

WAR & THE CONSTITUTION: CHEMICAL AGENTS AND THE RIGHTS OF PROTESTORS

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*“I do solemnly swear . . . that I will support and defend the Constitution of the United States . . . and that I will well and faithfully discharge the duties of the office on which I am about to enter: So help me God.”*¹

*“[We]’re gonna start gassing people; start pepperballing. We’re not gonna mess around; they’re gonna move.”*²

TABLE OF CONTENTS

INTRODUCTION.....	784
I. BACKGROUND.....	787
A. <i>The “War on ___” Rhetoric</i>	787
1. How Congress Militarized the Police.....	788
2. Access to All of the “Toys” Without the Restrictions.....	789
B. <i>The Rules of [Real] War</i>	793
1. The Chemical Weapons Convention.....	793
2. For All Mankind, Except	794

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¹ *Oath of Office*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Oath_Office.htm [<https://perma.cc/Z359-ZCU2>].

² A declaration made by a SWAT Team Leader during a protest in Ferguson following the death of Michael Brown. First Amended Complaint at ¶ 26, *Quraishi v. St. Charles Cnty.*, No. 16-CV-01320, 2019 WL 2423321 (E.D. Mo. June 10, 2019).

C. <i>Chemical Weapons</i>	796
1. Toxic Romance: The U.S. & RCAs.....	796
2. Tear Gas Doesn't Just Make You Cry	797
II. ANALYSIS	798
A. <i>The Use of RCAs Is Antithetical to Individual Rights</i>	798
1. "Gas and Run": The First Amendment	800
2. I Can't Breathe: Excessive Force Under the Fourth & Fourteenth Amendments	803
3. I See Neon Green: Legal Observers, Journalists & Medics.....	806
III. PROPOSAL	809
A. <i>Resistance in the Courts: Why It Isn't Enough</i>	810
1. Case Study: <i>Black Lives Matter Seattle-King County v. City of Seattle</i>	811
B. <i>Enter Article I: How Congress Can Solve the Issue</i>	815
1. The Treaty-Making Power	815
2. In Pursuit of the General Welfare: The Spending Clause.....	816
3. Congress Giveth, Congress Can Taketh Away	818
CONCLUSION	821

INTRODUCTION

In the wake of the murder of George Floyd, citizens across America launched mass protests that were mirrored around the world.³ Civil society sought to bring attention to the systematic killing of Black and Brown individuals at the hands of police officers and to the lack of accountability that these tragic events have been met by.⁴ Angry,

³ Derrick Bryson Taylor, *George Floyd Protests: A Timeline*, N.Y. TIMES (Nov. 5, 2021), <https://www.nytimes.com/article/george-floyd-protests-timeline.html> [https://perma.cc/7JE9-76G7]; Alessio Dellanna & Alasdair Sandford, "No to Racism!": *Statutes Targeted as George Floyd Anti-Racism Protests Spread Across Europe*, EURONEWS (Aug. 6, 2020), <https://www.euronews.com/2020/06/07/no-to-racism-protests-after-george-floyd-killing-spread-across-europe> [https://perma.cc/YSJ4-SWCF]. The Minneapolis police officer who caused George Floyd's death—by kneeling on his neck for over nine minutes during an arrest—was convicted of second-degree murder and received a twenty-two-and-a-half-year sentence. *State v. Chauvin*, No. 27-CR-20-12646, 2021 WL 2621001, at *10 (Minn. Dist. Ct. June 25, 2021).

⁴ *Race and Policing*, N.Y. TIMES, <https://www.nytimes.com/news-event/george-floyd-protests-minneapolis-new-york-los-angeles> [https://perma.cc/K3QH-TLZ8]; Complaint at

frustrated, and feeling defeated, protestors took to the streets to chant “Black Lives Matter,” “no justice, no peace,” and “defund the police.”⁵ In response, police departments met these largely peaceful denunciations of police brutality with the very force being protested.⁶ Departments responded with tear gas, pepper spray, rubber bullets, and mass arrests—making no distinction between rioters, peaceful protestors, medical staff, legal observers, or journalists.⁷

Unfortunately, this is not the first time there have been mass attempts to quell the First Amendment rights of citizens in America, particularly the rights of citizens from marginalized communities.⁸ From Ferguson to Standing Rock, back to the civil rights movement, American police departments have met the exercise of free speech by Black and Brown bodies with the use of force.⁹ Law enforcement agencies, equipped with military-grade gear, and the frequent calling in of the National Guard are increasingly turning the nation’s streets

¶¶ 1–10, *Black Lives Matter 5280 v. City & Cnty. of Denver*, 338 F.R.D. 506 (D. Colo. June 28, 2021) (No. 20-cv-01878); *Kadir Nelson’s “Say Their Names,”* NEW YORKER (June 14, 2020), <https://www.newyorker.com/culture/cover-story/cover-story-2020-06-22> [<https://perma.cc/9UZH-M4ZY>].

⁵ See *Race and Policing*, *supra* note 4; Associated Press, “*Defund the Police*”: *What the Protest Chant Means*, ALJAZEERA (June 8, 2020), <https://www.aljazeera.com/news/2020/6/8/defund-the-police-what-the-protest-chant-means> [<https://perma.cc/Q4ZM-UXRH>]; Carmen Baskauf, *Chants of “No Justice, No Peace” and No Traffic Moving on I-95*, NEW ENG. PUB. MEDIA (June 1, 2020), <https://www.nepm.org/post/chants-no-justice-no-peace-and-no-traffic-moving-i-95#stream/0> [<https://perma.cc/72EL-DBPS>].

⁶ Adam Gabbatt, *Protests About Police Brutality Are Met with Wave of Police Brutality Across US*, GUARDIAN (June 6, 2020, 4:00 PM), <https://www.theguardian.com/us-news/2020/jun/06/police-violence-protests-us-george-floyd> [<https://perma.cc/UDY9-UQAV>].

⁷ See (Second) Motion for Ord. to Show Cause Why City of Seattle Should Not Be Held in Contempt, *Black Lives Matter Seattle-King Cnty. v. City of Seattle*, 466 F. Supp. 3d 1206 (W.D. Wash. 2020) (No. 20-CV-00887) [hereinafter (Second) Motion for Contempt *BLM v. Seattle*]; Sydney Pereira, *Video: Cop Suspended Without Pay After Pepper-Spraying Bystander During Demonstrations*, GOTHAMIST (June 16, 2020, 7:04 PM), <https://gothamist.com/news/video-cop-suspended-without-pay-after-pepper-spraying-bystander-during-demonstrations> [<https://perma.cc/EBR8-WUAU>].

⁸ Eliav Liebllich & Adam Shinar, *The Case Against Police Militarization*, 23 MICH. J. RACE & L. 105, 144 (2018).

⁹ *Id.*; see also Molly Redden, *New Documents Show Pentagon Rubber-Stamping Police Requests for Military Gear*, HUFFPOST (Aug. 2, 2021, 1:15 PM), https://www.huffpost.com/entry/militarized-police-reform-joe-biden_n_6101967be4b000b997dd9429 [<https://perma.cc/YL45-XBPS>]; Katie Nodjimbadem, *The Long, Painful History of Police Brutality in the U.S.*, SMITHSONIAN MAG. (May 29, 2020), <https://www.smithsonianmag.com/smithsonian-institution/long-painful-history-police-brutality-in-the-us-180964098> [<https://perma.cc/N2UK-LYKP>].

during protests into something that resembles a battleground.¹⁰ Yet, in actual armed conflict, under the laws of war, the United States military is prohibited from using chemical weapons and riot control agents (RCAs) against enemy combatants.¹¹ So why are police officers allowed to use them against our own nationals outside of armed conflict?

The use of chemical agents during demonstrations has a chilling effect on free speech that disproportionately affects minority communities. As such, Congress should pass a statute prohibiting law enforcement from using RCAs against protestors and creating special protections for neutral individuals such as medical aides, journalists, and legal observers.¹² Alternatively, states should take it upon themselves to pass legislation to the same effect, given the federalism concerns raised by this Note's proposal.¹³

Part I of this Note details the history of the increased militarization of American police forces, the protections offered by the laws of war that the police are not bound by despite their growing paramilitary nature, and the harm caused by chemical agents.¹⁴ Part II analyzes how the disparity between the laws of war and domestic laws leaves those seeking to exercise their right to dissent vulnerable to First, Fourth, and Fourteenth Amendment violations.¹⁵ Part III proposes how legislators can tackle this pressing issue.¹⁶

¹⁰ Loan K. Le & Maitria Moua, *Civilian Oversight and Developments in Less Lethal Technologies: Weighing Risks and Prioritizing Accountability in Domestic Law Enforcement*, 14 SEATTLE J. SOC. JUST. 101, 102 (2015); Chelsey Cox, *Fact Check: National Guard Was Activated Most Often During the Civil Rights Era*, USA TODAY (June 17, 2020, 3:23 PM), <https://www.usatoday.com/story/news/factcheck/2020/06/14/fact-check-national-guard-activated-16-times-us/5319853002> [<https://perma.cc/XM2B-EARV>] (providing a list of incidents during which the National Guard has been called, at least nine of which pertain to periods of civil unrest).

¹¹ Chemical Weapons Convention, Jan. 13, 1993, S. TREATY DOC. NO. 103-21 [hereinafter CWC].

¹² "Neutral" here does not distinguish between peaceful protestors and those accused of rioting. This term is meant to distinguish between individuals actively partaking in the demonstration and those present as bystanders, only partaking in acts such as offering aid to injured individuals or documenting the events.

¹³ Cf. Melanie Trimble & Frank Donegan, *Albany Squanders an Opportunity to Ban Chemical Weapons*, NYCLU (Sept. 20, 2021, 4:15 PM), <https://www.nyclu.org/en/news/albany-squanders-opportunity-ban-chemical-weapons> [<https://perma.cc/WVF6-UCWY>]; see *infra* Part III.

¹⁴ See *infra* Part I.

¹⁵ See *infra* Part II.

¹⁶ See *infra* Part III.

I. BACKGROUND

A. *The “War on ____” Rhetoric*

Congress has historically enacted protections against the use of military forces in civilian law enforcement.¹⁷ However, the spirit of existing protections has increasingly been circumvented through a number of loopholes.¹⁸ For example, states have the ability to call upon the National Guard after declaring a state of emergency,¹⁹ the federal government has the ability to deputize certain federal agents to “protect federal property” during demonstrations,²⁰ and local police departments have increasingly gained access to military-grade weapons.²¹ While the former two acts—invoking the National Guard and deputizing federal agents—present their own constitutional

¹⁷ See, e.g., 18 U.S.C. § 1385; CONG. RSCH. SERV., R42659, THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW (2018) (detailing the Posse Comitatus Act of 1878, which prohibits the federal government from calling upon the U.S. army to execute state laws—absent an express authorization by an act of Congress or the Constitution).

¹⁸ See *infra* notes 19, 21 and accompanying text.

¹⁹ For example, in 2016, North Dakota Governor Jack Dalrymple declared a state of emergency and called upon the National Guard following protests by the Standing Rock Sioux Tribe—750 individuals were arrested. See Karen J. Pita Loor, *When Protest Is the Disaster: Constitutional Implications of State and Local Emergency Power*, 43 SEATTLE U. L. REV. 1, 9–10 (2019).

²⁰ 40 U.S.C. § 1315. During the demonstrations in Portland in the summer of 2020, the U.S. Marshals Services deputized U.S. Customs and Border Protection (CPB) agents to protect the federal courthouse against the will of the local government. The CPB agents allegedly failed to display identification during the demonstrations and were documented taking civilians off the streets and forcing them into unmarked vans. The agents were also documented indiscriminately beating and gassing protestors and journalists—at times, blocks from the federal courthouse they were deputized to protect. The State of Oregon sued the U.S. Department of Homeland Security (DHS) and the Department of Justice (DOJ) for the act. See Gillian Flaccus, *Portland Sues Over Use of Federal Agents at Protests*, REG. GUARD (Oct. 16, 2020, 6:30 AM), <https://www.registerguard.com/story/news/2020/10/16/portland-sues-over-use-federal-agents-protests/3672595001> [<https://perma.cc/5936-7MHC>]; Press Release, Or. Dep’t of Just., Att’y Gen. Rosenblum Files Lawsuit Against U.S. Homeland Sec.; Announces Crim. Investigation (July 17, 2020), <https://www.doj.state.or.us/media-home/news-media-releases/attorney-general-rosenblum-files-lawsuit-against-u-s-homeland-security-announces-criminal-investigation> [<https://perma.cc/G8E2-5G6F>]; Plaintiff’s Notice of Voluntary Dismissal, *Rosenblum v. John Does* 1–10, No. 20-cv-01161 (D. Or. July 17, 2020) (voluntarily dismissed on Sept. 16, 2020 because “defendant agencies . . . evidently ceased the conduct at issue in the Complaint”); Jonathan Levinson, Conrad Wilson, James Doubek & Suzanne Nuyen, *Federal Officers Use Unmarked Vehicles to Grab People in Portland, DHS Confirms*, NPR (July 17, 2020, 1:04 PM), <https://www.npr.org/2020/07/17/892277592/federal-officers-use-unmarked-vehicles-to-grab-protesters-in-portland> [<https://perma.cc/QEU5-YFA8>].

²¹ See *infra* Section I.A.1.

challenges to the right to dissent,²² this Note mainly focuses on the increased militarization of state police.²³

1. How Congress Militarized the Police

The growing parallel between American soldiers and state police has been caused by a number of congressional acts and federal programs that began in 1990.²⁴ In 1990, Section 1208 of the National Defense Authorization Act paved the way for local police departments to gain access to the Department of Defense's (DOD) surplus military equipment.²⁵ In fact, the DOD has transferred over \$4.3 billion of property to state police since 1997 under the rationale of preparing the departments for the "war on drugs" and the "war on terror."²⁶ The \$4.3 billion has been distributed among more than seventeen thousand federal and state law enforcement agencies across the United States.²⁷

²² Following the historical pattern of treating protests by marginalized groups as national emergencies, the National Guard has been called by twenty-three states since Mr. Floyd's murder. Kevin Mott, *What Police Can Learn from a Former Infantry Marine About De-escalation*, USA TODAY (June 18, 2020, 9:09 PM), <https://www.usatoday.com/story/opinion/policing/2020/06/18/what-police-can-learn-former-infantry-marine-deescalation-column/3206857001> [<https://perma.cc/G982-H6DB>]. The cities of Portland and Oakland sued the DOJ and DHS for their "unilateral[], unlawful[], and unconstitutional[] . . . policy that authorized the deployment and operation of federal agents in United States cities," and "commandeer[ed] control of local law enforcement officers . . . without the consent, request, or authorization from the states or local leaders," during Operations Legend and Diligent Valor. Complaint at ¶¶ 3–9, *City of Portland v. Barr*, No. 20-cv-7184 (N.D. Cal. Oct. 14, 2020); Complaint, *Nw. Ctr. for Alts. to Pesticides v. U.S. Dep't of Homeland Sec.*, No. 20-cv-1816 (D. Or. Oct. 20, 2020); Complaint, *Don't Shoot Portland v. Wolf*, No. 20-cv-02040 (D.D.C. July 27, 2020); Complaint, *Black Lives Matter D.C. v. Trump*, No. 20-cv-01469 (D.D.C. June 4, 2020).

²³ See *infra* Section I.A.1.

²⁴ See *infra* notes 25–30; 10 U.S.C. § 2576a.

²⁵ National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 1208, 103 Stat. 1352, 1566 (1989).

²⁶ Emmanuel Hiram Arnaud, Note, *The Dismantling of Dissent: Militarization and the Right to Peaceably Assemble*, 101 CORNELL L. REV. 777, 801–03 (2016); Lieblich & Shinar, *supra* note 8, at 119 (marking the total at over five billion dollars); Christopher Ingraham, *The Pentagon Gave Nearly Half a Billion Dollars of Military Gear to Local Law Enforcement Last Year*, WASH. POST (Aug. 14, 2014, 11:56 AM), <https://www.washingtonpost.com/news/wonk/wp/2014/08/14/the-pentagon-gave-nearly-half-a-billion-dollars-of-military-gear-to-local-law-enforcement-last-year> [<https://perma.cc/27RD-3D7Q>] ("Part of the thinking behind the 1033 program was that if law enforcement personnel were waging a drug war, they should be outfitted like warriors.").

²⁷ KARA DANSKY, ACLU, WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 24 (2014), <https://www.aclu.org/report/war-comes-home-excessive-militarization-american-police> [<https://perma.cc/R7C9-2ZAE>].

Other agencies, such as the U.S. Defense Logistics Agency Disposition Services,²⁸ also issued half-a-billion dollars worth of property to local departments through the DOD's 1033 program in 2013 alone.²⁹ Another program, 1122, also allows departments to obtain DOD equipment at subsidized rates.³⁰ Under the 1033 and the 1122 programs, local police departments have gained access to "humvees, mine-resistant ambush-protected (MRAP) vehicles, aircraft[s] . . . , sniper scopes and M-16s."³¹ Essentially, our police departments have gained the ability to walk (or roll) around American streets in the gear the U.S. military used in war-torn zones like Afghanistan.³² As a predictable—but deeply troubling—result, the use of militarized police units has become the normalized response to prolonged periods of protest.³³

2. Access to All of the "Toys" Without the Restrictions

Access to the DOD's gear has caused many police officers to lose sight of their roles as public servants who are tasked with protecting public safety, rather than as soldiers who are tasked with exerting dominance and control and neutralizing combatants.³⁴ Evidence suggests that the mere availability of militarized weapons incentivizes

²⁸ Lieblich & Shinar, *supra* note 8, at 119.

²⁹ See National Defense Authorization Act for Fiscal Year 1997, Pub. L. 104-201, § 1033, 110 Stat. 2422, 2639 (1996); Le & Moua, *supra* note 10, at 101-02; DANSKY, *supra* note 27, at 16. The 1033 program is named after the section of the act that authorizes it.

³⁰ National Defense Authorization Act for Fiscal Year 1994, Pub. L. 103-160, § 1122, 107 Stat. 1547, 1754 (1993); Lieblich & Shinar, *supra* note 8, at 118-19. Like the 1033 program, the 1122 program is also named after the section of the act that authorizes it.

³¹ Arnaud, *supra* note 26, at 804; see Ingraham, *supra* note 26; Nick Gillespie, *Police in Columbia, South Carolina and 499 Other Cities Get "Free" Tanks*, REASON (Nov. 18, 2013, 9:05 AM), <https://reason.com/2013/11/18/police-in-columbia-south-carolina-and-49> [<https://perma.cc/9XQH-HEEM>] (noting that, by 2013, at least five hundred agencies were in possession of Mine-Resistant Ambush Protected (MRAP) vehicles); Redden, *supra* note 9. With the 1033 program, the process of obtaining a tank that may later be used during a protest is as easy as ordering a pair of shoes: simply fill out a one-page request form and arrange for pickup or wait for delivery within fourteen days. See Ingraham, *supra* note 26.

³² Noticeably, as the United States has withdrawn troops from Afghanistan and Iraq there has been a sharp increase in the amount of gear transferred to local police agencies. Lieblich & Shinar, *supra* note 8, at 119.

³³ Arnaud, *supra* note 26, at 778; Lieblich & Shinar, *supra* note 8, at 128-29.

³⁴ See Lieblich & Shinar, *supra* note 8, at 132 ("Police chiefs have also reported that outfitting police in battle uniforms creates a mindset that 'you're a soldier at war.' In a sense, the presumption of threat is a necessary byproduct of military training of police."); Le & Moua, *supra* note 10, at 103 ("[A] new era of American policing, where cops increasingly see themselves as soldiers occupying enemy territory . . .").

their use in situations that do not call for their level of force.³⁵ The lack of significant public oversight of the grant programs that have given birth to the phenomena, and the lack of substantial requirements from the agencies that receive the grants, have further exacerbated the potential for the abuse or misuse of the weapons.³⁶ While police departments are reportedly prohibited from selling the equipment and are asked to maintain records of any equipment transfers,³⁷ the DOD is not required to report the impact or the effectiveness of transferring military equipment to local law enforcement to Congress.³⁸

In 2015, in an ongoing effort toward reform, the Ferguson Commission criticized the police response to the protests that followed Michael Brown's death.³⁹ The Commission recommended that "the state . . . cease providing, and local departments . . . cease using, militarized weaponry that does not align with a use of force continuum that authorizes only the minimal amount of force necessary."⁴⁰ Nonetheless, little improvement has been made in the area.⁴¹ Following

³⁵ See Lieblich & Shinar, *supra* note 8, at 111. There is evidence that law enforcement agencies that use military equipment are more likely to display violence or even kill the civilians they are supposed to protect. See DANSKY, *supra* note 27, at 18 ("The ACLU found . . . the use of paramilitary policing teams[] escalates the risk of violence, threatens individual liberties, and unfairly impacts people of color."). See generally Casey Delehanty, Jack Mewhirter, Ryan Welch & Jason Wilks, *Militarization and Police Violence: The Case of the 1033 Program*, RSCH. & POL., Apr.–June 2017.

³⁶ DANSKY, *supra* note 27, at 5 ("Agencies that monitor and provide oversight over the militarization of policing are virtually nonexistent."); see also Brian Barrett, *The Pentagon's Hand-Me-Downs Helped Militarize Police. Here's How*, WIRED (June 2, 2020, 4:54 PM), <https://www.wired.com/story/pentagon-hand-me-downs-militarize-police-1033-program> [<https://perma.cc/LM7A-XRVD>] ("That seemingly lax oversight has manifested in other troubling ways, as well. In a 2017 sting operation, the General Accountability Office obtained over 100 controlled items from the 1033 program . . . All it took was the creation of a fake law enforcement agency, website, and shipping address. The GAO's fraudulent application was processed and approved within a week.")

³⁷ DANSKY, *supra* note 27, at 29. Program 1033 also requires that the equipment be used within a year of being acquired, further incentivizing its extensive use rather than encouraging the police to reserve the equipment for unusual circumstances that require its prowess. *Id.* at 16.

³⁸ *Id.* at 30.

³⁹ See FERGUSON COMM'N, FORWARD THROUGH FERGUSON: A PATH TOWARD RACIAL EQUALITY 30 (2015), https://3680or2khmk3bzpk33juiea1-wpengine.netdna-ssl.com/wp-content/uploads/2015/09/101415_FergusonCommissionReport.pdf [<https://perma.cc/DF6A-94RV>]; Lieblich & Shinar, *supra* note 8, at 123.

⁴⁰ FERGUSON COMM'N, *supra* note 39, at 65; see Lieblich & Shinar, *supra* note 8, at 123.

⁴¹ See, e.g., Barrett, *supra* note 36 (describing the militarized responses that are still occurring in 2020 and displaying an image of the Miami police monitoring protestors from an armed vehicle); Michael Leo Owens, Tom Clark & Adam Glynn, *Where Do Police Departments Get Their*

the Commission's recommendations, President Barack Obama issued Executive Order 13688, creating a working group that would oversee the weapons being supplied to local agencies, the weapons' use, and the training of agents who received them.⁴² The working group created a list of weapons that it believed should not be supplied to local agencies given the weapons' militaristic nature and the propensity for their overuse and misuse.⁴³ Nevertheless, Obama's order was plagued with loopholes and proved an insufficient remedy to deal with the problem.⁴⁴ More importantly, any success the executive order may have had in curbing the use and acquisition of military-style weapons by local police agencies was short-lived—the order was repealed by former President Donald J. Trump in 2017 via Executive Order 13809.⁴⁵

The absence of guidelines is further reflected by the lack of parallel between the restrictions faced by the American military in combat and those faced by our police departments in domestic law enforcement. Despite increasingly obtaining military-level capabilities, our police departments have not altered their rules of engagement to match the rising level of force they are capable of exerting.⁴⁶ Furthermore, while police departments have gained access to military weapons, they have not concurrently been held to the same standards or trained to the same degree as the military.⁴⁷ For example, the armed forces have very precise regulations regarding the use of force, de-escalation, and who can legally be targeted.⁴⁸ Moreover, the armed forces must strictly adhere to

Military-Style Gear? Here's What We Don't Know, WASH. POST (July 20, 2020), <https://www.washingtonpost.com/politics/2020/07/20/where-do-police-departments-get-their-military-style-gear-heres-what-we-dont-know> [https://perma.cc/AZK4-24AG] (noting that in 2020, 160 police departments possessed armored vehicles, including MRAPs).

⁴² Lieblich & Shinar, *supra* note 8, at 124; Exec. Order No. 13688, 3 C.F.R. § 13688 (2015).

⁴³ See Lieblich & Shinar, *supra* note 8, at 124; LAW ENFORCEMENT EQUIPMENT WORKING GROUP, RECOMMENDATIONS PURSUANT TO EXECUTIVE ORDER 13688: FEDERAL SUPPORT FOR LOCAL LAW ENFORCEMENT EQUIPMENT ACQUISITION 11–13 (2015).

⁴⁴ See Lieblich & Shinar, *supra* note 8, at 125. See generally Exec. Order No. 13688, 3 C.F.R. § 13688 (2015).

⁴⁵ See Exec. Order No. 13809, 82 Fed. Reg. 41499 (Aug. 28, 2017); Lieblich & Shinar, *supra* note 8, at 125. House Democrats have introduced bills to end the 1033 program, but President Biden has not signed them. Redden, *supra* note 9.

⁴⁶ See Lieblich & Shinar, *supra* note 8, at 110.

⁴⁷ See Mott, *supra* note 22; Timothy Williams, *Long Taught to Use Force, Police Warily Learn to De-escalate*, N.Y. TIMES (June 27, 2015), <https://www.nytimes.com/2015/06/28/us/long-taught-to-use-force-police-warily-learn-to-de-escalate.html> [https://perma.cc/L9XH-VFDB]. A survey of 281 police agencies found that, on average, police officers receive far less training on de-escalation than on firearms—eight hours to fifty-eight hours respectively. *Id.*

⁴⁸ See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva

the laws of war, which police departments are not bound by.⁴⁹ If our police departments are going to confront dissent in full armored gear, reflecting an intrinsically problematic perspective that facing protestors critical of the police resembles going out to battle,⁵⁰ should they not be held to the same standards as the military? Should nationals in peace time not, at the bare minimum, receive the same protections civilians and combatants receive under the rules of “real” war?⁵¹

Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31. *See generally* OFF. OF GEN. COUNS., DEP’T OF DEF., DEPARTMENT OF DEFENSE LAW OF WAR MANUAL (2016) (discussing duties imposed by the laws of war).

⁴⁹ *See, e.g.*, CWC, *supra* note 11, art. II.

⁵⁰ The increased use of militarized police creates the presumption that protestors, often those in communities of color, are a threat and can only be met with military-grade force. Lieblich & Shinar, *supra* note 8, at 130; *see also* Karen J. Pita Loor, *Tear Gas + Water Hoses + Dispersal Orders: The Fourth Amendment Endorses Brutality in Protest Policing*, 100 B.U. L. REV. 817, 821 (2020) (“[L]aw enforcement officers [have a] predisposition to view people of color—and consequently activists of color—as threatening or dangerous.”). The deployment of forces capable of using extreme violence to demonstrations also sends out the message to protestors that the State deems them the enemy. Lieblich & Shinar, *supra* note 8, at 130.

⁵¹ *Cf.* Marissa J. Lang, *Federal Officials Stockpiled Munitions, Sought “Heat Ray” Device Before Clearing Lafayette Square, Whistleblower Says*, WASH. POST (Sept. 17, 2020, 2:54 PM), https://www.washingtonpost.com/local/dc-protest-lafayette-square/2020/09/16/ca0174e4-f788-11ea-89e3-4b9efa36dc64_story.html [https://perma.cc/GV35-ULSM]. The DOJ considered using a “heat ray” device on protestors at Lafayette Square in June of 2020. The device had been shelved due to humanitarian concerns in Iraq in the early 2000s and again in late 2018 when the Trump administration considered using it on migrants at the U.S.-Mexico border. *Id.*

B. *The Rules of [Real] War*⁵²

1. The Chemical Weapons Convention

In armed conflict, *jus in bello*, prohibits the use of riot control agents against combatants.⁵³ After the horrors of World War II, members of the international community gathered in an effort to restrain the use of chemical weapons in combat and created what came to be known as the Chemical Weapons Convention (CWC).⁵⁴ It would take almost a decade of treaty negotiations, but the convention finally opened for signatures in 1993 and entered into force in 1997.⁵⁵ Currently, 193 states are parties to the convention,⁵⁶ including the United States, which ratified the treaty on April 24, 1997, with a Senate vote of 74-26.⁵⁷ While the United States only ratified the CWC as a non-self-executing treaty,⁵⁸ Congress promptly implemented the convention through legislation.⁵⁹ In 1998, Congress passed 18 U.S.C. § 229—the language of which largely mirrors the CWC’s text.⁶⁰

⁵² I would like to further emphasize that while I am making an analogy in my comparison to the laws of armed conflict to highlight an illogical gap in civilian protection, I by no means think it is acceptable for our state to treat individuals exercising their constitutional right to dissent as enemies/combatants/domestic terrorists/insurgents or any variation of the term. Nor would I agree with any such rhetoric or perspective.

⁵³ *Jus in bello* is the body of law that regulates conduct in armed conflict. *What Are Jus Ad Bellum and Jus In Bello?*, INT’L COMM. OF THE RED CROSS (Jan. 22, 2015), <https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0> [<https://perma.cc/R3BR-MNBE>]; CWC, *supra* note 11, art. I, ¶ 5 (“Each State Party undertakes not to use riot control agents as a method of warfare.”). Riot control agents are defined as “[a]ny chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.” CWC, *supra* note 11, art II, ¶ 7.

⁵⁴ See generally CWC, *supra* note 11 (banning the use, development, and transfer of chemical weapons).

⁵⁵ *The Chemical Weapons Convention (CWC) at a Glance*, ARMS CONTROL ASS’N, <https://www.armscontrol.org/factsheets/cwcglance> [<https://perma.cc/EYS2-KDAT>].

⁵⁶ *Id.*

⁵⁷ *U.S. Ratification Timeline*, CHEM. WEAPONS CONVENTION ARCHIVE, <https://cwc.fas.org/us-ratification/us-ratification-timeline> [<https://perma.cc/4FTT-4HFF>].

⁵⁸ See *Medellín v. Texas*, 552 U.S. 491, 504–05 (2008) for a discussion of self-executing versus non-self-executing treaties.

⁵⁹ Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681 (codified at 18 U.S.C. §§ 229–229F; 22 U.S.C. §§ 6701–6771).

⁶⁰ 18 U.S.C. §§ 229–229F.

2. For All Mankind, Except . . .

“Determined for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons,”⁶¹ the CWC requires signatory parties to destroy a select list of weapons and to allow for inspections to ensure compliance.⁶² However, although the treaty opens with such a bold declaration, past its preamble, the CWC quickly fails to cover “all mankind” and to “exclude completely” the use of chemical weapons.⁶³ While the treaty-making body acknowledged the horrors of using chemical weapons against individuals in seeking to outlaw their use in war, the parties did not extend this protection domestically.⁶⁴ The CWC explicitly permits the use of riot control agents for law enforcement purposes.⁶⁵ Domestically, 18 U.S.C. § 229 mirrors the treaty. Section 229 outlaws the use and retention of chemical weapons by ordinary persons,⁶⁶ but exempts law enforcement from its restrictions.⁶⁷ The CWC furthermore does not require states to report their stock or use of RCAs for law enforcement purposes, wasting a great opportunity to create or retain some level of oversight over the practice.⁶⁸

⁶¹ CWC, *supra* note 11, at pmb1.

⁶² *Id.* art. I (“Each State Party to this Convention undertakes never under any circumstances: (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone; (b) To use chemical weapons; (c) To engage in any military preparations to use chemical weapons; (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.”); *Id.* Annex on Implementation and Verification § E.

⁶³ *Id.* at pmb1.

⁶⁴ *Id.* art. I, § 5 (“Each State Party undertakes not to use riot control agents as a method of warfare.”).

⁶⁵ *Id.* art. II, § 9(d) (“‘Purposes Not Prohibited Under this Convention’ means: (d) *Law enforcement* including domestic riot control purposes.” (emphasis added)).

⁶⁶ 18 U.S.C. § 229(a)(1) (prohibiting “any person knowingly—[]to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon”).

⁶⁷ *Id.* § 229(b)(1) (exempting “the retention, ownership, possession, transfer, or receipt of a chemical weapon by a department, agency, or other entity of the United States, or by a person described [below], pending destruction of the weapon”); *id.* § 229(b)(2)(A) (defining exempted persons as including “any person, including a member of the Armed Forces of the United States, who is authorized by law or by an appropriate officer of the United States to retain, own, possess, transfer, or receive the chemical weapon”); *id.* § 229F(7)(D) (“Purposes not prohibited by this chapter [include] . . . []law enforcement purposes. Any law enforcement purpose, including any domestic riot control purpose . . .”).

⁶⁸ Treasa Dunworth, *The Silent Killer: Toxic Chemicals for Law Enforcement and the Chemical Weapons Convention*, 10 N.Z. Y.B. INT’L L. 3, 23 (2012).

Although there are still open questions about the full scope of the law enforcement exception within the CWC,⁶⁹ experts largely agree that the CWC's language concerning RCAs and law enforcement was specifically designed to allow domestic police forces to continue their use of RCAs in crowd control uninterrupted.⁷⁰ In fact, in the transmittal package sent to Congress prior to the treaty's ratification, then-President Bill Clinton sought to make clear that law enforcement would continue to be permitted to use RCAs under the treaty.⁷¹ The U.S. Naval Handbook also adopted the exception.⁷² Essentially, the negotiating nation states exempted domestic police activities from the CWC, placing state sovereignty and the policing of their own territories above individual rights.⁷³ Whether it was strategic to exclude law enforcement in the treaty is beyond the scope of this Note, as there are questions regarding whether consensus could have been achieved among the drafting nations without such exceptions.⁷⁴ Nevertheless, the United States can always extend protections *above* those required by the treaty.⁷⁵ Domestically, the CWC, like the U.S. Constitution, can, and should, only serve as a floor to the full extent of rights guaranteed to individuals.⁷⁶

⁶⁹ *Id.* at 30.

⁷⁰ James D. Fry, *Gas Smells Awful: U.N. Forces, Riot-Control Agents, and the Chemical Weapons Convention*, 31 MICH. J. INT'L L. 475, 504 (2010).

⁷¹ U.S. GOV'T PRINTING OFF., MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING THE CONVENTION ON THE PROHIBITION OF DEVELOPMENT, PRODUCTION, STOCKPILING AND USE OF CHEMICAL WEAPONS AND ON THEIR DESTRUCTION, OPENED FOR SIGNATURE AND SIGNED BY THE UNITED STATES AT PARIS ON JANUARY 13, 1993, S. TREATY DOC. NO. 103-21, at 21 (1st Sess. 1993), https://www.cwc.gov/CWC%20Article_by_Article_Large.pdf [<https://perma.cc/2WEM-CF8B>] ("States Parties will still be allowed to use toxic chemicals for law enforcement."). Clinton similarly assured the Senate that "[o]ther peacetime uses of RCAs, such as normal peacekeeping operations [and] law enforcement operations . . . conducted outside such conflicts are unaffected by the Convention." 140 CONG. REC. 7635-02 (1994); Fry, *supra* note 70, at 505.

⁷² Fry, *supra* note 70, at 505; DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 10-3 (2007), [https://www.marines.mil/Portals/1/Publications/MCTP%2011-10B%20\(Formerly%20MCWP%205-12.1\).pdf?ver=2017-07-11-151548-683](https://www.marines.mil/Portals/1/Publications/MCTP%2011-10B%20(Formerly%20MCWP%205-12.1).pdf?ver=2017-07-11-151548-683) [<https://perma.cc/D2Z4-QLH4>].

⁷³ Fry, *supra* note 70, at 504.

⁷⁴ Dunworth, *supra* note 68, at 30.

⁷⁵ For example, the United States, while a party to the ICCPR, offers greater protections than the treaty in certain areas. 138 CONG. REC. S4781-01 (daily ed. Apr. 2, 1992) (filing a reservation stating that the United States Constitution permits fewer restrictions on—offers broader protections to—the freedom of expression than the ICCPR).

⁷⁶ For example, many states legalized same-sex marriage far before the Supreme Court recognized it as a constitutional right in *Obergefell v. Hodges*, 576 U.S. 644 (2015). Massachusetts became the first state to legalize same-sex marriage in 2003. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL

C. *Chemical Weapons*

1. Toxic Romance: The United States & RCAs

Unfortunately, the United States has a long history of wanting to hold on to the use of RCAs.⁷⁷ Before the creation of the CWC, the United States was a party to its predecessor, the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.⁷⁸ Even then, the United States resisted the treatment of tear gas as a chemical weapon.⁷⁹ In 1930, after finding a discrepancy in the French and English versions of the Protocol, the United States declared that the Protocol did not prohibit the use of tear gas, directly in opposition to the assertions of France, the United Kingdom, and eleven other nations.⁸⁰ Then–Secretary of State Dean Rusk asserted that the United States was not engaged in chemical warfare in Vietnam because tear gas was not prohibited by the 1925 Geneva Convention and did not constitute what was typically understood in reference to the “use of gas.”⁸¹ In 1969, the U.N. General Assembly sought to settle the matter through Resolution 2603A, which definitively declared that tear gas was included in the Protocol.⁸² It would consequently take fifty years for the United States

LAW 574 (20th ed. 2019). Over the next ten years, eleven other states would follow Massachusetts using legislation, court rulings, and statewide referendums. *United States v. Windsor*, 570 U.S. 744, 763–64 (2013).

⁷⁷ Exec. Order No. 11850, 40 Fed. Reg. 16187 (Apr. 10, 1975); 143 CONG. REC. S3643 (daily ed. Apr. 24, 1997) (stating that one of the Senate’s conditions for approving the CWC was for the President not to take any measures to alter or eliminate Exec. Order No. 11850).

⁷⁸ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65.

⁷⁹ National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, 119 Stat. 3136, 3468 (“It is the policy of the United States that riot control agents are not chemical weapons”); *U.S. Policy and Practice with Respect to the Use of Riot Control Agents by the U.S. Armed Forces: Hearing Before the Subcomm. on Readiness & Mgmt. Support of the Comm. on Armed Servs.*, 109th Cong. 6 (2006) (statement of Joseph A. Benkert, Acting Principal Deputy Assistant Secretary of Defense for International Security Policy).

⁸⁰ Fry, *supra* note 70, at 482–83.

⁸¹ *Id.* at 483–84.

⁸² *Id.* at 484.

to become a party to the Protocol—President Ford finally signed the treaty in 1975.⁸³

While the issues regarding the proper interpretation of the 1925 Geneva Convention were resolved, and the CWC did not leave room for such ambiguities, the dialogue between the United States and its counterparts in the intermediate period demonstrates the United States' long-standing resistance in acknowledging the harm caused by these chemical agents.⁸⁴ However, the U.S. view runs counter to the medical data.⁸⁵ Tear gas and other RCAs do not just make you cry; they have serious short- and long-term effects.⁸⁶

2. Tear Gas Doesn't Just Make You Cry

RCAs, rubber bullets, bean bag launchers, and the like, are often referred to as “non-lethal”⁸⁷ weapons, but this is a misnomer.⁸⁸ RCAs, which include tear gas (CN or chloroacetophenone gas), CS (2-chlorobenzylidene malononitrile) gas, pepper spray (OC or oleoresin capsicum), and other irritants that cause tears (lacrimators) or coughing and sneezing (sternutators),⁸⁹ are deployed in various forms including as bombs, spray tanks, and grenades.⁹⁰ Despite their unique attributes, all RCAs seek to cause pain to the nearby person's eyes, skin, mouth, lungs, and nose in an effort to subdue, incapacitate, and assert control over them.⁹¹ The Center for Disease Control notes that exposure to large doses of RCAs can lead to blindness, glaucoma, respiratory

⁸³ *Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Geneva Protocol)*, U.S. DEP'T OF STATE (Sept. 25, 2002), <https://2009-2017.state.gov/t/isn/4784.htm> [<https://perma.cc/88TR-UNSH>].

⁸⁴ Dunworth, *supra* note 68, at 12.

⁸⁵ See *infra* Section I.C.2.

⁸⁶ Fry, *supra* note 70, at 538 (“Even in healthy adults, RCAs can cause bronchospasms, chemical pneumonitis, pulmonary edema (fluid in the lungs), heart failure, hepatocellular damage, gastroenteritis with perforation (if ingested), and serious dermatitis Multiple exposures to RCAs can cause the formation of tumors, pulmonary disease, and reproductive problems. Furthermore, these agents often are used incorrectly, thus exacerbating their dangerous effects.”).

⁸⁷ U.S. DEP'T OF DEF., DIRECTIVE NO. 3000.03E, at 12 (2013) (defining non-lethal weapons as those “designed and primarily employed to incapacitate . . . while minimizing fatalities [and] permanent injury”).

⁸⁸ Fry, *supra* note 70, at 537.

⁸⁹ *Id.* at 480; Crystal N. Abbey, *Agents of Change: How Police and the Courts Misuse the Law to Silence Mass Protests*, 72 NAT'L LAWS. GUILD REV. 81, 86–87 (2015).

⁹⁰ U.S. MARINE CORPS, FLAME, RIOT CONTROL AGENT, AND HERBICIDE OPERATIONS B-1 (2003), <http://www.fas.org/irp/doddir/army/fm3-11-11-excerpt.pdf> [<https://perma.cc/Y3L3-UPNE>].

⁹¹ Fry, *supra* note 70, at 480; Abbey, *supra* note 89, at 87.

failure, and chemical burns to the throat and lungs.⁹² Additionally, the use of RCAs on particularly vulnerable populations, such as individuals with respiratory illnesses or pregnant women, can be especially dangerous,⁹³ possibly leading to miscarriages in the case of pregnant women.⁹⁴ Even the deployment of the agents themselves can be dangerous when improperly done.⁹⁵ An RCA projectile deployed from a grenade launcher can create shrapnel and can even penetrate wood.⁹⁶

II. ANALYSIS

A. *The Use of RCAs Is Antithetical to Individual Rights*

Beyond the serious health effects of RCAs, the use of RCAs against protestors is constitutionally problematic due to their inherent indiscriminate nature.⁹⁷ RCAs, once deployed, cannot be controlled and do not discriminate between rioters, peaceful protestors, and those who are merely bystanders⁹⁸—assuming that the officer deploying them

⁹² *Facts About Riot Control Agents Interim Document*, CDC, <https://emergency.cdc.gov/agent/riotcontrol/factsheet.asp> [<https://perma.cc/D7ZW-EDCQ>].

⁹³ GLOB. HUM. RTS. CLINIC, UNIV. OF CHI. SCH. OF L., DEFENDING DISSENT: TOWARDS STATE PRACTICES THAT PROTECT AND PROMOTE THE RIGHTS TO PROTEST 75 (2018), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1007&context=ihr> [<https://perma.cc/PGN3-23JU>]. The concern about the impact of the use of chemical agents on protesters during the COVID-19 pandemic led over 2,000 health professionals to sign a petition calling attention to these dangers. Open Letter Advocating for an Anti-Racist Public Health Response to Demonstrations Against Systemic Injustice Occurring During the COVID-19 Pandemic (2020) [<https://perma.cc/FW9L-9GSD>]; John Ryan, *Quit the Tear Gas, Doctors Tell Cops. It Might Exacerbate the Pandemic*, KUOW (June 4, 2020, 9:45 AM), <https://www.kuow.org/stories/disease-specialists-to-cops-stop-the-tear-gas> [<https://perma.cc/7Q68-64P8>]; Complaint at ¶ 64, *Abay v. City of Denver*, No. 20-cv-01616 (D. Colo. June 4, 2020) (“When one of the protesters who had been gassed began having an asthma attack, the protesters begged the police officers to call for medical attention. Instead the police officers laughed and said: ‘if you wanted to breathe, you should have stayed home tonight.’”).

⁹⁴ GLOB. HUM. RTS. CLINIC, *supra* note 93, at 75.

⁹⁵ Fry, *supra* note 70, at 545.

⁹⁶ U.S. MARINE CORPS, *supra* note 90, at B-1 to B-2. One of the named plaintiffs in the Water Protectors lawsuit reports suffering permanent injury to her eye after she was hit in the face by a tear gas canister. Complaint at 10–13, *Dundon v. Kirchmeier*, 2017 U.S. Dist. LEXIS 222696 (W.D. N.D. Feb. 7, 2017) (No. 16-cv-406), *aff’d*, 701 F. App’x 538 (8th Cir. 2017).

⁹⁷ Fry, *supra* note 70, at 543.

⁹⁸ Loor, *supra* note 19, at 31.

initially even attempted to do so.⁹⁹ As such, this Part explores why the breach in protection to civilians via the CWC frequently presents a challenge to individuals' First, Fourth, and Fourteenth Amendment rights.

The use of RCAs has not been limited to the demonstrations that took place during the summer of 2020.¹⁰⁰ As previously stated, the indiscriminate use of RCAs has been a long-standing practice in the United States.¹⁰¹ In the summer of 2020 alone, however, there were voluminous reports of police officers using chemical agents as crowd dispersal tools against peaceful protestors.¹⁰² Police were documented deploying tear gas without giving demonstrators any warning or opportunity to leave the area.¹⁰³ Police were also documented throwing flash-bang grenades and blast balls—explosives filled with pepper spray—into crowds where there was no specific imminent threat of harm against the officers and where they had no clear target.¹⁰⁴ Similarly, videos surfaced showing police lowering the masks of demonstrators—worn to protect them from the COVID-19 pandemic—to spray their faces with RCAs.¹⁰⁵ As such, individuals and civil rights organizations across the nation filed numerous lawsuits

⁹⁹ *Cf. id.* at 38 (noting that after the WTO protests in 1999, the State Patrol Chief publicly criticized the use of RCAs by the Seattle police, calling their actions “pointless ‘gas and run’ tactics”); *id.* at 29 (“A [DOJ] investigation of Ferguson concluded that military weapons, equipment, and tactics were used inappropriately throughout the Ferguson protests. Improper practices included armed sniper surveillance, indiscriminate use of tear gas, and employing canines for crowd control. Police ‘indiscriminately [shot] tear gas and other projectiles into a residential area.’”).

¹⁰⁰ See GLOB. HUM. RTS. CLINIC, *supra* note 93, at 68 (describing the police response to the 2017 inauguration day protests and the protests in Baton Rouge); Loor, *supra* note 19, at 37–39 (describing the police response to the WTO protests).

¹⁰¹ See *supra* Section I.C.

¹⁰² Complaint at 3, *Alsaada v. City of Columbus*, No. 20-cv-3431 (S.D. Ohio July 8, 2020); see also *infra* note 106 and accompanying text.

¹⁰³ Loor, *supra* note 19, at 31.

¹⁰⁴ Complaint at 3, *Alsaada v. City of Columbus*, No. 20-cv-03431 (S.D. Ohio July 8, 2020); Complaint at 40, 48, 60–64, *Black Lives Matter Seattle-King Cnty. v. City of Seattle*, 466 F. Supp. 3d 1206 (W.D. Wash. 2020) (No. 20-cv-00887); Chase Burns & Rich Smith, *SPD Disperses Crowd with Blast Balls, “Chemical Agents,” on Eighth Day of Protests Against Police Brutality*, STRANGER (June 7, 2020, 1:13 AM), <https://www.thestranger.com/slog/2020/06/06/43857405/spd-disperses-crowd-with-blast-balls-chemical-agents-pepper-spray-on-eight-day-of-protests-against-police-brutality> [<https://perma.cc/FP55-6EKJ>].

¹⁰⁵ Complaint at 10, *Sierra v. City of New York*, No. 20-cv-10291 (S.D.N.Y. Dec. 7, 2020); Complaint at 6, *Don’t Shoot Portland v. City of Portland*, No. 20-cv-00917 (D. Or. June 5, 2020); Myles Miller, Jonathan Dienst, Tom Winter & Gus Rosendale, *NYPD Cop Arrested in Caught-on-Cam Protest Shove that Put Woman in Hospital*, NBC N.Y. (June 10, 2020, 1:52 AM), <https://www.nbcnewyork.com/news/local/nypd-officer-seen-in-video-shoving-protester-faces-criminal-charges-sources/2452149> [<https://perma.cc/DJ5P-JXHB>].

against police departments for retaliation under the First Amendment and excessive force under the Fourth or Fourteenth Amendment.¹⁰⁶

1. “Gas and Run”: The First Amendment

The First Amendment, incorporated by the Fourteenth Amendment’s Due Process Clause,¹⁰⁷ protects citizens’ rights to free speech, to free press, to peaceful assembly, and to petition the government to redress their grievances.¹⁰⁸ As such, citizens have the right to participate in demonstrations in public forums such as streets, parks, and sidewalks.¹⁰⁹ The right cannot be abridged simply because an individual is protesting against an unpopular view, such as protesting against the police.¹¹⁰ The Court has consistently held that restrictive

¹⁰⁶ There were over thirty complaints filed across the country, which are on file with the author. *See, e.g.*, Complaint at 24–25, *Sierra v. City of New York*, No. 20-cv-10291 (S.D.N.Y. Dec. 7, 2020); Complaint at 187–89, *Protesters in Support of Black Lives v. City of Chicago*, No. 20-cv-06851 (N.D. Ill. Nov. 19, 2020); Complaint at 22–24, *Jones v. City of Los Angeles*, No. 20-cv-11147 (C.D. Cal. Dec. 9, 2020); Complaint at 40–42, *Scott v. Louisville/Jefferson Cnty.*, No. 20-cv-00535 (W.D. Ky. July 30, 2020); Complaint at 66–74, *Detroit Will Breathe v. City of Detroit*, No. 20-cv-12363 (E.D. Mich. Aug. 31, 2020); Complaint at 41–46, *Cruz v. City & Cnty. of Denver*, No. 20-cv-01922 (D. Colo. July 1, 2020); Complaint at 77–78, *Alsaada v. City of Columbus*, No. 20-cv-03431 (S.D. Ohio July 8, 2020); Complaint at 3, *Goyette v. City of Minneapolis*, No. 20-cv-01302 (D. Minn. June 2, 2020). Some of the complaints point out the prohibition on the use of RCAs under international law. Complaint at 4, *Crane v. City of Fort Wayne*, No. 20-cv-00240 (N.D. Ind. June 26, 2020); Complaint at 8, *Don’t Shoot Portland v. City of Portland*, No. 20-cv-00917 (D. Or. June 5, 2020); Complaint at 17, 34–36, 40–41, *Smith v. City of Philadelphia*, No. 20-cv-03431 (E.D. Pa. July 14, 2020); Complaint at 12, *Welch v. City of Philadelphia*, No. 20-cv-03432 (E.D. Pa. July 14, 2020); Complaint at 34, *Hough v. City of Philadelphia*, No. 20-cv-03508 (E.D. Pa. July 14, 2020).

¹⁰⁷ *See, e.g.*, *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

¹⁰⁸ U.S. CONST. amend. I; *cf.* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569 (1942) (describing traditionally unprotected areas of speech including obscenities, libel, and “fighting words” that tend to incite *immediate* breaches of peace).

¹⁰⁹ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

¹¹⁰ *Jones v. Parmley*, 465 F.3d 46, 56 (2d Cir. 2006) (“[T]he Court has repeatedly held that police may not interfere with orderly, nonviolent protests merely because they disagree with the content of the speech or because they simply fear possible disorder.”); *Cox v. Louisiana*, 379 U.S. 536, 551 (1965) (“[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise.” (quoting *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963))) (overturning the conviction of a reverend who had organized a demonstration protesting the arrests of twenty-three anti-segregation student activists); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982) (“Speech does not lose its protected character, however, simply because it may embarrass others or coerce them into action.”). The government can impose reasonable “time, place, or manner” restrictions on speech in public forums, but the restrictions must be

views of speech are incompatible with the Constitution as they amount to a standardization of ideas by the party seeking to impose such a view.¹¹¹

When confronted with a protest in a public forum, police should not order a crowd to disperse, unless there is a “clear and present danger” of a disorder or some other form of threat to public safety,¹¹² “far above public inconvenience, annoyance, or unrest.”¹¹³ Speech, likewise, cannot be suppressed for fear that some trivial harm may result from it, including some violence or destruction of property.¹¹⁴ Once an order to disperse has been issued, police must give protestors an opportunity to comply with the order before they begin to arrest participants or use other methods of dispersal, such as chemical agents.¹¹⁵ As previously mentioned, the police have not been adhering to the aforementioned constitutional requirements.¹¹⁶

RCAs have facilitated the police’s violations of these constitutional requirements by making it far easier to incapacitate protestors and to force them to retreat, even when the police do not have a legal right to disperse them. The RCAs have also aided police departments in their efforts to respond to protests decrying their acts with a disproportionate amount of force compared to demonstrations against other causes.¹¹⁷

content-neutral, be narrowly tailored, and leave alternative channels of communication open. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

¹¹¹ *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 98 (1972) (fashioning the denial of picketing to those expressing views against racial discrimination, while allowing picketing regarding other subjects, to “an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment” and a violation of the First Amendment (quoting *Cox*, 379 U.S. at 581 (Black, J., concurring))).

¹¹² Dispersing protestors “before demonstrators have acted illegally or before the demonstration poses a clear and present danger is presumptively a First Amendment violation.” *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1996) (citing *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 180–81 (1968)); *Schenck v. United States*, 249 U.S. 47, 52 (1919).

¹¹³ *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963).

¹¹⁴ Alicia A. D’Addario, *Policing Protest: Protecting Dissent and Preventing Violence Through First and Fourth Amendment Law*, 31 N.Y.U. REV. L. & SOC. CHANGE 97, 102 (2006); *Claiborne Hardware Co.*, 458 U.S. at 924.

¹¹⁵ *Beal v. City of Chicago*, No. 04 C 2039, 2007 U.S. Dist. LEXIS 23435, at *18 (N.D. Ill. Mar. 30, 2007).

¹¹⁶ See also Complaint at 1–5, *Abay v. City of Denver*, No. 20-cv-01616 (D. Colo. June 4, 2020) (including videos, photographs, and allegations of police officers using pepper spray gratuitously and indiscriminately to assert dominance and deter the documentation of their activities).

¹¹⁷ See Rachel Chason & Samantha Schmidt, *Lafayette Square, Capitol Rallies Met Starkly Different Policing Response*, WASH. POST (Jan. 14, 2021) [<https://perma.cc/D5X7-RNNG>]; Abbey, *supra* note 89, at 87; Lois Beckett, *US Police Three Times as Likely to Use Force Against Leftwing Protesters, Data Finds*, GUARDIAN (Jan. 14, 2021, 1:00 AM), <https://www.theguardian.com/us-news/2021/jan/13/us-police-use-of-force-protests-black-lives-matter-far-right> [<https://perma.cc/N28Y-67PN>].

Beyond protecting individuals' rights to speech, the First Amendment also prohibits officials from retaliating against individuals for exercising their rights.¹¹⁸ In order to allege a retaliation claim, an individual must prove, among other things, that there is a causal connection between the actor's "retaliatory animus" and the plaintiff's injury, i.e., that the injury was caused as a direct result of the defendant's retaliatory motives.¹¹⁹ In the case of protestors, the causation that must be shown is that, but-for the officer's animus towards demonstrations decrying police brutality, the officers would not have sought to abridge the protestors' First Amendment rights. The plaintiff must show that the police would not have sought to disburse peaceful gatherings without a clear or present danger and would not have attempted to do so without warning or through the use of force, including RCAs. A number of courts have found that certain plaintiffs have sufficiently demonstrated retaliatory intent as to warrant a grant of a temporary restraining order against the police.¹²⁰ Courts have also found that evidence showing police officers using RCAs against individuals who are not engaged in unlawful activity has exhibited intentional targeting, which has demonstrated a retaliatory intent.¹²¹ Again, the availability of RCAs has facilitated the police's ability to retaliate against demonstrators.

¹¹⁸ *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019); *Thornhill v. Alabama*, 310 U.S. 88, 101–02 (1940) (“The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment.”).

¹¹⁹ *Nieves*, 139 S. Ct. at 1722.

¹²⁰ See *infra* note 157.

¹²¹ *Index Newspapers LLC v. City of Portland*, 480 F. Supp. 3d 1120, 1144–45 (D. Or. 2020). For examples of such targeting see *George Floyd: “Unacceptable” Attacks on Reporters at Protests*, BBC (June 2, 2020), <https://www.bbc.com/news/world-us-canada-52880970> [<https://perma.cc/R44H-RRFL>]; see also *Abbey*, *supra* note 89, at 87 (“Law enforcement tends to look down upon these more politicized protesters, even as they exercise their same protected right to free expression. Thus, police are more likely to employ violent tactics against ‘bad protesters,’ most often with pepper spray . . .”).

2. I Can't Breathe: Excessive Force Under the Fourth & Fourteenth Amendments¹²²

The Fourth Amendment protects an individual's right to "be secure in their persons . . . against unreasonable searches and seizures."¹²³ A "seizure," per *California v. Hodari D.*, only occurs when there is a "laying on of hands" or the "application of physical force to restrain movement," or a "submission to the assertion of authority."¹²⁴ Consequently, the Fourth Amendment also protects individuals against the use of excessive force during "seizures."¹²⁵ To determine whether an officer's use of force is "excessive" a court must determine whether the force used was objectively unreasonable "in light of the facts and circumstances confronting [the officer], without regard to [the officer's] underlying intent or motivation."¹²⁶ The inquiry requires courts to look at each case individually and assess "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."¹²⁷ The court must also weigh the nature of the intrusion on the individual's Fourth Amendment rights against the government's interest at stake.¹²⁸ Courts tend to be very deferential in these cases, citing that police officers need to make a number of "split-second judgments" in stressful, high-stakes situations.¹²⁹

The use of RCAs against peaceful protestors in the frequently employed "gas and run" techniques do not comport with the reasonableness standard required by the Fourth Amendment.¹³⁰ Because of their indiscriminate nature, RCAs apply the same level of

¹²² The amendment under which a cause of action for excessive force is brought depends on the plaintiff's status. A person who has been "seized" or "arrested" can initiate a claim under the Fourth Amendment. A person who is incarcerated can initiate a claim under the Eighth Amendment. Lastly, a pretrial detainee or a person who has not been "seized" can bring a claim under the Fifth Amendment, if they are suing a federal officer, or the Fourteenth Amendment, if they are suing a state officer. See U.S. CONST. amends. IV, V, VIII, XIV; see also *Edrei v. Maguire*, 892 F.3d 525, 533 (2d Cir. 2018).

¹²³ U.S. CONST. amend. IV.

¹²⁴ *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (emphasis omitted).

¹²⁵ U.S. CONST. amend. IV.

¹²⁶ *Graham v. Connor*, 490 U.S. 386, 397 (1989); *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (citing *Beck v. Ohio*, 379 U.S. 89, 97 (1964)) (indicating that an officer's "good faith" is not enough, as it would render the Fourth Amendment meaningless).

¹²⁷ *Graham*, 490 U.S. at 396 (citing *Tennessee v. Garner*, 471 U.S. 1, 8–9 (1985)).

¹²⁸ *Id.*

¹²⁹ *Id.* at 396–97.

¹³⁰ *Loor*, *supra* note 19, at 38–39.

force against all nearby persons, instead of allowing for individualized threat assessments.¹³¹ The level of force, therefore, frequently does not equate to—and often exceeds—the level of force actually needed against specific individuals.¹³² When used *without* a specific target, RCAs raise the risk, not only that peaceful demonstrators and bystanders will be illegally gassed, but also that the projectile used to deploy the RCA will injure a person.¹³³ When used *with* a specific target, the risk of serious injury is equally as high, or even higher; depending on the level of misuse.¹³⁴ The gravity of the harm RCAs cause, the capacity for their misuse, and the propensity for such misuse support the conclusion that RCAs cause far greater harm and trauma than can be justified by the level of any threat posed by the majority of individual demonstrators during many of the cited protests.¹³⁵

As aforementioned, for there to be a Fourth Amendment violation, there must first be a “seizure.”¹³⁶ However, in the context of protests, force is often used for crowd dispersal purposes, rather than to effectuate an arrest.¹³⁷ As such, seizure, as defined in *Hodari D.*, may mean that an act such as deploying a tear gas canister against a crowd of demonstrators for the purpose of forcing them to disperse—and which also does not result in a submission to detention—may not

¹³¹ Fry, *supra* note 70, at 543.

¹³² *Nelson v. City of Davis*, 685 F.3d 867, 884–87 (9th Cir. 2012) (holding that it is unreasonable to use pepper spray, projectile bean bags, and pepper ball projectiles against individuals “who were suspected of only minor criminal activity, offered only passive resistance, and posed little to no threat of harm to others”).

¹³³ See, e.g., Maura Hohman, *NBC News’ Jo Ling Kent Hit by Flash-Bang Grenade at Seattle Protest Live on Air*, TODAY (June 2, 2020, 7:50 PM), <https://www.today.com/news/nbc-news-jo-ling-kent-hit-flash-bang-grenade-seattle-t183067> [<https://perma.cc/U43V-YJUT>] (showing that NBC News correspondent Jo Ling Kent was hit by a flash-bang grenade fired by the SPD live, on air, while trying to cover a protest); Loor, *supra* note 19, at 31.

¹³⁴ *Fogarty v. Gallegos*, 523 F.3d 1147 (10th Cir. 2008) (finding that excessive force was used on a peaceful, anti-Iraq war protestor who was shot with a pepper ball, which caused him to have an acute bronchospasm).

¹³⁵ *Young v. Cnty. of Los Angeles*, 655 F.3d 1156, 1162 (9th Cir. 2011) (“[T]he use of pepper spray can have very serious and debilitating consequences [and] . . . as such . . . must never be used to intimidate a person or retaliate against an individual.”); Motion for a Temp. Restraining Ord., *Black Lives Matter Seattle-King Cnty. v. City of Seattle*, No. 20-cv-00887 (W.D. Wash. June 9, 2020); *Ciminillo v. Streicher*, 434 F.3d 461, 468 (6th Cir. 2006) (“The use of less-than-deadly force in the context of a riot against an individual displaying no aggression is not reasonable.”).

¹³⁶ In *California v. Hodari D.*, the Supreme Court declared that a “seizure”—so that the Fourth Amendment comes into play—requires the “laying on of hands” or “application of physical force to restrain movement,” or a “submission to the assertion of authority.” *California v. Hodari D.*, 499 U.S. 621, 626 (1991) (citation omitted).

¹³⁷ D’Addario, *supra* note 114, at 108.

invoke the Fourth Amendment.¹³⁸ In instances of use of force in crowd dispersals, the use of force may instead be governed by the Due Process Clause of the Fourteenth Amendment.¹³⁹

When only the Fourteenth Amendment applies, allegations of substantive due process violations are evaluated under a “shocks the conscience” standard.¹⁴⁰ In order to meet the requirements for a due process violation, the plaintiff must show that the officer acted with an intent to injure an individual in some way that cannot be justified by any governmental interest—there must be a deliberate attempt to deprive an individual of life, liberty, or property.¹⁴¹ The Court has fashioned “shock the conscience” to ward against only “arbitrary” government actions that constitute the most “egregious” of official conduct.¹⁴² The Court has also noted that the Fourteenth Amendment is not meant to supplant tort law—in the case of the use of RCAs, negligence or battery.¹⁴³ While there existed a conflict among the circuits regarding whether the “shock the conscience” standard required a subjective or an objective standard, the Court settled the matter in *Kingsley v. Hendrickson*.¹⁴⁴

In *Kingsley*, the Court declared that in order for a plaintiff to prove a substantive due process violation of excessive force, the plaintiff does not need to prove the defendant’s state of mind, although a showing of maliciousness can factor into the analysis.¹⁴⁵ A plaintiff is only required to show that the force “purposefully or knowingly” used against them was “objectively unreasonable.” To determine if a use of force is “objectively unreasonable” the trier of fact can consider: the

¹³⁸ *Hodari D.*, 499 U.S. at 630 (Stevens, J., dissenting) (accusing the majority of assuming that an officer can fire his weapon at a citizen and not implicate the Fourth Amendment if the officer’s shot misses the target); D’Addario, *supra* note 114, at 109; *cf.* *Pluma v. City of New York*, No. 13 Civ. 2017, 2015 U.S. Dist. LEXIS 48134, at *13–14 (S.D.N.Y. Mar. 31, 2015) (noting that the Second Circuit had not yet decided whether the use of pepper spray for crowd dispersal qualifies as a “seizure” under the Fourth Amendment, but agreeing with the Ninth Circuit that it does).

¹³⁹ U.S. CONST. amend. XIV; *see, e.g.,* *Abujayyab v. City of New York*, No. 15 Civ. 10080, 2018 U.S. Dist. LEXIS 140914, at *13–14 (S.D.N.Y. Aug. 20, 2018) (considering plaintiff’s excessive force claim under the Fourteenth Amendment standard, instead of the Fourth Amendment, because physical force by a police officer does not constitute a seizure when it is not part of an effort to restrain the plaintiff).

¹⁴⁰ *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846–47 (1998).

¹⁴¹ *Id.* at 849.

¹⁴² *Id.* at 846.

¹⁴³ *Id.* at 848–49 (“[T]he Constitution does not guarantee due care on the part of state officials; liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.”).

¹⁴⁴ *Kingsley v. Hendrickson*, 576 U.S. 389 (2015) (concluding that the correct standard for excessive force cases is whether the officer was “objectively unreasonable”).

¹⁴⁵ *Id.* at 395, 402.

relationship between the need for force and the amount of force used; the extent of the resulting injury; any efforts made to temper or limit the amount of force used; the threat reasonably perceived by the defendant; the severity of the security problem at issue; and whether the plaintiff was actively resisting. Prior to the shift in standards, proving that an officer meant to deliberately cause injury to a particular protestor by shooting a canister into a crowd was a difficult feat, as RCAs, when used to disperse crowds, are often not used with an intent against any one specific target. However, there remain open questions amongst the circuits regarding the application of the Fourteenth Amendment to the use of force in crowd control contexts.¹⁴⁶ As long as the uncertainty remains, substantive due process may be a poor fit for protecting the rights of individuals at demonstrations when RCAs are used against them—leaving individuals vulnerable as a result of the inconsistency between the purpose of the CWC and its law enforcement exception.¹⁴⁷

3. I See Neon Green: Legal Observers, Journalists & Medics

“Neutral” parties such as legal observers, journalists, and medics have not been spared from the threat of RCAs.¹⁴⁸ Police officers were documented arresting legal observers and journalists, shooting flash-bang canisters directly at them and using pepper spray on medics

¹⁴⁶ *Edrei v. Maguire*, 892 F.3d 525, 541 (2d Cir. 2018) (finding that excessive force principles do apply to crowd control-related allegations and citing concurring opinions from the First, Sixth, Seventh, Ninth, and Tenth Circuits).

¹⁴⁷ CWC, *supra* note 11, at pmb1.; *id.* art. II, § 9(d); *D’Addario*, *supra* note 114, at 110.

¹⁴⁸ *ACLU of Washington, Korematsu Center, and Perkins Coie File a Motion for Contempt to Enforce Preliminary Injunction Barring Seattle Police from Indiscriminate Use of Crowd Control Weapons*, ACLU WASH. (July 27, 2020), <https://www.aclu-wa.org/news/aclu-washington-korematsu-center-and-perkins-coie-file-motion-contempt-enforce-preliminary> [<https://perma.cc/6B27-CT43>] (“Photos, videos, and witness testimony document numerous additional abuses, including SPD’s targeting of clearly identifiable legal observers, journalists, and medics and attack on a group of women known as the ‘Wall of Moms.’”); Complaint at 30, *Gray v. City of New York*, No. 21-cv-06610 (S.D.N.Y. Aug. 5, 2021) (“‘I’m a journalist, I have a press pass.’ Officer John Doe 7 responded ‘I don’t give a fuck about your press pass!’ and began forcefully shoving Mr. Alfiky in the chest with his baton.”); Marc Tracy & Rachel Abrams, *Police Target Journalists as Trump Blames “Lamestream Media” for Protests*, N.Y. TIMES (Mar. 10, 2021), <https://www.nytimes.com/2020/06/01/business/media/reporters-protests-george-floyd.html> [<https://perma.cc/9YPA-TQFZ>].

during the protests of the summer of 2020.¹⁴⁹ Whether these individuals currently have any more legal protections against having to comply with an order to disperse than any other individual present at a demonstration remains undecided.¹⁵⁰ However, meeting the legal threshold to use chemical agents against these individuals becomes even more difficult.¹⁵¹ These individuals do not directly “participate” in the demonstrations so as to make way for any plausible claim that they presented a danger to the public or the police.¹⁵² Legal observers, known for their neon green hats, are trained by organizations like the National Lawyers Guild to simply *observe* demonstrations and document any improprieties.¹⁵³ Legal observers do not mix with demonstrators, they do not participate in any sort of chanting, do not confront the police, and are not present at demonstrations to support any particular cause, save for the rule of law.¹⁵⁴ Journalists, similarly, are present at demonstrations—donning their press passes—as observers.¹⁵⁵ Medical staff members have increasingly begun to attend demonstrations as well, to offer aid to protestors in need, including treating individuals who have been subjected to chemical agents.¹⁵⁶

¹⁴⁹ George Floyd: “Unacceptable” Attacks on Reporters at Protests, BBC (June 2, 2020), <https://www.bbc.com/news/world-us-canada-52880970> [https://perma.cc/R44H-RRFL] (documenting attacks against journalists across the country, which have resulted in serious injuries, including permanent blindness); *Police Targeting NLG Legal Observers at Black Lives Matter Protests*, NAT’L LAWS. GUILD (June 7, 2020), <https://www.nlg.org/police-targeting-nlg-legal-observers-at-black-lives-matter-protests> [https://perma.cc/8PFF-NDGF]; *ACLU of Washington, Korematsu Center, and Perkins Coie File a Motion for Contempt to Enforce Preliminary Injunction Barring Seattle Police from Indiscriminate Use of Crowd Control Weapons*, ACLU WASH. (July 27, 2020), <https://www.aclu-wa.org/news/aclu-washington-korematsu-center-and-perkins-coie-file-motion-contempt-enforce-preliminary> [https://perma.cc/6B27-CT43].

¹⁵⁰ *Index Newspapers LLC v. City of Portland*, 480 F. Supp. 3d 1120, 1126 n.3 (D. Or. 2020). However, journalists were exempted from the curfew orders issued by some cities, such as New York, during the protests of the summer of 2020. Complaint at 14, *Gray v. City of New York*, No. 21-cv-06610 (S.D.N.Y. Aug. 5, 2021).

¹⁵¹ *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 925 (1982) (describing that “guilt by association” or “guilt for association” are not permissible under the First Amendment).

¹⁵² See *infra* notes 159–62

¹⁵³ Emma Whitford, *NYC Legal Observers Detained at George Floyd Protest*, LAW360 (June 5, 2020, 1:13 PM), <https://www.law360.com/articles/1280305> [https://perma.cc/S9XA-LLUK].

¹⁵⁴ NAT’L LAWS. GUILD, LEGAL OBSERVER TRAINING MANUAL 1–3 (2003), http://occupyanluisobispo.org/DATA/resources/nlg_legal_observer_manual.pdf [https://perma.cc/UP7H-NUAM].

¹⁵⁵ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (explaining that the media are “surrogates for the public”).

¹⁵⁶ Lori Jane Gliha, *Police Projectile Fractures Denver Protestor’s Face; She Says It Was Unprovoked*, FOX 31 (June 3, 2020, 6:43 PM), <https://kdvr.com/news/local/police-projectile-fractures-denver-protesters-face-she-says-it-was-unprovoked> [https://perma.cc/HFG7-9JKR];

Not only do legal observers, journalists, and medics, in their professional capacities—like peaceful protestors—not present a threat to public safety, they are *all* distinctively identifiable by the police—such that any argument that the police may have mistaken them for anyone else who was engaging in a violent act becomes very difficult to sustain.¹⁵⁷ Documenting police misconduct is not illegal.¹⁵⁸ Offering medical aid to a person in need who is lawfully present in a public forum is not illegal. Without legal cause to disperse or use chemical agents against neutral parties, police engagement in either act is a violation of their First, Fourth, and Fourteenth Amendment rights.¹⁵⁹ Even in situations where these individuals may be in the vicinity of others who may be engaged in unlawful acts, the police must engage in an individualized threat analysis before deploying any RCA against them.¹⁶⁰ As the Court has noted in *NAACP v. Claiborne Hardware Co.*, citizens retain their constitutional right to associate, even when certain members of a group may have participated in or advocated for conduct that is not itself protected.¹⁶¹ Nevertheless, various journalists reported ceasing to cover the events of the summer of 2020 for fear of being injured by the police—the journalists’ speech was effectively chilled by the use of RCAs.¹⁶² Coincidentally, under the laws of war, targeting a medical staff member or a journalist is a violation of international

Complaint at 1, *Abay v. City of Denver*, No. 20-cv-01616 (D. Colo. June 4, 2020); PHYSICIANS FOR HUM. RTS., “A TARGETED ATTACK ON THE BRONX”: POLICE VIOLENCE AND ARRESTS OF HEALTH WORKERS AT A NEW YORK CITY PROTEST (2020), https://phr.org/wp-content/uploads/2020/09/A-Targeted-Attack-on-the-Bronx_Police-Violence_Sept-2020.pdf [<https://perma.cc/H8XJ-CRBC>].

¹⁵⁷ See Rachel Treisman, *Order Temporarily Blocks Feds from Targeting Press and Legal Observers in Portland*, NPR (July 23, 2020, 11:51 PM), <https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/07/23/894953202/order-temporarily-blocks-feds-from-targeting-press-and-legal-observers-in-portla> [<https://perma.cc/9794-NZFB>]; *Index Newspapers LLC v. City of Portland*, 480 F. Supp. 3d 1120, 1127–30 (D. Or. 2020) (describing plaintiffs—journalists and legal observers—and their identifying attributes); see also Complaint at 15, *Gray v. City of New York*, No. 21-cv-06610 (S.D.N.Y. Aug. 5, 2021).

¹⁵⁸ *Index Newspapers LLC v. City of Portland*, 474 F. Supp. 3d 1113, 1123 (D. Or. 2020) (“Although the First Amendment does not enumerate special rights for observing government activities, [t]he Supreme Court has recognized that newsgathering is an activity protected by the First Amendment.” (quoting *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978))).

¹⁵⁹ See *supra* Sections II.A.1–II.A.3.

¹⁶⁰ See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 908 (1982).

¹⁶¹ *Id.*

¹⁶² *Index Newspapers*, 480 F. Supp. 3d at 1143; Complaint at 24, *Abay v. City of Denver*, No. 20-cv-01616 (D. Colo. June 4, 2020).

humanitarian law.¹⁶³ Hence, even in the most tumultuous of scenarios, such an act is considered egregious.¹⁶⁴ If Congress is to give any effect to the First Amendment, it should follow suit and extend extra protections to these individuals.¹⁶⁵ Legal observers, journalists, and medics are an integral part of ensuring that the rights and safety of others, as well as the rule of law, continue to be protected.¹⁶⁶

III. PROPOSAL

Courts have acknowledged the dangers of the use of RCAs against protestors and have issued a number of temporary restraining orders against their use.¹⁶⁷ However, courts cannot put an end to this practice *ad hoc*.¹⁶⁸ Congress needs to take action through the enactment of legislation. Naturally, given that law enforcement is quintessentially a function of local state government, this Note's proposal may present Tenth Amendment concerns.¹⁶⁹ Part III explores how Congress can pass legislation banning the use of RCAs against protestors without violating the Tenth Amendment. This Part goes through the challenges of using the treaty-making power as well as the possibility of using the Spending

¹⁶³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 79, June 8, 1977, 1125 U.N.T.S. 3; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 24, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

¹⁶⁴ *Index Newspapers*, 480 F. Supp. 3d at 1143 (“[M]any declarants note that they have covered protests in war zones around the world . . . and have never been subjected to th[is] type of egregious and violent attacks by law enforcement personnel If military and law enforcement personnel can engage around the world without attacking journalists, the Federal Defendants can respect Plaintiffs’ First Amendment rights [here].”).

¹⁶⁵ *See id.* at 1155–57 (enjoining the City of Portland, DHS, and the U.S. Marshals Service from arresting, threatening to arrest, or using physical force against any person known to be a journalist or a Legal Observer and exempting Legal Observers and journalists from having to comply with orders to disperse).

¹⁶⁶ *Cf. id.* at 1146–47 (“[T]he point of a journalist observing and documenting government action is to record whether the ‘closing’ of public streets . . . is lawfully originated and lawfully carried out. Without journalists and legal observers, there is only the government’s side of the story to explain why a ‘riot’ was declared and the public streets were ‘closed’ and whether law enforcement acted properly in effectuating that order.”).

¹⁶⁷ *See, e.g., infra* note 174.

¹⁶⁸ *See infra* Section III.A.

¹⁶⁹ *New York v. United States*, 505 U.S. 144 (1992); *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (discussing the limits the Tenth Amendment places on Congress’s power to regulate states).

Clause,¹⁷⁰ while acknowledging the obstacles that *South Dakota v. Dole*, *National Federation of Independent Business v. Sebelius*, and the anti-commandeering principle present.

A. *Resistance in the Courts: Why It Isn't Enough*

After numerous incidents of forced crowd dispersals through the use of chemical agents during the summer of 2020, some demonstrators turned to the courts to request temporary restraining orders (TROs) against police departments.¹⁷¹ TROs, however, are not courts' preferred method of remedy.¹⁷² As such, anyone requesting an order carries the burden of showing: (1) the likelihood of success on the merits; (2) the likelihood that irreparable harm will occur in the absence of preliminary relief; (3) that the balance of hardships tips in their favor; and (4) that a TRO is in the public's interest.¹⁷³ While not all courts have been open to the idea of granting TROs, some courts have issued orders.¹⁷⁴

¹⁷⁰ Local police already receive funds from the federal government. *See, e.g.*, DANKY, *supra* note 27, at 25 (giving examples of federal funds provided to police departments in cities like Austin (\$2.2 million), Fort Worth (\$1.2 million), and Salt Lake City (\$2 million), amongst others).

¹⁷¹ *See, e.g., infra* note 174.

¹⁷² *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) ("A preliminary injunction is an extraordinary remedy never awarded as of right.")

¹⁷³ *Id.* at 20; *see also* FED. R. CIV. P. 65 (detailing the procedural requirements for preliminary injunctions).

¹⁷⁴ *Abay v. City of Denver*, 445 F. Supp. 3d 1286, 1294 (D. Colo. 2020) ("The Court temporarily enjoins the City and County of Denver . . . from employing chemical weapons or projectiles of any kind against persons engaging in peaceful protests or demonstrations. . . . The Court further orders that: 1. Kinetic Impact Projectiles ('KIPs') and all other non- or less-lethal projectiles may never be discharged to target the head, pelvis, or back. 2. KIPs and all other non- or less-lethal projectiles shall not be shot indiscriminately into a crowd."); *Anti Police-Terror Project v. City of Oakland*, 477 F. Supp. 3d 1066, 1091 (N.D. Cal. 2020) ("[T]he Court . . . prohibit[s] outright the use of stinger grenades, wooden bullets, rubber or rubber coated bullets, pepper balls, and similar munitions. . . . [and] place[s] strict limits on the use of chemical agents, flashbang grenades and foam projectiles."); *Woodstock v. City of Portland*, No. 20-cv-1035, 2020 U.S. Dist. LEXIS 116612 (D. Or. July 2, 2020) (granting plaintiffs, journalists, and legal observers a TRO against the City of Portland and sixty other defendants); *Detroit Will Breathe v. City of Detroit*, 484 F. Supp. 3d 511, 520 (E.D. Mich. 2020) ("Defendants . . . [are] enjoined from: [u]sing . . . chemical agents (including, but not limited to, tear gas and pepper spray) . . . against any individual peacefully engaging in protest or demonstrations who does not pose a physical threat to the safety of the public or police . . ."); Nicholas Bogel-Burroughs, John Eligon & Will Wright, *L.A.P.D. Severely Mishandled George Floyd Protests, Report Finds*, N.Y. TIMES (Mar. 29, 2021), <https://www.nytimes.com/2021/03/11/us/lapd-george-floyd->

Nevertheless, the orders have had limited success in curbing the actual use of chemical agents.¹⁷⁵ The case of *Black Lives Matter Seattle-King County v. City of Seattle* is an excellent example of why turning to the courts is not a sustainable solution.¹⁷⁶

1. Case Study: *Black Lives Matter Seattle-King County v. City of Seattle*

In Seattle, the protests following George Floyd's death began on May 29, 2020.¹⁷⁷ The Seattle Police Department (SPD) responded to the demonstrations of grief by firing tear gas and flash-bang grenades and by beating protestors.¹⁷⁸ Two days later, Seattle Police Chief Carmen Best formally approved a request to authorize the use of tear gas on protestors.¹⁷⁹ On June 5, Mariko Lockhart, the city's director for the Office for Civil Rights, issued a statement denouncing the police's use of chemical agents, stating that the city leadership feared for its safety—not as a result of the protestors, but as a result of the police.¹⁸⁰ The

protests.html?referringSource=articleShare [https://perma.cc/AY87-XT6L] (“A [Texas] federal judge . . . issued a temporary restraining order preventing officers from using chemical agents, flash-bang grenades and other less-lethal weapons against protestors.”).

¹⁷⁵ It is predictably very difficult to enforce an order against law enforcement itself. See *Statement on Contempt Ruling in Black Lives Matter v. Seattle*, ACLU WASH. (Dec. 7, 2020), <https://www.aclu-wa.org/news/statement-contempt-ruling-black-lives-matter-v-seattle> [https://perma.cc/H44N-Y9XQ].

¹⁷⁶ Complaint, *Black Lives Matter Seattle-King Cnty. v. City of Seattle*, 466 F. Supp. 3d 1206 (W.D. Wash. 2020) (No. 20-cv-00887).

¹⁷⁷ Evan Bush, Amanda Snyder & Elise Takahama, *Sparked by Death of George Floyd, Seattle Protesters Clash with Police*, SEATTLE TIMES (Aug. 12, 2020, 11:41 AM), <https://www.seattletimes.com/seattle-news/protesters-break-windows-clash-with-police-in-downtown-seattle> [https://perma.cc/K3YX-DFGQ].

¹⁷⁸ Evan Bush, *Timeline of Demonstrations Over the Police Killing of George Floyd*, SEATTLE TIMES (June 6, 2020, 8:21 PM), <https://www.seattletimes.com/seattle-news/timeline-of-demonstrations-over-the-police-killing-of-george-floyd> [https://perma.cc/P92R-47RK].

¹⁷⁹ Kevin Schofield, *SPD Chief Best Authorized Non-SWAT Officers to Use Tear Gas on May 31*, SEATTLE CITY COUNCIL INSIGHT (June 7, 2020), <https://sccinsight.com/2020/06/07/spd-chief-best-authorized-non-swat-officers-to-use-tear-gas-on-may-31> [https://perma.cc/XW7G-ECBU].

¹⁸⁰ Open Letter from Mariko Lockhart, Dir., Seattle Off. for Civ. Rts., <https://www.documentcloud.org/documents/6938155-Lockhart-Letter.html> [https://perma.cc/KX29-A2GB]. During the first weekend of the protests alone, SPD received 12,000 complaints as compared to the 928 complaints they received in all of 2019. Compare Press Release, Seattle Off. of Police Accountability, Office of Police Accountability Processing 12,000 Complaints After Weekend Demonstrations (June 1, 2020), https://www.seattle.gov/Documents/Departments/OPA/PressReleases/06-01-20_OPA-Press-Release-Following-Demonstrations.pdf [https://perma.cc/9DNF-Y4L8], with SEATTLE OFF. OF POLICE ACCOUNTABILITY, OFFICE OF POLICE ACCOUNTABILITY: 2019 ANNUAL REPORT 2 (2020), <https://www.seattle.gov/Documents/Departments/OPA/Reports/2019-Annual-Report.pdf> [https://perma.cc/5AQJ-CWG9].

Seattle Community Police Commission (CPC), Office of Inspector General (OIG), and Office of Police Accountability (OPA), similarly issued a joint memorandum citing concerns over the use of CS gas on protestors and asking that the SPD cease its use until proper oversight could be established and written into SPD policy.¹⁸¹ In response, the City of Seattle finally announced that it would temporarily cease its use of tear gas on demonstrators, but it excluded flash-bang grenades and pepper spray from the order.¹⁸² Despite the city's order, however, SPD resumed using tear gas, reportedly engulfing an *entire* city block just three days later.¹⁸³ In response, on June 9, the ACLU of Washington filed a motion for a TRO against the City of Seattle and the SPD on behalf of Black Lives Matter (BLM) Seattle-King County and several other plaintiffs.¹⁸⁴ The motion sought an order enjoining the city from "the indiscriminate use of less-lethal [weapons] on peaceful demonstrators."¹⁸⁵

On June 12, Judge Jones of the U.S. District Court for the Western District of Washington granted plaintiffs' request for a TRO in part.¹⁸⁶ Finding that SPD had "used [chemical agents] disproportionately and without provocation," Judge Jones enjoined the Seattle Police Department from "employing chemical irritants or projectiles of any kind against persons peacefully engaging in protests or demonstrations. . . . includ[ing]: (1) any chemical irritant . . . and (2) any projectile such as and including flash-bang grenades, 'pepper balls,'

¹⁸¹ Memorandum from the Cmty. Police Comm'n, Off. of Inspector Gen. & Off. of Police Accountability to the Seattle City Council, Mayor & City Att'y (June 5, 2020) [hereinafter Joint Statement on Use of CS Gas], <https://seattlecpc.files.wordpress.com/2020/06/accountability-mass-demonstration-memorandum-060520.pdf> [https://perma.cc/ZRL2-L9NR].

¹⁸² Lewis Kamb & Daniel Beekman, *Seattle Mayor, Police Chief Agree to Ban Use of Tear Gas on Protestors amid Ongoing Demonstrations*, SEATTLE TIMES (Aug. 12, 2020, 11:41 AM), <https://www.seattletimes.com/seattle-news/watchdog-groups-to-seattles-mayor-and-police-chief-spd-should-stop-using-tear-gas-on-demonstrators> [https://perma.cc/T2RS-PVAG].

¹⁸³ Jemima McEvoy, *Seattle Police Use Tear Gas Against Protestors Despite City Ban*, FORBES (June 8, 2020, 10:54 AM), <https://www.forbes.com/sites/jemimamcevoy/2020/06/08/seattle-police-use-tear-gas-against-protestors-despite-city-ban/?sh=6a75db275b4b> [https://perma.cc/V3GV-TVS8]; Motion for Temp. Restraining Ord. at 20, *Black Lives Matter Seattle-King Cnty. v. City of Seattle*, 466 F. Supp. 3d 1206 (W.D. Wash. 2020) (No. 20-cv-00887).

¹⁸⁴ Motion for Temp. Restraining Ord. at 1, 33, *Black Lives Matter Seattle-King Cnty. v. City of Seattle*, 466 F. Supp. 3d 1206 (W.D. Wash. 2020) (No. 20-cv-00887).

¹⁸⁵ *Id.* at 12.

¹⁸⁶ *Black Lives Matter Seattle-King Cnty. v. City of Seattle*, 466 F. Supp. 3d 1206, 1210 (W.D. Wash. 2020).

‘blast balls,’ rubber bullets, and foam-tip projectiles.”¹⁸⁷ However, the order would not mark the end of the legal struggle.¹⁸⁸

On June 26, the Seattle City Council passed an ordinance banning the use of RCAs—to take effect on July 26.¹⁸⁹ Disgruntled, Mayor Jenny Durkan and Chief Best responded by filing a notice with the court to enjoin the ordinance, which the court subsequently denied.¹⁹⁰ As if there were not enough parties involved, the DOJ responded by filing its own TRO seeking to enjoin Chief Best’s directive giving effect to the city’s ordinance.¹⁹¹ Finding that “[t]he issuance of this immediate change, without time for additional direction or training, is likely to result in officer confusion,” Judge Robart granted the DOJ’s TRO in *United States v. City of Seattle*.¹⁹² Judge Robart enjoined the directive and postponed the date when the ordinance would take effect until the ordinance could be reviewed under the terms of a consent decree that was entered into by the city of Seattle and the DOJ in 2011.¹⁹³ Nevertheless, Judge Robart’s order left the TRO from *BLM v. City of Seattle* intact.¹⁹⁴ SPD seems to have missed the latter part of that memo.¹⁹⁵

On July 27, BLM filed a motion for contempt, alleging that, only a day after the court granted the DOJ’s TRO, SPD trampled journalists, maced medics, used chemical agents against protestors, and shot legal observers at close range.¹⁹⁶ Judge Jones subsequently granted an order

¹⁸⁷ *Id.* at 1216.

¹⁸⁸ The ACLU and co-counsel also filed a complaint on June 9, 2020. Complaint, Black Lives Matter Seattle-King Cnty. v. City of Seattle, 466 F. Supp. 3d 1206 (W.D. Wash. 2020) (No. 20-cv-00887); *Black Lives Matter Seattle-King County v City of Seattle*, ACLU WASH., <https://www.aclu-wa.org/cases/black-lives-matter-seattle-king-county-v-city-seattle> [https://perma.cc/EBU7-ZCB9].

¹⁸⁹ Seattle, Wash., Ordinance 126102 (June 15, 2020) (codified at SEATTLE, WASH., CODE § 3.28.146 (2020)) (“A[n] [ordinance] relating to the Seattle Police Department; banning the ownership, purchase, rent, storage, or use of crowd control weapons; and adding a new Section 3.28.146 to the Seattle Municipal Code.”).

¹⁹⁰ *United States v. City of Seattle*, 474 F. Supp. 3d 1181, 1184 (W.D. Wash. 2020).

¹⁹¹ *Id.* at 1183.

¹⁹² *Id.* at 1186–87.

¹⁹³ *Id.* at 1187; Settlement Agreement & Stipulated [Proposed] Ord. of Resol., *United States v. City of Seattle*, 474 F. Supp. 3d 1181 (W.D. Wash. 2020) (No. 12-cv-01282); Memorandum of Understanding Between the United States and the City of Seattle (July 27, 2012) [https://perma.cc/39CS-HHUR].

¹⁹⁴ *City of Seattle*, 474 F. Supp. 3d at 1187.

¹⁹⁵ See Motion for Ord. to Show Cause Why City of Seattle Should Not Be Held in Contempt, *Black Lives Matter Seattle-King Cnty. v. City of Seattle*, 466 F. Supp. 3d 1206 (W.D. Wash. 2020) (No. 20-cv-00887).

¹⁹⁶ *Id.*

clarifying and expanding *BLM v. City of Seattle*'s original TRO,¹⁹⁷ but the struggle continued. BLM filed another contempt motion on September 30, following the use of chemical agents on four more separate occasions.¹⁹⁸ This time, Judge Jones found that SPD's response to the protests during those four days had been more "targeted," "proportional," and "restrained"; for example, no use of tear gas was reported.¹⁹⁹ However, he also declared that the court could not ignore the clear violations of the TRO that had occurred during those four days and granted the motion in part and denied it in part.²⁰⁰

As of August 2021, both the *BLM v. Seattle* and the *United States v. City of Seattle* cases are ongoing.²⁰¹ After over a year of motions, litigation, demonstrations, and countless uses of chemical agents, all that the *BLM v. Seattle* plaintiffs obtained is a repeatedly violated TRO and an order sanctioning the city of Seattle with \$81,997.13 in attorney's fees—a small solace for those protestors, medics, legal observers, and journalists who have participated, and seek to continue to participate, in demonstrations in the city of Seattle.²⁰² Yet despite its mixed results, the *BLM v. Seattle* case presents one of the better case scenarios. The court granted the TRO, numerous individuals in the government spoke out against the use of chemical agents, and the city even sought to pass an ordinance banning its use.²⁰³ Nevertheless, none of it was enough to seriously curtail the use of chemical agents by SPD or to protect the rights of those present in the demonstrations.²⁰⁴ *BLM v. Seattle* presents a "better case scenario" because often the enormity of the burden imposed by TROs and the general deference shown to law enforcement

¹⁹⁷ Ord. Granting Stipulated Clarification of Preliminary Injunction, *Black Lives Matter Seattle-King Cnty. v. City of Seattle*, 466 F. Supp. 3d 1206 (W.D. Wash. 2020) (No. 20-cv-00887).

¹⁹⁸ (Second) Motion for Contempt *BLM v. Seattle*, *supra* note 7.

¹⁹⁹ Ord. on (Second) Motion for Ord. to Show Cause Why City of Seattle Should Not Be Held in Contempt, *Black Lives Matter Seattle-King Cnty. v. City of Seattle*, 466 F. Supp. 3d 1206 (W.D. Wash. 2020) (No. 20-cv-00887).

²⁰⁰ *Id.*

²⁰¹ Docket, *United States v. City of Seattle*, 2:12-cv-01282 (W.D. Wash.); *Black Lives Matter Seattle-King County v City of Seattle*, *supra* note 188.

²⁰² *Black Lives Matter Seattle-King Cnty. v. City of Seattle*, No. 20-cv-00887, 2021 U.S. Dist. LEXIS 16601 (W.D. Wash. Jan. 28, 2021).

²⁰³ *Black Lives Matter Seattle-King Cnty. v. City of Seattle*, 466 F. Supp. 3d 1206 (W.D. Wash. 2020) (No. 20-cv-00887); Open Letter from Mariko Lockhart, *supra* note 180; Joint Statement on Use of CS Gas, *supra* note 181; Kamb & Beekman, *supra* note 182; Seattle, Wash., Ordinance 126102 (June 15, 2020) (codified at SEATTLE, WASH., CODE § 3.28.146 (2020))

²⁰⁴ (Second) Motion for Contempt *BLM v. Seattle*, *supra* note 7; McEvoy, *supra* note 183.

within the legal system makes TROs difficult to obtain at all.²⁰⁵ Yet, even when they are granted, as demonstrated by this case, they are but a mere “band-aid” to the problem—and a temporary one by nature.²⁰⁶ As such, TROs—although they currently serve as the first, and often only, line of defense in protest cases—are an impractical and inadequate solution to the use of chemical agents on demonstrators.²⁰⁷

B. *Enter Article I: How Congress Can Solve the Issue*

1. The Treaty-Making Power

Traditionally, Congress can pass legislation to implement an international agreement, such as the CWC, through its treaty-making powers. In *Missouri v. Holland*, the Supreme Court declared that “if [a] treaty is valid there can be no dispute about the validity of [a] statute [implementing it] under Article I, § 8, as a necessary and proper means to execute the powers of the Government.”²⁰⁸ Hence, the Tenth Amendment provides no bar to such legislation; Congress need only stay away from enacting legislation that violates “prohibitory words” in the Constitution.²⁰⁹ However, while a ban on the use of riot control agents against protestors would not violate any prohibitory words in the Constitution, as aforementioned, the use of such weapons in a law enforcement capacity is not prohibited by the CWC.²¹⁰ As such, unless the exception in the CWC was to be interpreted as only applying to riots, as opposed to lawful exercises of free speech, Congress arguably could not pass the legislation as a way of implementing the treaty because the proposed legislation would fall outside of what the text of the treaty requires.²¹¹ Although the CWC explicitly names “riot control,” “riot control” is preceded by the word “including,” which gives states the discretion to use the RCAs for other purposes that fall under “law enforcement.”²¹² As such, using the treaty power to pass the

²⁰⁵ See *Benton v. City of Seattle*, No. 20-cv-01174, 2020 U.S. Dist. LEXIS 142935 (W.D. Wash. Aug. 10, 2020) (denying a request for a TRO related to the same demonstrations).

²⁰⁶ *Black Lives Matter Seattle-King Cnty. v. City of Seattle*, 505 F. Supp. 3d 1108 (W.D. Wash. 2020).

²⁰⁷ See *City of Seattle*, 2021 U.S. Dist. LEXIS 16601. However, Congress can use the language of the TROs to guide them in drafting the proposed legislation.

²⁰⁸ *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

²⁰⁹ *Id.* at 433–34.

²¹⁰ CWC, *supra* note 11, art. II § 9(d).

²¹¹ *Id.* (“‘Purposes Not Prohibited [by the CWC]’ means: (d) Law enforcement including domestic riot control purposes.”).

²¹² *Id.*; Fry, *supra* note 70, at 499, 502.

legislation proposed here would be a tough sell as necessary and proper to carry out the CWC for Congress. Therefore, Congress would have to turn to another one of its enumerated powers, which may present Tenth Amendment challenges.²¹³

2. In Pursuit of the General Welfare: The Spending Clause

Under the Tenth Amendment, any power not delegated to the federal government is reserved to the states.²¹⁴ As a result, generally, “Congress may not simply ‘commandeer the legislative process of the States by directly compelling them to enact[,] enforce[, or administer] a federal regulatory program.’”²¹⁵ Congress similarly cannot conscript the states’ officers directly by issuing directives requiring the state to address particular problems, or by commanding the states’ officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.²¹⁶ A law requiring state officials to ban the use of chemical weapons by state police officers against protestors may be seen as commandeering and an interference with the literal and figurative state police powers.

While the federal government cannot commandeer state officials into adopting federal programs or passing specific laws, they can offer states financial incentives to adopt said regulations through conditional spending programs under the Spending Clause.²¹⁷ Fortunately, regulations passed under the Spending Clause are presumptively constitutional.²¹⁸ The ruling case for such programs is *South Dakota v. Dole*, decided in 1987.²¹⁹ In *Dole*, the Court established the following test:

- (1) “the exercise of the spending power must be in pursuit of ‘the general welfare’”;

²¹³ See *infra* Section III.B.2.

²¹⁴ U.S. CONST. amend. X.

²¹⁵ *New York v. United States*, 505 U.S. 144, 161 (1992).

²¹⁶ *Printz v. United States*, 521 U.S. 898, 925–28 (1997).

²¹⁷ *New York*, 505 U.S. at 167. *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987); U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . .”).

²¹⁸ *Dole*, 483 U.S. at 206–07 (explaining that, incident to the Spending Clause, “Congress may attach conditions on the receipt of federal funds”).

²¹⁹ *Dole*, 483 U.S. 203.

- (2) “if Congress desires to condition the States’ receipt of federal funds, it ‘must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation’”;
- (3) “conditions on federal grants [may be found] illegitimate if they are unrelated ‘to the federal interest in particular national projects or programs’”;
- (4) “other . . . provisions [of the Federal Constitution] may provide an independent bar to the conditional grant of federal funds”; and
- (5) “in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”²²⁰

Despite these requirements, *Dole* alone should not bar the legislation proposed in this Note.²²¹ Applying the *Dole* test to the proposal outlined here: (1) protecting citizens’ ability to exercise their free speech and assembly rights, while simultaneously protecting their bodily integrity, can easily qualify as the general welfare;²²² (2) Congress can undoubtedly write legislation that explicitly states that states will (not may)²²³ lose their funding if they do not ban the use of chemical weapons against protestors and offer special protections to neutral individuals; (3) the proposed regulation is rationally related to the federal interest of ensuring the protection of citizens’ First, Fourth, and Fourteenth Amendment rights.²²⁴ Similarly, a ban on chemical agent use by federal law enforcement officials (which Congress can do without barriers)²²⁵ can serve as the national project or program; (4) this proposal does not require the states to violate any part of the Constitution—on the contrary, it ensures the protection of citizens’ constitutional rights; and (5) the fifth factor would present the biggest challenge to this proposal for reasons discussed below. Important to the analysis of the fifth factor is a determination of what percentage of a

²²⁰ *Id.* at 207–08, 211.

²²¹ The standard of review by which *Dole*’s general welfare factor is judged is rational basis; the Court “defer[s] substantially to the judgment of Congress.” *Id.* at 207.

²²² *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (“No right is held more sacred . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others . . .” (internal quotations omitted) (quoting *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891))).

²²³ I am using “will,” and not may, as “may” was found to be ambiguous by Chief Justice Roberts in *Sebelius*. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 542, 581 (2012).

²²⁴ Using chemical weapons against protestors can constitute excessive force in violation of the Fourth and Fourteenth Amendments. *See generally* Loor, *supra* note 19, at 28.

²²⁵ There is no Tenth Amendment restriction with federal officials. The Tenth Amendment only discusses powers reserved to the states. U.S. CONST. amend. X.

state's total budget is being used as inducement.²²⁶ In effect, Congress will have to examine how much funding each state gets and only threaten to remove less than ten percent of the state's funding.²²⁷

3. Congress Giveth, Congress Can Taketh Away

National Federation of Independent Business v. Sebelius offers us one of the most recent Supreme Court applications of the *Dole* factors.²²⁸ In *Sebelius*, Congress sought to incentivize states to expand their Medicaid coverage.²²⁹ In exchange, Congress offered increased federal funding to cover the states' cost, but also threatened the loss of all of the states' preexisting federal Medicaid funding if they did not comply.²³⁰ In *Sebelius*, the Court reinforced the idea that *Dole*'s fifth factor is especially important and provides the origin of the ten-percent cap.²³¹ While Chief Justice Roberts argued that he was not drawing a bright line in the case, he also fashioned "[t]he threatened loss of over 10 percent of a State's overall budget . . . [to] economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion."²³² As such, we know that the less than half of one percent at issue in *Dole* was not commandeering, but ten percent is probably too much.²³³ Similarly, Chief Justice Roberts thought that it was important that the legislation at issue provided a change in kind, rather than just a change in degree of coverage.²³⁴ From Chief Justice Robert's perspective, the states could not have anticipated that Congress was reserving the right to change the Medicare program so "dramatically" when they initially signed up for it and therefore there was inadequate notice.²³⁵ While this portion of the Court's opinion was dicta, it presents a challenge to the use of the spending power for the proposal if it is

²²⁶ *Id.* at 211.

²²⁷ *Sebelius*, 567 U.S. at 582.

²²⁸ *Id.* at 580–82.

²²⁹ *Id.* at 542.

²³⁰ *Id.*

²³¹ *Id.* at 580–82.

²³² *Id.* at 582.

²³³ *Id.* at 581–82.

²³⁴ *Id.* at 583.

²³⁵ *Id.* at 584.

applied to a preexisting program.²³⁶ In the age of “defund the police,” creating a new spending program—offering more money to police departments to persuade them not to interfere with citizens’ constitutional rights—has poor political optics to say the least.²³⁷

Congress currently provides grants to local law enforcement agencies through a number of federal programs, including the Community Oriented Policing Services (COPS) program.²³⁸ In June of 2020 alone, the DOJ announced that it would award \$400 million in funds for the COPS program, providing awards to 596 law enforcement agencies to hire an additional 2,732 law enforcement officials.²³⁹ The DOJ also allocated \$61 million to local agencies to combat violent crime through the so-called Operation Relentless Pursuit (OPR) initiative.²⁴⁰ The COPS program was established in 1994 by former President Bill Clinton as part of the Violent Crime Control and Law Enforcement Act of 1994, more commonly referred to as the 1994 Crime Bill.²⁴¹ Local police departments have obtained \$14 billion in funding from the

²³⁶ Congress must take care to write the legislation so as to set conditions on the use of the specific funds tied to the legislation, rather than to threaten to end an independent grant. *Id.* at 580. Chief Justice Roberts, who was only joined by two other Justices for the part of the opinion this Note discusses, similarly took issue with the fact that Congress was threatening to withhold preexisting funds, rather than refusing to issue new funds if the states did not comply. *Id.* at 579–80.

²³⁷ Even under “normal” times, creating a new spending program for such a purpose would be unreasonable. Ryan W. Miller, *What Does “Defund the Police” Mean and Why Some Say “Reform” Is Not Enough*, USA TODAY (June 8, 2020, 3:02 PM), <https://www.usatoday.com/story/news/nation/2020/06/08/what-does-defund-police-mean-george-floyd-black-lives-matter/5317240002> [<https://perma.cc/7ZMB-LYL3>]; Christy E. Lopez, *Defund the Police? Here’s What That Really Means*, WASH. POST (June 7, 2020, 6:37 PM), <https://www.washingtonpost.com/opinions/2020/06/07/defund-police-heres-what-that-really-means> [<https://perma.cc/V5WH-UNP8>].

²³⁸ Press Release, U.S. Dep’t of Just., Department of Justice Awards Nearly \$400 Million for Law Enforcement Hiring to Advance Community Policing (June 2, 2020), <https://www.justice.gov/opa/pr/department-justice-awards-nearly-400-million-law-enforcement-hiring-advance-community> [<https://perma.cc/N3MD-9FEM>].

²³⁹ *Id.* For a complete list of how the funds were distributed, see U.S. DEP’T OF JUST., COPS HIRING PROGRAM (CHP) 2020 AWARDS, https://cops.usdoj.gov/pdf/2020AwardDocs/chp/Award_List.pdf [<https://perma.cc/9DTT-8P6A>].

²⁴⁰ Press Release, U.S. Dep’t of Just., Justice Department Releases \$61 Million in Awards to Support Efforts to Combat Violent Crime in Seven U.S. Cities (May 11, 2020), <https://www.justice.gov/opa/pr/justice-department-releases-61-million-awards-support-efforts-combat-violent-crime-seven-us> [<https://perma.cc/CWT9-4DNB>]; see also OFF. OF CMTY. ORIENTED POLICING SERVS., U.S. DEP’T OF JUST., FACT SHEET: OPERATION RELENTLESS PURSUIT (ORP) (2019), https://cops.usdoj.gov/pdf/2020AwardDocs/chp/FY20_Relentless_Pursuit_Fact_Sheet.pdf [<https://perma.cc/H7E3-URA9>].

²⁴¹ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 30301, 108 Stat. 1796, 1844; Brian Naylor, *How Federal Dollars Fund Local Police*, NPR (June 9, 2020, 5:10 AM), <https://www.npr.org/2020/06/09/872387351/how-federal-dollars-fund-local-police> [<https://perma.cc/UU4F-EXUW>].

program since it was established.²⁴² The DOJ also provides funding to departments through the Edward Byrne Memorial Justice Assistance Grant Program, providing \$264 million to law enforcement agencies and corrections programs in 2019 alone.²⁴³ Similarly, the Patrick Leahy Bulletproof Vest Partnership, created by the Bulletproof Vest Partnership Grant Act of 1998, provides funds for the purchase of bulletproof vests, distributing \$522 million as of November 2020.²⁴⁴

The DOJ is not the only department that provides funds for the hiring, training, and arming of police officers; even the Department of Agriculture is involved in such projects.²⁴⁵ Under Rural Development's Community Facilities grant, funding is available for public safety services such as police stations and police vehicles.²⁴⁶ Likewise, the Department of Homeland Security has made over \$1.8 billion available for law enforcement agencies since the World Trade Center attacks in 2001.²⁴⁷ Essentially, there are a plethora of existing programs that Congress can use to incentivize local law enforcement agencies to prohibit the use of RCAs against protestors. The limitation of using the Spending Clause is that states can always choose to opt out of receiving the attached funds and continue their use of RCAs.²⁴⁸ In such an instance, at the very least, such legislation would limit police departments' source of funding and access to militarized weapons. It would then be incumbent upon the individual state legislatures to continue the mission and protect their own citizens.

²⁴² Naylor, *supra* note 241.

²⁴³ *Id.*

²⁴⁴ Bulletproof Vest Partnership Grant Act of 1998, Pub. L. No. 105-181, 112 Stat. 512; *Patrick Leahy Bulletproof Vest Partnership: Overview*, U.S. DEP'T OF JUST., <https://www.ojp.gov/program/bulletproof-vest-partnership/overview> [<https://perma.cc/U754-E8XL>]. For a list of 2020 awards, see U.S. DEP'T OF JUST., FY 2020 BVP AWARDS, https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/fy_2020_bvp_awards.pdf [<https://perma.cc/SF4B-EX8N>].

²⁴⁵ Naylor, *supra* note 241.

²⁴⁶ U.S. DEP'T OF AGRIC., COMMUNITY FACILITIES DIRECT LOAN & GRANT (2020), https://www.rd.usda.gov/sites/default/files/fact-sheet/508_RD_FS_RHS_CFDirect.pdf [<https://perma.cc/J289-ABMF>].

²⁴⁷ Naylor, *supra* note 241.

²⁴⁸ For example, despite the financial inducements at issue in *Sebelius*, twelve states have chosen not to opt into the Medicaid expansion program. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580–81 (2012); Jack Brewster, *Twelve States Have Yet to Pass a Medicaid Expansion—Nine Are Run by Republicans*, FORBES (Aug. 5, 2020, 11:36 AM), <https://www.forbes.com/sites/jackbrewster/2020/08/05/twelve-states-have-yet-to-pass-a-medicaid-expansion-nine-are-run-by-republicans/?sh=3fc0e08f2a80> [<https://perma.cc/3696-S8S8>].

CONCLUSION

The importance of the right to dissent cannot be overstated;²⁴⁹ public protests have been a pivotal aspect of numerous social movements and victories in the United States since its founding.²⁵⁰ However, the unchecked availability of RCAs has had a grave effect on citizens' rights to participate in such demonstrations.²⁵¹ The use of RCAs by law enforcement officers has led to serious physical injuries and grave violations of citizens' First, Fourth, and Fourteenth Amendment rights—while simultaneously hindering social and political progress.²⁵² The physical, psychological, and constitutional violations will only likely get worse given the increased development of weapons and the growing paramilitary nature of our police.²⁵³ Public trust in our institutions and the relationship between police departments and the communities they are meant to serve will likewise continue to deteriorate if our legislators do not act.²⁵⁴

Given that Congress took great part in creating the issue through its arming of law enforcement via the weapons program, Congress should use its enumerated powers to leverage the funds in the aforementioned projects in an effort to restore and expand the First Amendment rights of individuals. As the Supreme Court has stated, “free speech . . . may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are,

²⁴⁹ Hence, as a society, we opt for having broader protections for speech, rather than risk prohibiting speech that should be protected. Under the “overbreadth” doctrine, an individual whose speech may not be protected can nonetheless challenge a statute that restricts speech on its face, if the individual believes that the statute may “chill” those who wish to engage in protected speech from exercising their rights for fear of criminal prosecution. *Bd. of Airport Comm’rs v. Jews for Jesus, Inc.* 482 U.S. 569, 574 (1987); RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 177–80 (7th ed. 2015).

²⁵⁰ D’Addario, *supra* note 114, at 103; *see also* Justice Brandeis’s concurrence in *Whitney v. California*, 274 U.S. 357, 375 (1927) (describing freedom of speech as “fundamental” and “indispensable to the discovery and spread of political truth”). This concurrence was formally adopted by the Court in *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

²⁵¹ *See supra* Part II.

²⁵² *See supra* Part II.

²⁵³ *See supra* Section I.A.1.

²⁵⁴ *See* Lieblich & Shinar, *supra* note 8, at 122 (“[F]ormer Seattle Chief Stamper wrote: ‘[T]he police response to the Occupy movement . . . brings into sharp relief the acute and chronic problems of American law enforcement. . . . Such agencies inevitably view protesters as the enemy. And young people, poor people and people of color will forever experience the institution as an abusive, militaristic force’”); *see also* *Mapp v. Ohio*, 367 U.S. 643, 659 (1961) (“Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”).

or even stirs people to anger.”²⁵⁵ Unpopular protests—particularly civil rights and anti-police brutality protests—are exactly the type of speech our Constitution was designed to protect.²⁵⁶ However, historically, this is not how they have been treated.²⁵⁷ By mirroring our *jus in bello* obligations through outlawing the use of RCAs against protestors and extending greater protections to legal observers, journalists, and medics, Congress could better ensure that law enforcement is respecting the letter and spirit of the Constitution and that the rights of persons seeking to participate in political dissent—often in an effort to ensure equal protection²⁵⁸—become as tangible as the gas that currently permeates their lungs.

²⁵⁵ *Cox v. Louisiana*, 379 U.S. 536, 551–52 (1965).

²⁵⁶ *Stromberg v. California*, 283 U.S. 359, 369 (1931); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913–15 (1982) (“[E]xpression on public issues ‘has always rested on the highest rung of the hierarchy of First Amendment values.’” (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980))) (“[S]peech to protest racial discrimination is essential political speech lying at the core of the First Amendment.” (internal quotations omitted) (quoting *Henry v. First Nat’l Bank of Clarksdale*, 595 F.2d 291, 303 (1979))).

²⁵⁷ *Abbey*, *supra* note 89, at 87–89; *D’Addario*, *supra* note 114, at 97–99. When police use RCAs against demonstrators decrying state action in an attempt to chill their speech, the indiscriminate use of RCAs becomes especially dangerous to the democratic process given the difficulty of determining how many individuals the police succeed in deterring from exercising their rights for fear of being subjected to RCAs. Furthermore, individuals who are successfully deterred from participating in future demonstrations lack standing for equitable remedies, further limiting the legal remedies available to demonstrators subject to the speech chilling practice. *Cf. City of Los Angeles v. Lyons*, 449 U.S. 934 (1980) (White, J., dissenting) (noting that the court cannot grant injunctive relief if the plaintiff cannot demonstrate a real and imminent threat that they will be subjected to future violations).

²⁵⁸ *Cf. Caitlin O’Kane*, “Say their Names”: *The List of People Injured or Killed in Officer-Involved Incidents Is Still Growing*, CBS NEWS (June 8, 2020, 7:02 AM), <https://www.cbsnews.com/news/say-their-names-list-people-injured-killed-police-officer-involved-incidents> [<https://perma.cc/36MM-HM2V>].