sample narratives the 2016 North Dakota oil pipeline protests, the 2014 Ferguson protests, and the 1999 Seattle World Trade Organization (WTO) Conference protest. After a brief description of the events that precipitated protests in my sample jurisdictions in Part I, this Article explains the emergency powers of governors and mayors and corresponding emergency management structures in Part II. Using evidence from the chosen protest jurisdictions, Part III of this Article examines how executive decisions made during relevant crisis suppressed protests and violated individuals' constitutional rights, primarily First and Fourth Amendment rights. In Ferguson, first responders used oppressive policing tactics before any emergency declaration was instituted, thus violating the rights of demonstrators. Across the three jurisdictions, however, the executive emergency declaration aggravated the use of these oppressive pre-emergency tactics

24. See, e.g., VICTOR E. KAPPELER & BRIAN P. SCHAEFER, *POLICE & SOCIETY: TOUCHSTONE READINGS* (4th ed. 2019); Angela L. Clark, *City of Chicago v. Morales: Sacrificing Individual Liberty Interests for Community Safety*, 31 LOY. U. CHI. L.J. 113, 143–44 (1999); Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward An Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 314–15 (1991); Peter W. Neyroud, *Balancing Public Safety and Individual Rights in Street Policing*, 114 PROC. NAT'L ACAD. SCI. U.S.A. 9231 (2017); *V. Plight of the Tempest-Tost: Indefinite Detention of Deportable Aliens*, 115 HARV. L. REV. 1915 (2002).

25. An exception is the Missouri statute 44.101, which prohibits the state or local authority from interfering with an individual's Second Amendment right to arm themselves during a state of emergency. MO. REV. STAT. § 44.101 (2007).

26. See, e.g., ABA GUIDE, *supra* note 16, at 149–60.

and opened a Pandora's box of tools to suppress protest activity. The Article then asserts in Part IV that there is no effective legislative or judicial check on the executive's emergency management decisions. Lawmakers are unlikely to reign in the executive on behalf of protestors, and current judicial review is exceedingly deferential to the executive. This Article then suggests a better check on executive crisis and emergency actions undertaken in response to mass protest. *When the protest is the disaster*, more robust judicial review of executive emergency declarations and the establishment of a council to guide state and local executives' crisis/emergency response are crucial.

I. SAMPLE NARRATIVES

The following three sample narratives are intentionally diverse. Each of these narratives demonstrate that, regardless of the protest issue or whether it is the state or the local executive in charge of the response, the emergency mechanisms in place allowed for the serious abridgement of protestors' First and Fourth Amendment rights. I briefly describe them in reverse chronological order below, and in Part II, I specifically address each jurisdiction's emergency mechanisms.

A. *The North Dakota Access Pipeline*

At the end of 2014, private company Energy Transfer Partners, and later, its subsidiary Dakota Access, began working on its project to build a 1,172 mile, thirty-inch underground pipeline to transport crude oil across four states from North Dakota to Illinois.²⁷ In April 2016, Native American tribes began protesting pipeline construction, citing environmental and spiritual objections.²⁸ They also started setting up camps in the area.²⁹ The tribes grounded their protests on water contamination and religious

27. See *Company Overview of Dakota Access, LLC*, BLOOMBERG, <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=264269763> [https://perma.cc/JA4F-UV3U]; Madison Park, *5 Things to Know About the Dakota Access Pipeline*, CNN (Aug. 31, 2016), <http://www.cnn.com/2016/08/31/us/dakota-access-pipeline-explainer/index.html> [https://perma.cc/N3VL-RBVM]; see also Ryan W. Miller, *How the Dakota Access Pipeline Battle Unfolded*, USA TODAY (Dec. 2, 2016), <https://www.usatoday.com/story/news/nation/2016/12/02/timeline-dakota-access-pipeline-and-protests/94800796/> [https://perma.cc/X3VF-XN2Y].

28. Lauren Donovan, *Sioux Spirit Camp to Protest Dakota Access Pipeline*, BISMARCK TRIB. (Mar. 29, 2016), https://bismarcktribune.com/news/state-and-regional/sioux-spirit-camp-to-protest-dakota-access-pipeline/article_4773fba1-f3bb-599d-96a4-7d1ddf30690e.html [https://perma.cc/R2ZL-GQMD].

29. *Id.*

concerns associated with the route of the pipeline.³⁰ They asserted their duty to guard their ancestral water and land and stressed that they were “water protectors” instead of protestors.³¹ In July 2016, the U.S. Corps of Army Engineers approved the Dakota Access Pipeline (DAPL) project.³² In August, the Standing Rock Sioux Tribe sued to prevent the building of the pipeline, arguing that the DAPL could potentially contaminate the Tribe’s drinking water and damage its historically significant sites.³³ That same month, opposition intensified,³⁴ the encampment continued,³⁵ and North Dakota Governor Jack Dalrymple declared a state of emergency via Executive Order (EO) 2016-04, citing “illegal protesting” and “unlawful activity” by individuals at the construction site.³⁶ The order referenced the right to protest, as well as the need to enforce “the rule of law.”³⁷

30. Lauren Donovan, *Spiritual, Political Ride Protests Pipeline*, BISMARCK TRIB. (Apr. 1, 2016), https://bismarcktribune.com/news/state-and-regional/spiritual-political-ride-protests-pipeline/article_e9038f1b-e6d4-5d77-9203-f9a3234af3e6.html [https://perma.cc/97M6-YRVH].

31. See Iyuskin American Horse, *‘We Are Protectors, Not Protesters’: Why I’m Fighting the North Dakota Pipeline*, GUARDIAN (Aug. 18, 2016), <https://www.theguardian.com/us-news/2016/aug/18/north-dakota-pipeline-activists-bakken-oil-fields> [https://perma.cc/C6TL-NE32].

32. See Park, *supra* note 27; *Company Overview of Dakota Access*, *supra* note 27.

33. See *Complaint for Declaratory and Injunctive Relief* at 1–3, *Standing Rock Sioux Tribe v. U.S. Army of Corps Eng’rs*, 255 F. Supp. 3d 101 (D.D.C. July 27, 2016) (No. 1:16-cv-01534-JEB). The suit alleged violations of several historic preservation and environmental protection laws in the Corps’ issuance of final permits for the construction of 1,168-mile-long pipeline meant to transport crude oil from North Dakota to Illinois. The tribe alleged that no adequate environmental analysis of the project had been conducted, despite the high probability of leaks which would impact numerous communities and waterways along the route. The project stopped and started several times due to changes in federal administration, finally culminating with the granting of a controversial easement under Lake Oahe by the Trump administration. On June 14, 2017, Judge James Boasberg declared the permits “did not adequately consider the impacts of an oil spill on fishing rights, hunting rights, or environmental justice, or the degree to which the pipeline’s effects are likely to be highly controversial.” Michael Kennedy, *The Dakota Access Pipeline*, EARTH JUST. (2017), <https://earthjustice.org/cases/2016/the-dakota-access-pipeline> [https://perma.cc/LV78-C7X3]. Despite this ruling, on August 31, 2018, the Corps affirmed the permits. The tribe continued to challenge the project by filing a supplemental complaint on November 1, 2018. Jan Hasselman, *The Renewed Legal Challenges Against the Dakota Access Pipeline*, EARTH JUST. (Nov. 1, 2018), <https://earthjustice.org/features/explainer-renewed-legal-challenge-dakota-access> [https://perma.cc/MLN7-SX33].

34. See Catherine Thorbecke, *Timeline of Dakota Access Pipeline Protests*, ABC NEWS (Oct. 28, 2016), <https://abcnews.go.com/US/timeline-dakota-access-pipeline-protests/story?id=43131355> [https://perma.cc/23SJ-WDQY]; see also Alexander Sammon, *A History of Native Americans Protesting the Dakota Access Pipeline*, MOTHER JONES (Sept. 9, 2016), <https://www.motherjones.com/environment/2016/09/dakota-access-pipeline-protest-timeline-sioux-standing-rock-jill-stein/> [https://perma.cc/2S8N-DJL3]; *Complaint* at 5–9, *Dakota Access, LLC v. Archambault et al.*, No. 1:16-cv-296, 2016 WL 5107005 (D.N.D. Aug. 15, 2016).

35. See *supra* note 34.

36. N.D. Exec. Order 2016-04, *supra* note 23.

37. *Id.*

A month later, the Governor sent National Guard soldiers to the area in preparation for a court ruling on whether to permit a challenge to pipeline construction.³⁸ Protests and arrests continued and magnified. After the Army Corps issued an eviction notice,³⁹ the Governor issued EO 2016-08 mandating evacuation citing dangerous winter storm conditions and sanitation;⁴⁰ however, he did not evacuate the encampment at that time.⁴¹ Water protectors were, however, evacuated after the Governor's next evacuation order via EO 2017-01 in February 2017. This last order cited snow melt and flooding risks.⁴² Over 750 people were arrested over approximately ten months in the pipeline protests.⁴³

B. Ferguson

In the summer of 2014, white Police Officer Darren Wilson shot 18-year-old Michael Brown, a black teenager, at noontime in the streets of Ferguson, Missouri. After the shooting, the teenager's body lay face down on the street for about four hours, bleeding from at least six gunshot wounds.⁴⁴ During this time, a shocked neighborhood poured onto the street asking questions, taking videos of the scene, posting about the incident on social media, and calling local news outlets.⁴⁵ In the days following the

38. *North Dakota Governor Calls in the National Guard Ahead of Pipeline Ruling*, REUTERS (Sept. 8, 2016), <https://www.reuters.com/article/us-usa-pipeline-nativeamericans/north-dakota-governor-calls-in-national-guard-ahead-of-pipeline-ruling-idUSKCN11F031> [https://perma.cc/VQ A5-EY8W]; *Guard Soldiers Activated Amid Dakota Access Pipeline Protests*, ARMY TIMES (Sept. 8, 2016), <https://www.armytimes.com/news/your-army/2016/09/08/guard-soldiers-activated-amid-dakota-access-pipeline-protests/> [https://perma.cc/GCA8-2NJ3] (reporting that while the Governor only sent two dozen troops into the area, another 100 were on standby).

39. Letter from John W. Henderson, Dist. Commander, Army Corps of Eng'rs, to Dave Archambault II, Chairman, Standing Rock Sioux Tribe (Nov. 25, 2016), <https://www.indianz.com/News/2016/11/28/armycorps112516.pdf>.

40. N.D. Exec. Order 2016-08 (Nov. 28, 2016) [hereinafter N.D. Exec. Order 2016-08].

41. Theresa Braine, *DAPL: Evacuation Orders and Snowflakes Fly as Injured Water Protectors Sue Morton County*, INDIAN COUNTRY TODAY (Nov. 29, 2016), <https://indiancountrymedia.network.com/news/politics/dapl-evacuation-orders-and-snowflakes-fly-as-injured-water-protectors-sue-morton-county> [https://perma.cc/B5J5-HNA3].

42. See N.D. Exec. Order 2017-01 (Feb. 15, 2017) [hereinafter N.D. Exec. Order 2017-01]; see also David Kaplan, *North Dakota Governor Issues Emergency Evacuation Order for Dakota Access Pipeline Protest Camp*, ABC NEWS (Feb. 15, 2017), <https://abcnews.go.com/US/north-dakota-governor-issues-emergency-evacuation-order-dakota/story?id=45522458> [https://perma.cc/45PF-T59P].

43. Cliff Naylor, *Growth of DAPL Protests Much Bigger than Expected*, YOUR NEWS LEADER (Feb. 23, 2018), <http://www.kfyrtv.com/content/news/Growth-of-DAPL-protests-much-bigger-than-expected-475002913.html> [https://perma.cc/V6VS-8YGA].

44. Julie Bosman & Joseph Goldstein, *Timeline for a Body: 4 Hours in the Middle of a Ferguson Street*, N.Y. TIMES (Aug. 23, 2014), <https://www.nytimes.com/2014/08/24/us/michael-brown-a-bodys-timeline-4-hours-on-a-ferguson-street.html> [https://perma.cc/E2WJ-6CTM].

45. *Id.*

shooting, activists joined residents and large-scale demonstrations began.⁴⁶ In the streets of Ferguson, the community, outraged observers, and activists protested not only the death of Michael Brown, but also the epidemic of police killings of unarmed black and brown people, police brutality, and the structural racism of the criminal system.⁴⁷

Within a week of the shooting, the Governor declared a state of emergency via EO 14-08, prompted by what he termed “lawlessness” and “civil unrest.”⁴⁸ Two days later, the Governor extended EO 14-08 and issued a state of emergency throughout Missouri.⁴⁹ This extended EO referenced protection not only of the “rule of law” but also of civil rights and the right to peacefully assemble and protest; it omitted the term “civil unrest” in favor of “conditions of distress.”⁵⁰ Nevertheless, the Order imposed a curfew within Ferguson “under the terms and conditions as deemed necessary by the . . . State Highway Patrol.”⁵¹

As further examination will reveal, while the text in the order gave a nod to civil liberties, the repercussion of the declaration was suppression of individual liberties.⁵² The midnight to five a.m. curfew lasted for two days until lifted by the Governor.⁵³ On the same day he lifted the curfew, the Governor issued EO 14-09.⁵⁴ The order called the state National Guard “to protect life and property” and “support civilian authorities.”⁵⁵ Further, it expressly permitted the Highway Patrol to “restrict[] and/or clos[e] streets and thoroughfares in the City of Ferguson.”⁵⁶ The National Guard was active in Ferguson streets for eight days.⁵⁷ During the initial Ferguson uprising in August and early September, police arrested about 300 people.⁵⁸ The Governor terminated the state of emergency on September

46. DOJ FERGUSON REP., *supra* note 5, at xiii.

47. AMNESTY INT’L FERGUSON REP., *supra* note 1, at 6; *see also* Emanuella Grinberg, *What #Ferguson Stands for Besides Michael Brown and Darren Wilson*, CNN (Nov. 19, 2014), <http://www.cnn.com/2014/11/19/us/ferguson-social-media-injustice/index.html> [<https://perma.cc/J2BR-7YMR>].

48. Mo. Exec. Order 14-08, *supra* note 7; Press Release, Office of Mo. Governor Jay Nixon, Statement from Gov. Nixon Regarding the Ongoing Situation in Ferguson and Role of National Guard (Aug. 18, 2014), <http://wayback.archive-it.org/8248/20170107212451/https://governor.mo.gov/news/archive/statement-gov-nixon-regarding-ongoing-situation-ferguson-and-role-national-guard> [<https://perma.cc/6PYS-S98Q>].

49. *See* Mo. Exec. Order 14-08, *supra* note 7.

50. *Id.*

51. *Id.*; *see also* DOJ FERGUSON REP., *supra* note 5, at 24.

52. *See infra* Part III.

53. DOJ FERGUSON REP., *supra* note 5, at 26.

54. Mo. Exec. Order 14-09, *supra* note 9.

55. *Id.*

56. *Id.*

57. Mo. Exec. Order 14-10 (Sept. 3, 2014) [hereinafter Mo. Exec. Order 14-10].

58. DOJ FERGUSON REP., *supra* note 5, at 38.

3rd.⁵⁹ All in all, there was a governor-declared state of emergency in Missouri for almost twenty days in the summer of 2014.

On November 17, 2014, the Governor again declared a state of emergency in anticipation of the grand jury decision of whether to indict Officer Wilson.⁶⁰ He cited a “possibility of expanded unrest.”⁶¹ The Governor summoned 2,200 National Guard troops to Ferguson⁶² and gave primary responsibility for protest policing to the St. Louis County Police Department—instead of the Ferguson police.⁶³ Protestors criticized the preemptive gubernatorial emergency for equating protest activity with violence.⁶⁴ When the grand jury did not indict Officer Wilson,⁶⁵ protests spread throughout the St. Louis area.⁶⁶ On the day prosecutors announced the grand jury no bill, police arrested eighty people.⁶⁷ In the days after the grand jury decision, law enforcement responded again by violently suppressing activists’ constitutional liberties.⁶⁸ The Governor set the state of emergency to automatically terminate within thirty days of his November 17th order.⁶⁹

C. 1999 WTO in Seattle

On November 30, 1999, Seattle hosted the World Trade Organization (WTO) Conference. Activists with diverse concerns relating to economic,

59. Mo. Exec. Order 14-10, *supra* note 57.

60. Mo. Exec. Order 14-14 (Nov. 17, 2014) [hereinafter Mo. Exec. Order 14-14].

61. *Id.*

62. Ellen Wulforst, Daniel Wallis & Edward McAllister, *More Than 400 Arrested as Ferguson Protests Spread to Other U.S. Cities*, REUTERS (Nov. 25, 2014), <https://www.reuters.com/article/us-usa-missouri-shooting/more-than-400-arrested-as-ferguson-protests-spread-to-other-u-s-cities-idUSKCN0J80PR20141126> [<https://perma.cc/37GW-Y5QW>].

63. Mo. Exec. Order 14-14, *supra* note 60; *see also* Mariano Castillo & Dana Ford, *Missouri Governor Declares a State of Emergency in Ferguson*, CNN (Nov. 18, 2014), <https://www.cnn.com/2014/11/17/us/ferguson-state-of-emergency/index.html> [<https://perma.cc/3KCL-DRRK>].

64. Monica Davey, *State of Emergency Declared in Missouri for Grand Jury’s Decision on Ferguson*, N.Y. TIMES (Nov. 17, 2014), <https://www.nytimes.com/2014/11/18/us/missouri-governor-calls-out-national-guard-ahead-of-grand-jury-decision.html> [<https://perma.cc/4G3T-6EEL>].

65. Colleen Shalby, *Protestors React to Ferguson Grand Jury Decision Not to Indict Darren Wilson*, PBS NEWS HOUR (Nov. 24, 2014), <https://www.pbs.org/newshour/nation/follow-reaction-ferguson-grand-jury-decision> [<https://perma.cc/M54B-VEAT>].

66. Alan Scher Zagier, Andale Gross, Jim Suhr, & Catherine Lucey, *61 Arrested in Ferguson After Grand Jury Declines to Indict Police Officer in Michael Brown’s Death*, ASSOCIATED PRESS (Nov. 24, 2014), <https://www.dailynews.com/2014/11/24/61-arrested-in-ferguson-after-grand-jury-declines-to-indict-police-officer-in-michael-browns-death/> [<https://perma.cc/8CWU-BPLR>].

67. *Id.*

68. *See* Complaint at 9–26, *Templeton v. Dotson*, No. 4:14-cv-2019, 2015 WL 13650910 (E.D. Mo. Dec. 8, 2014).

69. Mo. Exec. Order 14-14, *supra* note 60.

environmental, and social issues descended upon the city in protest.⁷⁰ On the afternoon of the WTO Conference, Seattle Mayor Paul Schell declared a state of emergency in the city, which instituted a curfew and an extensive “no-protest” zone.⁷¹ After the declaration, the Governor immediately called in 300 state troopers and National Guard troops to assist the Seattle Police Department with the protest.⁷² Ultimately, the mayor terminated the emergency on December 4th. About 500 activists were arrested on November 30th and December 1st.⁷³

These three sample narratives are applied in the forthcoming analyses. In the next Part, I will explain state and local emergency mechanisms generally, as well as specifically in these three jurisdictions.

II. EXPLANATION OF STATE AND LOCAL EMERGENCY POWER AND BUREAUCRACY

When a crisis occurs within a state, state and local officials are the first responders who are responsible for managing and controlling the situation. The U.S. Constitution and federal statutes prevent the national government from interfering or assisting with a state level emergency without a preceding request of the state,⁷⁴ so in the majority of situations, the national executive will not be involved in the management of a state-level emergency. All state constitutions contain provisions making the governor the commander-in-chief of the state military with the power of maintaining the peace, suppressing insurrection, or both.⁷⁵ These

70. *World Trade Organization Protests in Seattle*, SEATTLE MUN. ARCHIVES, <http://www.seattle.gov/cityarchives/exhibits-and-education/digital-document-libraries/world-trade-organization-protests-in-seattle> [https://perma.cc/9YHM-R4A5].

71. Mayoral Proclamation of Civil Emergency, City of Seattle Resolution 30099, Exhibit A (Dec. 6, 1999) [hereinafter Seattle Emergency Proclamation], <https://www.seattle.gov/Documents/Departments/CityArchive/DDL/WTO/1999Dec6.htm> [https://perma.cc/YDW4-9KSC].

72. *Day Two, November 30, 1999*, WTO HISTORY PROJECT, <http://depts.washington.edu/wtohist/day2.htm> [https://perma.cc/R6FN-XJZS].

73. *Id.*

74. U.S. CONST. art. IV, § 4 (containing the “Guaranty Clause,” which delineates that the federal government will protect states against “domestic Violence,” upon an “Application of the [state] Legislature, or of the Executive”); 10 U.S.C. § 251 (2017) (requiring there be a state request before the federal government assists in a state emergency); William B. Fisch, *Emergency in the Constitutional Law of the United States*, 38 AM. J. COMP. L. SUPP. 389, 410–11 (1990) (stating that federal intervention before such a state request may amount to a Guaranty Clause violation, unless the state is acting in violation of federal law); see also HADDOW ET AL., *supra* note 16, at xvi.

75. See CRS REPORT SUMMARY, *supra* note 20, at CRS-4; FERRO ET AL., *supra* note 16, at 41; see also MO. CONST. art. IV (making the governor the “conservator of the peace” with the authority to use the state militia to “suppress and actual and prevent threatened insurrection, and repeal invasion.”); N.D. CONST. art V, § 7 (making the governor the commander in chief of the military with the authority to “mobilize them to . . . maintain order”); N.D. CONST. art. III, § 8 (making the governor

provisions are the foundation of the governor's emergency power. State legislatures have further enacted statutes that provide contour to emergency management powers and structures. Municipal ordinances provide local executives with similar powers.⁷⁶ During a crisis, safety is the dominating concern for the executive and *his*⁷⁷ emergency management team. In this calculus, protection of constitutional liberties is not an emergency management priority. A review through state constitutions and statutes dealing with emergencies demonstrates that no provision exists for the protection of individual rights.⁷⁸ The language of state emergency constitutional and statutory provisions—as well as the resulting emergency management structures—reflect the goal of guarding security, not individual liberties. The incentive might be different when some local politicians draft emergency provisions, possibly resulting from local residents having a stronger influence on these officials. After the 1999 WTO protests, a civil rights provision was added to the Seattle Municipal Code requiring the mayor to include language in the emergency declaration that states that any intrusions on individual rights are the least restrictive necessary to protect life and property.⁷⁹

In terms of structure, state and local jurisdictions have an emergency management bureaucracy which answers to the governor or the local executive, respectively.⁸⁰ Understanding these bureaucracies and how they operate when there is a crisis is a challenge. Publicly available materials on state and local emergency management are limited and do not present a clear picture of how these officials interact with state and local elected executives during a crisis. Therefore, my understanding of emergency

the commander-in-chief of the state military); N.D. CONST. art. X, § 2 (specifying that the governor can utilize the militia to “suppress insurrections and repel invasions”).

76. See SEATTLE, WASH., MUNICIPAL CODE § 10.02.010 (1973) (prior to amendments).

77. I intentionally utilize the male pronoun when referencing state and local executives. I do this because most are cis male and therefore—in most cases—cis male governors, mayors, and the like will decide how to manage the crisis as they did in my sample narratives. *Governors*, NAT'L GOVERNORS ASS'N, <https://www.nga.org/governors-2/> [<https://perma.cc/5FMW-22GQ>] (providing a comprehensive list of the U.S.'s governors, ten of whom are female and forty-five of whom are male).

78. See, e.g., MO. REV. STAT § 44.101 (2007); N.D. CENT. CODE § 37-17.1-29 (2013). One exception is that Missouri forbids firearm restrictions during an emergency. MO. REV. STAT. § 44.101 (2007). West Virginia also has a similar statute. W. VA. CODE § 15-5-19A (2014).

79. See Seattle, Wash., City Council No. 113809, Ordinance No. 120606 (codified at SEATTLE, WASH., MUNICIPAL CODE § 10.02.025 (2001)), <http://clerk.seattle.gov/~scripts/nph-brs.exe?s3=&s4=120606&s5=&s1=&s2=&S6=&Sect4=AND&l=0&Sect2=THESON&Sect3=PLURON&Sect5=CBORY&Sect6=HITOFF&d=ORDF&p=1&u=%2F-public%2Fcbor1.htm&r=1&f=G> [<https://perma.cc/3CJG-S9SJ>].

80. CRS REPORT SUMMARY, *supra* note 16, at CRS-4-7; see FEMA EMERGENCY MANAGEMENT INSTITUTE, *Unit Two: How Communities and States Deal with Emergencies and Disasters*, in A CITIZEN'S GUIDE TO DISASTER ASSISTANCE 2-1, 2-2 (2001), https://training.fema.gov/emiweb/downloads/is7unit_2.pdf [<https://perma.cc/8CFX-R5PF>].

management mechanisms is derived from not only my review of statutes, reports, and materials, but also from my interviews of emergency management officials and personnel in multiple jurisdictions.⁸¹ While these structures are not uniform across states, generalities do exist. Within each state executive itself, there is a state emergency management office headed by either a civilian or the Adjutant General.⁸² This office may be situated within a different agency in each state—but is always a part of the executive bureaucracy.⁸³ Cities have an analogous emergency management bureaucracy under the control of the chief local executive.⁸⁴ The role of these offices and their personnel is to coordinate crisis or emergency response under the direction of the state or local chief executive.⁸⁵ My discussions with these emergency management officials confirmed their focus on public safety, as opposed to any individual liberty concerns—even when the conversation turned to protest response.⁸⁶ Law enforcement is an integral part of state and local emergency management and officials are routinely the first responders to protests.⁸⁷

State and local emergency forces—i.e., police—do not await an emergency declaration to exert substantial control over protestors. Before a legal emergency, police activate mutual aid agreements to summon police from other intra-state jurisdictions.⁸⁸ This acts as a multiplier to regular police forces. In Ferguson, local police activated these agreements

81. Interviews, *supra* note 21.

82. See CRS REPORT SUMMARY, *supra* note 16, at CRS-4–5; see also HADDOW ET AL., *supra* note 16, at 106.

83. HADDOW ET AL., *supra* note 16, at 106.

84. See SEATTLE, WASH., MUNICIPAL CODE § 10.02.047 (2015) (describing Seattle’s Office of Emergency Management).

85. CRS REPORT SUMMARY, *supra* note 16, at CRS-4. About thirty states also have created a commission. *Id.* These commissions’ purported role is to provide the governor with advice on how to prepare for and handle an emergency. *Id.* In my conversations with emergency management officials, however, I learned that these commissions are not involved in efforts during an actual crisis, but they may instead provide feedback after the event. See Interviews, *supra* note 21; see also *State Emergency Response Commission*, NORTH CAROLINA DEPARTMENT OF PUBLIC SAFETY, <https://www.ncdps.gov/about-dps/boards-commissions/state-emergency-response-commission> [https://perma.cc/6ZBA-6XJS]. In North Dakota, the Emergency Commission’s role is also budgetary. See *Emergency Commission*, N. D. LEGISLATIVE BRANCH, <https://www.legis.nd.gov/assembly/64-2015/committees/joint/emergency-commission> [https://perma.cc/8QV9-UVVU]. During DAPL protests, the commission met twice to approve funding requests related to protest policing. See Minutes, Special Emergency Commission Meeting (Nov. 1, 2016), https://sos.nd.gov/files/uploaded_documents/ecm_nnov012016special.pdf [https://perma.cc/FQN6-K7BT]; see also Minutes, Emergency Commission Meeting (Nov. 30, 2016), https://sos.nd.gov/files/uploaded_documents/ecmn11302016.pdf [https://perma.cc/MF27-5G3X]. In some states like Missouri and Virginia, the commission has a specialized focus like environmental hazards. Interviews, *supra* note 21.

86. Interviews, *supra* note 21.

87. *Id.*

88. *Id.*; see also FERRO ET AL., *supra* note 16, at 47–51.

early—before any emergency declaration.⁸⁹ Police can don military garb and weapons, ride atop military-grade vehicles, and use them to break up protests like they did in Ferguson during the seven days leading up to the gubernatorial emergency declaration.⁹⁰ Police can use existing law to arrest. So, while police have some of the same weapons available to battle civilians whether or not there is an emergency, they are not as likely to use them as flagrantly and excessively as when there is a sense of an impending crisis (whether real or fabricated). In other words, without downplaying the regular police abuse and violence, it is difficult to imagine police routinely riding down American city streets in military tanks and tear gassing civilians without the rhetoric of emergency in the air. The rhetoric neutralizes abusive police conduct because it is perceived as necessary to emergency management.

The declaration of an emergency further expands executive power and aggravates the use of oppressive policing tools.⁹¹ The statutes and factual narratives from our sample jurisdictions demonstrate this. During an emergency, the Missouri and North Dakota governors can single-handedly control all emergency forces;⁹² suspend laws and statutes;⁹³ seize or control modes of transportation;⁹⁴ control access to emergency areas;⁹⁵ take and utilize private property;⁹⁶ and activate the state's National Guard.⁹⁷ Notably, the emergency statutes do not contain an exhaustive list of the governor's constitutional power since the language in each statute clearly states that it is not meant to define or otherwise cabin the extent of constitutional gubernatorial emergency authority.⁹⁸ In Seattle, the mayor has analogous power: he can prescribe a curfew; order evacuation; require the closing of private businesses, particularly those selling liquor and firearms; restrict or close access to public streets and places; and generally make any orders "as are imminently necessary for the protection of life

89. Compare DOJ FERGUSON REP., *supra* note 5, at 5 tbl.1 (indicating St. Louis police called for mutual aid the same day Michael Brown was shot on August 9, 2014), with Mo. Exec. Order 14-08, *supra* note 7 (declaring first state of emergency in response to protests on August 16, 2014).

90. See generally DOJ FERGUSON REP., *supra* note 5, at ch.2; Interviews, *supra* note 21.

91. State constitutions also grant the governor the power to declare martial law, which is a more extreme action. Kirk L. Davies, *The Imposition of Martial Law in the United States*, 49 A.F. L. REV. 67, 85 n.93 (2000) (stating "martial law has been imposed on the state level on numerous occasions"). However, an analysis of martial law is outside the scope of this paper and was not declared in any of our sample narratives.

92. MO. REV. STAT. § 44.100(3)(a) (2008); N.D. CENT. CODE § 37-17.1-05(5) (2013).

93. MO. REV. STAT. § 44.022(3)(1) (1998); N.D. CENT. CODE § 37-17.1-05(6) (2013).

94. MO. REV. STAT. § 44.100(3)(c)(a) (2008); N.D. CENT. CODE § 37-17.1-05(6)(f) (2013).

95. N.D. CENT. CODE § 37-17.1.05 (6)(g) (2013).

96. See MO. REV. STAT. § 44.100 (3)(c) (2008); N.D. CENT. CODE § 37-17.1-05(6) (2013).

97. MO. REV. STAT. § 41.480 (1951); N.D. CENT. CODE § 37-17.1-05(6), (8) (2013).

98. MO. REV. STAT. § 44.032(8) (2016); N.D. CENT. CODE § 37-171-03(4) (1985).

and property.”⁹⁹ However, only a governor can activate the National Guard as its commander.¹⁰⁰

During an emergency, executive orders are the law of the land.¹⁰¹ Police arrest for failure to abide by ad hoc emergency rules, since noncompliance is criminal—this includes protesting past curfew, demonstrating or even stepping outside a designated protest zone, or, in Ferguson, standing still for longer than five seconds.¹⁰² In Missouri, as in Seattle during the WTO protest, nonadherence to the order is a criminal misdemeanor that can subject someone to a fine or one year in jail.¹⁰³ In North Dakota, nonadherence is a fineable criminal infraction.¹⁰⁴ The governor has the authority to declare a state of emergency unilaterally across his state when his focus is public safety.¹⁰⁵ In most states, this power belongs only to the governor. Missouri—where Ferguson is located—is one of the exceptions where the legislature can also proclaim an emergency.¹⁰⁶ In the few states where the legislative branch can likewise institute an emergency, lawmakers rarely, if ever, utilize this power.¹⁰⁷ This does not mean that most state statutes do not allow for any legislative involvement in an emergency. In both Missouri and North Dakota, as well as in twenty-eight other states, the legislature can terminate the

99. SEATTLE, WASH., MUNICIPAL CODE § 10.02.020(O) (1992) (prior to amendments).

100. Interviews, *supra* note 21; *see also* MAJ. GEN. TIMOTHY J. LOWENBERG, *THE ROLE OF THE NATIONAL GUARD IN NATIONAL DEFENSE AND HOMELAND SECURITY* 2 (2014).

101. *See* MO. REV. STAT. § 44.100(3)(b) (2008); N.D. CENT. CODE § 37-17.1-05 (2013).

102. *See infra* Part III.

103. MO. REV. STAT. § 44.130(2) (1955) (“Any person violating any rule or regulation adopted under this law after it has become effective during an emergency or any person or officer violating any provision of this law shall be deemed guilty of a misdemeanor.”); MO. REV. STAT. § 558.011(6)–(8) (2017) (stating that the term of imprisonment for misdemeanors is “not to exceed one year”); *see also* SEATTLE, WASH., MUNICIPAL CODE §§ 10.02.110 (1973) (prior to amendments), 12A.26.040 (2001). The penalty for failure to obey a mayoral emergency order is now 180 days in jail. SEATTLE, WASH., MUNICIPAL CODE § 10.02.110 (2015) (as amended by City of Seattle Ordinance No. 124849).

104. *See* N.D. CENT. CODE §§ 37-17.1-05(7), 12.1-32-01(7) (2017) (defining penalty for criminal infraction).

105. NAT’L EMERGENCY MGMT. ASS’N, 2018 BIENNIAL REPORT 3 (2018) [hereinafter NEMA Report]. Even before the triggering event has occurred, every state governor, with the exception of Minnesota, can declare an emergency also for an impending incident. *Id.*; *see also* CRS REPORT SUMMARY, *supra* note 16, at CRS-4.

106. *See* MO. REV. STAT. § 44.100(1) (2008) (stating that an emergency “may be proclaimed...by resolution of the legislature.”). The state legislatures of Alabama, Missouri, North Carolina, New Hampshire, Nevada, North Carolina, Oklahoma, and West Virginia also have the power to proclaim an emergency. *See* ALA. CODE §31-9-8(a) (2014); NEV. REV. STAT. §414.070 (2009); N.H. REV. STAT. ANN. § 4:45(2002); N.C. GEN. STAT. § 166A-19.20(a) (2012); OKLA. STAT. tit. § 683.9 (2013); W. VA. CODE § 15-5-6 (2014).

107. In 2017, the 206 state level emergencies were all gubernatorial declarations. NEMA Report, *supra* note 105, at 3.

emergency, even if it cannot initiate it.¹⁰⁸ In some states, a governor's emergency declaration must be continued by the legislature after a certain

108. State legislatures can terminate the emergency in Alaska, Arizona, Colorado, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, Utah, West Virginia, and Wisconsin. *See* ALASKA STAT. § 26.23.025 (2000); ARIZ. REV. STAT. ANN. § 26-303 (2015); COLO. REV. STAT. § 24-33.5-704(4) (2018); CONN. GEN. STAT. § 28-9 (2010); FLA. STAT. § 252.36 (2006); GA. CODE ANN. § 38-3-51 (2014); IDAHO CODE § 46-1008 (2016); IND. CODE § 10-14-3-12 (2010); IOWA CODE § 29C.6(1) (2017); KAN. STAT. ANN. § 48-924 (2002); LA. STAT. ANN. § 29:724 (2009); ME. REV. STAT. ANN. tit. 37-B, § 743 (1984); MD. CODE ANN., PUB. SAFETY § 14-107 (West 2006); MO. REV. STAT. § 44.100.1 (2008); MONT. CODE ANN. § 10-3-303 (2009); NEB. REV. STAT. § 81-829.40 (2019); NEV. REV. STAT. § 414.070 (2009); N.H. REV. STAT. ANN. § 4:45 (2019); N.Y. EXEC. LAW § 29-a (McKinney 2012); N.C. GEN. STAT. § 166A-19.20 (2012); N.D. CENT. CODE § 37-17.1-05 (2013); OKLA. STAT. tit. 63, § 683.9 (2013); OR. REV. STAT. § 401.192 (2009); 35 PA. STAT. AND CONS. STAT. ANN. § 7301 (West 2014); 30 R.I. GEN. LAWS ANN. § 30-15-9 (West 2016); UTAH CODE ANN. § 53-2a-206 (West 2013); W.VA. CODE § 15-5-6 (2014); WIS. STAT. § 166.03 (2009); *see also* KEITH BEA ET AL., CONG. RESEARCH SERV., RL32288, ALASKA EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004); KEITH BEA ET AL., CONG. RESEARCH SERV., RL32289, ARIZONA EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-4 (2004); KEITH BEA ET AL., CONG. RESEARCH SERV., RS21784, COLORADO EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004); KEITH BEA ET AL., CONG. RESEARCH SERV., RS21801, CONNECTICUT EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004); KEITH BEA ET AL., CONG. RESEARCH SERV., RS21784, FLORIDA EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004); KEITH BEA ET AL., CONG. RESEARCH SERV., RS21800, GEORGIA EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004); KEITH BEA ET AL., CONG. RESEARCH SERV., RS21780, IDAHO EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004); KEITH BEA ET AL., CONG. RESEARCH SERV., RS21781, INDIANA EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004); KEITH BEA ET AL., CONG. RESEARCH SERV., RS21782, IOWA EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004); KEITH BEA ET AL., CONG. RESEARCH SERV., RS21788, KANSAS EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004) [hereinafter KAN. CRS REPORT]; KEITH BEA ET AL., CONG. RESEARCH SERV., RL32678, LOUISIANA EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-4 (2004); KEITH BEA ET AL., CONG. RESEARCH SERV., RS21927, MAINE EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004); KEITH BEA ET AL., CONG. RESEARCH SERV., RS21929, MARYLAND EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004); KEITH BEA ET AL., CONG. RESEARCH SERV., RL32318, MISSOURI EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004) [hereinafter MO. CRS REPORT]; KEITH BEA ET AL., CONG. RESEARCH SERV., RL32319, MONTANA EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004); KEITH BEA ET AL., CONG. RESEARCH SERV., RS21789, NEBRASKA EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004); KEITH BEA ET AL., CONG. RESEARCH SERV., RL32320, NEVADA EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004) [hereinafter NEV. CRS REPORT]; KEITH BEA ET AL., CONG. RESEARCH SERV., RS21790, NEW HAMPSHIRE EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004) [hereinafter N.H. CRS REPORT]; KEITH BEA ET AL.,

duration.¹⁰⁹ None of the state legislatures in the sample jurisdictions had any involvement with emergency management during the relevant protests.

Whether the Missouri and North Dakota governors complied with their respective statutes when declaring the relevant emergency is questionable. In Missouri, an emergency is defined as “any state of emergency *declared by proclamation by the governor . . . upon the actual occurrence of a natural or man-made disaster of major proportions . . . when the safety and welfare of the inhabitants of the state is jeopardized.*”¹¹⁰ Although the statute references a “disaster of major proportions,” no provision requires the governor to provide any evidence of the emergency. The circumstances in Missouri at the time of the emergency declaration did not amount to a “disaster of major proportions.” Although some civilians acted violently against police in the streets of Ferguson, the overwhelming majority of protestors were peaceful.¹¹¹

CONG. RESEARCH SERV., RL32332, NEW YORK EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004); KEITH BEA ET AL., CONG. RESEARCH SERV., RS21797, NORTH CAROLINA EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004) [hereinafter N.C. CRS REPORT]; KEITH BEA ET AL., CONG. RESEARCH SERV., RS21798, NORTH DAKOTA EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004); KEITH BEA ET AL., CONG. RESEARCH SERV., RSL32329, OKLAHOMA EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004) [hereinafter OKLA. CRS REPORT]; KEITH BEA ET AL., CONG. RESEARCH SERV., RL32328, OREGON EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004); KEITH BEA ET AL., CONG. RES. SERV., RL32330, PENNSYLVANIA EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (Mar. 23, 2004); KEITH BEA ET AL., CONG. RESEARCH SERV., RS21873, RHODE ISLAND EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004); KEITH BEA ET AL., CONG. RESEARCH SERV., RL32405, UTAH EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-2 (2004) [hereinafter UTAH CRS REPORT]; KEITH BEA ET AL., CONG. RESEARCH SERV., RL32559, WEST VIRGINIA EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004) [hereinafter W.VA. CRS REPORT]; KEITH BEA ET AL., CONG. RESEARCH SERV., RS21879, WISCONSIN EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004) [hereinafter Wis. CRS REPORT].

109. The legislatures in Kansas, Michigan, Utah, and Wisconsin need to extend the emergency after certain period. *See* KAN. STAT. ANN. § 48-924 (2002); MICH. COMP. LAWS ANN. § 30.403 (2002); UTAH CODE ANN. § 53-2a-206 (2013); WIS. STAT. § 166.03 (2009); *see also* KAN. CRS REPORT, *supra* note 108, at CRS-3; KEITH BEA ET AL., CONG. RESEARCH SERV., RL32326, MICHIGAN EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004) [hereinafter MICH. CRS REPORT]; UTAH CRS REPORT, *supra* note 108, at CRS-2; WIS. CRS REPORT, *supra* note 108, at CRS-3.

110. MO. REV. STAT. § 44.010(6) (2013) (emphasis added).

111. AMNESTY INT’L FERGUSON REP., *supra* note 1, at 7 (“The vast majority of those participating in the protests around Michael Brown’s death have been peaceful—as noted by government officials such as the President of the United States, the Governor of Missouri and Attorney General along with the Missouri Highway Patrol.”).

Admittedly, there were large crowds, some looting, and police reports of gun shots—although no shots were fired at police or any other individual.¹¹² The situation was certainly serious, but not a major disaster. As discussed later in this Article, the police response was militaristic from the day of Michael Brown’s shooting.¹¹³ The appearance of war on the ground likely contributed to the crisis atmosphere; Americans are not accustomed to seeing tanks on city streets. Still, this last circumstance was created by law enforcement—not civilians or protestors—and thus should not factor into the declaration. Instead of citing the “disaster of major proportions” language, the governor stated in his emergency executive order that “events occurring in the City of Ferguson . . . have created conditions of distress for the citizens and businesses of that community.”¹¹⁴ This is a far cry from a major disaster. Nevertheless, the citizenry did not bring a court challenge to the emergency declaration. This is not because all agreed with the governor’s actions,¹¹⁵ instead it is likely because there is no mechanism to meaningfully challenge a gubernatorial emergency declaration. This is because the declaration receives highly deferential review, established by precedents in the courts, and is de facto not constrained by state legislatures. I will discuss both of these points later in this Article.¹¹⁶

On the other hand, North Dakota defines an emergency as “any situation *determined by the governor* to require . . . response or mitigation actions to protect lives and property, to provide public health and safety, or to avert or lessen the threat of disaster.”¹¹⁷ A plain reading of this definition suggests that the governor’s perception completely dictates whether an emergency exists in the state. Thus, the emergency is in the eyes of the governor beholder. However, the emergency statute does require the North Dakota governor to specify the affected areas; the nature and incidents leading to the emergency; and what conditions, once satisfied, would result in the emergency’s termination.¹¹⁸ In the North Dakota Governor’s EO declaring the emergency, he specified the location as the Southwest and South Central regions of the state and generally referenced “illegal” and “unlawful activity” and “illegal protesting

112. DOJ FERGUSON REP., *supra* note 5, at 6–19.

113. *Infra* Section III(b).

114. Mo. Exec. Order 14-08, *supra* note 7.

115. Alice Speri, *State of Emergency and Curfew in Ferguson After Tensions Flare Again*, VICE (Aug. 16, 2014), https://news.vice.com/en_us/article/9kvmx8/state-of-emergency-and-curfew-in-ferguson-after-tensions-flare-again [<https://perma.cc/RU3Q-6W5V>].

116. *Infra* Sections IV(a), IV(b).

117. N.D. CENT. CODE § 37-17.1-04(4) (2013) (emphasis added).

118. *Id.*

activity.”¹¹⁹ This conclusory language likely does not satisfy the statute’s requirement that the executive include the relevant incidents. Further, there was no mention of what conditions would lead to termination of the emergency, which begs how the target of the emergency—water protectors—would know what circumstances would lead to the lifting of the emergency order. Like the Missouri emergency executive orders, there was no legal challenge to the pipeline emergency order.

Local executives often can also declare an emergency within their jurisdiction—although their authority may be more limited. In response to the WTO protests, it was the Seattle mayor who declared an emergency in the city.¹²⁰ Seattle’s list of what can lead to a mayoral emergency declaration is broad: natural disasters, “riot, unlawful assembly, insurrection, other disturbance, [or]the imminent threat thereof. . . .”¹²¹ Much like the Missouri and North Dakota provisions, it relies on the judgment of the executive that “extraordinary measures” are needed to ward off damage to life, property, and maintain “public peace . . . [and] welfare.”¹²² However, the Seattle mayor’s emergency declaration required prompt City Council ratification—which he received.¹²³ Although the City Council needs to agree with the declaration in Seattle, it is the mayor’s sole judgment that initially determines whether the declaration is warranted.

While the governor—and, at times, a local executive—has unilateral power to declare an emergency, this does not mean that he reaches this decision without any advice or influence of other state management officials, or that the top executive only becomes involved in crisis management when deciding whether to declare an emergency. Instead governors and local executives are involved in an information loop with first responders and other emergency management officials from the moment there is a concern about a potential crisis.¹²⁴ My conversations with emergency management officials provided an insider’s view into who

119. N.D. Exec. Order 2016-04, *supra* note 23.

120. Seattle Emergency Proclamation, *supra* note 71, at Exhibit A. Because they were mayoral emergency declarations in Seattle, the declarations needed to and were ratified by the City Council of the City of Seattle. *See* SEATTLE, WASH., MUNICIPAL CODE §10.02.010(c) (1973) (prior to amendments); *see also* FERRO ET AL., *supra* note 16, at 17.

121. *See* SEATTLE, WASH., MUNICIPAL CODE § 10.02.010 (1973) (prior to amendments).

122. *Id.*

123. *See* City of Seattle Resolution 30099 (Dec. 6, 1999) (enacted) <https://www.seattle.gov/Documents/Departments/CityArchive/DDL/WTO/1999Dec6.htm> [<https://perma.cc/5J4N-D748>]; *see also* SEATTLE, WASH., MUNICIPAL CODE § 10.02.010(c) (1973) (prior to amendments). Even if the City Council voids or changes the declaration, the rejection does not affect the propriety of emergency actions taken before its rejection. *Id.*

124. Interviews, *supra* note 21.

feeds this information loop during mass protests. Top law enforcement agents base their perspectives on their officers' accounts of engagement with protestors in the field.¹²⁵ Law enforcement officials feed this information loop and thus frame the top executive's perception of the crisis and of the appropriate response. Police are unlikely to provide a neutral account of protest events—their accounts are particularly likely to be biased in the circumstances of Ferguson, where protestors are objecting to police conduct and violence. Even when the protest does not revolve around police, law enforcement is trained to view protestors through a lens of threat assessment where protestors are labeled as the enemy to be quashed.¹²⁶ Police interests will be maintenance of public order, at best—suppression of dissent, at worst. Therefore, top emergency management executives and personnel will not act to protect the rights of protestors when they receive one-sided biased information and relevant statutory provisions ignore constitutional protections.

III. CONSTITUTIONAL IMPLICATIONS FOR PROTESTORS OF STATE AND LOCAL EMERGENCY MANAGEMENT

This Part uses the emergency narratives to demonstrate how the government's crisis response suppressed protest activities and infringed on the First and Fourth Amendment rights of protestors and dissenting community members. In the three cases, the governor or the mayor declared a legal emergency.¹²⁷ My investigation shows that the government viewed the mass protests as a crisis and acted to maintain order without true regard for constitutional liberties both before and, more egregiously, after the emergency declaration. My objective is to interject the protection of constitutional liberties as a measuring stick of the government response. Where government actors' preeminent value is public safety, protection of constitutional liberties is conversely undervalued.

Even when the language in the executive orders provided lip service to the right to gather and protest, as did the orders in Missouri and North Dakota,¹²⁸ governmental actions hindered these activities. Government directives undertaken in the name of order and safety—when mass dissent is the purported crisis—suppress protest activity. These actions most clearly implicate the First Amendment freedom of speech and assembly and the Fourth Amendment right to be free from unreasonable searches

125. *Id.*

126. WOOD, *supra* note 18, at 125.

127. *See supra* Part I.

128. Mo. Exec. Order 14-08, *supra* note 7; Mo. Exec. Order 14-10, *supra* note 57; Mo. Exec. Order 14-14, *supra* note 60; N.D. Exec. Order 2016-04, *supra* note 23.

and seizures. The accounts below show law enforcement acting in crisis and, subsequently, emergency mode to maintain or regain control and order without regard to constitutional liberties. The First and Fourth Amendment rights of protestors were not an actual part of the equation for the executive, emergency management officials, and much less police on the ground.

For the purposes of this discussion, I define threats to the First Amendment as limitations on the right of assembly and individual expression.¹²⁹ This includes limitations on people's ability to freely congregate and protest. I define threats to the Fourth Amendment as government interference with an individual's physical freedom.¹³⁰ This includes detention, arrests, excessive use of force, and intrusive searches. The other value, of course, is public safety—which the executive may perceive as having an inverse relationship with individuals' constitutional freedoms.¹³¹ Through these narratives, harm to First and Fourth Amendment rights is obvious through government use of excessive and militarized force, arbitrary and mass arrests, protest zones, curfews, and ad hoc emergency rules and practices. While some of the problematic government action resulted in lawsuits, Part IV will discuss why litigation is an incomplete remedy.

In this Part, I discuss patterns of government conduct across my selected emergency jurisdictions that impinged on the First and Fourth Amendment. Before any emergency, the executive can use its regular police power to arrest under existing criminal laws and summon police reinforcements from within the state. Surprisingly, it can also use military tools, weapons, and garb for policing and restrict where individuals can protest to certain streets. Thus, even before the legal emergency, the executive can, and sometimes does, use its extraordinary policing authority during a purported crisis, causing harm to protestors' liberties as

129. See U.S. CONST. amend. I.

130. See U.S. CONST. amend. IV.

131. I will resist the temptation to speculate about how public safety was affected by the government's constitutionally problematic use of emergency power. I do not know whether people and property were safer because of the government's actions in the sample narratives. I can only point to remarks by protestors, community members, and observers that excessive government response serves to escalate each event. DOJ FERGUSON REP., *supra* note 5, at 44; REPORT OF THE WTO ACCOUNTABILITY REVIEW COMMITTEE OF THE SEATTLE CITY COUNCIL 11 (Sept. 14, 2000) [hereinafter SEATTLE CITY COUNCIL REPORT]; AM. CIVIL LIBERTIES UNION, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 4, 7, 16, 18, 39–41 (2014) [hereinafter WAR COMES HOME]; AM. CIVIL LIBERTIES UNION, WRITTEN SUBMISSION OF THE AMERICAN CIVIL LIBERTIES UNION ON FAILURES OF THE FEDERAL DEPARTMENT OF JUSTICE TO ADDRESS POLICE MISCONDUCT 1, 6 (2017), https://www.aclu.org/sites/default/files/field_document/iachr_statement_final.pdf [<https://perma.cc/A3HN-WXM4>]; U.N. Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on her Mission to the United States of America*, 15, U.N. Doc. A/HRC/36/46/Add.1 (Aug. 9, 2017).

I demonstrate in my discussion of police conduct prior to the governor's emergency declaration in Ferguson. After an emergency declaration, the situation only gets worse for protestors' First and Fourth Amendment rights. Once law enforcement perceives that it is responding to an emergency, it adopts a "no holds barred" approach that results in increased abuse of activists and their rights. Militarized policing escalates; arrest numbers soar; and most of the streets become no protest, no dissent zones. In addition, the legal emergency declaration grants the executive further policing power. With a preceding emergency declaration, the executive can activate the National Guard, beckon police from other states, institute a curfew, or arrest individuals based on ad hoc emergency rules. Below, I discuss my observation of these patterns in my target emergency jurisdictions.

A. Enlistment of Multiple Police Forces

High concentration of law enforcement on high alert creates a volatile environment. In the three protest jurisdictions, law enforcement presence was highly concentrated. Without an emergency declaration, police can summon law enforcement from other intrastate jurisdictions through existing mutual aid agreements when they want reinforcements.¹³² The larger the crowds that police encounter, the more likely they will call for additional assistance. In North Dakota and Missouri, the local law enforcement called upon outside police agencies to provide additional force. Before any emergency was declared, the St. Louis police chief employed agreements to call in officers from surrounding Missouri jurisdictions.¹³³ While there is no clear account of when law enforcement agents were called in to assist or when they left the Ferguson protests,¹³⁴ ultimately police from over 50 police departments in the state responded to the Ferguson protests.¹³⁵ The situation was different in North Dakota. Governor Jack Dalrymple utilized the Emergency Management Assistance Compact (EMAC)—instead of intrastate agreement—to call in police from six other states.¹³⁶ EMAC is an interstate agreement that

132. Interviews, *supra* note 21.

133. See DOJ FERGUSON REP., *supra* note 5, at 5. These mutual aid agreements do not require an emergency declaration before intrastate police can be asked to assist. Interviews, *supra* note 21.

134. See DOJ FERGUSON REP., *supra* note 5, at 31–38.

135. *Id.* at xiii, xvi, xxi, 46, 52.

136. Tracy Loeffelholz Dunn, *Why Police from 7 Different States Invaded a Standing Rock Camp—and Other Questions*, YES! MAG. (Oct. 31, 2016), <http://www.yesmagazine.org/people-power/why-the-assaults-on-standing-rock-require-police-from-seven-different-states-and-other-questions-20161031> [https://perma.cc/7LZC-4C9P]; see also Emergency Management Assistance Compact (EMAC) 6 U.S.C. § 761 (2018). EMAC is an interstate agreement that requires a state level

requires a state level emergency declaration for the deployment of out of state law enforcement assistance.¹³⁷ Thus, the governor summoned police from out of state after he declared an emergency. Both EMAC and Ferguson's requests for additional law enforcement are mechanisms which are better suited to respond to natural disasters—not protests.¹³⁸ This is because there is no requirement that these various police agencies train together before providing this type of assistance.¹³⁹ The merging of various police forces that are unfamiliar with each other and have not undergone emergency training together adds to the confusion and volatility of the situation and can aggravate the potential for constitutional violations.

In Ferguson, police brought in from various jurisdictions reported confusion regarding the chain of command and policing tactics during the protests.¹⁴⁰ This led to inconsistent arrest procedures.¹⁴¹ Law enforcement later reported that it was unclear what amounted to an arrestable offense and that release procedures were applied differently depending on which law enforcement agency effectuated the arrest.¹⁴² Police abandoned their regular arrest procedures. Police adherence to these procedures is vital because they protect individuals' rights to be free from unreasonable seizures and allow protestors to express dissent without intimidation. Abandonment of these procedures led to arbitrary arrests; after the emergency declaration, officers in Ferguson were "ordered to arrest demonstrators and charge them indiscriminately," regardless of whether these charges could be sustained.¹⁴³ The message was that people "should

emergency declaration for the deployment of out of state law enforcement assistance. *Id.* Critics called this use of EMAC problematic since the federal law was enacted to deal with natural disasters—not for protest policing. Steve Horn, *The Natural Disaster Assistance Law is Why Other States are Policing the Dakota Access Pipeline Protests*, DESMOG (Oct. 27, 2016), <https://www.desmogblog.com/2016/10/27/emergency-assistance-law-dakota-access-pipeline-out-state-cops> [https://perma.cc/QMU2-CTK7]. EMAC was enacted over twenty years ago and has only been used twice during protests—the pipeline protests and the Baltimore protests over the shooting of Freddie Gray. *Id.*

137. Emergency Management Assistance Compact (EMAC) 6 U.S.C. § 761 (2018).

138. See Horn, *supra* note 136; see also DOJ FERGUSON REP., *supra* note 5, at 32.

139. See DOJ FERGUSON REP., *supra* note 5, at 32, 38–39, 72, 121, 127.

140. *Id.* at xvi, 13, 20, 37.

141. *Id.* at 37.

142. *Id.* at 17, 37.

143. Complaint at 16, *Templeton v. Dotson*, No. 4:14-cv-2019, 2015 WL 13650910 (E.D. Mo. Dec. 8, 2014); see also Kimberly Kindy & Wesley Lowery, *Ferguson Police Continued Crackdown on Protestors After Federal, State Interventions*, WASH. POST: POL. (Oct. 10, 2014), https://www.washingtonpost.com/politics/ferguson-police-continued-crackdown-on-protesters-after-federal-state-interventions/2014/10/09/15df8a2a-4e40-11e4-aa5e-7153e466a02d_story.html?utm_term=.19129cfef76d [https://perma.cc/93MM-LXNL] (describing protestors recounting how, as they were being arrested, police were asking aloud what the charges should be).

not have been out in Ferguson protesting.”¹⁴⁴ Police received the message to abandon probable cause principles and limitations and instead use arrests as a tool to curtail protest activity. Arrests became a method to temporarily incapacitate protest. These are tactics endemic to protest policing.¹⁴⁵ The goal of these arrests was not to obtain a conviction, but to temporarily detain protestors. Activists were sometimes released from the jail without information about any charges and were instead told that they might receive paperwork later informing them of a case against them.¹⁴⁶ This practice suggests that in violation of the Fourth and First Amendment rights of these demonstrators, no probable cause existed at all to support these arrests. The Supreme Court has found a First Amendment violation when police have unfettered discretion to arrest protestors because of their public expressions of dissent.¹⁴⁷ This is as true today as when individuals protested segregation.¹⁴⁸ In addition, an arrest that is not supported by probable cause that the person has committed or will commit a criminal offense violates the Fourth Amendment.¹⁴⁹

B. Militarized Response: Police and National Guard

As many have already observed, American policing is highly militarized.¹⁵⁰ The general militarization of police has led to protest police tactics characterized by little regard for protestors’ speech rights, “general intolerance . . . for public disruption, and violent police responses to public contention.”¹⁵¹ This takes place, remarkedly so, when protestors of color are involved whom government actors are more likely to view as threatening or dangerous¹⁵² and thus is even more relevant to the Ferguson and pipeline protests. The police militarization on our protest sites was unparalleled and surpassed any critiques of warrior tactics in general American policing, which focus on the routine use of SWAT teams and

144. Complaint at 16, *Templeton*, No. 4:14-cv-2019.

145. See WOOD, *supra* note 18, at 38, 78–79.

146. Kindy & Lowery, *supra* note 143.

147. See *Cox v. Louisiana*, 85 U.S. 453 (1964).

148. *Id.*

149. *Brinegar v. U.S.*, 338 U.S. 160, 164–65 (1949).

150. See generally WAR COMES HOME, *supra* note 131; Liku T. Madoshi, *Policing the Police: Implicit Racial Bias and the Necessity of Limiting Police Discretion to Use Militarized Gear Against Civilian Protestors*, 44 S.U. L. REV. 118, 120 (2016).

151. TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 197 (2008).

152. See WOOD, *supra* note 18, at 41–42 (“[P]olice and intelligence agents are much more likely to label protestors from poor or racially marginalized communities, ideologically oriented protestors, and youthful protestors [as uncooperative and threatening.]”).

paramilitary training for drug enforcement.¹⁵³ Law enforcement's use of military weapons and tactics was extreme during our protests. The war-like atmosphere on the streets of Ferguson arguably generated the perception that there was an emergency.

Ferguson streets were embattled from the inception of the protests. Police utilized military grade tactics and tools early and before the governor declared a legal emergency. From the day of the shooting, police descended on the Ferguson neighborhood like a military unit. Tactical police teams rode into the neighborhood in armored vehicles.¹⁵⁴ Although the Governor could not call National Guard troops until after the emergency declaration, local police departments nevertheless had access to military equipment and vehicles pursuant to various federal grants and programs.¹⁵⁵ This is the same for most American police forces.¹⁵⁶ Demonstrators and community members reported feeling that they were being invaded and fighting a war against police.¹⁵⁷ Camouflaged helmeted police riding on military vehicles suggest an unfolding catastrophe. These images—caused by the disproportionate, warrior-like police response—created, or at least contributed to, the crisis atmosphere.

Numerous reports and images surfaced of police officers in full battle gear on the ground or atop armored vehicles with the Ferguson community in their crosshairs.¹⁵⁸ Police sprayed protestors with tear gas throughout many nights.¹⁵⁹ These strategies were utilized for crowd control, intimidation, or to effectuate arrest.¹⁶⁰ A SWAT officer was clear when he stated: “[We]’re going to start gassing people; start pepper balling. We are not gonna mess around; they’re gonna move.”¹⁶¹ While the officer made these comments before any legal emergency, it is clear that in his view there was already an emergency and battle on the Ferguson streets. Of

153. These general critiques of routine militarized policing focus on the use of tactical units and strategies for regular drug enforcement. *See generally* WAR COMES HOME, *supra* note 131.

154. Complaint at 3–5, *Quraishi v. Saint Charles County*, No. 4:16-cv-1320-NAB, 2019 WL 2423321 (E.D. Mo. June 10, 2019); *see also* DOJ FERGUSON REP., *supra* note 5, at 54–55.

155. *Oversight of Fed. Programs for Equipping State and Local Law Enf't: Hearing Before the S. Comm. on Homeland Sec. and Gov. Affairs*, 113th Cong. 2 (2014) (Opening Statement of Hon. Tom Carper, Chairman).

156. *Id.*

157. DOJ FERGUSON REP., *supra* note 5, at 55–57.

158. *See* Complaint at 6–7 (photo), 10–11, *Quraishi*, 2019 WL 2423321; *see also* PEN AM., PRESS FREEDOM UNDER FIRE 2 (2014); AMNESTY INT’L FERGUSON REP., *supra* note 1, at 14–15.

159. *See* Complaint at 7, *Quraishi*, 2019 WL 2423321; DOJ FERGUSON REP., *supra* note 6, at 16, 49.

160. DOJ FERGUSON REP., *supra* note 5, at 55–56.

161. Complaint at 7, *Quraishi*, 2019 WL 2423321.

course, the emergency declaration did not in any way restrain abusive use of military equipment and practices.

After the emergency declaration, the Missouri Governor called in reinforcements in the form of National Guard troops.¹⁶² Unlike police, the National Guard can only be called once an emergency has been declared.¹⁶³ The Guard's presence in response to domestic civil discontent is not the norm.¹⁶⁴ The Guard is, after all, a military unit, as it is usually activated domestically to assist with natural disasters.¹⁶⁵ As of 2014, almost half of the Guard soldiers had been called to "oversea combat duty in the past three years."¹⁶⁶ In each of our jurisdictions, the governor called in the National Guard.¹⁶⁷ While there were not the types of abuse complaints against Guard soldiers or their tactics that there were against police during the initial Ferguson protests, some community members felt that the troops' presence amounted to a military escalation.¹⁶⁸ Certainly, the Guard's presence did nothing to detract from the air of militarization.¹⁶⁹ Even if Guard soldiers were limited to guarding the

162. Mo. Exec. Order 14-10, *supra* note 57.

163. NAT'L GUARD BUREAU OFFICE OF THE CHIEF COUNSEL, 2019 DOMESTIC OPERATIONS LAW AND POLICY 169 (2d ed. 2018); LOWENBERG, *supra* note 100, at 4.

164. Lauren Gambino, *What is the US National Guard and When is It Called Up?*, GUARDIAN (Aug. 18, 2014), <https://www.theguardian.com/world/2014/aug/18/what-is-national-guard-ferguson-missouri> [<https://perma.cc/Y7J6-E5HN>].

165. *See id.*

166. LOWENBERG, *supra* note 100, at 4.

167. In Ferguson, two days after the Governor declared a state of emergency, he activated the National Guard. *See* Mo. Exec. Order 14-09, *supra* note 57. In Seattle, the mayor requested that the Governor provide assistance after declaring an emergency in the city. *See* City of Seattle Resolution 30099 (Dec. 6, 1999) (enacted) <https://www.seattle.gov/Documents/Departments/CityArchive/DDL/WTO/1999Dec6.htm> [<https://perma.cc/5J4N-D748>]. The Governor then activated the National Guard, as well as State Troopers. SEATTLE POLICE DEP'T, THE SEATTLE POLICE DEPARTMENT AFTER ACTION REPORT: WORLD TRADE ORGANIZATION MINISTERIAL CONFERENCE 41 (2000) [hereinafter SEATTLE AFTER ACTION REP.], <http://media.cleveland.com/pdextra/other/Seattle%20PD%20after%20action%20report.pdf> [<https://perma.cc/4CZ7-PANV>]. In the pipeline protests, the Governor activated the National Guard about three weeks after declaring an emergency in the area. Eric M. Johnson, *North Dakota Governor Calls in National Guard Ahead of Pipeline Ruling*, REUTERS (Sept. 8, 2016), <https://www.reuters.com/article/us-usa-pipeline-nativeamericans/north-dakota-governor-calls-in-national-guard-ahead-of-pipeline-ruling-idUSKCN11F031> [<https://perma.cc/2CUN-9PWQ>]. About 500 National Guard soldiers were ultimately deployed in relation to the pipeline protests. Rebecca Hersher, *Key Moments in the Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017), <https://www.npr.org/sections/thetwo-way/2017/02/22/514988040/key-moments-in-the-dakota-access-pipeline-fight> [<https://perma.cc/94AL-8CZ8>].

168. DOJ FERGUSON REP., *supra* note 5, at 26.

169. When questioned whether the National Guard would improve the situation in Ferguson, Professor Jim Graig, an expert in military and veteran studies, remarked "The National Guard by design is militarized, and so that doesn't theoretically de-escalate the situation." Gambino, *supra* note 164.

police command post as the Missouri Governor declared,¹⁷⁰ their presence supported abusive police conduct. The Guard soldiers were not present to protect protestors, but to protect police.

A Department of Justice (DOJ) investigation of Ferguson concluded that military weapons, equipment, and tactics were used inappropriately throughout the Ferguson protests.¹⁷¹ Improper practices included armed sniper surveillance, indiscriminate use of tear gas, and employing canines for crowd control.¹⁷² Police “indiscriminately [shot] tear gas and other projectiles into a residential area.”¹⁷³ These tactics violated the First and Fourth Amendment rights of protestors, since they amounted to excessive force and intimidation of activists. Police use of force must be reasonable in order to comply with the Fourth Amendment.¹⁷⁴ Further, violent arrests curtail protestors’ First Amendment rights because they intimidate activists.¹⁷⁵ When the police use of force is unreasonable, individuals feel unsafe engaging in protests.

Some months after Governor Nixon terminated the initial state of emergency, he declared a second emergency in anticipation of the grand jury’s November decision of whether to indict Officer Wilson and immediately activated the National Guard.¹⁷⁶ This time, having experienced the militarized response to the initial protests, activists complained that Guard presence was unnecessary and extreme.¹⁷⁷ They called the activation of Guard troops, on top of 1,000 police units, an “overreaction.”¹⁷⁸ Ferguson protestors placed the problematic presence of the Guard in the context of their deployment throughout American history to annihilate Black dissent.¹⁷⁹ In denouncing Guard presence, a protest leader stated, “Remember we haven’t done anything. Today is the 102nd day of protests and there have been two days of looting out of 102 days, so what it shows us is that Missouri is afraid of black bodies

170. Monica Davey, *National Guard Troops in Ferguson to Quell Disorder*, N.Y. TIMES (Aug. 19, 2014), <https://www.nytimes.com/2014/08/20/us/ferguson-missouri-protests.html> [https://perma.cc/4YQQ-M2LP].

171. DOJ FERGUSON REP., *supra* note 5, at xvii, 59.

172. *Id.* at 43 (canines), 51 (tear gas), 60 (snipers).

173. Complaint at 7, *Devereaux v. County of Saint Louis*, No. 4:15-cv-00553-RWS (E.D. Mo. Mar. 30, 2015).

174. *See* *Graham v. Connor*, 490 U.S. 386, 388 (1989); *see also* DOJ FERGUSON REP., *supra* note 5, at 41.

175. *See generally* ZICK, *supra* note 151.

176. Mo. Exec. Order 14-14, *supra* note 60.

177. Lily Workneh, *Will the National Guard Really Help Keep the Peace*, HUFFPOST (Nov. 18, 2014), https://www.huffpost.com/entry/national-guard-keep-peace_n_6181802?guccounter=1 [https://perma.cc/EKP2-ZJ9P].

178. *Id.*

179. *Id.*

assembling.”¹⁸⁰ The Guard’s historically violent involvement with Black protestors cannot be ignored,¹⁸¹ and its presence is naturally reminiscent of past injustice for African American activists. The concern that Guard troops would aggravate the war-like climate and response was reinforced after the discovery of internal communications within the Missouri Guard that referred to protestors as “enemy forces.”¹⁸² Documents describing the Guard’s mission in Ferguson labeled protestors as hate groups.¹⁸³

With 2,200 Guard troops as backup,¹⁸⁴ police again responded with extreme force to the community’s disdain at the grand jury’s refusal to indict Officer Wilson.¹⁸⁵ In the *Templeton v. Dotson* complaint, six plaintiffs described how they, and many others, were peacefully protesting this failure to indict, as well as other police shootings of unarmed black men and general police violence against the community.¹⁸⁶ According to the complaint, unidentifiable police—without name badges and in riot gear—conducted mass random and violent arrests, beating and tear gassing activists and observers without warning.¹⁸⁷ The *Templeton* complaint describes this police behavior over several days in late November 2014.¹⁸⁸ The district court granted plaintiffs’ requests for a temporary restraining order preventing police from using chemical agents

180. *Id.*

181. Cassie Owens, *What Can Happen When the National Guard Is Called into a City Over Riots*, NEXT CITY (Apr. 29, 2015), <https://nextcity.org/daily/entry/city-riots-baltimore-wilmington-national-guard-in-cities> [https://perma.cc/3KT6-5RS7]; see, e.g., Anjali Sastry, *When LA Erupted in Anger: A Look Back at the Rodney King Riots*, NPR (Apr. 26, 2016), <https://www.npr.org/2017/04/26/524744989/when-la-erupted-in-anger-a-look-back-at-the-rodney-king-riots> [https://perma.cc/GG3C-D7GF] (stating that 10 individuals were “shot and killed by LAPD officers and National Guardsmen” as they took part in the protests against the police force’s brutal treatment of African American Rodney King). See generally Alan Flippen, *Not Just Ferguson: National Guard Has a Long History with Civil Unrest*, N.Y. TIMES (Aug. 18, 2014), <https://www.nytimes.com/2014/08/19/upshot/not-just-ferguson-national-guard-has-a-long-history-with-civil-unrest.html> [https://perma.cc/6KNV-ADC3] (stating the “[u]se of the National Guard to quell civil disturbances, especially race-related ones . . . has a long history in the United States”).

182. Barbara Starr & Wesley Bruer, *Missouri National Guard’s Term for Ferguson Protestors: ‘Enemy Forces,’* CNN (Apr. 17, 2015), <https://www.cnn.com/2015/04/17/politics/missouri-national-guard-ferguson-protesters/index.html> [https://perma.cc/9MBY-3K55].

183. *Id.*

184. See Ben Kesling, Pervaiz Shallwani & Mark Peters, *Ferguson Beefs Up Response*, WALL ST. J. (Nov. 26, 2014), <https://www.wsj.com/articles/ferguson-beefs-up-response-after-violence-1416964911?tesla=y> [https://perma.cc/V7PR-R7RD].

185. Complaint at 8, *Templeton v. Dotson*, No. 4:14-cv-2019, 2015 WL 13650910 (E.D. Mo. Dec. 8, 2014); Temporary Restraining Order at 1, *Templeton*, 2015 WL 13650910; see also *Curfew in Effect as Seattle Struggles to Control WTO Protests*, CNN (Nov. 30, 1999), <http://www.cnn.com/US/9911/30/wto.04/> [https://perma.cc/U5J8-W38Y].

186. Complaint at 10, 12–13, *Templeton*, 2015 WL 13650910.

187. *Id.* at 10, 12–13.

188. *Id.*

to disperse peaceful protestors.¹⁸⁹ The district court concluded that people were unable to avoid chemical agents exposure because officers were using the agents “to disperse crowds of protestors . . . who were not engaged in violent or criminal activity”—without warning and in violation of the First Amendment.¹⁹⁰

This type of police activity is unconstitutional because it precludes protests and also chills individuals’ speech and assembly rights.¹⁹¹ The district judge in *Templeton* properly enjoined the government’s use of tear gas to stop the demonstrations. Peaceful protestors are protected by the First Amendment.¹⁹² This is so even when observers or others present become “unruly.”¹⁹³ The violent actions of a few cannot restrict the First Amendment rights of others. Government policies are clear: tear gas should only be used after proper warnings so that individuals can disperse.¹⁹⁴ As a matter of fact, the U.S. military cannot use tear gas in international warfare against its enemies.¹⁹⁵ This is because tear gas can be dangerous and cannot be controlled once fired.¹⁹⁶ Incomprehensibly, the government can use tear gas on its own people.¹⁹⁷ Therefore if used, chemical agents should only be employed as a tool of “last resort” during protests and only after protestors have received a warning and had an

189. Temporary Restraining Order at 3, *Templeton*, 2015 WL 13650910.

190. *Id.* at 2–3. The court eventually dismissed at the request of all parties pursuant to a settlement agreement establishing limitations and conditions under which law enforcement could utilize tear gas in Ferguson. See Settlement Agreement at 1, *Templeton*, 2015 WL 13650910; Rachel Lippmann, *Settlement Reached: Police Must Warn Before Use of Tear Gas or Other Chemical Agent*, ST. LOUIS PUBLIC RADIO (Mar. 26, 2015), <http://news.stlpublicradio.org/post/settlement-reached-police-must-warn-use-tear-gas-or-other-chemical-agents#stream/0> [https://perma.cc/9PSF-DRNE]. The District Court further retained the ability to supervise compliance with the agreement. See Order of Dismissal, *Templeton*, 2015 WL 13650910.

191. See *Gregory v. City of Chicago*, 394 U.S. 111 (1968); see also *Lamont v. Postmaster Gen. of U.S.*, 381 U.S. 301 (1965).

192. *Gregory*, 394 U.S. at 111.

193. *Id.*

194. DOJ FERGUSON REP., *supra* note 5, at 49.

195. Chemical Weapons Convention, art. I, Jan. 13, 1993, 120 Stat. 170 (as amended), 1975 U.N.T.S. 45. The United States is one of 165 signatories. *Id.* The U.S. Senate voted to ratify the convention on April 24, 1997. Resolution of Advice and Consent to Ratification of Chemical Weapons Convention, S. Res. of Treaty Doc. 103-21, 105th Cong. (1997); see also Louis Jacobson, *Teargas was Banned for Warfare in 1993 but Police Still Use It, Viral Meme Says*, POLITIFACT (Aug. 26, 2014), <https://www.politifact.com/truth-o-meter/statements/2014/aug/26/facebook-posts/tear-gas-was-banned-warfare-1993-police-1997/> [https://perma.cc/CWL5-XUG8].

196. Angus Chen, *How Tear Gas Works: A Rundown of the Chemicals Used on Crowds*, PBS (Dec. 2, 2018), <https://www.pbs.org/newshour/science/how-tear-gas-works-a-rundown-of-the-chemicals-used-on-crowds> [https://perma.cc/Y9EH-XA9L].

197. Chemical Weapons Convention, art. II, Jan. 13, 1993, 120 Stat. 170 (as amended), 1975 U.N.T.S. 45 (“Purposes not prohibited under this convention” to include “[l]aw enforcement including domestic riot control purposes.”).

opportunity to leave the area. In contravention of this principle, tear gas seemed to be first responders' preferred tool in Ferguson.¹⁹⁸

Furthermore, according to the Missouri statute, an officer can only arrest for refusal to disperse if “[a] person . . . present at the scene of an unlawful assembly . . . or of a riot . . . knowingly fails or refuses to obey the lawful command of a law enforcement officer to depart from the scene.”¹⁹⁹ Thus, if there was no command, there was no crime of refusal to disperse. Even if Ferguson protestors had been able to avoid chemical exposure, police would still be violating the rights of individuals who had to flee because the officers were precluding their ability to protest on public streets. Directing police officers to break up peaceful protests through force, including tear gas and other chemical irritants or agents, violates clearly established First Amendment principles.²⁰⁰ The intent of state officials could not have been clearer, considering admissions by police officers that their marching orders were to stop the protests.²⁰¹ Courts must closely scrutinize restrictions on speech and assembly on streets because they are traditional public forums.²⁰² “[S]treets and parks . . . ‘have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions.’”²⁰³

Furthermore, the government need not completely preclude speech to violate the First Amendment. Instead, inhibition of speech in traditional public forums is unwarranted and unconstitutional without a compelling state interest and a narrowly tailored restriction.²⁰⁴ The indiscriminate use of chemical agents not only prevents peaceful protests, but also dissuades others from engaging in demonstrations out of fear. Government intimidation tactics will lead many to “simply abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas.”²⁰⁵ The question of whether there is an unconstitutional chilling effect on the First Amendment depends on gauging the balance between the level of

198. DOJ FERGUSON REP., *supra* note 5, at 49.

199. MO. REV. STAT. § 574.060 (2019).

200. Keating v. City of Miami, 598 F.3d 753, 767 (11th Cir. 2010).

201. Complaint at 16, Templeton v. Dotson, No. 4:14 cv 2019, 2015 WL 13650910 (E.D. Mo. Dec. 8, 2014).

202. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

203. *Id.* (quoting Hague v. Comm. for Indus. Org., 307 U.S. 515 (1939)).

204. Lamont v. Postmaster Gen. of U.S., 381 U.S. 301, 309 (1965); *see also* ZICK, *supra* note 151, at 54.

205. Virginia v. Hicks, 539 U.S. 113, 119 (2003).

government deterrence and the purported state interest.²⁰⁶ While the purported government interest is public order on the streets of Ferguson, a state strategy that precludes all dissent by force—not just violent dissent—fails as overbroad,²⁰⁷ because it suppresses peaceable public expression.

In the pipeline protests, the government response shifted from regular policing to a militarized response after the Governor's emergency declaration. Early in those protests, police did not resort to military grade weapons or tactics. Water protectors set up camp in objection to any pipeline construction starting in April 2016. While some arrests began months later in August, there were no reports of a militarized police presence.²⁰⁸ Photos of that time period show police in regular uniform instead of military garb.²⁰⁹ The governor declared a legal emergency on August 19, 2016,²¹⁰ and government aggression escalated.

About three weeks after the emergency declaration, the Governor activated 100 National Guard troops to the pipeline area, with two dozen troops to conduct traffic checks while armed.²¹¹ Within three months, this number increased to 500 Guard soldiers.²¹² Complaints of government intimidation referenced actions of the police and Guard soldiers.²¹³ Sioux

206. *NAACP v. Alabama*, 357 U.S. 449, 463 (1958).

207. The modern First Amendment overbreadth doctrine reviews laws determine “whether a statute is too sweeping in coverage—and if so, invalid on its face.” *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844, 845 (1970) (internal citation omitted); see, e.g., *Gooding v. Wilson*, 405 U.S. 518, 520 (1972).

208. See Lauren Donovan, *Movie Star Joins Pipeline Protest as 10 Arrested in Heavily Policed Scene*, BISMARCK TRIB. (Aug. 11, 2016), https://bismarcktribune.com/news/state-and-regional/movie-star-joins-pipeline-protest-as-arrested-in-heavily-policed/article_962ce3ce-8ecc-5897-b727-ddd8d2f28c69.html [<https://perma.cc/Q4UN-GZ9P>]; Caroline Grueskin, *Charges Filed Against Protestors*, BISMARCK TRIB. (Aug. 12, 2016), https://bismarcktribune.com/news/local/crime-and-courts/charges-filed-against-protesters/article_27990d77-a2e2-5523-9451-c12f1bcc5841.html [<https://perma.cc/8GAJ-Q3RM>].

209. See, e.g., Donovan, *supra* note 208; Grueskin, *supra* note 208.

210. See N.D. Exec. Order 2016-04, *supra* note 23.

211. Johnson, *supra* note 167; see also Caroline Grueskins & Blair Emerson, *North Dakota National Guard to Provide Backup to Law Enforcement*, BISMARCK TRIB. (Sept. 8, 2016), https://bismarcktribune.com/news/state-and-regional/north-dakota-national-guard-to-provide-backup-to-law-enforcement/article_57090461-12d0-5376-bf6b-041a4511ce4f.html [<https://perma.cc/5F5B-AJT9>].

212. Hersher, *supra* note 167.

213. See Letter from Dave Archambault, II, Sioux Tribe Chairman, to Loretta E. Lynch, Atty. Gen. of U.S. (Oct. 24, 2016) [hereinafter Archambault Letter], <https://www.documentcloud.org/documents/3189653-Ltr-to-AG-Lynch-Re-Dakota-Access-10-24-16-Pdf-1.html> [<https://perma.cc/5W7Q-ZJPK>]; EDWARD JOHN, REPORT AND STATEMENT FROM CHIEF EDWARD JOHN EXPERT MEMBER OF THE UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, FIRSHAND OBSERVATIONS OF CONDITIONS SURROUNDING THE DAKOTA ACCESS PIPELINE (Nov. 1, 2016) [hereinafter JOHN REPORT], <https://www.un.org/esa/socdev/unpfii/documents/2016/Docs-updates/Report-ChiefEdwardJohn-DAPL2016.pdf> [<https://perma.cc/YT4P-DTEV>].

Tribe Chairman David Archambault expressed that checkpoints guarded by military vehicles and heavily armed soldiers intimidated water protectors.²¹⁴ The emergency declaration provided the Governor not only with the ability to mobilize Guard troops, but also to make use of their “federally assigned . . . vehicles . . . and other equipment.”²¹⁵ The Chairman also cited intimidation by increasingly militarized police forces.²¹⁶ Police shifted their tactics to include the use of chemical agents at the pipeline site. Law enforcement utilized a range of military weapons—including pepper spray, tear gas, long range acoustic devices, water hoses and cannons, and rubber bullets. Human rights groups echoed the Chairman’s concerns asserting that law enforcement used militarized tactics to intimidate peaceful demonstrators.²¹⁷

Plaintiffs in the *Dundon v. Kirchmeier* complaint recounted how law enforcement confronted them and other water protectors during a late November spiritual ceremony and sprayed them in subfreezing temperatures with water cannons mounted atop an armored vehicle.²¹⁸ People were sprayed for ten minutes at a time for a whole hour.²¹⁹ Police hit activists (even on their faces) with tear gas grenades.²²⁰ One woman suffered permanent injury to her eye when she was hit with a tear gas canister.²²¹ Ultimately, twenty-six people required hospitalization.²²² Plaintiffs claimed that these police actions amounted to a violation of protestors’ First and Fourth Amendment rights because this violence intimidated protestors and therefore chilled their expression, and this use of weapons amounted to excessive force.²²³ The *Dundon* matter is currently pending before the district court. However, the case has a checkered past. In 2017, the district court denied the plaintiff’s motion for

214. Archambault Letter, *supra* note 213.

215. National Guard Regulation 500-5 (Aug. 18, 2010).

216. Archambault Letter, *supra* note 213.

217. Letter from Board of Directors, Amnesty Int’l U.S.A., to Doug Berman, Governor of N.D., & Wayne Stenehjem, Atty. Gen. of N.D. (Mar. 9, 2017) https://www.amnestyusa.org/files/letter_to_gov_and_ag_of_nd.pdf [<https://perma.cc/S9QM-JH87>]; *see also* JOHN REPORT, *supra* note 213.

218. First Amended Civil Rights Class Action Complaint for Damages and Injunctive and Declaratory Relief at 2, 14, 19, *Dundon v. Kirchmeier*, No. 1:16-cv-406 (D.N.D. Nov. 28, 2016).

219. *Id.*

220. *Id.* at 1–2, 14, 17, 21, 25.

221. *Id.* at 18, 31. A medical expert explained that she might forever be blind in her right eye. *Id.*

222. Julia Carrie Wong, *Dakota Access Pipeline: 300 Protestors Injured After Police Use Water Cannons*, GUARDIAN (Nov. 21, 2016), <https://www.theguardian.com/us-news/2016/nov/21/dakota-access-pipeline-water-cannon-police-standing-rock-protest> [<https://perma.cc/5BLT-FYD4>].

223. First Amended Civil Rights Class Action Complaint for Damages and Injunctive and Declaratory Relief at 37–39, *Dundon*, No. 1:16-cv-406 (D.N.D. Feb. 27, 2018).

an injunction preventing law enforcement from using less-than-lethal weapons, water hoses, and water canons to disperse protestors, finding that plaintiffs were not likely to succeed on the merits of their claims.²²⁴ The judge's finding regarding the First Amendment claim was that water protectors were located on a bridge closed to public and thus, had no right to protest there.²²⁵ On the Fourth Amendment excessive force claim, the judge essentially declared that the water protectors were never arrested or detained, and thus were free to leave the area when confronted by police with water hoses.²²⁶ In addition, the judge labeled the situation as chaotic, and ruled that he could not conclude at the injunction stage that it was unreasonable for police to utilize these weapons against water protectors.²²⁷

The district judge was too quick to deny the injunction. The Fourth Amendment does not permit police to use excessive force during any seizure.²²⁸ According to the Supreme Court in *Graham v. Connor*, force is excessive and unconstitutional when it is not objectively reasonable in light of existing circumstances.²²⁹ Although it is easiest to demonstrate that someone is seized when police arrest them, the Fourth Amendment applies to law enforcement seizures that are less than arrests. A seizure occurs whenever an individual reasonably believes that she is not free to leave.²³⁰ Contrary to the district judge's assertion that "protestors could have easily removed themselves from the . . . [b]ridge and the presence of law enforcement,"²³¹ the *Dundon* plaintiffs explained that they were unable to escape the "unrelenting bombardment of [Specialty Impact Munitions], chemical agents, and high-pressure water."²³² In their amended complaint, plaintiffs further explained both that "[c]louds of chemical agents" prevented egress, and that other did not want to leave other injured water protectors to fend for themselves.²³³ Plaintiffs were effectively seized on

224. See Order Denying Plaintiffs' Motion for a Preliminary Injunction at 35, *Dundon*, No. 1:16-cv-406 (D.N.D. Feb. 7, 2017). The Eighth Circuit affirmed the district court's order denying of the injunction. *Dundon v. Kirchmeier*, 701 F. App'x 538 (8th Cir. Nov. 14, 2017) (per curiam).

225. See Order Denying Plaintiffs' Motion for a Preliminary Injunction at 29–30, *Dundon*, No. 1:16-cv-406 (D.N.D. Feb. 7, 2017).

226. *Id.* at 31.

227. *Id.* at 32.

228. *Graham v. Connor*, 490 U.S. 386, 388 (1989).

229. *Id.*

230. See *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988).

231. Order Denying Plaintiffs' Motion for a Preliminary Injunction at 31, *Dundon*, No. 1:16-cv-406 (D.N.D. Feb. 7, 2017).

232. Plaintiffs' Memorandum in Support of Temporary Restraining Order and Preliminary Injunction at 8, *Dundon*, No. 1:16-cv-406 (D.N.D. Nov. 28, 2016).

233. First Amended Civil Rights Class Action Complaint for Damages and Injunctive and Declaratory Relief at 15, *Dundon*, No. 1:16-cv-406 (D.N.D. Feb 27, 2018).

the bridge once police began the barrage of water and chemical agents. The concept of seizure is complicated in protest cases where police use force to disperse protestors with courts reaching different conclusions about whether an activist was seized depending on the jurisdiction.²³⁴ However, even in jurisdictions that define a seizure narrowly when police seek to disperse individuals, the court will still conclude that police have seized a person who is incapacitated by chemical agents and submits to police authority.²³⁵ In *Dundon*, the judge ignored plaintiffs' statements that they were incapacitated and trapped by police use of less than lethal weapons.

Graham's reasonableness analysis requires the balancing of the force applied by the government with the need for that force.²³⁶ The factors that the court must consider in this analysis are "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."²³⁷

Taking into account these factors, there simply was no need for the level of force used by police against the water protectors in *Dundon*. While the judge articulated the *Graham* factors, he did not apply them to the facts in the case.²³⁸ A methodological application of the factors would have concluded that no violent crime was afoot—most water protectors were, at worst, trespassers if the bridge was actually closed to the public. There was no immediate safety threat because most demonstrators were peaceful—as recognized by the judge.²³⁹ Finally, water protectors were not a flight risk. However, the judge completely deferred to police actions, using law enforcement's own decision to call in additional units as proof

234. See, e.g., *Lamb v. City of Decatur*, 947 F. Supp. 1261, 1263–66 (D. Ill. 1996) (finding protestors who were tear gassed by police were seized and concluding the question of whether police used excessive force was properly for the jury since police were on notice that excessive force against demonstrators is prohibited); see also *Marbet v. City of Portland*, No. CV 02-1448-HA, 2003 WL 23540258, at *10 (D. Or. Sept. 8, 2003). See generally Renee Paradis, *Carpe Demonstrators: Towards a Bright-Line Rule Governing Seizure in Excessive Force Claims Brought by Demonstrators*, 103 COLUM. L. REV. 316 (2003). *Contra* *Buck v. City of Albuquerque*, No. 04-1000 JP/DJS, 2007 WL 9734037, at *30–33 (D.N.M. Apr. 11, 2007) (determining whether protestors were seized based on if each was surrounded by tear gas and police).

235. See *Buck*, 2007 WL 9734037, at *30.

236. *Headwaters Forest Defense v. City of Humboldt*, 240 F.3d 1185, 1198–99 (9th Cir. 2000).

237. *Graham v. Connor*, 490 U.S. 386, 396 (1989); see also *Lamb*, 947 F. Supp. at 1265 (quoting the *Graham* factors).

238. Order Denying Plaintiffs' Motion for Preliminary Injunction at 30–32, *Dundon*, No. 1:16-cv-406 (D.N.D. Feb. 7, 2017). *Contra* *Lamb*, 947 F. Supp. at 1265 (applying factors methodically to police use of pepper spray against protestors).

239. Order Denying Plaintiffs' Motion for Preliminary Injunction at 14, *Dundon*, No. 1:16-cv-406 (D.N.D. Feb. 7, 2017).

that the level of force was warranted.²⁴⁰ This is despite the judge's recognition that police used water hoses and chemical agents indiscriminately.²⁴¹

It cannot be reasonable for police to spray demonstrators with water hoses or cannons to the point of hypothermia and shoot tear gas grenades at mostly peaceful protestors because it is a direct impediment to their constitutionally protected rights to peaceful protest. The fact that those on the bridge were engaged in First Amendment activity means that the government actions must be more scrupulously reviewed.²⁴² The district judge ignored this prescription and thus facilitated police abuse of activists and the quelling of dissent.

Regarding their First Amendment claims, *Dundon* plaintiffs contended all along that the bridge was open to the public during the event.²⁴³ If this is the case, the police actions in *Dundon* violated water protectors' First Amendment rights, just like the actions of Ferguson law enforcement in *Templeton*. The bridge is like a street, park, or sidewalk, which are considered traditional public forums.²⁴⁴ The district judge asserted that water protectors would have needed to obtain permits to protest even if the bridge was not closed to the public or even if they were protesting on the streets.²⁴⁵ Government authorities may require protestors to obtain a permit.²⁴⁶ However, even with a permitting requirement, the district judge would still have to evaluate the process to determine that it did not discriminate based on the content of the speech and was instead a neutral time, place or manner restriction.²⁴⁷ The district judge did not engage in any of this analysis.

As previously mentioned, the Seattle mayor declared an emergency on the first afternoon of the WTO Conference. Like police in my other narratives, Seattle law enforcement also used military weapons

240. *Id.* at 32–33.

241. *Id.*

242. See *Zurcher v. Stanford Daily*, 436 U.S. 547, 564 (1948) (stating in a search warrant case that where the materials sought by the government might be protected by the First Amendment the Fourth Amendment requirements “must be applied with ‘scrupulous exactitude’”); see also *Lamb*, 947 F. Supp. at 1263 (quoting same *Zurcher* language).

243. Civil Rights Class Action Complaint for Damages and Injunctive and Declaratory Relief at 10–11, *Dundon*, No. 1:16-cv-406 (D.N.D. Nov. 28, 2016); First Amended Civil Rights Class Action Complaint for Damages and Injunctive and Declaratory Relief at 2, *Dundon*, No. 1:16-cv-406 (D.N.D. Feb. 27, 2018).

244. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

245. Order Denying Plaintiffs' Motion for Preliminary Injunction at 30, *Dundon*, No. 16-cv-406 (D.N.D. Feb. 7, 2017).

246. *Cox v. New Hampshire*, 312 U.S. 569, 574–76 (1941).

247. *Id.* at 576–78.

inadequately and dangerously on WTO protestors. Police outfitted in militaristic garb used tear gas, pepper spray, or rubber bullets to clear protestors.²⁴⁸ At one site, police sprayed individuals sitting down in protest after forcibly removing their masks.²⁴⁹ There were accounts of teams of police jumping out of vehicles to gas and shoot rubber bullets at unsuspecting activists.²⁵⁰ Careless use of these weapons even endangered individuals uninvolved with the protests.²⁵¹ At the mayor's request, state troopers participated in the policing of the WTO protests.²⁵² The State Patrol Chief later criticized the use of chemical agents by Seattle police calling them "pointless 'gas and run' tactics."²⁵³ These accounts of abusive use of chemical weapons by police were not few and far between, but rampant.²⁵⁴

C. Mass Arrests

In the protest jurisdictions, police used arrests to incapacitate protestors. When police use arrests in this manner, their objective is not to obtain a conviction, but rather to temporarily detain individuals and stop protesting activity. Thus, the police do not assess whether there is probable cause of criminal conduct as the Fourth Amendment requires, and instead they arrest to suppress dissent in contravention of First Amendment rights. While law enforcement agents regularly use this arrest tactic when dealing with protestors,²⁵⁵ the executive's declaration of an emergency augments the problem. Once there is an emergency declaration, law enforcement agents act with flagrant disregard for the constitutional limitations of arrest. This is evident from the practice of mass arrests and the elevated volume of arrests after the emergency declaration in my three protest narratives.

In the Seattle WTO Conference scenario, police arrested protestors *en masse*. A large swath of protestors were arrested in a park—within a no-protest zone ordered by the Seattle mayor. In the case of *Menotti v. City of Seattle*, one hundred and seventy-five marchers were surrounded by police within the no-protest area and when they responded by sitting, they

248. ACLU, OUT OF CONTROL: SEATTLE'S FLAWED RESPONSE TO PROTESTS AGAINST THE WORLD TRADE ORGANIZATION 35 (2000) [hereinafter OUT OF CONTROL].

249. *Id.* at 36.

250. *Id.* at 40–41.

251. *Id.* at 36, 39.

252. *Day Two November 30, 1999*, THE WTO HISTORY PROJECT, <http://depts.washington.edu/wtohist/day2.htm> [<https://perma.cc/JCS6-QXVR>].

253. OUT OF CONTROL, *supra* note 248, at 44.

254. *See generally id.*

255. *See* WOOD, *supra* note 18, at 38, 78–79.

were arrested without any warning and without police having assessed whether any of the marchers were permitted to be in the zone.²⁵⁶ At an eventual trial, jurors concluded that the police had violated these arrestees' Fourth Amendment rights after hearing evidence that the arrestees' police reports were fabricated.²⁵⁷ When police reports of these arrests were compared, they were all found to be identical and false. Instead of writing an individualized report for each arrest, police simply duplicated one report from an unassociated arrest that had occurred hours before at a different location.²⁵⁸

The *Menotti* case demonstrates the problem endemic with mass arrests, which shows that these types of arrests are by definition arbitrary and therefore unreasonable. Under the Fourth Amendment, an arrest is justified when the court can make a finding that a reasonable person in the officer's position—faced with the specific facts and circumstances—would have probable cause to believe that the arrestee had committed or was in the process of committing a criminal offense,²⁵⁹ or—in a legal emergency—refusing to comply with an emergency order. Probable cause is a particularized assessment with respect to each arrested individual.²⁶⁰ A police officer cannot reasonably make a particularized probable cause assessment for a mass of people. Prior to the trial, the district judge presiding over the case granted summary judgment to some of the plaintiffs on the probable cause question elucidating this point.²⁶¹ The judge stated that just like in other circumstances, during protests “individualized suspicion of wrongdoing is required for probable cause.”²⁶² The police cannot paint all activists with a broad brush because they are all engaged in protest activity. The police officers in the Westlake Park mass arrest could not make the necessary observations regarding each protestor to determine whether each was engaging in illegal conduct or behaving in violation of the emergency order. Yet, the pressure to arrest and to control and suppress the protests created by the emergency declaration instigated officers to falsify police reports. After all was said

256. *Menotti v. City of Seattle*, 409 F.3d 1113, 1126, 1147 (9th Cir. 2005); *see also* Bob Young, *City to Pay \$1 Million to Settle Lawsuit Over WTO Arrests*, SEATTLE TIMES (Apr. 3, 2007), <https://www.seattletimes.com/seattle-news/city-to-pay-1-million-to-settle-lawsuit-over-wto-arrests/> [<https://perma.cc/UAR5-G6GV>].

257. *See* Young, *supra* note 256. After the verdict, Seattle settled the lawsuit for \$1 million. *Id.*; *see also* OUT OF CONTROL, *supra* note 248, at 67–68.

258. OUT OF CONTROL, *supra* note 248, at 67; *see also* *Hickey v. City of Seattle*, No. C00-1672MJP, 2006 WL 3692658, at *2 (W.D. Wash. Dec. 3, 2006).

259. *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949).

260. *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979).

261. *Hickey*, 2006 WL 3692658 at *10.

262. *Id.* at *7 (citing *Barham v. Ramsey*, 434 F.3d 565, 573–74 (D.C. Cir. 2006)).

and done, there were 631 people arrested in four days in Seattle, and in the overwhelming majority of these arrests individuals were either never charged or their cases were dismissed.²⁶³ Once protestors arrived at the jail, they were mistreated by jail officials, particularly if they sought to exercise their right to legal counsel.²⁶⁴ Protestors reported about 300 incidents of excessive force by correctional officers.²⁶⁵ This number of complaints is unconscionable and demonstrates that these individuals were targeted during detention for their protest activity.

Likewise, after the gubernatorial emergency in North Dakota, law enforcement replicated the pattern of mass arrests and abusive post-arrest treatment—targeting water protectors *en masse* and then punishing them with humiliating detention tactics. In two incidents in October, approximately 250 people were arrested. In the first incident, police arrested about 130 people as they marched and prayed.²⁶⁶ Five days later, police used less than lethal military weapons on water protectors and arrested about 140 people, most of whom had simply been praying.²⁶⁷ Narratives described police advancing with tanks and in riot gear after attempting to remove people from their encampment.²⁶⁸ Those arrested reported abusive conditions, including being unnecessarily strip searched and women being left naked in cells.²⁶⁹ No rationale justifies law enforcement holding people naked in their cells. This amounts to punitive pretrial detention conditions that violate the Due Process Clause of the Fifth Amendment. The Due Process Clause forbids punishing an arrestee who has not yet been convicted of any offense.²⁷⁰ In assessing whether a

263. SEATTLE AFTER ACTION REP., *supra* note 167, at 48; OUT OF CONTROL, *supra* note 248, at 68.

264. OUT OF CONTROL, *supra* note 248, at 69–70. About 300 incidents of excessive force at the jail were reported by protestors. *Id.* at 71.

265. *Id.*

266. First Amended Civil Rights Class Action Complaint for Damages and Injunctive and Declaratory Relief at 11, *Dundon v. Kirchmeier*, No. 16-cv-406 (D.N.D. Feb. 27, 2018).

267. *Id.*

268. Michael McLaughlin, *Dakota Access Pipeline Standoff Lapses into Violence*, HUFFPOST (Oct. 28, 2016), https://www.huffpost.com/entry/dakota-access-pipeline-protesters-removed_n_58123b0ee4b0990edc2fb009 [<https://perma.cc/9ZR9-NJ9J>].

269. Loeffelholz Dunn, *supra* note 136; *see also* First Amended Civil Rights Class Action Complaint for Damages and Injunctive and Declaratory Relief at 11, *Dundon*, No. 16-cv-406 (D.N.D. Feb. 27, 2018); Ben Norton, *Dakota Pipeline Protesters Say They Were Detained in Dog Kennels; 268 Arrested in Week of Police Crackdown*, SALON (Nov. 1, 2016), <https://www.salon.com/2016/10/31/dakota-pipeline-protesters-say-they-were-detained-in-dog-kennels-268-arrests-in-week-of-police-crackdown/> [<https://perma.cc/BZ4T-UP5V>]; Daniella Silva, *Dakota Access Pipeline: More Than 100 Arrested as Protesters Ousted From Camp*, NBC NEWS (Oct. 27, 2016), <https://www.nbcnews.com/storyline/dakota-pipeline-protests/dakota-access-pipeline-authorities-start-arresting-protesters-new-camp-n674066/> [<https://perma.cc/9A59-KJGA>].

270. *Bell v. Wolfish*, 441 U.S. 520, 535 (1979).

condition of pretrial detention amounts to a punishment, a court inquires whether there is an “expressed intent to punish.”²⁷¹ If there is not, the court will assess whether the condition is reasonably related to a legitimate government purpose or whether it “appears excessive . . . arbitrary or purposeless.”²⁷² Detaining people naked in cells can only fit the latter. The government could not possibly articulate a “legitimate government purpose” for humiliating women in this manner. No public or individual safety rationale justifies this mode of detention. Even when there is concern for a detainee’s safety such as when someone is considered suicidal the individual is garbed in special anti-suicide smocks.²⁷³ Of course, there was no allegation that these women were suicidal. Further, use of this humiliating tactic demonstrates an actual intent to punish.

The Supreme Court has dealt with strip searches from the perspective of the Fourth Amendment, in addition to due process. The Court has ruled that a strip search of pretrial detainees does not violate the Fourth Amendment when conducted to protect against disease, contraband, or weapons.²⁷⁴ Generally, judicial review is deferential to jail officials “unless there is ‘substantial evidence’ demonstrating that their response to the situation is exaggerated.”²⁷⁵ The factual contexts of these strip searches are unclear. Without more information regarding how, where, and by whom they were conducted, it is difficult to assess whether arrestees could demonstrate that these searches were exaggerated under the circumstances. However, the fact that people were simultaneously held naked in their cells evidences an intent to punish in violation of due process and demonstrates that the searches were, therefore, unreasonable and in violation of the Fourth Amendment. These arrest conditions are untenable and violate not only detainees’ constitutional rights, but also human decency. Needless to say, being subjected not only to these unreasonable and militarized mass arrests but also to humiliating searches and detention conditions will dissuade most from expressing public dissent.

The same arbitrary arrest mentality dictated the police strategy in Ferguson after the gubernatorial emergency declaration. In interactions with protestors, police made telling assertions, such as stating that “the constitution did not provide any constitutional right to assemble” and that

271. *Id.* at 584.

272. *Id.* at 538–39, 560–61.

273. Juliet Lapidus, *What’s an Anti-Suicide Smock? It’s Noose-Proof*, SLATE (Dec. 5, 2007), <https://slate.com/news-and-politics/2007/12/how-an-anti-suicide-smock-prevents-prisoners-from-killing-themselves.html> [<https://perma.cc/28NJ-JZ23>].

274. *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 330–34 (2011).

275. *Id.* at 330; *see also Bell*, 441 U.S. at 547–48.

they were advised to “arrest demonstrators and charge them indiscriminately, even though they were certain that the charges would not stand.”²⁷⁶ The police felt that people should not be protesting.²⁷⁷ An analysis of arrest numbers demonstrates a marked increase in the frequency of arrests after the emergency declaration. The DOJ investigation estimates that police arrested about 300 people in connection with the initial Ferguson protests.²⁷⁸

My examination of St. Louis County police arrest records from August 10th to 21st demonstrate that almost all of these arrests occurred after the governor’s emergency declaration.²⁷⁹ When looking at arrest numbers, I counted arrests made in the protest area for certain crimes, namely refusal to disperse, disorderly conduct, interference with police, weapon possession, and destruction of property. I limited my investigation to these types of arrests because I believe that they are most likely to be connected to the protests. Almost 85% of arrests were for refusal to disperse. Understanding that these records may not encompass all arrests, such as when an individual was released before booking or when an arrestee was booked in another county, the numbers show that police only made nine relevant arrests in the six days before the emergency declaration, while they made 142 arrests in the five days after the declaration.²⁸⁰ Since the emergency continued after August 21st for ten more days, we can assume that the approximately 150 remaining arrests occurred during the rest of the emergency period. Thus, there is a staggering difference in the volume of arrests before versus after the emergency declaration. This difference—along with police’s admitted statements—shows that the state of emergency in Missouri animated law enforcement to engage in arbitrary and voluminous arrests.

D. Restricting Use of Traditional Public Forums

Another pattern discernable from the protest jurisdictions is controlling of protestors’ expressive activities in public physical spaces. As previously mentioned, people enjoy the greatest level of First Amendment freedoms in public streets and parks—otherwise called traditional public forums.²⁸¹ In the protest jurisdictions, the executive

276. Complaint at 13, 16, *Templeton v. Dotson*, No. 4:14-cv-2019, 2015 WL 13650910 (E.D. Mo. Dec. 8, 2014).

277. *Id.* at 16.

278. DOJ FERGUSON REP., *supra* note 5, at 38.

279. Ferguson Crisis Arrest Data, Aug. 10–22, 2014 (on file with author).

280. *Id.*

281. See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

limited activists' access to the streets via protest zones and curfews. While police do not need an emergency declaration to restrict protesting to certain areas, law enforcement instituted these protest/free-speech zones in Ferguson and Seattle after the governor and mayor proclaimed an emergency.²⁸² The executive can only institute a curfew with a preceding emergency declaration.

1. Assembly & No-Protest/Speech Zones

When the government restricts protests to a specific area, these areas are “free-speech zones.” Outside the parameters of the zone, speech and assembly is foreclosed. These restrictions of demonstrators are justified during an emergency as tools to keep the peace. From the activist perspective, these types of free-speech zones minimize the effectiveness of protests, reducing the volume, expanse, and reach of the message.²⁸³ Official statements that emergency directives—which include protest zones—are meant to protect speakers are not uncommon,²⁸⁴ but the larger public space then becomes a no-speech, no-dissent zone. The Supreme Court has not yet ruled on whether the use of protest zones or pens conforms with the First Amendment. Lower courts have categorized and evaluated these zones as content-neutral time, place, and manner restrictions, and thus have applied the test the Supreme Court elucidated in the *Ward v. Rock Against Racism* case.²⁸⁵ In *Ward*, plaintiffs challenged

282. See DOJ FERGUSON REP., *supra* note 5, at 64; See City of Seattle Resolution 30099 (Dec. 6, 1999) (<https://www.seattle.gov/Documents/Departments/CityArchive/DDL/WTO/1999Dec6.htm>) [<https://perma.cc/5J4N-D748>].

283. See ZICK, *supra* note 151, at 225; WOOD, *supra* note 18, at 36.

284. ZICK, *supra* note 151, at 225; see WOOD, *supra* note 18, at 36.

285. The analysis in the Supreme Court case *Ward v. Rock Against Racism* can be applied to the concept of protest pens. 491 U.S. 781 (1989). Because they are not categorized as viewpoint based restrictions on speech, spatial constraints receive comparatively less exacting review, and the government need not employ the least restrictive means to regulate this speech. *Id.* Instead, according to *Ward*, when government alleges a legitimate interest in regulating the time, place and manner of speech, narrowly tailored restrictions that provide alternative channels for expression will survive the court's intermediate scrutiny. *Id.* at 798. Generally, this spatial regulation has passed judicial muster among lower courts as being reasonable. ZICK, *supra* note 151, at 246. Scholars have expressed concerns that content-neutral restrictions on speech pass judicial review too readily and thus are most chilling to speech. See Aaron Johnson, *Interning Dissent: The Law of Large Political Events*, 9 DUKE J. CONST. L. & PUB. POL'Y 87 (2013); see also James J. Knicely & John W. Whitehead, *The Caging of Free Speech in America*, 14 TEMP. POL. & CIV. RTS. L. REV. 455, 488 (2005) (discussing court's failure to require the government to meet its burden of proof showing that restrictions on speech are not too great and that alternative avenues are available to protesters); Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581, 587, 631 (2006) [hereinafter *Speech and Spatial Tactics*]. Critiques of the content-neutral *Ward* test assert that it is not sufficiently exacting to protect speech. Critics suggest more discerning review of content neutral spatial limitations on speech is appropriate, particularly when the government utilizes free-speech zones or pens because such “spatial tactics are

a New York City ordinance that required bands performing in Central Park to use City sound equipment and a City sound technician to regulate the degree of noise.²⁸⁶ Finding that the ordinance was a content neutral time, place, and manner restriction on the First Amendment rights of musicians, the Court reasoned that the City alleged a substantial interest in noise regulation, and that the ordinance survived because it was narrowly tailored and provided alternative channels for expression.²⁸⁷ First Amendment experts have criticized the application of the *Ward* test to protest zones, suggesting that courts realistically are applying “a weak strain of rationality review” that is not sufficiently protective and chills speech.²⁸⁸ Courts are particularly deferential when the government alleges a security concern.²⁸⁹ Courts can most easily take this view when the government claims that there is an emergency situation.²⁹⁰ This results in an increasingly protracted review where the Court will easily justify the spatial restriction on First Amendment rights. The *Ward* test is not appropriate for speech zones—particularly when the protest is the emergency that the government is protecting against. The Supreme Court stated in *Ward* that “[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”²⁹¹ In the protest jurisdictions, the restrictions are not comparable to a noise ordinance. The protest conduct is not distinguishable from the message. Furthermore, in all the protest jurisdictions, the message is critical of the government—thus unlike messages targeted by neutral noise ordinances. More exacting review is warranted than a weak brand of content-neutral analysis.

neutering political dissent.” See *Speech and Spatial Tactics*, *supra*, at 587, 631; see also ZICK, *supra* note 151, at 225; James J. Knically & John W. Whitehead, *The Caging of Free Speech in America*, 14 TEM. POL. & CIV. RTS. L. REV. 455, 481–90 (2005). Although courts in their application of *Ward* theoretically utilize intermediate scrutiny to assess these protest zones, First Amendment experts quarrel that the court’s test really amounts to “a weak strain of rationality review.” *Speech and Spatial Tactics*, *supra*, at 583.

286. *Ward*, 491 U.S. at 784 (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984)).

287. *Id.* at 798.

288. *Speech and Spatial Tactics*, *supra* note 285, at 583.

289. See *id.* at 641; ZICK, *supra* note 151, at 246; see also *Menotti v. City of Seattle*, 409 F.3d 1113, 1126 (9th Cir. 2005).

290. See *Menotti*, 409 F.3d at 1113; *Hickey v. City of Seattle*, 236 F.R.D. 659, 659 (W.D. Wash. 2006).

291. *Ward*, 491 U.S. at 791.

In both Ferguson and Seattle, there is no question that the government regulated the use of public city streets.²⁹² Police enforced these regulations with less than lethal weapons, aggression, and arrests—as discussed in the preceding section. In Seattle, the mayor instituted a protest zone through an emergency order.²⁹³ While the Seattle mayor’s statement termed the restriction a “curfew,” the restriction essentially amounted to a zoning which prohibited civilians—with exceptions for WTO delegates and area residents and business owners—from entering downtown Seattle during the conference.²⁹⁴ Litigants in *Menotti v. City of Seattle* filed a class action lawsuit on behalf of all those arrested due to the no-protest zone and thereafter not convicted.²⁹⁵ As expected, the Ninth Circuit applied the content-neutral *Ward* analysis. In response to the facial First Amendment challenge, the court found that the restriction was content neutral because it did not limit a particular type or content of speech—but instead limited the place where speech was permitted.²⁹⁶ Of course, those protesting in the zone would necessarily be protesting the WTO.

On whether the restriction was narrowly tailored, the court ultimately answered by refusing to “inject [itself] into the methods of policing.”²⁹⁷ This was despite the WTO no-protest zone covering a twenty-five block radius of Seattle streets.²⁹⁸ The *Menotti* opinion evidences the court’s fear—as it focused the discussion on violent protestors, despite recognizing that the overwhelming majority were lawful and peaceful.²⁹⁹ The court then concluded that there were ample alternative areas to protest, despite the large no-protest zone³⁰⁰—again citing violence and “dire facts.”³⁰¹ Thus, the court found that the curfew was a facially valid time, place, and manner restriction.³⁰² *Menotti* did find that a First Amendment as applied challenge was appropriate and should proceed to trial, as well

292. The public at large is meant to enjoy the greatest ability to express itself on its city streets because they are a traditional public forum. ERIC BARENDT, FREEDOM OF SPEECH 276 (2d ed. 2005); ZICK, *supra* note 151, at 55–56.

293. See Seattle Emergency Proclamation, *supra* note 71, at Exhibit D.

294. *Id.*; see also SEATTLE CITY COUNCIL REPORT, *supra* note 131, at 15.

295. See *Menotti v. City of Seattle*, 409 F.3d 1113, 1126 (9th Cir. 2005).

296. *Id.* at 1129.

297. *Id.* at 1137.

298. *Id.* at 1358 (Paez, J., concurring and dissenting).

299. *Id.* at 1120, 1132.

300. *Id.* at 1358 (Paez, J., concurring and dissenting).

301. *Id.* at 1140–42.

302. *Id.* at 1143.

as a Fourth Amendment challenge for unreasonable arrests and seizures.³⁰³ Ultimately, at trial a jury found that police violated activists' Fourth Amendment rights, but not their First Amendment rights to free speech.³⁰⁴ Even without the jury finding a First Amendment violation, the jury's verdict on the Fourth Amendment issue signals constitutional concerns associated with the use of no-protest zones. After the verdict, Seattle eventually settled by paying \$1 million to 175 arrested protestors and clearing their criminal records.³⁰⁵

As seen by the *Menotti* opinion, facial challenges to protest zones easily survive court scrutiny because they are evaluated as content-neutral restrictions. As applied First Amendment violations are difficult to prove because plaintiffs must demonstrate to a jury that chilling protected speech "was a substantial or motivating factor in the defendant's conduct."³⁰⁶ This element is challenging for plaintiffs because it requires the jury to assess not only a police officer's subjective intent, but specifically whether chilling the plaintiff's expression was the motivating and/or substantial objective. Reading the police officers' personal motives might feel impossible for jurors. Fourth Amendment violations present a less insurmountable challenge, since jurors are asked to assess whether the seizure was reasonable under the circumstances³⁰⁷—not whether the police officer's subjective intent was reasonable.

Three days after the Missouri emergency declaration, the highway patrol—which the governor placed in command via executive order—restricted protests to a specific zone.³⁰⁸ Protestors were displaced from the locations that they had selected to gather and communicate with the media.³⁰⁹ Protestors complained that this alternative site was not relevant to their protest and not accessible to the media zone.³¹⁰ The protest zone in Ferguson was not challenged, despite activists' concerns—perhaps due

303. The Ninth Circuit did not dismiss the plaintiffs' as applied First Amendment challenges to the curfew, finding persuasive plaintiffs' accounts that individuals exempt from the curfew were not permitted into the protest zone unless they removed anti-WTO paraphernalia and instead remanded the case for trial on those issues. *Id.* at 1148. Similarly, the Ninth Circuit found that the district court had improperly dismissed the Fourth Amendment challenge finding a genuine issue of material fact existed as to whether the police had probable cause to arrest the plaintiff, thus reversing the district court and remanding that issue for trial. *Id.* at 1150.

304. *See Young, supra* note 256.

305. *See id.*

306. NINTH CIRCUIT JURY INSTRUCTIONS COMM., MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 9.11 (2017).

307. *Id.* at § 9.20.

308. *See DOJ FERGUSON REP., supra* note 5, at 64 n.212.

309. AMNESTY INT'L FERGUSON REP., *supra* note 1, at 9.

310. *Id.*; *see also* Abdullah v. County of Saint Louis, 52 F. Supp. 3d 936, 941–42 (E.D. Mo. 2014).

to the ease of overcoming judicial review. In North Dakota, the U.S. Corps of Engineers eventually established a “free-speech zone” far from pipeline construction.³¹¹ Within the week, the North Dakota Governor ordered the evacuation of the relevant area.³¹²

2. Curfews

Governors and mayors often set curfews pursuant to an emergency declaration.³¹³ An emergency declaration is a necessary antecedent to a curfew.³¹⁴ Missouri Revised Statute section 44.100 and North Dakota Central Code section 37.17.1-05, both listing the governor’s emergency power, do not explicitly mention curfews.³¹⁵ However, the North Dakota law states that the governor can “control ingress and egress in a[n] . . . emergency area, the movement of persons within the area”³¹⁶ Less specifically, the Missouri law states that the governor can direct law enforcement to “secur[e] compliance” with emergency orders.³¹⁷ Further, both these statutes have broad, catch-all provisions.³¹⁸ Seattle Municipal Code section 10.02.020 explicitly states that in an emergency, the mayor can order a curfew.³¹⁹

Without an emergency declaration, the executive cannot impose a curfew that does not at least provide an exception for First Amendment activity. The existence of an emergency declaration determines whether a

311. Press Release, Stand with Standing Rock, Army Corp Closes Public Access to Oceti Sakowin Camp on Dec. 5th (Nov. 26, 2016) <https://standwithstandingrock.net/army-corp-closes-public-access-oceti-sakowin-camp-dec-5th/> [<https://perma.cc/JC8Z-MH58>].

312. N.D. Exec. Order 2016-08, *supra* note 40.

313. *See* *Smith v. Avino*, 91 F.3d 105 (11th Cir. 1996) (upholding a curfew imposed after hurricane Andrew), *abrogated on other grounds by* *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Moorhead v. Farrelly*, 727 F. Supp. 193 (V.I. 1989) (affirming the constitutionality of a curfew imposed after Hurricane Hugo); *U.S. v. Chalk*, 441 F.2d 1277 (4th Cir. 1971) (finding constitutional an Asheville curfew in response to fight between African American students and police); *ACLU of W. Tenn., Inc. v. Chandler*, 458 F. Supp. 456 (W.D. Tenn. 1978) (upholding Tennessee curfew in response to police strike); *In re Juan C.*, 33 Cal. Rptr. 2d 919 (Cal. Ct. App. 1994) (holding the imposed during the Los Angeles Riots was not unconstitutionally overbroad and did not encourage arbitrary enforcement).

314. *See* Glenn C. Frese, *The Riot Curfew*, 57 CAL. L. REV. 450, 457 (1969); Jeffrey F. Ghent, *Validity and Construction of Curfew Statute, Ordinance, or Proclamation*, 59 A.L.R.3D 321, Section 2-a, 3-a (1974).

315. *See* MO. REV. STAT. § 44.100 (2008); N.D. CENT. CODE § 37-17.1-05 (2013).

316. N.D. CENT. CODE § 37-17.1-05(6)(g) (2013).

317. MO. REV. STAT. § 44.100.1(3)(b) (2008).

318. *Id.* at § 44.100.1(3)(j) (“The emergency powers of the governor shall be as follows: . . . Perform and exercise such other functions, powers and duties as may be necessary to promote and secure the safety and protection of the civilian population.”); N.D. CENT. CODE § 37-17.1-05(6) (2013) (enumerating numerous powers of the governor during an emergency under the title, “In addition to any other powers conferred upon the governor by law . . .”).

319. SEATTLE, WASH., MUNICIPAL CODE § 10.02.020(A)(1) (1992) (prior to amendments).

court will—without a First Amendment exception—find the curfew to be an unconstitutional restriction on individuals’ rights. Courts have upheld curfews that are enacted during a legal emergency.³²⁰ General curfews impact the rights of speech and assembly. They generally preclude all types of public activity during a portion of the day—including protest. Courts apply a particularly yielding reasonableness test when evaluating an “emergency” curfew. For emergency curfews, judges inquire only whether the curfew was enacted in good faith and whether a factual basis exists for the decision that such action was necessary to maintain order.³²¹ As I will discuss in the next Part of this Article, this is the same yielding standard that courts apply when assessing the propriety of the emergency declaration.³²² In the emergency curfew cases, the courts compare the government’s asserted interest in public safety with the freedom interests of individuals.³²³ The government always wins when it alleges a threat to life and property that warrants an emergency declaration.³²⁴ Particularly with nighttime curfews, courts dismiss concerns by highlighting dangers associated with the evening hours of an emergency and by reasoning that individuals retain access to the streets for protest or other activities during day time.³²⁵ But courts also do not scrutinize an executive’s emergency declaration.³²⁶ This, coupled with minimal judicial review of both the state of emergency and the resulting curfew, means the legal emergency abridges First Amendment rights via a curfew that would not be permitted

320. See, e.g., *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding a curfew from 8:00 p.m. to 6:00 a.m. imposed on German and Italian noncitizens, and Japanese noncitizens and citizens during World War II); *Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996) (“when a curfew is imposed as an emergency measure in response to a natural disaster, the scope of review in cases challenging its constitutionality ‘is limited to a determination whether the [executive’s] actions were taken in good faith and whether there is some factual basis for the decision that the restrictions . . . imposed were necessary to maintain order.’”).

321. See *Smith*, 91 F.3d at 109 (11th Cir. 1996); *United States v. Chalk*, 441 F.2d 1277, 1282 (4th Cir. 1971); *Moorhead v. Farrelly*, 727 F. Supp. 193, 200 (V.I. 1989).

322. See *infra* Part IV(b).

323. *Chalk*, 441 F.2d at 1280–81.

324. See *In re Juan C.*, 33 Cal. Rptr. 2d 919, 922 (Cal. Ct. App. 1994); see also *Chalk*, 441 F.2d at 1280.

325. See *ACLU of W. Tenn. v. Chandler*, 458 F. Supp. 456, 461–62 (W.D. Tenn. 1978) (“There can be no doubt that plaintiffs will suffer a limitation on the exercise of their first amendment rights as long as the curfew remains in effect. . . . However, it must be remembered that plaintiffs are free to exercise these rights during other hours of the day, and that the curfew is an emergency measure which hopefully will not long remain in effect.”); *Moorhead*, 727 F. Supp. at 201 (“The hours during which the curfew will remain in effect are among those least likely to interfere with the exercise of first amendment rights, and simultaneously close to if not identical to the hours when the threat of crime and violence are at their highest: the hours when most people are asleep, and when night is at its darkest.”).

326. See *infra* Part IV(b).

without the executive declaration. The court's calculus of balancing the government's asserted safety interest with individual rights is not sufficiently protective of the First Amendment when the protest is the emergency. This is because, while the curfew forbids every person from being on the streets, the executive institutes it in response to mass protests—not a natural or other disaster. Thus, it is difficult to argue that it is not targeted to stop the protests. However, because of the emergency lens, courts apply a lenient reasonableness and good faith standard to the curfew.

Without an emergency declaration, courts seriously consider the First Amendment implications of curfews.³²⁷ Curfews are considered time, place, and manner restrictions; and courts will invalidate them when there is no “clear and present danger”³²⁸ or a First Amendment exception. This is because a curfew is an “all-encompassing restriction . . . [It] significantly restricts expression in all forums for [a significant portion] of [the] day.”³²⁹ From this perspective, the courts' content-neutral time, place, and manner review has more bite than in the previously discussed no-protest zones. Using this analysis, courts have found that juvenile curfews without robust First Amendment exceptions are not narrowly tailored; therefore, they are unconstitutional.³³⁰ Emergency curfews cannot have First Amendment exceptions, particularly when the protest is the emergency. It is the emergency declarations that condone and justify this “all-encompassing restriction” on speech.

In Ferguson, the governor instituted a curfew from midnight to five in the morning in his initial executive order declaring the emergency.³³¹

327. See, e.g., *Hodgkins ex rel. Hodgkins v. Peterson*, 355 F.3d 1048 (7th Cir. 2004); *Commonwealth v. Weston W.*, 913 N.E.2d 832, 842–43 (Mass. 2009).

328. See *State v. Dobbins*, 178 S.E.2d 449, 458 (N.C. 1978) (upholding a curfew in the City of Asheville after a mayoral emergency declaration); see also *Chandler*, 458 F. Supp. at 456; *State v. Boles*, 240 A.2d 920 (Conn. Cir. Ct. 1967); *Judicial Control of the Riot Curfew*, 77 YALE L.J. 1560 (1968).

329. *Nunez v. City of San Diego*, 114 F.3d 935, 950 (9th Cir. 1997).

330. *Id.* at 949–51; see also *Hodgkins*, 355 F.3d at 1048. *Contra* *Hutchins v. District of Columbia*, 188 F.3d 531, 535, 546 (D.C. Cir. 1999) (finding that an exception for “exercising First Amendment rights, including free exercise of religion, freedom of speech and right of assembly” was not vague and the curfew was constitutional); *Schleifer v. City of Charlottesville*, 159 F.3d 843, 853–54 (4th Cir. 1998) (finding that a juvenile nighttime curfew containing a First Amendment exception was not unconstitutionally vague).

331. Mo. Exec. Order 14-08, *supra* note 7; see also Julie Bosman & Alan Blinder, *Midnight Curfew in Effect for Ferguson*, N.Y. TIMES (Aug. 16, 2014), <https://www.nytimes.com/2014/08/17/us/ferguson-missouri-protests.html> [<https://perma.cc/P4HT-C2TA>] (reporting that the curfew lasted for two days); Julian Kimble, *Missouri Governor Ends Curfew in Ferguson*, COMPLEX (Aug. 18, 2014), <http://www.complex.com/pop-culture/2014/08/missouri-governor-ends-curfew-in-ferguson> [<https://perma.cc/2VZT-3HK6>].

Contrary to the promise that the curfew would not be “enforce[d] with trucks . . . [or] with tear gas, [but with] communication,”³³² law enforcement traveling in armored vehicles used tear gas on demonstrators.³³³ On the first night of the curfew, police shot one African American teenager and arrested others.³³⁴ In their Statement on the Ferguson Curfew, civil rights groups asserted infringements on protestors’ First Amendment rights and declared that the curfew essentially amounted to “a lockdown on the residents of Ferguson.”³³⁵ From its inception, civil rights groups complained that the Ferguson curfew suppressed speech.³³⁶ Despite these complaints, the curfew was not challenged in court. This may be due to courts’ deferential review.

E. Ad Hoc Emergency Rules and Practices

In my protest narratives, government officials enforced a series of ad hoc rules, prompted by the proclaimed emergency, that created fear and suppressed First Amendment activity.

In Ferguson, police commanders under the supervision of the Missouri State Highway Patrol—the police agency designated by the Governor as incident commander³³⁷—instituted a “keep moving” strategy.³³⁸ During a legal emergency, any orders by the governor or his designated incident commander become the law of the land.³³⁹ Noncompliance with those rules was an arrestable offense.³⁴⁰ This rule required protestors to keep moving when outside the protest zone or be arrested for failure to disperse,³⁴¹ despite the fact that this conduct did not warrant an arrest for that crime.³⁴² The state’s failure to disperse crime instead required that an individual fail to obey a lawful command while

332. Bosman & Blinder, *supra* note 331.

333. *More Violence, Unrest in Ferguson*, CBS NEWS (Aug. 17, 2014), <http://www.cbsnews.com/news/ferguson-protest-broken-up-after-curfew/> [<https://perma.cc/7DEW-EGBW>].

334. *Id.*

335. ACLU, LAWYER’S COMM. FOR CIVIL RIGHTS, LEGAL DEF. & EDUC. FUND, JOINT STATEMENT ON FERGUSON, MO CURFEW, <https://www.aclu.org/other/joint-statement-ferguson-mo-curfew> [<https://perma.cc/8CCL-9N3R>].

336. *Id.*

337. Mo. Exec. Order 14-08, *supra* note 7.

338. DOJ FERGUSON REP., *supra* note 5, at 25.

339. See MO. REV. STAT. § 44.100.1(3)(b) (2008).

340. MO. REV. STAT. § 44.130(2) (“Any person violating any rule or regulation adopted under this law after it has become effective during an emergency or any person or officer violating any provision of this law shall be deemed guilty of a misdemeanor.”).

341. AMNESTY INT’L FERGUSON REP., *supra* note 1, at 7; Abdullah v. County of Saint Louis, 52 F. Supp. 3d 936, 944 (E.D. Mo. 2014).

342. MO. REV. STAT. § 574.060 (2017).

being present at a riot or an unlawful assembly.³⁴³ Police were not told to assess whether protestors were somehow engaged in either rioting or unlawful assembly. Police were informed of the keep moving strategy during roll call, but they were provided no guidance regarding how and under what circumstances it should apply.³⁴⁴ Officers were just instructed “to use their discretion.”³⁴⁵ The police applied the policy in myriad ways, including ordering people not to stand still for more than five seconds, to continue to move at a particular speed, etc.³⁴⁶ Some officers only applied the keep moving policy to those outside the protest zone, while others applied it within, and there were also inconsistencies about whether the rule applied to the press.³⁴⁷ Activists believed that the purpose of the keep moving rule was to exhaust protestors.³⁴⁸

The same day that the keep moving rule was enacted and enforced by police, plaintiff filed a civil complaint in *Abdullah v. County of St. Louis* and sought to enjoin the practice.³⁴⁹ The complaint asserted that the ad hoc rule violated the First Amendment and due process.³⁵⁰ At the initial hearing, the judge applied the time, place, and manner test and denied plaintiff’s first request for a temporary restraining order that the practice cease immediately.³⁵¹ The court was convinced by the government’s contention that, while the keep moving practice was in effect, there was an alternative designated protest zone.³⁵² The plaintiff then returned to the streets of Ferguson. Despite his inability to locate the zone that day, he was again forced to keep moving.³⁵³ Law enforcement utilized this keep moving strategy, albeit inconsistently, for five days.³⁵⁴ Using the *Ward* test for content-neutral restrictions, the court eventually decided that the plaintiff would likely succeed in a First Amendment challenge to the strategy that did not permit him to either engage in conversation with others on the sidewalk or peacefully assemble.³⁵⁵ The court ruled that the

343. *Id.*; see also AMNESTY INT’L FERGUSON REP., *supra* note 1, at 12.

344. *Abdullah*, 52 F. Supp. at 941.

345. *Id.* at 943.

346. *Id.* at 942.

347. *Id.* at 946.

348. AMNESTY INT’L FERGUSON REP., *supra* note 1, at 7.

349. See Verified Complaint at 2, *Abdullah*, 52 F. Supp. 3d 936 (No. 4:14-cv-1436).

350. *Id.* at 5–6.

351. *Abdullah*, 52 F. Supp. 3d at 941.

352. *Id.*

353. *Id.* The DOJ After Assessment Report of Ferguson confirms that a protest zone was not established until the day after police enacted the keep moving strategy. DOJ FERGUSON REP., *supra* note 5, at 63–64 n.212.

354. *Abdullah*, 52 F. Supp. 3d at 941–42 (finding police unified command used this strategy from August 18, 2014 to August 23, 2014).

355. *Id.* at 946–47.

keep moving strategy was not narrowly tailored, but instead was a blanket rule applied too broadly to protect the government's asserted interest to prevent violence.³⁵⁶ The court further concluded that even if the keep moving restriction could be justified there was likely no adequate alternate forum since the establishment of a protest zone was delayed.³⁵⁷

The court also agreed with the plaintiff that the keep moving strategy likely violated due process and the Fourth Amendment.³⁵⁸ Due process principles require that when a government rule affects First Amendment rights, the rule must provide a "greater degree of specificity" or be void for vagueness.³⁵⁹ This is because a rule is unconstitutionally vague when it does not give notice of what conduct is prohibited so individuals may regulate their behavior; further, this vagueness also promotes arbitrary application by law enforcement.³⁶⁰ The court found that the tactic both gave insufficient notice to civilians regarding what conduct was prohibited and provided the police with too much discretion.³⁶¹ The court agreed with the plaintiff's allegation that this broad police discretion "authorize[d] and encourage[d] arbitrary and discriminatory enforcement."³⁶² A community member confirmed this, stating: "The five-second rule only applied to those people that police wanted it to apply to."³⁶³ Consistent with my arguments in the prior section, I believe the *Ward* time, place, and manner test is not sufficiently protective of First Amendment rights when the protest is the chaos that law enforcement is attempting to quash. This is even more so in Ferguson, where the message was intimately connected to the expression and was critical of the same police who instituted and enforced the keep moving tactic.³⁶⁴ Furthermore, although this was not an argument made by the plaintiff in the suit, failure to disperse arrests resulting from enforcement of the unlawful keep moving strategy were not supported by probable cause, since the police did not engage in any determination regarding the main element of the crime—the existence of

356. *Id.* at 947.

357. *Id.* at 946–47.

358. *Id.* at 946.

359. *United States v. O'Brien*, 391 U.S. 367, 377 (1968) ("[G]overnment regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.").

360. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 5.02 (7th ed. 2015).

361. *Abdullah*, 52 F. Supp. 3d at 943.

362. Verified Complaint at 6, *Abdullah*, 52 F. Supp. 3d 936 (No. 4:14-cv-1436); see also *Abdullah*, 52 F. Supp. 3d at 943.

363. DOJ FERGUSON REP., *supra* note 5, at 62.

364. See *supra* Section I(B) (describing the subject matter of the Ferguson protests).

a riot or an unlawful assembly. Thus, the strategy also violated the Fourth Amendment.

Police officers adopted the ad hoc practice of not wearing or covering name tags and badges in both Seattle and Ferguson.³⁶⁵ This practice was contrary to the policies of their police departments.³⁶⁶ Across law enforcement, police officers must be readily identifiable.³⁶⁷ This is because an anonymous militarized police force is dangerous. Anonymity is inconsistent with accountability and breeds violence.³⁶⁸ Civilians can hold officers personally accountable for their unlawful or violent actions via complaint procedures or lawsuits. Nameless police officers can instead act with personal “impunity.”³⁶⁹ During the WTO protests, police wore riot gear that did not identify officers and covered their badges,³⁷⁰ turning them into nameless warriors. Police also covered their badges with rain gear or even removed or altered their badges.³⁷¹ Some police went as far as wearing ski masks.³⁷² In Ferguson, police also removed any identifying information.³⁷³ The Deputy Chief of the DOJ Civil Rights Division wrote a letter to the Ferguson Police Chief demanding that law enforcement stop this practice and stating that the Department received “numerous complaints” about such conduct demonstrating that it was “not aberrational.”³⁷⁴ When civilians asked anonymous officers for their names in Ferguson or Seattle, they refused to identify themselves.³⁷⁵ Besides providing police with a sense of immunity for misconduct, a militarized, aggressive, and anonymous high police presence is understandably

365. OUT OF CONTROL, *supra* note 248, at 63–66; Letter from Christy E. Lopez, Deputy Chief, Special Litigation Section, Civil Rights Div., U.S. Dep’t of Justice, to Chief Thomas Jackson, Police Chief, City of Ferguson (Sept. 23, 2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/11/04/ferguson_itr_nameplates_9-23-14.pdf [<https://perma.cc/F2AA-QR4M>] [hereinafter DOJ Letter]; DOJ FERGUSON REP., *supra* note 5, at 78–79; AMNESTY INT’L FERGUSON REP., *supra* note 1, at 18–19.

366. The Ferguson Police Department’s General Order 214.00, Uniforms, Equipment and Appearance, requires that police wear visible identification in uniform and that supervisors ensure compliance with the uniform policy. DOJ Letter, *supra* note 365. Likewise, the Seattle Police Department Manual requires that officers also wear identification and provide their name and badge information upon inquiry. OUT OF CONTROL, *supra* note 248, at 64.

367. DOJ Letter, *supra* note 365.

368. OUT OF CONTROL, *supra* note 248, at 63; DOJ FERGUSON REP., *supra* note 5, at 78.

369. DOJ Letter, *supra* note 365, at 1.

370. OUT OF CONTROL, *supra* note 248, at 63. Officers removed their names from the back of their riot helmets. *Id.* at 64.

371. *Id.* at 63.

372. *Id.* at 64.

373. AMNESTY INT’L FERGUSON REP., *supra* note 1, at 18; DOJ Letter, *supra* note 365.

374. DOJ Letter, *supra* note 365.

375. OUT OF CONTROL, *supra* note 248, at 63; AMNESTY INT’L FERGUSON REP., *supra* note 1, at 18.

intimidating for protestors. Such intimidation chills activists' willingness to confront this police force and engage in protest.

Ad hoc practices by judges and government lawyers in Seattle also were conducive to the suppression of protestors' rights. After police swept up individuals in massive and arbitrary arrests on the streets of Seattle, protestors could not escape jail unless they agreed to stay away from the WTO area—thus impeding further their right to protest. Prosecutors conditioned protestors' release on their agreement to stay out of downtown Seattle.³⁷⁶ Those who did not agree to the downtown restriction were not released.³⁷⁷ In one particularly egregious case, a woman was only released after she agreed to refrain from protesting anywhere in the U.S. for two years.³⁷⁸ These preconditions to release amount to violations of traditional bail principles. “[T]he ‘general rule’ of substantive due process [is] that the government may not detain a person prior to a judgment of guilt in a criminal trial.”³⁷⁹ Furthermore, the Supreme Court has interpreted the Eighth Amendment guarantee against excessive bail to mean that the main objective in imposing pretrial detention is assuring the accused's return to court to face the criminal matter.³⁸⁰ When the judge at arraignment is making this determination, the judge must consider factors that are relevant to flight.³⁸¹ These factors are codified in the federal bail statute and include:

- (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence . . . ;
- (2) the weight of the evidence against the person;
- (3) the history and characteristics of the person . . . ; and
- (4) the nature and the seriousness of the danger to any person or the community that would be posed by . . . release.³⁸²

The Court has also held that it does not violate the Eighth Amendment and Due Process to detain someone pretrial when the accused is charged with a dangerous crime, and the judge finds by clear and convincing evidence that no combination of release conditions could assure community safety.³⁸³ State criminal bail statutes and rules essentially capture the same principles as their federal counterparts.³⁸⁴ As

376. OUT OF CONTROL, *supra* note 248, at 68.

377. *Id.*

378. *Id.*

379. *United States v. Salerno*, 481 U.S. 739, 749 (1987).

380. *Id.* at 753.

381. *Stack v. Boyle*, 342 U.S. 1, 8 (1965).

382. 18 U.S.C. § 3142(g) (2008).

383. *See Salerno*, 481 U.S. at 739.

384. *See WASH. SUP. CT. R. CRIM. CT. 3.2*. The rule states that a defendant charged with a noncapital offense “shall . . . be ordered released on the accused's personal recognizance pending

a matter of fact, the Washington State Constitution guarantees no excessive bail and that “[a]ll persons charged with crimes shall be bailable by sufficient sureties,” unless charged with a capital offense.³⁸⁵ None of these well-established bail principles justify protestors being held in jail simply for refusing to agree to stay away from the WTO area. There is no connection between that condition and posing a flight risk or danger to the community. It is inconsistent with the Eighth Amendment and Due Process principles for the government to impose this restriction as a precondition to release, and it demonstrates how prosecutors and judges were complicit in the suppression of protests in Seattle. Although not one of my target narratives, after the Maryland Governor declared an emergency in Baltimore in response to mass protests and outcry because of the death of Freddie Gray—an African American man—while in police custody, prosecutors used an analogous tactic: keeping arrested protestors detained for over forty-eight hours without access to a hearing.³⁸⁶ This practice was in direct contravention of Maryland Rule 4-212(e) requiring arrested individuals to be brought for bail determination before a judicial officer within twenty-four hours of arrest.³⁸⁷

F. Conclusion

As demonstrated by the WTO, Ferguson, and pipeline protests in North Dakota, the threat to constitutional liberties is serious when state and local governments utilize emergency management mechanisms and tools to respond to perceived crises. The threat increases when the executive proclaims a legal emergency because it incites law enforcement to amplify their use of existing policing tactics and expands the arsenal of oppressive tools that the government can use to suppress protests. Executive interests are not aligned with the protection of individual liberties but with maintaining public order and guarding public safety. Therefore, state and local authorities taxed with emergency management duties are currently not well equipped to safeguard the rights of protestors, members of the community, and the press. Further, current legislative and judicial mechanisms provide no adequate check on government’s emergency actions when the protest is the crisis.

trial.” *Id.* When considering whether the government has overcome the presumption of release on personal recognizance, the judge will balance factors similar to those in the federal bail statute. *See id.*

385. WASH. CONST. art. I, §§ 14, 20.

386. Petition for Writ of Habeas Corpus & Application for Temporary Restraining Order & Motion for Preliminary Injunction at 4, *Carrie v. Scruggs*, No. 24H15000166 (Cir. Ct. for Balt. City Apr. 29, 2015); *see also* Md. Exec. Order 01.01.2015.14 (Apr. 27, 2015).

387. Petition for Writ of Habeas Corpus & Application for Temporary Restraining Order & Motion for Preliminary Injunction at 4, *Carrie*, No. 24H15000166; *see also* MD. R. CRIM. § 4-212(e).

IV. CHECKS ON THE EXECUTIVE'S EMERGENCY POWER IN RESPONSE TO PROTEST

A. Legislative Check is Not Enough

Some may look towards legislatures to manage executive emergency action. State legislatures often possess some authority regarding emergency declarations. Missouri is unlike most states in that the legislature can initiate an emergency.³⁸⁸ This is unusual.³⁸⁹ Legislatures may have more authority over how the emergency ends. In about half of the states, either the governor or the legislature can end the emergency.³⁹⁰ Whether a state legislature will realistically act to terminate a gubernatorial emergency is a separate issue. In addition, legislative consent or approval may also be required to extend the gubernatorially-declared emergency beyond some initially circumscribed amount of time.³⁹¹ At the municipal level, city councils or commissions can play a role in a local emergency declaration.³⁹²

Even when legislatures can theoretically limit the power of the governor to declare a state of emergency, they do not realistically serve as a check on the governor's actions. The state legislature may abdicate the decision to terminate a state of emergency.³⁹³ This may be due to legislators' sensitivity to the governor's position as commander in chief, lawmakers' fears of taking ownership and responsibility for an emergency declaration and its consequences, or legislators' inability to reach a consensus quickly enough to respond to existing exigencies. Legislators may also feel that they are at an information deficit compared to the

388. MO. REV. STAT. § 44.100.1(1) (2008).

389. A review of state emergency laws reveals that in addition to Missouri, the state legislatures of Alabama, Nevada, New Hampshire, North Carolina, Oklahoma, and West Virginia can proclaim an emergency. See KEITH BEA, CONG. RESEARCH SERV., ALABAMA EMERGENCY MANAGEMENT AND HOMELAND SECURITY STATUTORY AUTHORITIES SUMMARIZED, at CRS-3 (2004); MO. CRS REPORT, *supra* note 108, at CRS-3; NEV. CRS REPORT, *supra* note 108, at CRS-3; N.H. CRS REPORT, *supra* note 108, at CRS-3; N.C. CRS REPORT, *supra* note 108, at CRS-3; OKLA. CRS REPORT, *supra* note 108, at CRS-3; W. VA. CRS REPORT, *supra* note 108, at CRS-3. But the remaining state legislatures do not have this power.

390. See authorities cited *supra* note 108.

391. In Kansas, Michigan, Utah, and Wisconsin, the governor may declare a state of emergency for a limited period of time, but thereafter the declaration may only be extended when approved by legislators. See KAN. CRS REPORT, *supra* note 109, at CRS-3; MICH. CRS REPORT, *supra* note 109, at CRS-3; UTAH CRS REPORT, *supra* note 109, at CRS-2; WIS. CRS REPORT, *supra* note 109, at CRS-3.

392. See Interviews, *supra* note 21.

393. See, e.g., Robert A. Zarnoch, *Gubernatorial Executive Orders: Legislative or Executive Powers*, 44 MD. B.J. 48, 52 (2011) (explaining that while the Maryland legislature has the ability to change or supersede an executive order, "[t]his rarely occurs").

executive, whose law enforcement is closer to the developing crisis. They may feel ill-equipped to assess the situation.

The efficacy of lawmakers' restraint on the President during a national emergency is relevant since the relationship is mirrored at the state level. When dealing with the executive's power during a national emergency, some have proposed that the executive be permitted to unilaterally act only subject to approval by the legislature within a prescribed brief period of time.³⁹⁴ However, others have evaluated the legislature's actions at times of crisis and concluded that the legislature is "unlikely to be a guardian of civil liberties."³⁹⁵ State legislatures' records confirm the latter conclusion, as they do not serve as restraints on the state or local executives during emergencies.³⁹⁶ This may be particularly the

394. Ackerman, *supra* note 15, at 1047. Professor Ackerman's proposal includes a concept that he terms the "supermajoritarian escalator," which means that the percentage of legislators that would have to cast an approval vote for the emergency to continue increases as the duration of the emergency extends. *Id.* at 1047–50.

395. David Cole, *Judging the Next Emergency: Judicial Review and Individual Rights in Times of Crisis*, 101 MICH. L. REV. 2565, 2591 (2003). Professor Cole recounts laws passed during times of crisis by Congress which have been criticized as offensive to civil liberties. *Id.* at 2591–92; *see also* David Cole, *The Priority of Morality: The Emergency Constitution's Blind Spot*, 113 YALE L.J. 1753, 1761–68 (2004).

396. Even in states where the legislature has the authority to declare or terminate a state of emergency, the governor himself routinely acts unilaterally in proclaiming and ending the emergency. Numerous states' responses to civil strife within their jurisdiction are probative of this trend of legislative passivity. The state of emergency instituted in Baltimore in response to the city's 2015 protests prompted by the police-involved death of Freddie Gray was both enacted and rescinded by Maryland Governor Larry Hogan. *See* Krishnadev Calamur, *Maryland Governor Lifts State of Emergency in Baltimore*, NPR (May 6, 2015), <https://www.npr.org/sections/thetwo-way/2015/05/06/404675117/maryland-governor-lifts-state-of-emergency-in-baltimore> [<https://perma.cc/L66Y-ML5M>]; Emily Shapiro, *National Guard Troops Deployed After Violent Clashes in Baltimore*, ABC NEWS (Apr. 27, 2015), <https://abcnews.go.com/US/hundreds-people-clash-police-baltimore-mall/story?id=30622868> [<https://perma.cc/QD9E-YZT9>]. The legislature played no role in either declaration, despite it having the statutory power to terminate the state of emergency at any time. CRS REPORT SUMMARY, *supra* note 16. The response has been similar in the other states where the legislature is statutorily authorized to terminate an active state of emergency. In Wisconsin, the state of emergency declared in Milwaukee in response to 2016 protests spurred by a police shooting of an African American driver was declared unilaterally by then-Governor Scott Walker, and it expired naturally, without legislative involvement. Wis. Exec. Order 209 (Aug. 16, 2015); Shibani Mahtani & Scott Calvert, *Governor Declares State of Emergency in Milwaukee After Shooting, Unrest*, WALL STREET J. (Aug. 15, 2016), <https://www.wsj.com/articles/violence-erupts-in-milwaukee-after-fatal-shooting-by-police-1471157651> [<https://perma.cc/MG56-RYE3>]. In 2017, the state legislature had no involvement in the termination of a state of emergency issued by Florida's then-Governor, Rick Scott, in preparation for a white supremacist's speech at the University of Florida. As drafted, the state of emergency expired naturally within seven days, unless extended. Fla. Exec. Order No.17-264 (Oct. 16, 2017). In North Carolina—a state in which the legislature has the power to both declare and terminate a state of emergency—the legislature has similarly remained uninvolved in instituting and rescinding/revoking such proclamations. In response to the 2016 Charlotte protests against the police killing of African American Keith Scott, the Governor declared a state of emergency without legislative involvement. Matthew Teague, *Charlotte Protests: Governor of North Carolina Declares*

case when it is the liberties of minority communities that are at stake—like in Ferguson and the pipeline protests—because lawmakers are not representative of those communities and thus are unlikely to defend or be accountable to their interests.³⁹⁷ After Ferguson, observers highlighted the lack of African American representation in local government.³⁹⁸ The same was true for state governments in Missouri and North Dakota. Data from 2015 shows that in Missouri and North Dakota about 86% of state legislators identified as white.³⁹⁹ For these reasons, community members and protestors cannot rely on state lawmakers to protect their constitutional rights during an emergency declaration. Also, as previously discussed, most emergency management strategies do not need a preceding emergency declaration to go into effect.⁴⁰⁰ Emergency management mechanisms offer first responders latitude to act when they perceive an event as a crisis.⁴⁰¹ Thus, even before the executive declares an emergency, the problematic practices I have discussed will begin to materialize.

B. The Judiciary has Insufficient Ability to Provide a Check on State and Local Emergency Management Action

A state of emergency declaration is not immune from judicial review. However, review of an executive emergency declaration is highly

State of Emergency, GUARDIAN (Sept. 22, 2016), <https://www.theguardian.com/us-news/2016/sep/22/charlotte-protests-north-carolina-governor-declares-state-of-emergency> [<https://perma.cc/QLS3-SJZG>]. In the other six states where the legislature is statutorily authorized to declare a State of Emergency, the legislatures have similarly taken no action. Besides Missouri and North Carolina, none of these six states has experienced mass protests leading to an emergency declaration in the last several years. However, based on the prevalence of governor-declared weather-related states of emergency in these states, one can hypothesize that any state of emergency declared in relation to protests would similarly be issued by the executive. *See, e.g., States of Emergency*, OFFICE OF THE GOVERNOR, STATE OF ALABAMA, <https://governor.alabama.gov/newsroom/state-of-emergency/> [<https://perma.cc/2XQ7-48HL>] (archiving the copious states of emergency the governor has instituted).

397. *See* Amber Phillips, *The Striking Lack of Diversity in State Legislatures*, WASH. POST (Jan. 26, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/01/26/the-real-problem-with-diversifying-congress-state-legislatures-are-even-less-diverse/?noredirect=on&utm_term=.3da75a234077 [<https://perma.cc/QLU6-CD9X>]; Karl Kurtz, *Who We Elect: The Demographics of State Legislatures*, NCSL (Dec. 1, 2015), <http://www.ncsl.org/research/about-state-legislatures/who-we-elect.aspx> [<https://perma.cc/4TAY-KX8U>].

398. Samuel P. Jordan, *Federalism, Democracy, and the Challenge of Ferguson*, 59 ST. LOUIS U. L.J. 1103, 1112–13 nn.41–42 (2015).

399. *See* NAT'L CONFERENCE OF STATE LEGISLATURES, LEGISLATORS' RACE AND ETHNICITY (2015), http://www.ncsl.org/Portals/1/Documents/About_State_Legislatures/Raceethnicity_Rev2.pdf [<https://perma.cc/Q8BP-4F6X>].

400. *See supra* INTRODUCTION.

401. *See supra* Part II.

deferential.⁴⁰² Courts inquire whether the executive's declaration was made in good faith and whether there was a factual basis for it.⁴⁰³ The Supreme Court first dealt with a challenge to a state level state of emergency in the early 1900s in *Moyer v. Peabody*, when the Colorado Governor declared an emergency in connection to a miner's strike.⁴⁰⁴ In *Moyer*, the plaintiff argued that the Governor and the National Guard violated his due process rights when he was arrested and held for over two weeks with no criminal charges because of his post as president of the Federation of Miners.⁴⁰⁵ The Court established a highly deferential review of a governor's decision to declare a state of emergency by stating that "the governor's declaration that a state of insurrection existed is conclusive of that fact."⁴⁰⁶ When assessing the propriety of the plaintiff's detention pursuant to the emergency declaration, the Court distinguished with approval the precautionary purpose of the plaintiff's arrest as opposed to a regular arrest which requires probable cause.⁴⁰⁷ Referencing the Governor's power to suppress insurrection pursuant to the Colorado constitution and accompanying statutes, the Court stated that "he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist, and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace."⁴⁰⁸ In *Moyer*, the only caveat that the Court seemingly placed on the power of the Governor was that he act in good faith. The language of the opinion further suggests lack of any judicial review and instead the need to "substitut[e] [] executive process for judicial process."⁴⁰⁹

The next time the Supreme Court considered the issue in *Sterling*, it did exert some judicial limits on the range of a governor's actions pursuant to an emergency.⁴¹⁰ Thus, a reading of *Moyer* that displaces any judicial review of a governor's emergency power proved too broad. While the Court in *Sterling* still did not question the Texas Governor's conclusion that an emergency existed, the Court reviewed the executive's resulting actions.⁴¹¹ In that case, the Governor alleged an insurrection from a dispute

402. *Moyer v. Peabody*, 212 U.S. 78, 84–85 (1909); *Sterling v. Constantin*, 287 U.S. 378, 399–400 (1932).

403. *Sterling*, 287 U.S. at 400; *see also* *Scheuer v. Rhodes*, 416 U.S. 232, 247–48 (1974).

404. *Moyer*, 212 U.S. at 82–84.

405. *Id.* at 83.

406. *Id.* at 84.

407. *Id.* at 84–85.

408. *Id.* at 84.

409. *Id.* at 85; *see also* Jason Collins Weida, *A Republic of Emergencies: Martial Law and American Jurisprudence*, 36 CONN. L. REV. 1397, 1412–14 (2004).

410. *Sterling v. Constantin*, 287 U.S. 378, 403–04 (1932).

411. *Id.* at 395–402.

relating to oil production and issued “martial law” in the state.⁴¹² The Texas Railroad Commission had issued an order limiting oil production which plaintiff oil producers challenged in federal district court. In an attempt to override the judicial process, the Governor—pursuant to martial law—ordered the National Guard to shut down the oil wells.⁴¹³ Looking past the question of what the Governor meant by martial law, the Court did not quarrel with the Governor’s power to call in military forces to keep the peace, stating, consistent with *Moyer*, that “his decision to that effect is conclusive.”⁴¹⁴

Despite the Supreme Court’s reference to the district court’s findings on the record that there was no actual uprising, no threats of violence, and that at most there were potential breaches of the peace, neither the Supreme Court nor the district court questioned the Governor’s proclamation of an insurrection and his general use of military power.⁴¹⁵ Still, the Court recognized that plaintiffs had a property right in their oil that could not be curtailed without due process of law and rejected the Texas Governor’s argument that the judiciary could not review any of his actions because of the proclaimed emergency.⁴¹⁶ Instead, the Supreme Court clarified that “the allowable limits of military [and executive] discretion, and whether or not they have been overstepped in a particular case[] are judicial questions.”⁴¹⁷ The Court then concluded that the Governor had “overstepped” by curtailing the plaintiffs’ constitutional access to courts to vindicate their property rights and that there was “no military necessity” to prevent or limit lawful oil production.⁴¹⁸ *Sterling* thus established that a governor’s emergency declaration does not mitigate the court’s jurisdiction over executive actions when they contravene constitutional rights.⁴¹⁹ While the court will not question a governor’s good faith declaration of emergency, it can assess whether the specific executive actions, pursuant to that declaration, were “related to the quelling of the disorder” and necessary.⁴²⁰

412. *Id.* at 387. It is also worth noting that prior to the Governor’s order, the federal district court had issued a temporary protective order preventing the execution of an order by the state’s Railroad Commission limiting oil production. *Id.*

413. *Id.* at 387–88.

414. *Id.* at 399.

415. *See id.*

416. *Id.* at 393.

417. *Id.* at 401.

418. *Id.* at 401, 403.

419. *Id.* at 400–02.

420. *Id.* at 400, 403–04 (“the findings of fact made by the District Court . . . leave no room for doubt that there was no military necessity which, from any point of view, could be taken to justify the

In the midst of vigorous anti-government protests, the Supreme Court heard the *Scheuer* case and concluded that it was error for the lower court to assume, without any actual inquiry, that the Governor was acting in good faith when declaring and executing a state of emergency.⁴²¹ Four years before, the Court had refused to hear a case dealing with the Philadelphia mayor's declaration of emergency after the assassination of Rev. Martin Luther King, Jr.⁴²² In his dissent from the dismissal of appeal, Justice Douglas noted that the declaration contained no factual findings regarding threats to peace or public safety.⁴²³ When the Court did hear *Scheuer*, it faulted the lower court for assuming, without any inquiry, that the Governor's acts were in good faith.⁴²⁴ *Scheuer* involved the National Guard officers' shooting and killing of Kent State University students protesting the Vietnam War after the Ohio Governor's declaration of a state of emergency.⁴²⁵ The Court found that it was error for the district court to grant the defendant government officials' motion to dismiss and lamented that, at the early stage of the proceedings, the petitioners were not allowed to contest the assumption of good faith given that the government had not introduced evidence of the executive's intent.⁴²⁶ The Court stated that while "a declaration of emergency by the chief executive of a State is entitled to great weight[,] . . . it is not conclusive."⁴²⁷ Notably, however, *Scheuer* provided no guidance regarding how a court should evaluate a governor's actions when engaging in this inquiry. This type of guidance is essential. Without direction from the Supreme Court, judges feel generally ill-equipped to gauge executive actions at a time of perceived crisis, and neglect to do so out of worry that these matters are

action of the Governor in attempting to limit complainants' oil production, otherwise lawful."); *see also* Weida, *supra* note 409, at 1416.

421. *Scheuer v. Rhodes*, 416 U.S. 232, 249–50 (1974). The Court also clarified in *Scheuer* that neither the governor nor other state officials acting under color of law have absolute immunity from suit for their unconstitutional actions during a state of emergency. *Id.* at 237.

422. *Stotland v. Pennsylvania*, 398 U.S. 916, 917, 920–21 (1970) (Douglas, J., dissenting).

423. Justice Douglas stated that the lower courts justified the mayor's declaration of emergency "by [the] various scattered acts of disorder occurring in the City of Philadelphia . . . such as a window breaking, damage to automobiles, false alarms of fire, and jostling of pedestrians, some of which occurred incident to demonstrations." *Id.* at 917. In response to the killing of Rev. Martin Luther King, Jr., the mayor declared a state of emergency in Philadelphia making it illegal for twelve or more people to gather outdoors, causing individuals to be arrested while participating in three peaceful protests. *Id.* Justice Douglas faulted the rest of the Court for the denying cert for lack of federal question, citing serious constitutional concern related to the emergency declaration. *Id.* at 920–21.

424. *Scheuer*, 416 U.S. at 249–50.

425. *Id.* at 234–35.

426. *Id.* at 249–50.

427. *Id.* at 250.

political rather than judicial questions.⁴²⁸ This worry stems from the following factors: the fact that police powers rest in the executive, judges' reticence to review gubernatorial decisions made under the pressure of an allegedly impending crisis, public safety concerns, and fear of massive disorder.⁴²⁹

Since *Scheuer*, the Supreme Court has not considered another challenge to a state level emergency declaration. Lower courts dealing with these challenges have generally upheld state and local executive declarations of a state of emergency.⁴³⁰ Further, in the single post-*Scheuer* case where a lower court ruled that a governor's emergency declaration was inappropriate, the Governor of the U.S. Virgin Islands did not allege a public safety threat. Instead, he attempted to bypass a government contracts bidding process by claiming that the need to comply with a federal court order to repair wastewaters systems amounted to an emergency.⁴³¹ Courts have resisted placing any language or explicit emergency findings requirements on a governor's order.⁴³²

428. See *United States v. Chalk*, 441 F.2d 1277, 1282 (4th Cir. 1971). While the Fourth Circuit decided *Chalk* prior to the *Scheuer* opinion, more recent cases have cited to *Chalk* as support for refusing to inquire into the state level emergency declaration. See *Smith v. Avino*, 91 F.3d 105, 109 (11th Cir. 1996) (discussing *Chalk* and the Hurricane Andrew curfew); *Moorhead v. Farrelly*, 727 F. Supp. 193 (V.I. 1989); see also Diane P. Wood, *The Bedrock of Individual Rights in Times of Natural Disaster*, 51 *How. L.J.* 747, 757–58 (2008) (discussing that courts are unlikely to “second-guess” the executive’s determination regarding whether a state of emergency has concluded).

429. *Chalk*, 441 F.2d at 1281–82.

430. See *Cal. Corr. Peace Officers Ass’n v. Schwarzenegger*, 77 *Cal. Rptr. 3d* 844 (Cal. Ct. App. 2008); *Martin v. Mun. Court*, 196 *Cal. Rptr.* 218 (Cal. Ct. App. 1983); *State ex rel. Mo. Highway and Transp. Comm’n v. Pruneau*, 652 *S.W.2d* 281 (Mo. Ct. App. 1983); *State v. Pearson*, 975 *So. 2d* 646 (La. Ct. App. 2007); *In re Farrow*, 754 *A.2d* 33 (Pa. Commw. Ct. 2000); *Cougar Bus. Owners Ass’n v. State*, 97 *P.2d* 481 (Wash. 1982).

431. In *United States v. Virgin Islands*, 363 *F.3d* 276 (3d Cir. 2004), the Governor declared a state of emergency, dispensing with the government contracts bidding process usually required, and then negotiated a contract for wastewater systems repairs to a private company. *Id.* at 279. There was evidence that the “contract was likely tainted by political corruption.” *Id.* The court concluded that no justification was provided by the Governor regarding why the requirement of repairing the wastewater system amounted to an emergency. *Id.* at 290; see also *Hatton v. Mun. de Ponce*, No. RE-91-37, 1994 *WL* 909605 (P.R. 1994). In *Hatton*, the municipal finance director of the town of Ponce, Puerto Rico, awarded a medical equipment contracts to a private company without undergoing the required bidding process. *Id.* By the time the company attempted to deliver the medical equipment, the mayor and municipal finance directors were no longer in office and the new administration refused to accept the equipment. *Id.* In attempting to enforce the contract, the company alleged that there was a state of emergency due to the municipality’s economic crisis at the time that the contract was awarded. *Id.* The court in *Hutton* found that the conditions did not amount to an emergency and that no state executive had declared an emergency. *Id.*

432. In *Farrow*, the Pennsylvania court found that although the Governor did not state in his executive order that there was an “emergency” when he extended the deadline to file nominations for a primary election due to “a sudden and severe winter storm,” the Governor had satisfied the statutory requirements of the disaster emergency declaration by referencing inclement weather. *Farrow*, 754

Even though courts will not seriously inquire into whether the declaration of emergency was appropriate and routinely dismiss challenges to the emergency declaration, federal courts remain open during an emergency and will litigate claims by individuals requesting an injunction based on a violation of their constitutional rights when a government acts pursuant to an emergency. Thus, litigants often challenge the specific constitutional rights violation by seeking court injunctions against these practices, instead of confronting the emergency declaration as a whole.⁴³³ In addition, emergency management officials and personnel do not need to wait for an emergency declaration to act in a perceived crisis and often take action prior to such declaration.⁴³⁴ Their directives may be challenged whether or not an official state of emergency has been declared.⁴³⁵

A.2d at 35–36. The court ignored the petitioner’s claim that the circumstances demonstrated that there was no real emergency. *Id.* at 34–35. In *Schwarzenegger*, the California appellate court dismissed the procedural argument that Governor Schwarzenegger was required to state that he had made a finding that circumstances described in the relevant California statute existed to warrant the emergency. Instead, “[i]ssuance of the [emergency] proclamation implies the governor has made the finding. Therefore, it is sufficient if the proclamation sets forth circumstances that support the implied finding.” *Schwarzenegger*, 163 Cal. App. 4th at 820; *see also Martin*, 148 Cal. App. 3d at 697 (stating no findings are required under the California emergency statute).

433. *See, e.g., Menotti v. City of Seattle*, 409 F.3d 1113, 1117–18 (9th Cir. 2005) (challenging the WTO no-protest zone and mass arrests but not the mayoral emergency declaration); First Amended Civil Rights Class Action Complaint for Damages and Injunctive and Declaratory Relief at 11, *Dundon v. Kirchmeier*, No. 16-cv-406 (D.N.D. Feb. 27, 2018) (challenging police’s use of water cannons and less than lethal weapons on water protectors in North Dakota but not the gubernatorial emergency declaration); *Franklin v. Missouri*, No. 4:15-cv-01283, 2016 WL 366799 (E.D. Mo. Jan. 29, 2016) (challenging police officer’s use of a “beanbag round” to shoot a Ferguson protestor in the eye but not the governor’s emergency declaration); Complaint at 1–14, *Devereaux v. County of Saint Louis*, No. 4:15-cv-00553-RWS (E.D. Mo. Mar. 30, 2015) (challenging police restrictions on press activity and aggressive arrests of journalists in Ferguson but not the gubernatorial emergency declaration); Complaint at 1–3, *Templeton v. Dotson*, No. 4:14-cv-2019 (E.D. Mo. Dec. 8, 2014) (challenging police use of chemical agents on Ferguson protestors but not the gubernatorial emergency declaration); Complaint at 1–2, *Abdullah v. County of Saint Louis*, 52 F. Supp. 3d 936 (E.D. Mo. 2014) (No. 4:14-cv-1436) (challenging the keep moving order in Ferguson but not the gubernatorial emergency declaration).

434. *See supra* Part II.

435. *See, e.g.,* Complaint at 1, 14–27, *Quraishi v. Saint Charles County*, No. 4:16-cv-01320-NAB (E.D. Mo. Aug. 15, 2016) (challenging police shooting at a journalist and police use of tear gas against media during the Ferguson protests prior to the gubernatorial emergency declaration); Complaint at 4–8, *Powers v. City of Ferguson*, No. 4:16-cv-01299 (E.D. Mo. Aug. 9, 2016) (challenging unlawful and retaliatory arrests in Ferguson prior to the gubernatorial emergency declaration); Complaint at 1–2, 5–6, *White v. Jackson*, No. 4:14-cv-01490 (E.D. Mo. Aug. 28, 2014) (challenging aggressive and unlawful arrests in Ferguson prior to the gubernatorial emergency declaration); Complaint at 1–5, *Hussein v. County of Saint Louis*, No. 4:14-cv-1410 (E.D. Mo. Aug. 18, 2014) (challenging police recording restrictions on media in Ferguson occurring prior to the gubernatorial emergency declaration).

As discussed in Part III, plaintiffs sought judicial relief in various cases alleging constitutional violations in the WTO, Ferguson, and North Dakota pipeline protests.⁴³⁶ Even where plaintiffs ultimately obtained beneficial rulings or injunctions, the relief did not sufficiently vindicate constitutional violations because it arrived too late or was ignored by officials. In the largest WTO litigation—the *Menotti* case—175 protestors received a settlement, but it was not until seven years after their unconstitutional arrest.⁴³⁷ Ferguson examples include the challenges to the “keep moving” practice where the court granted an injunction about two months after police engaged in the practice,⁴³⁸ and challenges to police use of tear gas against protestors which occurred for five months before the court issued a temporary restraining order against the practice.⁴³⁹ The main lawsuit challenging aggressive government response to pipeline protests, *Dundon v. Kirchmeier*, was filed in late 2016 and the resolution is still unclear, as litigation is pending.⁴⁴⁰ As the preceding litigation demonstrates, even where a court does intervene to stop constitutional rights abuses, there is a timeliness problem. The court does not respond in real time to piecemeal challenges of emergency practices and orders. There are delays associated with the filings of pleadings, obtaining a hearing, and a judge rendering a decision. During these delays, the potentially unconstitutional government activity and resulting abuses continue.

Plaintiffs can also bring actions for constitutional rights violations against governments and state officials acting under color of law pursuant to 42 U.S.C. § 1983.⁴⁴¹ However, expansive immunity principles allow

436. See *supra* Part III.

437. Young, *supra* note 256. Three plaintiffs in the *Menotti* matter received settlements about a year after the WTO and withdrew from the lawsuit. See Stipulation & Order for Entry of Partial Judgment in Favor of Plaintiffs Russell, Holloway and Matyjas, *Menotti v. City of Seattle*, 409 F.3d 1113 (W.D. Wash. Nov. 7, 2000) (No. 2:00-cv-372-BJR).

438. See *Abdullah v. County of Saint Louis*, 52 F. Supp. 3d 936 (E.D. Mo. 2014).

439. The DOJ report documented and discussed the improper use of tear gas against protestors beginning on August 10, 2014. DOJ FERGUSON REP., *supra* note 5, at xvi–xvii, 10–18, 26–29, 47–51. The *Templeton* complaint against police and the City was not filed until December 8, 2014. See Complaint at 1, *Templeton v. Dotson*, No. 4:14-cv-2019 (E.D. Mo. Dec. 8, 2014). The court issued the temporary restraining order on December 11, 2014. Temporary Restraining Order at 1, *Templeton*, No. 4:14-cv-2019 (E.D. Mo. Dec. 11, 2014).

440. See Civil Rights Class Action Complaint for Damages and Injunctive and Declaratory Relief at 2, *Dundon v. Kirchmeier*, No. 16-cv-406 (D.N.D. Nov. 28, 2016). The court did initially deny plaintiffs’ request for a restraining order, see Order Denying Plaintiffs’ Motion for Preliminary Injunction, *Dundon*, No. 16-cv-406 (D.N.D. Feb. 7, 2018), but plaintiffs filed an amended complaint highlighting that they were protesting on public land and the case is ongoing. See First Civil Rights Class Action Amended Complaint at 2, *Dundon*, No. 16-cv-406 (D.N.D. Feb. 27, 2018).

441. 42 U.S.C. § 1983 (2012).

certain defendants to escape liability. Under the doctrine of sovereign immunity, state governments cannot be sued unless they consent to it.⁴⁴² A state may waive sovereign immunity, which is determined by looking at that state's law.⁴⁴³ Thus, litigants will often be unable to assert tort claims against the state itself, or those claims may be dismissed by the court due to sovereign immunity.⁴⁴⁴ State officials are also protected from Section 1983 liability by qualified immunity, which serves as expansive protection since it applies when the court determines that the official's behavior is not in violation of a "clearly established statutory or constitutional right[]" that he should have known.⁴⁴⁵ For example, Fourth Amendment excessive force cases against police officers are quite complicated. Judges often rule that these claims cannot proceed to trial because of expansive qualified immunity principles which establish that police cannot be sued for using unconstitutional excessive force if an officer could reasonably misunderstand the constitutional boundary.⁴⁴⁶ Because judges must look at excessive force claims in a factually specific and highly "particularized" manner,⁴⁴⁷ victims of unconstitutional excessive force claims must point to a preceding case where a court has ruled factually similar police conduct unconstitutional, or the officer will escape litigation.⁴⁴⁸ Section 1983 lawsuits claiming that police unlawfully arrested protestors in violation of the Fourth Amendment are also challenging because in most federal circuits qualified immunity will shield officers that courts find had arguable probable cause to arrest, even when the officers were actually mistaken.⁴⁴⁹ Finally, when litigants allege that their First Amendment rights were violated by an unlawful arrest in retaliation for speech, courts will find an officer immune from suit if there

442. See U.S. CONST. amend. XI; *Hans v. State of Louisiana*, 134 U.S. 1 (1890).

443. *Hans*, 134 U.S. at 16–21.

444. See, e.g., Opinion, Memorandum & Order at 7, 9, *Franklin v. State of Missouri*, No. 4:15-cv-1283 (E.D. Mo. Jan. 29, 2016).

445. *Harlow v. Fitzgerald*, 457 U.S. 800, 816–18 (1982); see *Malley v. Briggs*, 475 U.S. 335 (1986); see also *Wood v. Moss*, 572 U.S. 744, 757–61 (2013) (querying whether Secret Services officers should have known that the perimeter that they established for the presidential motorcade clearly violated activists' First Amendment rights, before concluding that federal officers had qualified immunity from *Bivens* suit for constitutional violations).

446. See *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

447. *Id.* at 198–99.

448. See Avidan Y. Cover, *Reconstructing the Right Against Excessive Force*, 68 FLA. L. REV. 1773, 1791–93 (2016).

449. Tal J. Lifshitz, "Arguable Probable Cause": An Unwarranted Approach to Qualified Immunity, 65 U. MIAMI L. REV. 1159, 1178–1180 (2011) (stating that courts in the "First, Second, Fifth, Seventh, Eighth, Tenth and . . . Eleventh Circuit[s] have embraced the 'arguable' language in their qualified immunity analyses").

is arguable probable cause that justifies the arrest.⁴⁵⁰ In *Menotti v. City of Seattle*, the district court initially granted several officers qualified immunity on First and Fourth Amendment claims, which the Ninth Circuit ultimately reversed, allowing the case to proceed to trial against police officer defendants.⁴⁵¹ In *Dundon v. Kirchmeier*, defendants in North Dakota have argued in their pending motions to dismiss that police officers “are entitled to qualified immunity as any right allegedly violated was not so clearly established at the time of the violation that a reasonable officer would have known that his actions were unlawful.”⁴⁵²

C. Devising a More Protective Mechanism to Check the Executive’s Power in Response to Protest

The three case narratives demonstrate that when protest is the crisis, the emergency declaration provokes and justifies violations of protestors’ First and Fourth Amendment rights. The best solution would be to for the courts to apply more exacting review than good faith to executive emergency declarations and orders invoked in response to protests. This would recognize the fundamental place that political protests have in American democratic society. To quote Justice Brandeis again,

Those who won our . . . revolution were not cowards. . . . They did not exalt order at the cost of liberty. . . . Only an emergency can justify repression [of speech]. . . . The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State. Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly.⁴⁵³

However, the assurance that speech and assembly will not be abridged during vigorous protest is an empty promise when an executive has unrestrained authority to declare an emergency, and his decision faces minimal judicial scrutiny. A more appropriate judicial assessment would subject the executive’s emergency declaration when enacted during mass protests to heightened review. Courts would evaluate the circumstances on these grounds, analyze any factual support the executive cites in his

450. Katherine Grace Howard, *You Have the Right to Free Speech: Retaliatory Arrests and the Pretext of Probable Cause*, 51 GA. L. REV. 607, 621–22 (2017).

451. *Menotti v. City of Seattle*, 409 F.3d 1113, 1119, 1151–57 (9th Cir. 2005).

452. Memorandum of Law in Support of Defendants Kyle Kirchmeier, Morton Cty., City of Mandan, Jason Ziegler, Stutsman Cty., and Chad Kaiser’s Second Motion to Dismiss at 1, 20–30, *Dundon v. Kirchmeier*, No. 16-cv-406 (D.N.D. Apr. 6, 2018); see also Memorandum of Law in Support of Defendants Kyle Kirchmeier, Morton Cty., City of Mandan, Jason Ziegler, Stutsman Cty., and Chad Kaiser’s Motion to Dismiss, *Dundon*, No. 16-cv-406 (D.N.D. Feb. 6, 2017).

453. *Whitney v. California*, 274 U.S. 357, 377–78 (1927) (Brandeis, J., concurring).

declaration, inquire whether there is an impending threat to the state, and examine whether there are more narrowly tailored means to control the threat than an emergency declaration. This review would prove more protective of protest activity than a lax good faith standard.

State and local government executives will have objections to this mechanism. They may cite separation of powers concerns; however, emergency declarations are not currently immune from judicial review. Thus, the precedent supports courts evaluating the executive's actions. It is a fair assertion that the courts' review of these orders has been highly deferential because of judges' concerns about the need for immediate action and the perceived unfairness of evaluating the governors' actions in hindsight.⁴⁵⁴ I am not suggesting that state and local executives obtain judicial approval before making an emergency declaration. The Sixth Circuit has already rejected the proposition of a judicial prior restraint of a governor's ability to declare an emergency.⁴⁵⁵ Furthermore, the exigencies may demand a quicker response than a court can provide.⁴⁵⁶ Still, individuals should be able find pertinent recourse within the courts for overbroad emergency declarations that suppress their ability to protest.

This heightened judicial review would help protect the rights of demonstrators when the protest is the purported emergency. However, it is not enough. As my discussion of the events in Ferguson demonstrates, executives and first responders sometimes react immediately in aggressive crisis mode when the prospect of an emergency declaration looms.⁴⁵⁷ Law enforcement feed the information loop and can shape top executive and emergency management officers' understanding of the nature of protests and protestors, thus making an emergency declaration a certainty.⁴⁵⁸ The governor (or mayor) must tune in and obtain guidance from individuals whose focus is the protection of protest activity. I propose a council that will advise the executive on how to more fairly respond to protests in a manner that is protective of the individual liberties of protestors. Chief executives and emergency officials will wield their authority more judiciously with the counsel of relevant experts. Thus, the emergency advisory council should convene whenever a jurisdiction's executives and emergency management personnel respond to mass protests.

454. See *Sterling v. Constantin*, 287 U.S. 378 (1932); *Moyer v. Peabody*, 212 U.S. 78 (1909); *United States v. Chalk*, 441 F.2d 1277, 1282 (4th Cir. 1971).

455. See *Morgan v. Rhodes*, 456 F.2d 608, 610 (6th Cir. 1972), *rev'd on other grounds by Gillian v. Morgan*, 413 U.S. 1 (1973).

456. *Smith v. Avino*, 866 F. Supp. 1399, 1404 (S.D. Fla. 1994) (stating that "dealing with . . . an emergency situation requires an immediacy of action that is not possible for judges" (quoting *United States v. Chalk*, 441 F.2d 1277, 1281 (4th Cir. 1971))).

457. See *supra* Part III.

458. See *supra* Part II.

The main duty of this council would be to advise the chief executive and engage with emergency management personnel on the handling of a perceived crisis associated with public protests, with a particular emphasis of protecting First and Fourth Amendment rights. This duty should dictate the protest council membership in terms of numbers and expertise. Because the council must be able to respond quickly and fairly to a perceived exigency, membership should cap at a small number, in addition to the top emergency management official. Any greater number would be unwieldy and hamper decision making. Regarding the council's expertise, members should be knowledgeable in areas of constitutional law, conflict management, policing, and cultural competence. Council members may include the following:

- Civil Rights Attorney⁴⁵⁹
- Police Representative (with special training in de-escalation, implicit bias, and cultural competence)⁴⁶⁰
- Social Media Expert⁴⁶¹

Missing from this list is an expert in negotiation and conflict resolution. This is a neutral individual not embroiled in the issue either from the government's or protestors' perspectives but with the skills to help these groups reach a peaceful resolution. My early research suggests

459. A civil rights attorney would advise on the constitutionality of proposed government emergency action. The DOJ Report on Ferguson concluded that legal counsel should be involved in the development of police procedures employed during protests to prevent infringement on individuals' constitutional rights. DOJ FERGUSON REP., *supra* note 5, at 125.

460. The DOJ Report on Ferguson highlighted that community discontent was spurred not only by the shooting, but also because of the already tense relationship between Ferguson police and the communities of color it policed; the Report recommended that police receive training on "procedural justice, implicit bias, [and] cultural diversity[.]" *Id.* at 116. The Report further found that police who directed the response to the Ferguson protests did not receive enough training on de-escalation and problem solving. *Id.* at 68. "[D]e-escalation techniques are designed to nonviolently resolve conflict that has already manifested." Brandon Garrett, *A Tactical Fourth Amendment*, 103 VA. L. REV. 211, 265 (2017). I suggest that police who receive this type of training are best suited for a position in the council.

461. In its Ferguson report, the DOJ concluded that the government did not use social media effectively. DOJ FERGUSON REP., *supra* note 5, at 97–104. The government can use social media in various ways, ranging from communication to surveillance. *See id.* After its assessment of the police response to the protests in Ferguson, Amnesty International recommended that police seek to communicate with protestors before and during protests to "create mutual understanding and prevent violence." AMNESTY INT'L FERGUSON REP., *supra* note 1, at 19. In this council, the social media expert would seek to communicate accurately with the community and protestors to manage and de-escalate the situation. Using social media for surveillance and other nefarious purposes would have the opposite effect of increasing distrust between community and protestors and the government.

that a conflict resolution specialist,⁴⁶² a community mediator,⁴⁶³ or a crisis negotiator⁴⁶⁴ could possess these skills. Also missing is a protest leader. This omission is due to the fact that council membership must be determined before any crisis so that the council can convene and act quickly. However, among the responsibilities of some of the experts—particularly the civil rights attorney and negotiator—council members should be seeking out engagement from these individuals either by having them sit on the council or communicating their perspectives.

To provide for the best possible action, the council should establish appropriate protocols and structures to respond before any crisis associated with public protest. The council might agree on what factors must be present before taking emergency action, how to tailor the action to protect constitutional liberties, degree of threats, necessary training, drills, etc.

An open question is how this council would come into effect. At the state level, a governor might recognize the benefits of receiving this expert advice and choose to voluntarily institute the council. A politically savvy executive could foresee as a benefit the fact that the council may provide political cover when engaging in a controversial emergency action. Although this is a risk, the benefit of exerting influence on the form and manner of emergency action might be worth it.

Nevertheless, a problem with a council that is voluntarily instituted by the executive may be that the council may not be able to bind the governor or mayor. Also, a successor unwilling to share executive emergency power might dismantle the council. Thus, to create a permanent body to effectively check on the chief executive's power, state legislatures should enact the council. Some may assert that separation of powers questions are associated with such legislative action. Nevertheless, in states where the executive already shares emergency authority with the legislature—because lawmakers can initiate, terminate, or need to approve continuation of the emergency—the existing structure of emergency power may suggest that there are no separation of powers concerns. In

462. See ASS'N FOR CONFLICT RESOLUTION, *Ethical Principles* (May 2010), <https://acnet.org/page/EthicalPrinciples> [<https://perma.cc/BQB4-Q2J9>].

463. See NAT'L ASS'N FOR CMTY. MEDIATION, *Purpose*, <https://www.nafcm.org/page/Purpose> [<https://perma.cc/U6TF-CNRE>].

464. See Jeff Thompson, *Hostage and Crisis Negotiators: Nonverbal Communication Basics*, PSYCHOL. TODAY (Aug. 13, 2013), <https://www.psychologytoday.com/us/blog/beyond-words/201308/hostage-crisis-negotiators-nonverbal-communication-basics> [<https://perma.cc/3CGJ-X644>]; see also Kerry Shaw, *I Was a Crisis Negotiator for 23 Years. Here's What It's Like to Talk Down an Armed Hostage Taker*, TRACE (Aug. 25, 2016), <https://www.thetrace.org/2016/08/crisis-negotiator-armed-hostage-taker/> [<https://perma.cc/LK6Q-59BD>].

addition, legislatively created councils already exist in multiple state jurisdictions.⁴⁶⁵ These councils provide policy advice to the governor related to certain natural disasters or hazardous waste.⁴⁶⁶ While the council I suggest is admittedly different because it would be engaged in guiding decision making during the perceived crisis—the protest—both the existence of statutorily enacted councils and the fact that lawmakers do possess emergency authority suggest that the conception of a protest council has a precedent. In any event, the granular separation of powers question is beyond the scope of the current paper.

CONCLUSION

Whether it is asylum seekers at the southern border or protestors on the city streets, the concept of emergency is malleable. At the state level, constitutions and statutes set no real parameters on what amounts to an emergency. This is dangerous for constitutional liberties when the emergency is mass public dissent. Moreover, emergency management mechanisms do not require a threshold legal emergency before authorities respond to a perceived crisis. Law enforcement can call in excess police from surrounding jurisdictions via mutual aid agreements, utilize military grade equipment and tactics against activists, and employ existing laws to effectuate arrest. Once the executive declares an emergency, it aggravates the use of oppressive police tactics and also expands executive power. State and local officials can institute a curfew, close public streets to dissent, arrest for failure to adhere to emergency orders, deviate from regular procedures and institute ad hoc rules, and call in the National Guard. When the protest is the emergency, the protest narratives demonstrate that the result is pervasive suppression of protest activity in violation of our constitutional rights and founding principles. A solution that serves to protect speech and assembly rights must occur on both judicial and executive fronts. First, government executives' responses to mass protests should be guided by an expert emergency council whose goals include protection of constitutional liberties and de-escalation. Second, courts should scrupulously scrutinize any emergency declared in response to protests. This prescription will better preserve the freedom to vigorously dissent while in search of our American ideals.

465. CRS REPORT SUMMARY, *supra* note 16, at CRS-4.

466. *Id.* at CRS-6 to CRS-8.