

The Quasi-Army Law Enforcement, Value Judgments, & the Posse Comitatus Act

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INTRODUCTION

“I mean you call something a war, and pretty soon everyone is going to be running around acting like warriors. They gonna be running around on a damn crusade, storming corners, racking up body counts. And when you at war, you need [an] enemy. And pretty soon, damn near everybody on every corner is your [] enemy. And soon, the neighborhood you’re supposed to be policing, that’s just occupied territory. You follow this? . . . The point I’m making is this: Soldiering and policing, they ain’t the same thing.” – Howard “Bunny” Colvin¹

Few issues have been laid bare more clearly in the wake of the death of George Floyd than the prevalence and dangers of highly militarized police.

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1. THE WIRE: REFORMATION (HBO Nov. 28, 2004).

Police departments in Minneapolis and from New York to Los Angeles have responded to protests by deploying mine-resistant vehicles and paramilitary units, armed with flashbangs, tactical armor, and assault rifles.² The federal government has also deployed highly militarized law enforcement officers to patrol the streets and make arrests, prompting widespread criticism.³ While the presence of these officers is both unnecessary and likely counterproductive, it should not surprise us—we have seen this sequence play out before. In 2014, police deployed armored transports carrying heavily armed officers in response to protests after Officer Darren Wilson shot Michael Brown.⁴ The unrest led St. Louis-area police to mobilize “tactical officers [armed] with military-style uniforms, equipment, weapons and armored vehicles.”⁵ In Ferguson, as now, officers who bore enough weaponry to invade a small nation were deployed against protestors.⁶

Further still, we have long known that American police are militarizing. The wars in Afghanistan and Iraq both left the federal government with vast surpluses of military equipment.⁷ Rather than allowing equipment to languish in storage, the Department of Defense (DOD) has dispersed the equipment to state

2. Nicole Kobie, *How US Police Used Military Tactics to Turn Peaceful Protests Violent*, WIRED (June 4, 2020), <https://www.wired.co.uk/article/police-brutality-minneapolis-floyd-blm-trump> [<https://perma.cc/4TZ6-QLRL>]; James Queally et al., *LAPD Tactics Get More Aggressive as Arrests Soar*, L.A. TIMES (June 3, 2020), <https://www.latimes.com/california/story/2020-06-03/amid-chaos-and-under-curfew-arrests-in-los-angeles-surge-into-the-thousands> [<https://perma.cc/7NNY-XJVQ>]; Shaila Dewan & Mike Baker, *Facing Protests Over Use of Force, Police Respond With More Force*, N.Y. TIMES (last updated June 2, 2020), <https://www.nytimes.com/2020/05/31/us/police-tactics-floyd-protests.html> [<https://perma.cc/8YQ6-DXFS>].

3. E.g., Quinta Jurecic & Benjamin Wittes, *Nothing Can Justify the Attack on Portland*, ATLANTIC (July 21, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/nothing-can-justify-attack-portland/614413/> [<https://perma.cc/NX3D-W94X>].

4. See Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html> [<https://perma.cc/8LTH-9KK4>]; Elise Hu, *Crowds Confront Police, Businesses Burn In Ferguson Chaos*, NPR (Nov. 25, 2014), <https://www.npr.org/sections/thetwo-way/2014/11/25/366452769/ferguson-businesses-burn-crowds-confront-police-in-overnight-chaos> [<https://perma.cc/84N3-G2E4>]; Mark Thompson, *Why Ferguson Looks So Much Like Iraq*, TIME (Aug. 14, 2014), <https://time.com/3111455/ferguson-missouri-michael-brown-iraq/> [<https://perma.cc/9L63-Y5A3>].

5. Mark Berman & Wesley Lowery, *Justice Dept. Report Criticizes Police Response to Ferguson Protests*, WASH. POST (June 30, 2015), <https://www.washingtonpost.com/news/post-nation/wp/2015/06/30/justice-dept-report-criticizes-police-response-to-ferguson-protests/> [<https://perma.cc/YV5Y-9A2B>].

6. German Lopez, *What Happened in Ferguson, Missouri, Following the Shooting and Grand Jury Decision?*, VOX (Jan. 27, 2016), <https://www.vox.com/2015/5/31/17937880/ferguson-missouri-2014-protests-riots-police> [<https://perma.cc/TL6N-WKRD>] (“Law enforcement officials deployed heavily armed teams to try to contain the situation. Police blocked the roads and dispersed protesters on several nights with military-grade equipment, including body armor, rifles, tear gas, rubber bullets, and even armored, mine-resistant vehicles that are basically tanks.”).

7. Paulina Fiorizi, *Police Forces Pick Up Surplus Military Supplies*, USA TODAY (June 15, 2014), <https://www.usatoday.com/story/news/nation/2014/06/15/local-law-enforcement-agencies-surplus-military-equipment/10286485/> [<https://perma.cc/WN5V-TBA9>].

and local police departments.⁸ There are many programs that aid police departments in their acquisition of military grade equipment. For example, the 1033 Program, which is administered by the Department of Defense, allows the federal government to transfer equipment like helicopters and grenade launchers to local police departments.⁹ Today, police departments from Leon, Florida, to Wahkiakum, Washington, are participants in the 1033 Program.¹⁰

Criticism of police militarism is abundant, and for good reason.¹¹ Militarism in policing is a grossly disproportionate reaction to the crises American police and the American public face today. Militarism does not increase officer safety,¹² harms public perception of police,¹³ and leads to increased civilian death,¹⁴ without any appreciable benefit to crime reduction.¹⁵ And yet, despite the plentiful critiques of militarization, scholarship has left behind an important argument on the place of militarism in American policing stemming from the Posse Comitatus Act of 1878 (PCA). As it was passed in 1878, the PCA prohibited using “any part of the Army of the United States” to enforce domestic law.¹⁶ Today, the PCA prohibits using the Army or the Air Force to enforce domestic law, absent express authorization from Congress or the Constitution.¹⁷

This Article explores why the PCA offers a strong and important signal that militarism has no place in American policing. In Part I, I examine how we have come to the present moment, in which police find themselves in possession of equipment designed to suppress grievous threats to service members on battlefields that are half a world away. This Part contends that the implements of force that officers now possess are divorced from any real need officers might

8. *E.g., id.*

9. *MRAPs and Bayonets: What We Know About the Pentagon's 1033 Program*, NPR (Sept. 2, 2014), <http://www.npr.org/2014/09/02/342494225/mraps-and-bayonets-what-we-know-about-the-pentagons-1033-program> [<https://perma.cc/V3F4-YGHC>].

10. Tess Owen, *Locked and Loaded*, VICE (Aug. 28, 2017), https://news.vice.com/en_us/article/mb9xya/trump-is-letting-local-cops-have-grenade-launchers-again [<https://perma.cc/YER2-FYY8>].

11. *See generally* RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* (2014). *See also, e.g.*, ACLU, *WAR COMES HOME: THE EXCESSIVE MILITARIZATION OF AMERICAN POLICING 2* (2014); Daniel M. Stewart & Willard M. Oliver, *The Adoption of Homeland Security Initiatives in Texas Police Departments: A Contextual Perspective*, CRIM. JUST. REV., 2014, at 9; Al Baker, *When the Police Go Military*, N.Y. TIMES (Dec. 3, 2011), <https://www.nytimes.com/2011/12/04/sunday-review/have-american-police-become-militarized.html> [<https://perma.cc/M8XF-KTXV>] (“[T]he problem is, if you have those kinds of specialized units, that you hunt for appropriate settings to use them. . .”).

12. Jonathan Mummolo, *Militarization Fails to Enhance Police Safety or Reduce Crime but May Harm Police Reputation*, 115 PROC. NAT'L ACAD. SCI. 9181, 9183–84 (2018).

13. *Id.* at 9184–85.

14. Edward Lawson Jr., *TRENDS: Police Militarization and the Use of Lethal Force*, 72 POL. RES. Q. 177, 185 (2018).

15. Mummolo, *supra* note 12, at 9183–84.

16. Army Appropriation Act for 1879, Pub. L. No. 45-263, § 15 (1878).

17. 18 U.S.C. § 1385 (2018).

have—and are certainly not needed to respond to the odd brick-throwing protester. In Part II, I offer a brief history of the PCA. The statute’s history is long and complex, so this Section offers an illustrative rather than exhaustive account of the PCA. Finally, in Part III, I argue that the PCA embodies an important value judgment that military force is inappropriate to enforce domestic law. As I explain, despite the PCA’s many carve-outs and exceptions, the statute’s drafters were concerned with not with the “who” but the “how” question when it came to enforcement of domestic law. With a heavy focus on purposivism, I contend that the PCA is concerned with restricting the use of military *force* in the domestic arena rather than with limiting the role of a particular institution. By unleashing military tactics and weapons onto American streets, police departments around the country are violating a value that traces its intellectual roots to the very founding of our country and which has been crystallized in statute for well over a century.

I.

FEDERAL GRANTS & MILITARIZATION

The propagation of military equipment and tactics has dramatically shrunk the lacuna between the police and the military. During the 1970s and ‘80s, that was widely regarded as a good thing.¹⁸ Tough-on-crime legislators prided themselves on being the strongest advocates for giving police more firepower. Section I discusses the programs and initiatives that have sprung up to provide police with military equipment. It identifies a single main force that led police departments to more closely resemble military branches: federal equipment disbursements. Section I is merely illustrative and does not purport to be exhaustive. Suffice it to say the police have more means to militarize than this section describes.

While the question of why a department would choose to militarize is an important one, it does not bear on our inquiry.¹⁹ The PCA is likely ambivalent about how police have come to possess military equipment. The Act does not put weight on whether equipment was obtained to respond to a heavily armed

18. See BALKO, *supra* note 11, at 145–47.

19. There are myriad reasons why a police department may opt to arm itself with military-grade armaments. Given the unparalleled prevalence of firearms in the civilian population, police have an interest in remaining in lockstep. Or perhaps departments militarize simply because they can. Whatever the reasons departments have, there should be little doubt that the decision to accept federal armaments has deleterious effects on the communities that officers serve. For example, militarized officers are more likely to use force—a decidedly negative outcome for the community. Lawson, *supra* note 14, at 186 (“[T]here is an association between militarization and suspect deaths. In other words, increasing militarization corresponds to more suspect deaths.”).

citizenry,²⁰ or as a product of the “War on Drugs.”²¹ This Section focuses only on the question of how police have become so heavily militarized: How does a police department in Neenah, Wisconsin, a town of 25,000, afford a mine-resistant vehicle that retails for a half a million dollars?²²

There are two federal programs that surpass all others in facilitating police militarism: the Department of Defense’s 1033 Program and Department of Homeland Security’s (DHS) Homeland Security Grant Program (HSGP).²³ DHS’s grant programs grew out of the initial fear of terrorism after September 11th. In the first year after DHS was created, it distributed nearly \$2.5 billion in grants to local law enforcement.²⁴ The grants represent huge investments by the federal government, often in communities that have little need for massive influxes of equipment.²⁵ DHS does not account for how the equipment it funds will be used.²⁶ While the equipment is, ostensibly, to prepare communities in the

20. The firearm ownership rate in the United States surpasses all other nations. The 2018 *Small Arms Survey* estimated that there are more guns in the United States than people—about 120 firearms for every 100 human beings. See Aaron Karp, *Briefing Paper: Estimating Global Civilian Held Firearms Numbers*, SMALL ARMS SURVEY 3 (2018) (“National ownership rates vary from about 120.5 firearms for every 100 residents in the United States to less than 1 firearm for every 100 residents in countries like Indonesia, Japan, Malawi, and several Pacific island states.”).

21. Eliav Liebllich & Adam Shinar, *The Case Against Police Militarization*, 23 MICH. J. RACE & L. 105, 120 (2018) (“As part of the “Global War on Terror,” virtually every law enforcement agency was enlisted in the war effort. The establishment of the Department of Homeland Security (DHS) was one major consequence of the terrorist attacks. The DHS, with its \$66 billion budget for the fiscal year 2017, spends much of that money in the form of grants to local law enforcement agencies that in turn serve to procure military equipment. . . . Between 2001 and 2011, the DHS gave \$34 billion in anti-terror grants, many of which went to unlikely places such as Fargo, North Dakota, or Canyon County, Idaho, hardly prime terrorist targets. Many of these places, unsurprisingly, chose to buy military equipment.” (footnotes omitted)); BALKO, *supra* note 11, at 254.

22. Matt Apuzzo, *War Gear Flows to Police Departments*, N.Y. TIMES (June 8, 2014), <https://www.nytimes.com/2014/06/09/us/war-gear-flows-to-police-departments.html> [<https://perma.cc/P662-GG49>].

23. See Taylor Wofford, *How America’s Police Became an Army: The 1033 Program*, NEWSWEEK (Aug. 13, 2014), <https://www.newsweek.com/how-americas-police-became-army-1033-program-264537> [<https://perma.cc/N8Z3-GSYW>]. Of course, other programs exist, such as the 1122 Program, which is also run out of DOD and provides resources to support counter-drug initiatives. *1122 Program*, GEN. SERV. ADMIN. (last visited Feb. 21, 2019), <https://www.gsa.gov/buying-selling/purchasing-programs/gsa-schedules/schedule-buyers/state-and-local-governments/1122-program> [<https://perma.cc/CS8K-4TQX>]. In the personnel category, the federal government has encouraged and facilitated veterans moving into law enforcement careers once they leave the military. See Matt Compton, *President Obama: “Hire a Veteran”*, OBAMA WHITE HOUSE (Nov. 21, 2011), <https://obamawhitehouse.archives.gov/blog/2011/11/21/president-obama-hire-veteran> [<https://perma.cc/89XA-KACP>].

24. *The Flow of Money and Equipment to Local Police*, N.Y. TIMES (Dec. 1, 2014), <https://www.nytimes.com/interactive/2014/08/23/us/flow-of-money-and-equipment-to-local-police.html> [<https://perma.cc/3AXM-DJZJ>].

25. Matthew Harwood, *How Did America’s Police Get So Militarized?*, MOTHER JONES (Aug. 14, 2014), <https://www.motherjones.com/politics/2014/08/america-police-military-swat-ferguson-westcott-tampa/> [<https://perma.cc/3MGJ-VNNS>].

26. *Id.*

event of a terror attack or school shooting, it is rarely deployed for these reasons.²⁷

Disbursements of equipment like the 1033 Program began as a means to offload aging equipment that federal departments no longer needed.²⁸ When the 1033 Program was created, the Cold War and First Gulf War had been over for nearly a decade and there was no major military deployment abroad. Equipment that had been stockpiled and maintained was aging and it made little sense to hoard it. Equipment upkeep is a staggeringly expensive proposition for the federal government, so giving the equipment away once it is no longer in use is relatively rational.²⁹ Since the National Defense Authorization Act of 1997 authorized the 1033 Program, the wars in Afghanistan and Iraq have left the federal government with a new influx of equipment to jettison.

Through 2014, the 1033 Program distributed nearly \$4.3 billion in military-grade equipment to local law enforcement.³⁰ The program put 79,288 assault rifles, 205 grenade launchers, 11,959 bayonets, 3,972 combat knives, \$124 million of night vision technology, and 420 helicopters in the hands of local law enforcement.³¹ Indeed, in 2013 alone, \$248 million worth of vehicles were handed out to local police departments. Not only does the DOD distribute this technology, it attaches a condition to the handout: It must be used within a year.³²

While the 1033 Program has done much to erase differences in equipment and tactics that once sharply distinguished the military from local police officers,³³ it is not the only responsible program. Since 2000, the DOD and DHS

27. Liebllich & Shinar, *supra* note 21, at 120–22; see Steven Hsieh, *Report: SWAT Teams Armed With Military Equipment Spend Most of Their Time Waging the Drug War*, NATION (June 24, 2014), <https://www.thenation.com/article/archive/report-swat-teams-armed-military-equipment-spend-most-their-time-fighting-drug-war/> [<https://perma.cc/Q36K-H6G4>].

28. Brent Skorup & Andrea O'Sullivan, *Breaking Down Department of Defense Grants to State and Local Law Enforcement*, MERCATUS CTR. (Dec. 15, 2014), <https://www.mercatus.org/publication/breaking-down-department-defense-grants-state-and-local-law-enforcement> [<https://perma.cc/4L38-VVKS>].

29. Brad Lockwood, *The Militarizing of Local Police*, FORBES (Nov. 30, 2011), <https://www.forbes.com/sites/bradlockwood/2011/11/30/the-militarizing-of-local-police/#67203ec15fed> [<https://perma.cc/88QD-45RA>] (“The Pentagon spends nearly \$23 billion annually on rust. Seriously, corrosion costs American taxpayers more than Canada or South Korea spend on defense, total.”).

30. Wofford, *supra* note 23.

31. Arezou Rezvani et al., *MRAPs and Bayonets: What We Know About the Pentagon's 1033 Program*, NPR (Sept. 2, 2014), <http://www.npr.org/2014/09/02/342494225/mraps-and-bayonets-what-we-know-about-the-pentagons-1033-program> [<https://perma.cc/3XX6-PQUQ>].

32. See *Excess Federal Property*, JUST. TECH. INFO CTR. (Mar. 30, 2019), <https://www.justnet.org/resources/Excess-Federal-Property.html> [<https://perma.cc/YZL6-LKTQ>].

33. See Arva Hassonjee, *Militarization of Police Fails to Enhance Safety, May Harm Police Reputation*, PRINCETON U. (Aug. 21, 2018), <https://www.princeton.edu/news/2018/08/21/militarization-police-fails-enhance-safety-may-harm-police-reputation> [<https://perma.cc/5DQF-4D59>] (“In recent decades, police units have grown more militarized in part due to the “War on Drugs” campaign as well as federal initiatives that supplied neighborhoods with excess military equipment and funds to purchase arms.”); see also Peter B. Kraska, *Enjoying Militarism: Political/Personal Dilemmas in Studying U.S. Police Paramilitary Units*, 13

have together doled out nearly \$40 billion in resources to police departments.³⁴ These agencies' purported objective has been to better prepare police for the realities of policing today.³⁵ Yet the programs have provided departments with armaments that are devoid of any connection to the local problems that police face. For example, when the aforementioned town of Neenah, Wisconsin, began receiving equipment, it hadn't had a homicide in four years.³⁶ The federal government has rampantly distributed equipment for which departments have no use, let alone a need. Today, officers are no longer armed with handguns and perhaps a standard pump-action shotgun. Rather, they are dressed in camouflage fatigues, carrying assault rifles, and wearing body armor designed to stop an IED. The Army may not be walking the streets of Ferguson and Fargo, but their weapons certainly are.

II.

A (BRIEF) HISTORY OF THE PCA

The history of the PCA is circuitous and decidedly complex and has been described at length in other pieces of scholarship.³⁷ As such, this Section does not offer an exhaustive description of the PCA's history. Rather, its account is meant to be illustrative—to adequately set the scene for the values and fears that are engrained in the PCA. I aim to provide enough background to properly contextualize the sentiments that led to the PCA's passage, what the Act prohibits, and how it is applied today.

A. *The Founding*

The term “posse comitatus” is derived from the common law tradition in England, whereby “every male in the country, over the age of fifteen” could be summoned “to come to the aid of the sheriff for the purpose of preserving the

JUSTICE Q. 405, 407 (1996) (“In a popular police magazine, the Fresno PD claimed that the streets had become a ‘war zone’; they responded by deploying their SWAT team, equipped with military fatigues and weaponry, as a full-time patrol unit to ‘suppress’ the crime and drug problem.”) (citation omitted).

34. Harwood, *supra* note 25; Aaron C. Davenport et al., *An Evaluation of the Department of Defense's Excess Property Program*, RAND CORP. (2018), https://www.rand.org/content/dam/rand/pubs/research_reports/RR2400/RR2464/RAND_RR2464.pdf [<https://perma.cc/7HEZ-JSPP>].

35. *Law Enforcement Resources*, DEP'T HOMELAND SEC. (last visited Feb. 21, 2019), <https://www.dhs.gov/LEP-resources> [<https://perma.cc/73GL-Y2VL>] (“The [HSGP] plays an important role in the implementation of the National Preparedness System (NPS) by supporting the building, sustainment, and delivery of core capabilities essential to achieving the National Preparedness Goal of a secure and resilient Nation.”).

36. Kevin Rizzo, *Crime in America in 2015*, LAW STREET (Apr. 20, 2015), <https://lawstreetmedia.com/blogs/crime/crime-america-2015-top-10-safest-dangerous-metros-midwest/> [<https://perma.cc/Y2GN-XCR4>].

37. See, e.g., Mark P. Nevitt, *Unintended Consequences: The Posse Comitatus Act in the Modern Era*, 36 CARDOZO L. REV. 119 (2014); H.W.C. Furman, *Restrictions Upon the Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85 (1960).

public peace.”³⁸ The power of posse comitatus has been endowed to sheriffs since Alfred the Great ruled Britain in the ninth century.³⁹ The use of posse comitatus allowed sheriffs to call forth local citizens to aid in law enforcement activities,⁴⁰ a history of which the founders were well aware.⁴¹ More simply, a posse is a group of citizens enlisted by the sheriff to aid in the capture of fugitives, enforcement of laws, and maintenance of public order.

While the power of posse comitatus had historically been reserved to local sheriffs, in Federalist Paper No. 29, Alexander Hamilton noted the new Constitution would extend the power to the federal government:

The same persons who tell us in one breath, that the powers of the federal government will be despotic and unlimited, inform us in the next, that it has not authority sufficient even to call out the posse comitatus. The latter, fortunately, is as much short of the truth as the former exceeds it. . . . It [is] therefore evident that the supposition of a want of power to require the aid of the posse comitatus is entirely destitute of color. . . .⁴²

Accordingly, we know that in the early republic, local sheriffs *and* the federal government had the power of posse comitatus.

While the founders did not themselves limit the scope of posse comitatus powers, they were quite clearly aware of the dangers posed by domestic militarism.⁴³ James Madison and Alexander Hamilton were particularly wary of a standing military force because of how the British had used troops in the pre-Revolutionary colonies to enforce the law.⁴⁴ Madison’s misgivings about standing armies were made clear in the Federalist Papers.⁴⁵ In Federalist Paper No. 41, Madison called a standing military force “dangerous” but acknowledged a pragmatic belief that the benefits of standing militaries likely outweighed the

38. Furman, *supra* note 37, at 87.

39. See Steve Gullion, *Sheriffs in Search of a Role*, 142 NEW L.J. 1156, 1156 (1992) (“[T]he original role of the sheriff was to act as the personal representative of the King in each county. . . . In their law enforcement role they could call upon the local freemen to form a posse comitatus to hunt for outlaws and, in their judicial role, they presided over the shire court, exercising both civil and criminal jurisdiction.”). Today, sheriffs continue to be empowered to compel citizens to aid in the enforcement of the law. See, e.g., COLO. REV. STAT. § 30-10-516 (West 2018); VA. CODE ANN. § 18.2-463 (West 2018); WASH. REV. CODE ANN. § 36.28.010 (West 2018). More commonly, the power is exercised by maintaining a group of volunteer “reserve officers.” See David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOLOGY 761, 809 (2015).

40. *Posse Comitatus*, BLACK’S LAW DICTIONARY (8th ed. 2004).

41. See THE FEDERALIST NO. 29 (Alexander Hamilton).

42. *Id.* (emphasis added).

43. Christopher A. Abel, Note, *Not Fit for Sea Duty: The Posse Comitatus Act, the United States Navy, and Federal Law Enforcement at Sea*, 31 WM. & MARY L. REV. 445, 456–57 n.76 (1990) (quoting MARSHALL SMELSER, *THE CONGRESS FOUNDS THE NAVY 1787–1798*, 6 (1959)).

44. See Nevitt, *supra* note 37, at 128; Furman, *supra* note 37, at 92.

45. THE FEDERALIST NO. 41, (James Madison) (“A standing force, therefore, is a dangerous, at the same time that it may be a necessary, provision.”).

risks.⁴⁶ The fears of a standing military are understandable; at times, the British military had been brutal in colonial America, as exemplified in violent events like the Boston Massacre in 1770.⁴⁷ George Washington himself once lectured Alexander Hamilton that “[t]he army . . . is a dangerous instrument to play with.”⁴⁸ When the Whiskey Rebellion was underway, Washington regarded using the military as a “last resort” and expected critics from all circles if he did.⁴⁹ Republicans like Thomas Jefferson and James Madison believed that *any* standing military would “constrain American liberties.”⁵⁰

Although the founders were fearful of militarism, these anxieties did not translate into a push to limit the military’s domestic power. In fact, the opposite is true—they believed the new Constitution fully endowed the federal government with the power of *posse comitatus*.⁵¹

B. Reconstruction and the Posse Comitatus Act Passage

Nearly a century after the founding, fears about military force being used in domestic affairs returned to the fore of America’s political consciousness. In the aftermath of the Civil War, the southern states were placed under federal supervision during Reconstruction.⁵² Congress used Army troops to enforce sweeping legislation in the Southern states once they were readmitted.⁵³ This culminated in the use of troops to supervise polling places in Florida, South Carolina, and Louisiana during the 1876 Presidential election.⁵⁴ Congressional representatives from the South were furious with the federal government’s use of troops and demanded a legislative response.⁵⁵ Congress’s response was the PCA.

46. *Id.*

47. See John Phillip Reid, *A Lawyer Acquitted: John Adams and the Boston Massacre Trials*, 18 AM. J. LEGAL HIST. 189, 189–90 (1974) (“Only a few facts need concern us. Blood was shed on the streets of Boston and the British army had spilled it. Five civilians were to die as a result and no one fired a gun at the soldiers.”). See generally HILLER B. ZOBEL, *THE BOSTON MASSACRE* (1996).

48. RON CHERNOW, *ALEXANDER HAMILTON* 179 (2004).

49. *Id.* at 469.

50. *Id.* at 478.

51. Some have suggested that the Posse Comitatus Act applies only to *state* officials and places “no limits” on the federal government. BALKO, *supra* note 11, at 25 (2014). Hamilton’s account of the new Constitution directly refutes this contention. The PCA prohibits “anyone” and so applies in full against the federal government as well. 18 U.S.C. § 1385.

52. James P. O’Shaughnessy, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 AM. CRIM. L. REV. 703, 704–05 (1976).

53. *Id.* at 704–06.

54. *Id.* at 707–08 (“On the same day the election results were announced, the precursor to the Posse Comitatus Act was introduced in the House as a ‘rider’ on the Army Appropriations Bill, seeking to limit the use of federal troops in the South by restricting use of Army funds for certain purposes.”).

55. Nevitt, *supra* note 37, at 135.

As Eric Rishel notes, “discontent with specific uses of [the] military . . . drove the passage of the Act.”⁵⁶ The 45th Congress passed the Posse Comitatus Act of 1878, which provided:

[I]t shall not be lawful to employ any part of the Army of the United States, as a posse comitatus, or otherwise, for the purpose of executing the laws, except in such cases and under such circumstances as such employment of said force may be expressly authorized by the Constitution or by act of Congress.⁵⁷

The Act embodied a desire for law enforcement to be handled by local officials, who lacked military firepower.⁵⁸ Before its passage, local sheriffs had the inherent authority to use federal Army personnel to enforce domestic law—a power they no longer had after the PCA’s passage.⁵⁹

Of course, the PCA cannot be separated from the deeply racist sentiments that permeated the readmitted states and animated the Act’s passage. But at its core, it represents a deeply democratic value: Military force shall not be used against Americans save authorization from the people’s representatives themselves. While those who sought this protection did so for a deeply abhorrent reason—a refusal to enfranchise Black Americans—the value embedded in the PCA is worth endorsing nonetheless. By reserving the decision to authorize the military’s use to Congress, the PCA represented a categorical judgment that the military is too blunt and inappropriate an instrument to effectuate domestic law enforcement tasks.

Admittedly, it is unclear whether the PCA was a meaningful curtailment of government action at the time it was passed. President Hayes sent federal troops to New Mexico to quell civil disorder the same year the PCA was passed.⁶⁰ Fifteen years later, President Grover Cleveland sent federal troops to Illinois to tamp out railroad strikes.⁶¹ It appears that only one instance of executive use of federal troops was scrutinized by Congress: When President McKinley sent 500 troops to Idaho in 1899, the House Committee on Military Affairs “investigated the legality of the President’s deployment.”⁶² While these incidents are largely forgotten in modern discussions about the PCA’s effectiveness, they highlight

56. Eric C. Rishel, *Unleashing “High-Tech” Weaponry in the Drug War: Posse Comitatus, the Fourth Amendment, and Enhanced Sensing* 19 (Apr. 1992) (unpublished thesis, Judge Advocate General’s School) (on file with Homeland Security Digital Library).

57. Army Appropriation Act for 1879, Pub. L. No. 45-263, § 15 (1878).

58. *Id.*

59. Nevitt, *supra* note 37, at 136–37.

60. John R. Longley III, *Military Purpose Act: An Alternative to the Posse Comitatus Act—Accomplishing Congress’s Intent with Clear Statutory Language*, 49 ARIZ. L. REV. 717, 720 n. 118 (2007).

61. Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage Is Done*, 175 MIL. L. REV. 86, 122 (2003).

62. Arthur Rizer, *Trading Police for Soldiers: Has the Posse Comitatus Act Helped Militarize Our Police and Set the Stage for More Fergusons?*, 16 NEV. L.J. 467, 477 (2016).

the importance of the PCA's values. Because the statute is unlikely to be criminally prosecuted, we rely on leaders' own willingness to adhere to the value judgements the PCA embodies—values Presidents Grover and McKinley opted to ignore.

C. *The Posse Comitatus Act Today*

For much of the PCA's history, it lay dormant, acting only as a background recognition of values. But after World War II, it made a resurgence. For instance, in 1948, Douglas Chandler, an accused Nazi propagandist, argued the military had violated the PCA when it seized him for prosecution.⁶³ The First Circuit easily dispensed with the argument but commended Chandler's lawyer for the creative approach.⁶⁴

Later in the twentieth century, lower federal courts began to confront questions about the PCA's scope. A series of cases forced the issue upon the federal courts. In 1973, a group of indigenous Americans seized the town of Wounded Knee, South Dakota, for 71 days.⁶⁵ The Department of Defense sent military observers to advise local law enforcement and evaluate whether the military could play any role in resolving the dispute.⁶⁶ After their arrest, members of the group argued that the officers were acting outside their lawful authority when they effectuated the arrests.⁶⁷ The defendants' theory was that law enforcement's use of military equipment and advice was a violation of the PCA, which made the arrests illegal.⁶⁸ The cases set up the highest-profile consideration of the PCA in modern American history.

Federal courts in Nebraska, North Dakota, and South Dakota reached entirely different conclusions about whether the military's involvement at Wounded Knee violated the PCA. The three courts applied three different tests to assess whether a violation of the PCA had occurred. In *United States v. McArthur*, the court focused on whether citizens were subjected to military power that was "regulatory, proscriptive, or compulsory in nature," and, finding insufficient evidence of such, ruled for the government.⁶⁹ In *United States v. Jaramillo*, the court asked whether the use of the military "pervaded" the activities of law enforcement officials, holding that the federal government had not adequately shown that the military assistance it had provided *didn't* violate

63. Chandler v. United States, 171 F.2d 921, 936 (1st Cir. 1948).

64. *Id.*

65. Emily Chertoff, *Occupy Wounded Knee: A 71-Day Siege and a Forgotten Civil Rights Movement*, THE ATLANTIC (Oct. 23, 2012), <https://www.theatlantic.com/national/archive/2012/10/occupy-wounded-knee-a-71-day-siege-and-a-forgotten-civil-rights-movement/263998/> [https://perma.cc/W6VA-AYMV].

66. Rishel, *supra* note 56, at 21.

67. *See, e.g.*, United States v. Jaramillo, 380 F.Supp. 1375, 1378 (D. Neb.1974).

68. *Id.*

69. United States v. McArthur, 419 F.Supp. 186, 194-95 (D.N.D. 1975).

the PCA; the defendants were acquitted.⁷⁰ Finally, in *United States v. Red Feather*, the court framed the question as one of whether the military was used in a “direct” and “active” role, holding that it had not been.⁷¹ Importantly, no matter how we read the Wounded Knee cases, the common theme that emerges is that the PCA is concerned with military *contact* with citizens.⁷² The question this necessarily invites is, “Why?”

Today, the PCA reads slightly differently than it did in 1878. It provides:

Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.⁷³

Moreover, Congress has codified several new exceptions to the PCA allowing the provision of intelligence,⁷⁴ training,⁷⁵ and equipment.⁷⁶ But as Congress has made clear, these activities do not “include or permit direct participation by a member of the [armed services] in a search, seizure, arrest, or other similar activity.”⁷⁷ And so, while exceptions exist to the PCA’s categorical judgment, its core value remains intact and arguably even more strongly expressed.

Since the PCA’s enactment, no individual has ever been prosecuted for violating it.⁷⁸ Despite being unenforced, the PCA has successfully come to embody the widely accepted value that the military may not be used to enforce the laws of the United States.⁷⁹ For example, the PCA has never explicitly prohibited the Navy from operating on U.S. soil.⁸⁰ But in 1981, Congress directed the Secretary of Defense to promulgate guidance to regulate the Navy’s involvement in domestic matters, and PCA-style guidelines were adopted in due course.⁸¹ Similarly, the Act does not address “the National Guard, [but] it is generally understood that when the National Guard is under federal control, the

70. *Jaramillo*, 380 F.Supp at 1379–81.

71. *United States v. Red Feather*, 392 F.Supp 916, 921–24 (D.S.D. 1975).

72. *See id.* at 921–22; *Jaramillo*, 380 F.Supp. at 1378–79; *McArthur*, 419 F.Supp. 194.

73. 18 U.S.C. § 1385 (2016).

74. 10 U.S.C. § 271 (2016).

75. 10 U.S.C. § 272 (2016).

76. 10 U.S.C. § 273 (2016). Other exceptions to the PCA’s prohibitions also exist. For example, the Stafford Act authorizes “special measures” to help localities recover from natural disasters. 42 U.S.C. § 5121 (2012). Section 5121’s “special measures” clause has been interpreted to allow military deployment after a natural disaster. Candidus Dougherty, *While The Government Fiddled Around, the Big Easy Drowned: How the Posse Comitatus Act Became the Government’s Alibi for The Hurricane Katrina Disaster*, 29 N. ILL. U. L. REV. 117, 132-33 (2008).

77. 10 U.S.C. § 275 (2016).

78. Rishel, *supra* note 56, at 15.

79. *Id.* (“It remains, however, a statute greater than its terms. It has evolved into an embodiment of all concerns about military-civilian relations in the American political psyche.”).

80. Nevitt, *supra* note 37, at 135. Nevitt posits this was the result of the traditional use of “posses” by sheriffs, which were inherently land bound. *Id.* at 135 n. 93.

81. *See* 10 U.S.C. § 275 (2016).

Act applies.”⁸² DOD policy has explained since 1982 that the PCA forbids military personnel from engaging in interdictions, searches and seizures, arrests, and surveillance.⁸³

Today, lower federal courts continue to confront questions about the reach of the PCA’s new language and exceptions. For example, in *United States v. Dreyer*, the *en banc* Ninth Circuit reaffirmed its holding in *United States v. Chon* when it found that the Navy Criminal Investigative Service (NCIS) was subject to PCA restriction.⁸⁴ Ultimately, the government did not suffer major consequences, but the Ninth Circuit noted NCIS had “clearly violated DOD and naval policy, as well as the boundary Congress imposed through the PCA.”⁸⁵

The government’s historic respect for the PCA and hesitancy to invoke exceptions to the PCA such as the Insurrection Act⁸⁶ contributed to the Act’s solidification in American culture as a reflection of important values—a trend the Trump administration has abandoned. The public and the government alike have come to understand the PCA to reflect values that are not purely dictated by the Act’s text. “Posse comitatus” is now commonplace shorthand for the axiom, “The military may not operate on U.S. soil.” While that claim may be erroneous—there are plenty of instances where the military is free to operate on U.S. soil—it speaks to the PCA’s stature in America’s political consciousness.

III.

MILITARY FORCE, NOT INSTITUTIONS

Having examined the scope of police militarism and the PCA’s history, in this Section, I contend that it is a mistake to suggest the PCA is concerned with a particular *institution* that is enforcing the law. Rather, the PCA should be read to reflect a well-founded distrust of militarism such that it is concerned with the *nature* of actions taken to enforce the law. That is to say, the PCA reflects a judgment that military force and tactics have no place in domestic law enforcement.⁸⁷

With a heavy focus on purposivism, I contend that the PCA embodies a value judgment that the degree of force utilized by a party enforcing domestic law should be sharply limited. Focusing on purpose is helpful because when the PCA was enacted, police departments looked nothing even remotely like they do today. The PCA’s reference to “the Army,” I argue, speaks to the level of force that the Act is concerned with as much as a particular institution. Thus, as

82. Rizer, *supra* note 62, at 482; Joshua M. Samek, *The Federal Response to Hurricane Katrina: A Case for Repeal of the Posse Comitatus Act or a Case for Learning the Law?*, 61 U. MIAMI L. REV. 441, 446 (2007).

83. See 32 C.F.R. § 213.10(a)(3) (1982); Dep’t Of Defense, Directive No. 5525.5, DOD Cooperation With Civilian Law Enforcement Officials (1986).

84. *United States v. Dreyer*, 804 F.3d 1266, 1274 (9th Cir. 2015) (*en banc*).

85. *Id.* at 1276.

86. See 10 U.S.C. § 252 (2018).

87. See *supra* Part I.

differences between the police and the armed forces begin to disappear, even local police come into conflict with the PCA's values. I conclude by considering why the PCA's values offer a concrete and important reference point for critics of militarism in policing.

A. Prohibition

The PCA prohibits using “the Army or the Air Force” to enforce domestic law.⁸⁸ Police are, of course, not members of the Army. But it would be a mistake to conclude that this means that police are categorically incapable of violating the values engrained in the statute. The position that the PCA is intended to limit military *force* is both consistent with normal modes of statutory interpretation and a desirable means of understanding the PCA. Indeed, embracing this more dynamic interpretation of the PCA better serves its goals.

As we have seen, the PCA has long been understood to cover more than just the Army,⁸⁹ suggesting it represents a broader value judgment about domestic law enforcement. Indeed, we also know the PCA's restrictions have been interpreted to bind the Navy and Marines,⁹⁰ as well as military police.⁹¹ While the judicial and executive branches have interpreted the PCA in this manner, these interpretations are devoid of support from the text of the statute. The government's understanding of the PCA is essentially nonsensical if a

88. 18 U.S.C. § 1385 (2016).

89. See Nevitt, *supra* note 37, at 152.

90. See *United States v. Kahn*, 35 F.3d 426, 431 (9th Cir. 1994) (“Thus the Posse Comitatus Act applies to the Navy through section 375 [of title 10 of the United States Code] and 32 C.F.R. § 213.10”); *United States v. Yunis*, 924 F.2d 1086, 1094 (D.C. Cir. 1991) (“Regulations issued under 10 U.S.C. § 375 require Navy compliance with the restrictions of the Posse Comitatus Act. . . .”); *Hayes v. Hawes*, 921 F.2d 100, 102–103 (7th Cir. 1990) (“10 U.S.C. § 375 and the regulations promulgated thereunder at 32 C.F.R. §§ 213.1–213.11 make the proscriptions of § 1385 applicable to the Navy and serve to limit its involvement with civilian law enforcement officials”); *State v. Short*, 113 Wash.2d 35, 39, 775 P.2d 458, 460 (1989) (“Because the limitations on the use of the armed services contained in 10 U.S.C. § 375 correspond closely with those in the posse comitatus act, the same analysis should apply”); *United States v. Ahumedo-Avendano*, 872 F.2d 367, 372 n.6 (11th Cir. 1989) (“The Posse Comitatus Act does not expressly regulate the use of naval forces as a posse comitatus; the courts of appeal that have considered this question, however, have concluded that the prohibition embodied in the Act applies to naval forces, either by implication or by virtue of executive act”); *United States v. Roberts*, 779 F.2d 565, 568 (9th Cir. 1986) (“[T]he Posse Comitatus Act and sections 371–378 of Title 10 embody similar proscriptions against military involvement in civil law enforcement. . . .”); *United States v. Del Prado-Montero*, 740 F.2d 113, 116 (1st Cir. 1984) (“18 U.S.C. § 1385 prohibits the use of the Army and the Air Force to enforce the laws of the United States, a proscription that has been extended by executive act to the Navy”); *United States v. Walden*, 490 F.2d 372, 373–74 (4th Cir. 1974) (“The use of Marines as undercover investigators by the Treasury Department is counter to a Navy military regulation proscribing the use of military personnel to enforce civilian laws. . . . Thus, though by its terms the Posse Comitatus Act does not make criminal the use of Marines to enforce federal laws, the Navy has adopted the restriction by self-imposed administrative regulation”)

91. See *United States v. Dreyer*, 767 F.3d 826, 832 (9th Cir. 2014) (“[W]e re-affirm *Chon*'s holding that NCIS agents are bound by PCA-like restrictions on direct assistance to civilian law enforcement.”) *aff'd en banc Dreyer*, 804 F.3d at 1274; *United States v. Chon*, 210 F.3d 990, 993 (9th Cir. 2000) (“[W]e find that the PCA like restrictions adopted by DOD with respect to the Navy apply to the NCIS.”);

strictly textualist approach is endorsed. Yet the government's interpretations are decidedly less strained if purpose and not text alone guides our understanding of the PCA.

Like police, the Navy is plainly not part of “the Army or the Air Force.” The government's interpretation is entirely rational if we look beyond the PCA's text and emphasize its underlying purpose. To discern this purpose, we may consider the events that gave rise to the PCA's passage: The Army was being used to supervise elections in the South after reconstruction.⁹² Southern Democrats argued that the Army was being used to intimidate voters in a tyrannical move to entrench Republican control of the presidency.⁹³ And Southerners were furious that the Army had been used by local sheriffs as a posse to enforce local law.⁹⁴

Given the military's deployment to the South by the federal government, Democratic lawmakers may well have wished to preclude federal authorities from intervening in their states. Accordingly, it is tempting to conclude the Act's purpose was to preclude federal meddling in local affairs. But we have a strong clue that this was not the PCA's only purpose when it was enacted. The PCA did not simply forbid the use of the armed forces to enforce domestic law by *federal* officials. Rather, as enacted in 1878, the PCA prohibited this use of the military by *anyone*.⁹⁵ Indeed, the power of posse comitatus had been exercised by local law enforcement for at least 600 years when the PCA was passed.⁹⁶ If federal involvement was the only concern, there would have been little reason to strip local officials of the power to control a posse of military personnel.

There is a far more plausible reading of the PCA's intended purpose—one that suggests the PCA's purpose was to preclude state and federal officials alike from unleashing the Army to enforce domestic law because it is simply different from other actors. In 1878, the only entity that wielded the kind of force that would have warranted this kind of congressional attention was the military. In the late nineteenth century, state militias were decidedly less organized and sophisticated than the federal Army.⁹⁷ Indeed, Alexander Hamilton's quip that militias were “the mimicry of soldiership”⁹⁸ held true a hundred years after he said it. Even after the Revolution, there would have been no reason to include state militias, let alone the police, in the PCA's general prohibition.

92. Rishel, *supra* note 56, at 19.

93. Nevitt, *supra* note 37, at 135. Of course, it goes without saying that Reconstruction-era efforts to protect Black Americans' rights were neither tyrannical nor oppressive.

94. *Id.* at 135.

95. Army Appropriation Act for 1879, Pub. L. No. 45-263, § 15 (1878); *see also* 10 U.S.C. § 1385.

96. *See* James Tomberlin, Note, “Don't Elect Me”: *Sheriffs and the Need for Reform in County Law Enforcement*, 104 VA. L. REV. 113, 117 (2018).

97. SPANISH AMERICAN WAR, 1898, GOVERNMENT DOCUMENTS: PAMPHLET, 94–95 (1898).

98. *See* CHERNOW, *supra* note 48, at 308.

When Congress passed the PCA, there were few organized police departments, let alone heavily armed officers.⁹⁹ Police departments were informal and often unsophisticated.¹⁰⁰ Police were neither armed nor required to wear any identifying uniforms.¹⁰¹ Indeed, the NYPD did not arm their officers until 1895, nearly twenty years after the PCA was passed.¹⁰² Thus, the exclusion of “militarized police” from the PCA is unsurprising given that none existed. The 45th Congress had no reason to directly address the use of military equipment because they were unaware that any actor other than the military would ever come to possess it.

While the PCA’s text is at best unclear on the question of the statute’s objective, there is another contextual clue that suggests reading “Army” narrowly would not give effect to Congress’s purpose. If we read the PCA in a formalistic manner, the PCA prohibits very little. If the PCA prohibits only using “the Army or the Air Force” as a posse, then it can be circumvented through clever nomenclature. Renaming the Army or Air Force would, presumably, remove any PCA concerns. Surely even the most avowed textualist would not suggest the PCA should be susceptible to such easy circumvention.¹⁰³

Of course, critics of this position might point out that since 1981, the provision of military equipment to police departments has been specifically exempted from the PCA, making this debate moot.¹⁰⁴ However, the decision to exempt the provision of military equipment is evidence of this Article’s thesis—that current law does violence to the PCA’s values—rather than evidence that the PCA’s values are somehow consistent with militarized officers. What the 97th Congress thought has very little bearing on correctly discerning the values that underlie the PCA. Congress’s decision to allow equipment to trickle down to departments reveals the degree to which the PCA’s values have been misunderstood, forgotten, or both. Further, the slow trickle of equipment that began in the 1980s became an avalanche after the invasions of Afghanistan and Iraq, something the 1981 Act surely never contemplated.¹⁰⁵

99. BALKO, *supra* note 11, at 30.

100. *Id.*

101. *Id.*

102. Ashley Southall, *New York Police Department Is Retiring the Revolver*, N.Y. TIMES (May 31, 2018), <https://www.nytimes.com/2018/05/31/nyregion/new-york-police-revolver.html> [<https://perma.cc/BF6Q-VZ7R>] (“Revolvers became the standard firearm for city police officers in 1895, and they remained the dominant weapon in policing for much of the 20th Century.”).

103. See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998) (“Statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”).

104. See Pub. L. 97–86, §§ 374–77, 95 Stat. 1099 (codified as amended at 10 U.S.C. §§ 274–277).

105. Shawn Musgrave, Tom Meagher, & Gabriel Dance, *The Pentagon Finally Details its Weapons-for-Cops Giveaway*, MARSHALL PROJ. (Dec. 3, 2014), <https://www.themarshallproject.org/2014/12/03/the-pentagon-finally-details-its-weapons-for-cops-giveaway> [<https://perma.cc/X4FS-U2TT>] (detailing how transfers to departments began in earnest in the mid-2000s).

We have strong evidence not only that the PCA's values reach beyond what the statute says in plain terms, but that we should pay close attention to those principles. Failure to do so would allow governments to frustrate the statute's animating principles entirely.

B. Consequences

If police using military weaponry, armor, and tactics runs afoul of the PCA's central values, the necessary follow-up question is, "So what?" Why should we be concerned if police violate the intangible values of a 150-year-old statute passed because Southern states wished to freely intimidate Black citizens? The answer to this question lies in an appeal to broader democratic principles. If the United States is a government of "laws and not men," then the values embodied by those laws must be taken to have some importance.¹⁰⁶ All criminal statutes embody value judgments of some kind, and so long as the underlying judgment remains valid, we should take it seriously.¹⁰⁷ Here, we have a value that is both valid and deeply egalitarian: American citizens, the source of the government's power, are not to be subjected to military might in domestic law enforcement, a signature tool of the despotic rule we shed in 1783.

Indeed, the most forward-leaning interpretation of the PCA might allow us to include the police under the Act's prohibitions. Giving meaningful effect to a statute's purpose is a central goal of statutory interpretation.¹⁰⁸ While varying degrees of textualism have overtaken the legal landscape in the United States, courts do not universally shy from less text-bound readings of statutes. Dynamic interpretation focuses on giving effect to the intended meaning of a statute as circumstances evolve, ensuring the statute's values remain important guiding principles even if the facts of the world shift dramatically.¹⁰⁹

While dynamic interpretation of statutes is controversial, it is by no means a fringe theory. For example, in an opinion by Judge Easterbrook, the Seventh Circuit held that a "haybine" was a "mower" under a Wisconsin statute exempting it from seizure in foreclosure.¹¹⁰ According to Judge Easterbrook:

If the function of [the statute] is to enable farmers to keep a minimal set of equipment to work the fields, then a haybine is a "mower". It performs the mowing function of the mower, and its additional drying

106. *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.")

107. Richard C. Fuller, *Morals and the Criminal Law*, 32 J. CRIM. L. & CRIMINOLOGY 624 (1941–42).

108. CALEB NELSON, *STATUTORY INTERPRETATION* 1–5 (2011). Of course, intended meaning and intended application must be distinguished. Intended meaning speaks to the principles the legislature intended to enact—the statute's values. Conversely, intended application speaks to how the enacting legislature thought a statute would play out on the ground.

109. *Id.* at 904–07.

110. *In re Erickson*, 815 F.2d 1090, 1094 (7th Cir. 1987).

function used to be performed by rakes and other tools. The haybine and the mower have many features in common; the haybine is a close rather than a distant descendant of the mower.¹¹¹

This logic has a compelling parallel in the PCA context: Militarized police are a “close rather than a distant descendant” of the Army.¹¹² If the PCA’s value judgment is that military force is inappropriate in domestic law enforcement, then a militarized police officer who uses military equipment could be within the reach of the statute.¹¹³

What if federal, state, and municipal governments took the PCA seriously and committed to coming into compliance with its values? At the federal level, the largest impact would be the end of equipment disbursements to local departments. Since the 1970s, police departments across the United States have organized themselves on the assumption that they may access military weapons and use military tactics.¹¹⁴ They have accepted billions of dollars of military weapons and equipment from the federal government¹¹⁵ and begun to operate like military units do.¹¹⁶ To come into compliance with the PCA’s values, police should be required to abandon many forms of conduct on which they depend. Such a reorganization would thrust the largest reordering onto departments since they transitioned to a professional service.¹¹⁷

As I have discussed, if we take the PCA’s values seriously, police cannot use what I have called military force. The question of where military force begins and police force ends is undoubtedly a difficult one. When police exercise force they have long been entrusted to employ, I concede they are not exercising military force. But when they use equipment like mine-resistant vehicles or grenade launchers, which they have not traditionally utilized, they fall decidedly closer to military force. I arrive at this conclusion because the true rise in police militarism has arguably taken place since the Afghanistan and Iraq wars created a glut of military equipment to hand away.¹¹⁸ Police will likely—though I am unwilling to concede they *should*—remain free to use handguns and wear bulletproof vests, simply because no court will hold otherwise.¹¹⁹ At the margins, there will always be difficult questions about whether the PCA prohibits

111. *Id.*

112. *Id.*

113. The Ninth Circuit has already ruled that the PCA applies to law enforcement’s naval counterpart, the Naval Criminal Investigative Service. *Dreyer*, 804 F.3d at 1274.

114. See BALKO, *supra* note 11, at 145–47.

115. See, e.g., Wofford, *supra* note 23.

116. BALKO, *supra* note 11, at 210–12.

117. See *id.* at 30.

118. Musgrave, *supra* note 105.

119. I offer this concession in part because the sweeping prevalence of firearms in America. Christopher Ingraham, *There Are More Guns than People in the United States, According to a New Study of Global Firearm Ownership*, WASH. POST (June 9, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/06/19/there-are-more-guns-than-people-in-the-united-states-according-to-a-new-study-of-global-firearm-ownership/> [https://perma.cc/9MG3-YGTY].

particular police conduct. Yet some police practices are clearly impermissible under the statute.

Consider how the PCA's values would map onto the most militaristic police practice: the deployment of SWAT teams. Based in Los Angeles and originally called "Special Weapons Attack Team,"¹²⁰ the first SWAT team in the country was intended to unleash military-like force on suspects.¹²¹ What began in Los Angeles as an isolated pocket of militarism has become a nationwide trend.¹²² Having a SWAT team has become a normal and accepted feature of local policing. SWAT teams are now deployed approximately 150 times a day.¹²³ Eighty percent of towns with populations between 25,000 and 50,000 have a SWAT team.¹²⁴

Today, SWAT teams are ubiquitous and indistinguishable from paramilitary units.¹²⁵ They employ former military personnel, are armed with military-grade equipment, and ride in mine-resistant military transports.¹²⁶ SWAT teams are routinely outfitted with equipment that is decidedly excessive given local law enforcement needs: assault rifles, grenade launchers, and armored vehicles.¹²⁷ They are trained in manners that mirror military training¹²⁸ and consider themselves "soldiers."¹²⁹ If American police militarism is a problem, SWAT is at the fore of the issue.

The consequences for violating the values that a criminal statute embodies are, of course, symbolic in nature. But departments that breach the PCA are violating a statute that has come to stand for a deeply held American value about the relationship between government and citizen. Indeed, even non-legal observers invoke "posse comitatus" for the principle that the U.S. military should not operate on U.S. soil.¹³⁰

If the risk the PCA poses to law enforcement is assessed by the severity of expected consequence and the likelihood the consequence will occur, then departments may decide to forego compliance.¹³¹ But in an era when Americans have their lowest confidence in police since the Rodney King riots,¹³² the last

120. BALKO, *supra* note 11, at 62.

121. *Id.*

122. BALKO, *supra* note 11, at 307–08.

123. *Id.*

124. *Id.*

125. *See id.*

126. *See, e.g.,* Wofford, *supra* note 23.

127. BALKO, *supra* note 11, at 210.

128. *See id.* at 210–12.

129. BALKO, *supra* note 11, at 211–12.

130. *See, e.g.,* DESIGNATED SURVIVOR: STING OF THE TAIL (ABC Oct. 4, 2017).

131. Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 209–10 (2013).

132. Jeffrey M. Jones, *In U.S., Confidence in Police Lowest in 22 Years*, GALLUP (June 19, 2015), <https://news.gallup.com/poll/183704/confidence-police-lowest-years.aspx> [https://perma.cc/D7CS-DD8U] (noting Americans' confidence in police was at its lowest point since the Rodney King beating in 1992).

thing that departments should do is neglect value judgments embodied in federal law. As discussed above, complying with the PCA's values requires departments to abandon equipment and tactics they have come to rely on. Failure to do so signals a contempt for the PCA and its longstanding judgment that militarism has no place in law enforcement save for in the rarest of circumstances.

CONCLUSION

This Article has not argued that the PCA necessarily prohibits police from using military equipment or tactics. Rather, it argues that the PCA represents an important and valid judgment that military weaponry and tactics are disproportionate in domestic law enforcement. If the PCA tells us anything, it is that military force should not lightly be employed against citizens. Police militarism runs up against that principle. Insufficient attention has been afforded to the values the PCA espouses. Local law enforcement has not come to so closely resemble the military overnight: The creep has been long, deliberate, and insidious. A renewed emphasis on the values that underlie the PCA provides a clear path forward to reversing the militarism trend in American policing.